



photocopied

Provincial Leader
Nick Taylor

1106 B P HOUSE
333-5th AVENUE S W
CALGARY ALBERTA
T2P 3E6
(403) 265-6405

Provincial Office

111 GRAYMAC BUILDING
11745 JASPER AVENUE
EDMONTON, ALBERTA
T5A 0N5
(403) 482-4461

SUBMISSION TO THE SPECIAL JOINT COMMITTEE OF THE
SENATE AND THE HOUSE OF COMMONS CONSIDERING THE
PROPOSED RESOLUTION FOR A JOINT ADDRESS TO HER
MAJESTY THE QUEEN RESPECTING THE CONSTITUTION OF
CANADA BY NICK TAYLOR, LEADER OF THE ALBERTA
LIBERAL PARTY

December 31, 1980

RECEIVED / REÇU
H of C - C des C
14 JAN 1981
Committee and Privy
Legislation Branch
Comité et Législation Privy

1. Introduction: Support the Principle

The Alberta Liberal Party appreciates the opportunity of making this submission to the Special Joint Committee of the Senate and the House of Commons considering the "Proposed Resolution For a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada."

Like most Canadians who have examined the Proposed Resolution, those represented by the Alberta Liberal Party can no doubt point to details we would like to have revised. But we wish at the outset to extend our support in principle for this Resolution.

We strongly urge the Special Joint Committee, the Parliament and the Government of Canada not to falter in the bold and noble purpose underlying the Proposed Resolution, but this time, at last, to carry the purpose to a decisive conclusion, namely, the completion of Canada's long evolution to independence in law, as has already been achieved in fact.

In 1981 Canada enters its 54th year of federal-provincial attempts to bring the Canadian constitution home to Canada from Britain. The Alberta Liberal Party shares the conviction of other Alberta opposition parties that the time has come for decisive and conclusive action on this issue. It should be noted that the three opposition parties in Alberta represent some 40 per cent of the electorate. Recent opinion polls have shown that the Alberta Liberal Party, though unrepresented in the provincial Legislature, was the first choice of Albertans among the opposition parties.

There is no excuse, in our opinion, except lust for more personal power in some of our Premiers, including Alberta Premier Peter Lougheed at the head of the list, for delaying any longer the securing for every Canadian of a position of equality

as a citizen in the whole of our country.

We have no doubt that for every Canadian living in Alberta, there is a wider opportunity for personal self-fulfilment because Alberta is a part of a unified Canada than if it were not. We also have no doubt that the opportunity for Canadian businessmen to flourish in Alberta is greater because the province remains a part of Canada than if it separated from Canada.

2. Amending Formula

We take the point about the Amending Formula in the Proposed Resolution that was made a few weeks ago in Regina by the Prime Minister, namely, that there may be better ones but that the Victoria formula at least has the virtue of having been the only one in our history unanimously agreed to by the federal and all provincial governments, however short-lived that unanimity was.

We support the provision in the Proposed Resolution for a two-year search for a better amending formula once the constitution has been lodged in Canada. Nor can we imagine a more democratic and independent Canadian solution to the real possibility that there will be no unanimity among the eleven governments on an ultimate amending formula that the provision for a referendum as a last resort to settle any such deadlock.

This reflects our belief that the Canadian constitution must be treated as the property of the people of Canada, not of any government whether federal or provincial. This provision is a valuable means of moderating the power of Canadian political

leaders at both levels of senior government by diverting it to the people on crucial constitutional issues. This may pose a threat to the power of Premiers and the Prime Minister but not to the power of the Canadian democratic system of government. Those who fear this extension of power to the Canadian people should examine their views for unwarranted elitism.

Finally, we wish to point out our disagreement with the Premier of Alberta's interpretation of the amending formula provisions as giving Alberta "second class status". The Alberta Liberal Party believes Western Canadians have legitimate grievances, as do Canadians in other regions of the country. But we also believe that democracy, realistically, must rest ultimately on the will of the people, which in turn means numbers cannot be ignored. If Western Canada has not had as much political power as some of us might have wished, the realistic explanation is that we have not had the numbers of people to command that political power. We know that is changing as the balance of Canada's population increases in Western Canada.

Meanwhile, as this westward shift in the balance of economic and political power continues, we would point out that the amending provisions in the Proposed Resolution, while they may not give the Alberta Premier as much power as he would prefer, do offer Western Canadians a larger per capita power over future constitutional amendments than Canadians living in Ontario.

As the Joint Committee is aware, the proposal is that amendments to the constitution by national referendum would have to be approved by a majority of voters in a majority of provinces, including every province that has or has had a population of at least 25 per cent of the Canadian population of that region, and at least two Western provinces with at least half our region's population. According to the most recent population estimates by Statistics Canada, that means roughly 3.4 million Western Canadians would enjoy the same referendum

power to determine constitutional amendments as roughly 4.3 million Canadians living in Ontario would.

This is not to say, as we noted at the beginning of this section, that the Alberta Liberal Party is absolutely satisfied with the amending provisions. We hope a better formula can be agreed upon when the constitution has been brought to Canada finally. But under the circumstances, we believe the provisions in the Proposed Resolution are as fair as reasonable Canadians can expect. Certainly they should not be treated as an excuse for delaying the passage of the Resolution, as Premier Lougheed is doing.

3. Are Energy Issues Related to Constitutional Issues?

The Alberta Premier claims in a variety of forums, including his government's grossly misleading energy propaganda pamphlet, that energy and constitutional issues are closely related. We find especially misleading his claim, through the pamphlet, that "The Federal Government is making a determined effort to alter Confederation as we know it today." The authoritative legal opinion of a former law partner of the Premier argues that the very opposite is the case: It is the present Alberta Government and other energy-rich provinces who are making the determined effort to alter Confederation, not only as we know it today but as it has been since 1867.

John B. Ballem, a Calgary lawyer who once practised as a partner with Peter Lougheed, published a lengthy opinion entitled "Constitutional Validity of Provincial Oil and Gas Legislation" in The Canadian Bar Review in 1963 (Vol. XLI, p.199). His conclusion, in summary, was that the constitutional power to control the oil and gas industry rests entirely with the federal government once the product moves across provincial and/or international borders. The further conclusion to be drawn from his thorough review of federal and provincial

powers in this industry was that virtually the whole edifice of provincial regulatory systems over this industry was unconstitutional. Those provincial regulatory systems existed then, as today, because the federal government preferred to employ cooperation rather than constitutional power in sharing responsibility with provincial governments for the industry's development.

Summing up his findings, Ballem wrote: "In the case of oil and gas legislation, it must be admitted, the provinces have made a very courageous invasion of 'no mans land' but there is reason to doubt their continued survival in this area." His explanation was that the federal government "has by all odds the best chance of success as a sponsor of legislation which could adequately cover the field."

Both in that opinion and a more recent one, Mr. Ballem explained why the federal government could be exercising an over-riding control over the industry that shunted the provincial governments aside, were Ottawa really as greedy for power as Premiers of the producing provinces would like Canadians to believe it has been.

It had the power to do so under the provision which authorizes the Parliament of Canada "to make Laws for the Peace, Order and Good Government of Canada." The circumstances that gave rise to approval by the Supreme Court of Canada of the federal anti-inflation program suggested, Mr. Ballem wrote in the same Review in December, 1979, (Vol. LVII, p. 740), that a similar approach could be taken if a crisis developed in the Canadian oil and gas situation, although "the crisis would have to be real and apparent before existing provincial powers could be displaced."

The trade and commerce provisions of the constitution offer a second means by which the federal government could exercise control over the industry. "There are many aspects

of the oil and gas industry which, although not amounting to an emergency, nonetheless lend themselves to federal, rather than provincial, regulation. The petroleum substances themselves are important commodities in both interprovincial and export trade. The federal power to regulate trade and commerce as interpreted by the courts to mean only international and interprovincial trade, and maybe general regulations affecting the whole country, is ideally tailored to the purpose, "Mr. Ballem wrote.

Another passage in Mr. Ballem's 1979 interpretation of federal-provincial constitutional powers over the oil and gas industry seems to have a particular bearing on the current Edmonton-Ottawa impasse over oil and gas prices and taxation, over oil production, and over the provincially-stalled oil sands projects in Alberta. In our mind, it raises the disturbing possibility of whether Premier Lougheed is deliberately trying to force the federal government to employ its full constitutional power to protect the national energy interests of all Canadians in these matters, so as to add fuel to Western separatist fires.

"Although the trade and commerce head can do the job by itself," Mr. Ballem wrote, "the peace, order and good government power could also become operative under certain circumstances. A shortage of domestic crude to meet Canadian requirements (a situation which prevails today) coupled with a curtailment of foreign supplies, would give rise to an 'emergency' every bit as severe as the one in the Anti-Inflation Reference."

But if these two constitutional powers of the federal government were not enough, Mr. Ballem noted, the "declaratory power" granted the federal government under Section 92, 10.c provides a third means for exercising national control of the oil and gas industry, if Premier Lougheed's intransigence led to a serious enough threat to employment and other economic interests within Alberta itself or to the national interest in the crucial energy projects currently stalled by the Premier.

"The potential application of the declaratory power to oil and gas is staggering," as Mr. Ballem notes. "Almost everything about the industry is a 'work'...All that needs to be established is (a) that the declaration was duly passed: 'Parliament is the sole judge of the advisability of making (a) declaration as a matter of policy' and (b) that the subject matter of the declaration is a 'work'. An affirmative answer to (b) would be a foregone conclusion in the case of oil and gas installations," Mr. Ballem concludes.

What do these authoritative and widely respected constitutional interpretations by Mr. Ballem indicate about Premier Lougheed's claim that the federal government, not the Alberta government, is the one trying to "alter Confederation"? Surely Mr. Lougheed cannot claim to be ignorant of Mr. Ballem's interpretation of federal and provincial constitutional powers over the oil and gas industry. So if he knows that the federal government already has more than enough constitutional power to take over the management of the oil and gas industry in the national interest, if irresponsible and self-serving posturing by provincial governments makes such a drastic and undesirable more necessary, why does Premier Lougheed play so hard at pretending he is defending Alberta's constitutional position against inroads by the "Ottawa Government," as his energy propaganda pamphlet repeatedly--and, we believe, demagogically--describes the Canadian Government?

Why does he claim in his energy propaganda pamphlet that "the proposed constitutional changes could make Ottawa more dominant" when, firstly, the Resolution proposes no change in the existing federal-provincial shares of constitutional power, and, secondly, he has the opinion of his own former law partner that the Fathers of Confederation in 1867 conferred on the national government all the dominant powers it needs and perhaps more than it needs? This seems to be a very strange and extremely dangerous power game Premier Lougheed is playing.

If he knows, as it seems obvious he does, that the constitutional law is all on the federal government's side, and not on his, why does he claim, as his energy propaganda pamphlet does, that the amending provisions in the Proposed Resolution "could jeopardize Alberta's ownership of its natural resources"? If there is any threat to Alberta's resources ownership it lies in provisions written into the B.N.A. Act in 1867, not in the Proposed Resolution. We fear that the real threat to Alberta's resource interests today arises from the apparent determination of the Premiers of all the producing provinces to attempt to use those resources to blackmail the Canadian Government into transferring power to them that the Fathers of Confederation denied them.

On this issue, the Alberta Liberal Party shares the views expressed last Fall in the Legislative Assembly of Alberta by Tom Sindlinger, the Calgary Buffalo M.L.A. who was expelled from the Lougheed caucus because he supported in principle this Proposed Resolution. During a debate at the end of October, Mr. Sindlinger noted that the provincial government and the federal government were in a position of confrontation over energy and constitutional policies.

Then Mr. Sindlinger said: "We have to ask ourselves why did it happen? Where is this government leading us?" We Liberals in Alberta ask those same questions.

As Mr. Lougheed's own former law partner has pointed out in the authoritative legal opinions already referred to, there is an established relationship between federal and provincial powers that has long been recognized by the Canadian courts. This relationship is that both levels of government may legislate in the same general areas where both share interests, so long as there is no conflict. "In the event of a conflict, however," as Mr. Ballem observed in his December, 1979, opinion, "the structure of the federation and the overriding interests of the country as a whole dictate that

in which the provincial and federal legislatures may be united if they are not in conflict, if there is a conflict, the federal legislation must prevail."

We believe the recent constitutional posturing of Premier Lougheed has been a primary factor in the latest outbreaks of separatist emotionalism in Alberta and other parts of Western Canada. Because of the dangerous potential for further disruption of Canada as a whole if the Premier maintains his present uncooperative attitude, we believe this Joint Committee has a responsibility to ask itself what Premier Lougheed is up to. The learned opinions of his own former law partner leave little doubt that Mr. Lougheed and the other energy-rich Premiers cannot win their confrontation with the Government of Canada; his opinions suggest these Premiers are all standing on ground that is unconstitutional, which is to say illegal.

So what are these Premiers really up to? Are they really trying to generate such a threat of Western separatism by their demagogic appeals to regional emotionalism that they hope to use this threat to force the Canadian government to let them use illegally constitutional powers that are not legally theirs?

The Alberta Liberal Party shares the view of Mr. Sindlinger that the confrontation between Mr. Lougheed and the Government of Canada boils down to two views of Canada. Are we one country with a national will, as the Proposed Resolution indicates? Or do we wish to become a collection of 10 northern banana republics, as Premier Lougheed evidently wants Canada to become? We believe the majority of Canadians, including the majority of Canadians living in Alberta, prefer the idea of Canada as a united parliamentary federation, a Canada that is greater as a unified whole than the sum of its separate parts.

4. Unilateral Patriation

Obviously, unilateral action by the Parliament of Canada without the support of all the provincial Legislatures on a matter as important as patriation of the constitution is not the ideal procedure. However, the Liberal Party of Alberta believes the procedure being followed by the Government of Canada is the only practical way to resolve this longstanding problem, the solution to which has evaded Canadian governments for 54 years because of the trap of unanimity. So we reluctantly support this unilateral course because we believe further delay in reaching a lasting decision on this fundamental issue could lead to the destruction of Canada as the unified country intended by the British North America Act.

We also deplore as harmful to the best interests of Canadians living in Alberta the position taken toward the Proposed Resolution by the Premier of that province. We believe his refusal to explain or defend his own government's constitutional position to this Special Joint Committee is an insult to the Parliament of Canada and through it to all Canadians, including Canadians living in Alberta.

In taking this obstinate attitude, Premier Lougheed refuses to acknowledge that the Government of Canada has any role to play in the patriation of the Canadian constitution. Yet by sending his position paper opposing this Resolution to London, he treats the Government of the United Kingdom as though it had the power to control Canada's constitution. He refuses to acknowledge any jurisdiction over Canada's constitution by the Canadian Parliament, but by asking the British Parliament to oppose the will of the Canadian Parliament, he acknowledges the jurisdiction of the British Parliament over Canada's constitution. This attitude suggests either that he would rather return to a colonial status than recognize the paramountcy in Canadian constitutional issues of the Canadian Parliament, or that he

sees this posture as one more subtle assertion of his government's separation from Canada and our national government.

The Premier's constitutional gamesmanship is further illustrated by his claims that the Government of Canada is trying to use the British Parliament to change our constitution and give the Government of Canada powers that the provincial governments now enjoy. As we have already argued, this is simply not the case. The only change in the power structure of Canada that the Proposed Resolution will bring about is to increase the power of individual citizens. For the first time in our history, a Charter of Human Rights will spell out some limits on the powers of both our legislators and our judges over the rights of the individual in Canada. The power relationships of our federal and provincial governments will remain unchanged.

In further opposition to Premier Lougheed's position on this issue, we would also point out that all the decisions to be taken about Canada's constitution are in the process of being taken in the Parliament of Canada, where they should be taken when unanimous agreement with provincial governments has failed, as it has for so long and so dismally. Because our provincial premiers have never in our history been able to agree on something as important as a method of bringing Canada's constitution to Canada, the Resolution, in its finally approved form, still must be submitted to the formality of approval by the British Parliament. But it should be made clear that all the British Parliament is being asked at that time is to approve the decisions taken by the Canadian Parliament.

Even though Premier Lougheed seems willing to grant the British Parliament more power over Canada's Constitution than he would concede to the Canadian Parliament, the British Parliament can make no changes in the Canadian Resolution, nor should it. To touch so much as a comma of the Canadian Resolution would be an insult to all Canadians, just as Mr. Lougheed insults all Canadians by trying to go over the heads of the national government

of all Canadians, to try to influence the government and Parliament of another country to help him in his personal power struggle with the Government of Canada.

5. Charter of Rights

Finally, the Liberal Party of Alberta supports the entrenchment in the constitution of a Canadian Charter of Rights and Freedoms. The basic rights and freedoms of all Canadians should be as unconditional as it is humanly possible to provide for them. They should include the freedom to move across the country, take up residence, and pursue employment in any province. The Charter should guarantee that citizens of the English or French language minority in a province have the right to educate their children in that language wherever numbers warrant, as unanimously agreed by all ten Premiers at their Montreal meeting in 1978. We also believe the principle of equalization, which involves the redistribution of wealth among the richer and poorer provinces, should be recognized so that Canadians in all provinces can continue to be provided with a reasonable level of public services.

Others more expert on these matters than we have already presented some reservations to the Joint Committee about certain limits on these rights and freedoms contained in the original draft of this Proposed Resolution. We recommend that the Joint Committee take these observations into serious consideration in the final draft of the Resolution so that any such limits may be minimal and there is ample opportunity for the evolution of these rights and freedoms to continue in the courts and the legislative bodies of our country, as experience indicates.