A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta

by Alfred Thomas Neitsch

A contemporary misconception exists in Canada that the Governor General and the Lieutenant Governors are politically impotent. In fact, they have considerable power both of a legal and political nature. Using the province of Alberta as an example, this article looks at the ways various Lieutenant Governors have exercised the powers given to them by law and convention.

The Lieutenant Governor was envisioned to function in a dualist role, as a representative of the monarch, but more clearly as a Dominion officer doing the bidding of the Federal Cabinet. Peter J.T. O'Hearn recounts this office was by no means ceremonial,

> In the early days, some governors, notably in the new provinces, actually conducted the administration. There were exciting clashes in Quebec and British Columbia between strong-minded governors and their ministries, leading to the dismissal of five Cabinets. In the first half-century of Confederation, governors refused assent to twenty-six bills and reserved sixty-four for action in Ottawa.[1]

The frustrations felt by the provinces lead them to challenge assertions that Lieutenant Governors possessed limited powers. "From 1867 onwards, Oliver Mowat, the Premier of Ontario, attempted to change the notion of subordination of the Lieutenant Governor.

> The fulcrum for Dominion interference was the Lieutenant Governor. Appointed and removed by the Dominion Government; considered by the Imperial Government as well as by the Dominion Government as merely a Dominion Officer mainly useful for bringing Provincial policies into harmony with those of the central Government; the Lieutenant Governor must have appeared to Mowat as likely to prove a "Trojan Horse' within the Provincial Citadel.[2]

In *Liquidators of Maritime Bank v. Receiver General* (1892), the Judicial Committee of the Privy Council effectively reversed some twenty-five years of Constitutional law and practice. Until that point, the Lieutenant Governor was regarded primarily as a representative of the federal government. However, after the Maritime Bank went bankrupt, the New Brunswick government, eager to regain its funds, argued that the Lieutenant Governor was the representative of the monarch and possessed all of the prerogative powers of the Crown. This meant that the government of New Brunswick could use Crown prerogative as a basis for claiming priority over other creditors seeking to recover funds from the liquidators of the Maritime bank. The court agreed with this argument. The historical significance of this case lies in the fact that legally speaking the Lieutenant Governor would no longer be viewed as a Dominion Officer or in anyway subordinate to the central government.

The Lieutenant Governor in Alberta

Alberta has a long history of interventionist Lieutenant Governors going back to the years of Social Credit and William Aberhart. The Social Credit period in Alberta, especially between 1936 and 1938, witnessed considerable intervention by both the Lieutenant Governor and the Governor General. In this period, several prece-

Alfred Thomas Neitsch is a recent graduate of the Department of Political Science at the University of Alberta. This paper is based on his MA Thesis, In Loco Regis - The Contemporary role of the Governor General and Lieutenant Governor in Canada submitted to the Faculty of Graduate Studies, University of Alberta in 2006.

dents were established on the role and authority of the Governor General and the Lieutenant Governor.

Early into Aberhart's term, the Lieutenant Governor was already expressing concerns over some legislation. On March 31, 1936, in a letter to the Premier, Walsh noted, "I have a very great objection on principle to the enactment by Order-in-Council of legislation which should be enacted by statute."[3] Walsh continued to express his reservations noting "I think that such legislation should be enacted only after full discussion in the open forum of the legislature by those elected for that purposes rather than in the Executive Council chamber by a few of those so elected."[4] Lieutenant Governor Walsh issued Aberhart this ultimatum: change the provisions of the Act or provide legal opinion regarding whether the law was *ultra vires*.

Several months later Walsh once again threatened intervention. On August 31, 1936, he wrote to Aberhart deeply troubled over a proposed Act relating to the reduction and settlement of debts. In the letter, Walsh expressed sympathy for the difficulties besetting the Aberhart government, but clearly outlined his objections, "I cannot too strongly condemn the ruthless fashion in which the Act proposes to deal with the rights of creditors…surely creditors have some rights in this country as well as debtors."[5] Walsh warned such legislation would further batter Alberta's damaged financial reputation and that the proposed Act might be *ultra vires* as it encroached upon the banking jurisdiction exclusive to the Dominion government. It was therefore possible that the Dominion government would disallow the legislation.

Therefore, Walsh provided Aberhart with three options. First, delay the passing of the bill until the conclusion of the next session. Second, send the legislation for review to the Supreme Court of Alberta. Third, do nothing. In this event Walsh casually mentioned, "I have the power under section 55 of the *British North America Act* to reserve this bill for the signification of the Governor General's pleasure."[6] Walsh noted that, "If however I find that I can constitutionally do so I will feel myself quite justified in reserving it."[7] In the end, Walsh elected not to withhold Royal Assent. The Supreme Court of Alberta did review this legislation, renamed the *Reduction and Settlement of Debts Act*. It is likely that Walsh – a former Alberta Chief Justice and earnest opponent of the Act - played a role in alerting the courts.

In February 1937, Mr. Justice A.F. Ewing of the Supreme Court of Alberta ruled the *Reduction and Settlement of Debts Act* unconstitutional. In June of that year, the provincial government was ultimately unsuccessful on appeal. On October 25, 1938, the appeal court refused to hear the Aberhart government's second appeal application. By 1937, the regularity of unconstitutional bills passed by the Alberta legislature made it necessary for a mode of intervention independent from time consuming judicial reviews: vice-regal intervention by both Alberta's Lieutenant Governor and Canada's Governor General.

Disallowance and Reservation

Alberta's longest serving Lieutenant Governor was John Campbell Bowen. His tenure illustrates that the Lieutenant Governor's efficacy in protecting of civil liberties and ensuring the constitutionality of provincial legislation. However, Bowen's insight and guardianship were not immediately apparent to his contemporaries. Bowen was roundly criticized during the Constitutional Crisis of 1937-38 for demonstrating weakness unbecoming of a Lieutenant Governor. Mackenzie King would note in his diary on February 1, 1938: "…had conservation with the Lieutenant Governor Bowen of Alberta who impressed me as a very delicate man, and not altogether suited for the post he occupies…" Nonetheless, he was largely able to overcome this.

When William Aberhart assumed office of premier of Alberta in 1935, he asked for eighteen months to establish a new order, which would free Albertans from the economic evils of the Great Depression. By 1938, it was clear that Aberhart's measures had failed. In the meantime, Aberhart had raised serious alarm over his policies and legislation. On August 16, 1937, Arthur Meighen corresponded with Senator William Griesbach, foreshadowing the intervention of the Federal government and the Lieutenant Governor. "What cannot be forgotten" Meighen wrote, "is that the people of Alberta are still citizens of Canada and they are still entitled to the safeguards of our Constitution. If Provincial legislation is always to be allowed to go unless upset by the courts, then the very sheet anchor of Confederation is gone."[8]

In August 1937, Aberhart's government, eager to implement social credit economics passed the *Credit of Alberta Regulation Act*, the *Bank Employees Civil Rights Act* and the *Judicature Act Amendment Act*. In an early letter dated August 11, Prime Minister Mackenzie King had requested that William Aberhart first send the legislation for review to the Supreme Court of Canada to judge its constitutionality. Having already received Royal Assent of the Acts the previous day from the Lieutenant Governor, Aberhart refused.

Major constitutional concerns were raised over the legislation even to the extent that the Lieutenant Governor should not have granted Royal Assent. For instance, the *Credit of Regulation Act* Section 7 stated that any banker

"…while unlicensed, be capable of commencing or maintaining any action...in respect to any claim, in law or equity."[9] The *Judicature Act Amendment Act* absurdly proposed what was tantamount to an unilateral Constitutional amendment by stating that "No action or proceeding of any nature whatsoever concerning the Constitutional validity of any enactment of this Legislative Assembly of the Province shall be commenced, maintained, continued or defended, unless and until permission…has first been given by the Lieutenant Governor in Council." The *Bank Employees Civil Rights Act* essentially denied any civil right of unlicensed employees of chartered banks. Bowen's decision not to reserve the Acts was called into question. Would, for example, William Walsh have granted Royal Assent to these three bills? Bowen's failure to intervene demonstrated some weakness, yet the subsequent federal disallowance certainly prompted an awakening of his guardianship of the Canadian Constitution. Following this incident, Bowen exhibited great care in granting Royal Assent and availed himself of independent legal advice.

This is not to say that Bowen remained unconcerned over the August 1937 legislation. In fact, on the last day of session, August 6, Bowen called on Premier William Aberhart and the Attorney General John Hugill to discuss the constitutionality of the proposed Acts. In a rather bizarre turn of events, Hugill advised against Royal Assent. Hugill would later explain his position in a letter to Aberhart,

> On the afternoon of Friday, August 6th, 1937 shortly before the special session prorogued I went with you for an audience with the Lieutenant Governor in his room at his request. There I had the temerity to differ with the opinion you gave of the competence of our Provincial Legislature to enact certain Bills then awaiting His Honour's pleasure and upon which he sought our advice.[10]

A shocked Aberhart attempted to refute Hugill's opinion to Bowen despite lacking any legal experience or qualifications. Upon leaving the Lieutenant Governor's suite Aberhart suddenly fired his Attorney General. Of greater surprise, was Bowen's granting Royal Assent to the *Credit of Alberta Regulation Act*, the *Bank Employees Civil Rights Act* and the *Judicature Act Amendment Act*, over the concerns of the Attorney General.

As foreshadowed earlier that year by Walsh, legislation that violated the Constitutional division of provincial and federal powers would result in disallowance by the Governor General-in-Council, which promptly occurred on August 17, 1937. Federal Justice Minister, Ernest LaPointe, remarked to the House of Commons, "The statutes of Alberta in question constitute an unmistakeable invasion of the legislative field thus assigned to Parliament. They conflict with the dominion laws and virtually supplant dominion institutions designed by Parliament to facilitate the trade and commerce of the whole dominion."[11] Aberhart refused to fulfil his obligation to publish the disallowance in the *Alberta Gazette* so the federal government published the disallowance in the *Canada Gazette*.

In response to the disallowance, James Mackinnon, Liberal MP for Edmonton West, and the only Liberal MP in Alberta, proposed a course of action for the Lieutenant Governor in September 1937. If Aberhart were to re-introduce the bills in the Legislative Assembly for the fall session, the Lieutenant Government should refuse Royal Assent. In the event that Aberhart asked for dissolution of the legislature with the intent of making the federal disallowance an election issue, the Lieutenant Governor should refuse the request and instead commission Alberta Liberal Leader E.L. Gray as Premier. Lieutenant Governor Bowen conveyed this plan to the federal government as Mackenzie King memorialized in his diary on September 28, 1937. "The Lt. Gov. Bowen had written Lapointe," King wrote, "indicating he might refuse dissolution if requested and possibly form a new ministry—a mad course."

Ernest Lapointe had warned Lieutenant Governor Bowen that Aberhart might want to reintroduce the legislation. Elements of the disallowed legislation were reintroduced in legislation for the fall session. Perhaps predictably, the new legislation included new unconstitutional provisions. These were apparent in the *Bank Taxation Act, an Act to amend the Credit of Alberta Regulation Act* and the *Act to ensure the publication of accurate news and information*. The *Bank Taxation Act* would allow the province, "to levy taxes of one- half per cent per annum on all paid-up capital of the banks and one per cent per annum on their reserve funds and undivided profits."[12] The recently disallowed *Credit of Alberta Regulation Act* was "rewritten to drop all reference to the banks and substitute the words 'credit institutions.' All such credit institutions were to come under the direction of the Social Credit Board."[13] The *Accurate News and Information Act* was described by David Raymond Elliot.

> The *Accurate News and Information Act* required that every Alberta newspaper publish any statements furnished by the chair of the Social Credit party "which has for its objective the correction or amplification of any statement relating to any policy or activity of the Government of the Province." The bill further directed that newspapers could be ordered to reveal in writing all sources of their information and the names and addresses of such sources … [as well as] writers of any editorial, articles, or news item appearing in their papers. Failure to abide by this ruling would result in the prohibition of the publication of said newspaper, the prohibition of

> anything written by an offending writer and the prohibition of the publication of any information emanating from any offending person or source.[14]

The new legislation generated further anxiety and concern in both Ottawa and Alberta. However, opinions on what to do in response were mixed among members of the federal Cabinet. Some Liberals thought that the legislation, rather than being disallowed, should be allowed to pass. The Banks themselves could challenge the legislation afterwards in the courts. King noted however, that as Liberals, they must uphold the constitution. The debate was settled in favour of LaPointe's view that "… the Lieutenant Governor should reserve any such legislation."[15] It was clear that the Lieutenant Governor was already onboard.

On October 1, 1937, Bowen wrote to Aberhart with respect to the proposed *An Act to Amend and Consolidate the Credit of Alberta Regulation Act*. Bowen noted, "As Attorney General and one who is not versed in the Law, you could hardly be expected to give me legal advice, therefore I am asking that you be good enough to appoint an independent solicitor to review the said Bill for my information. In this respect I would suggest that you ask Mr Sidney B. Woods to do this for me."[16] On October 6, 1937, the Lieutenant Governor announced his reservation of the *Bank Taxation Act, An Act to amend the Credit of Alberta Regulation Act* and the *Act to ensure the publication of accurate news and information* for the Governor General-in-Council who sent the bills on to the Supreme Court for review. The following spring the Supreme Court of Canada would determine that all three were in fact *ultra vires*.

The hallmark of Federal legislative and vice-regal influence is evident on this reservation. On October 9, 1937, Mackenzie King met with Governor General Lord Tweedsmuir. After gossiping about the scandalous abdication of King Edward VIII, they settled into the matter of the Alberta Legislation, and, as Mackenzie King recounted in his diary,

> He asked me as to whether I had advised Bowen of Alberta re reserving bills. I told him of what he had written Lapointe and what I had advised Lapointe to do, having to dissuade him from the wrong course [of wanting to dismiss Aberhart]…[Bowen had] proposed in discussing his position and leaving it to him to withhold or pass as he might wish.

It is clear that the Governor General held no objection to this course of action. While the King government supported Bowen, it did not force Bowen to reserve the legislation. Bowen was quite happy to do so, even proposing to dismiss Aberhart if necessary - a prospect that the Prime Minister was extremely uncomfortable with.

The Aberhart government would also challenge the Governor General-in-Council's authority to disallow and the Lieutenant Governor's power to reserve legislation. On September 30, the Aberhart referred the question of disallowance to the Supreme Court of Canada. On October 2, the federal government accepted this referral. On March 4, 1938, the Supreme Court ruled that the powers of reservation and disallowance were "subject to no limitation or restriction."[17]

In Alberta, Aberhart was deeply upset at the Lieutenant Governor and publicly swore revenge. The Premier's rage and vindictive attitude nearly provoked another Constitutional Crisis. Bowen and Aberhart confronted each other again in the spring of 1938, this time over the closing of Government House, the Lieutenant Governor's official residence. The idea to close Government House had its origins in a grass-root Social Credit movement. The Social Credit membership, angered by the 'interference' of the Lieutenant Governor, demanded Bowen's resignation. When it became apparent, the Lieutenant Governor would not resign, the Social Credit Party resolved to shutter up the vice-regal mansion.

In March 1938, the committee of supply of the Alberta Legislature took unequivocal action and eliminated all grants for the upkeep of Government House effective March 31, 1938. Government House, as the press widely reported, was to be closed. Unfortunately, nobody thought to tell Bowen. The Lieutenant Governor continued in residence forcing the government to fund Government House for the month of April through a special warrant Bowen signed himself. By the end of April, there was a more confrontational tone. The Lieutenant Governor was informed late Saturday April 29th that he would have to vacate Government House by May 3. The Lieutenant Governor refused to leave without an Order-in-Council. Aberhart argued that an Order-in-Council was not necessary. To end the standoff, Aberhart cut off the utilities to the building and fired the staff. Government House was beset by protestors. Other concerned citizens and Aberhart supporters wrote letters to the Lieutenant Governor attacking him. Bowen eventually capitulated, signed the Order-in-Council on May 6, and left Government House on May 9th.

Publicly humiliated, Bowen ensured he had the last word. As Norman Ward writes,

> Publicly, Bowen did not challenge the government's right to dispossess him, claiming only that it must be done in the right way. Privately he was so upset that he had to take to his bed, where he brooded over possible courses of action. Deprived of even a secretary, he considered the humiliation of his office; "he feels", a faithful correspondent (and Liberal organizer) reported on May 14 to James, "that the Kings' representative has

> been insulted to a point that might lead to grave consequences if allowed to go unchallenged."[18]

The closing of Government House and the denial of administrative and other support by Aberhart angered the Lieutenant Governor. The Lieutenant Governor began to implement an accelerated version of the Mackinnon plan proposed in September 1937. Bowen approached E.L. Grey, the Alberta Liberal Leader who would note,

> When I was first approached I was opposed to the idea. This situation is, however, so serious that I am inclined to believe it is my duty to step in. I feel that if something drastic is not done the Social Credit forces may have a solid western block in the very near future.[19]

The removal of Aberhart and the end of Social Credit in Alberta seemed imminent. The Lieutenant Governor would forcibly remove the Premier from office.

However, this plan reached the ears of Prime Minister Mackenzie King courtesy of the provincial Liberals, including E.L. Grey, who sought King's advice on the matter. On May 19, 1938, King noted in his diary,

> Mr. Gardiner and Mr. Mackinnon came to the office to talk over the Alberta situation before going to Council. The present Lieutenant Governor wants to dismiss the Alberta ministry, and has asked Grey to form a ministry, which is to be one composed of the different political parties of the Province. It is sheer madness. Action of the kind would almost certainly have repercussions in Saskatchewan, which would cause the Liberals the election there, and might bring on a sort of civil war in Alberta. I had Gardiner phone Gray and MacKinnon phoned the Governor.

Aberhart's dismissal was averted as Mackenzie King persuaded Bowen to consider another course of action. Norman Ward has argued that, "his near dismissal [of William Aberhart] was not a partisan matter, in which an unprincipled representative of the monarch sought to rid himself of a premier whose views he considered dangerous. Nor was it in essence the product of a Constitutional impasse which required the opening of a rarely used safety valve…"[20] Aberhart was nearly dismissed for his closure of Government House, the residence of the Lieutenant Governor, not because of a constitutional impasse.

Affronts to vice-regal ceremonial functions – justified or not - can have serious political consequences, as politicians are liable to forget that they do not exercise power they merely grant advice to Her Majesty's representative. The Bowen example serves as a powerful example that no vice-regal should be ostracized. It also illustrates the tremendous power potentially wielded by a Lieutenant Governor. Some may argue that this incident was Bowen's abuse of vice-regal power. The author disagrees. However, even if such abuse were conceded, Bowen's actions not violate the written laws of the Constitution. Had Bowen's dismissed Aberhart, Aberhart would have had no recourse. It is possible, however, that Bowen might have found himself dismissed by the Governor General on the advice of Prime Minister Mackenzie King. King thought that any intervention would damage the chances of the provincial Liberals in the 1938 elections in Saskatchewan. Mackenzie King was not sympathetic to Aberhart, as he had noted in diary on October 1, 1935, "my feeling is that Aberhart should be hanged. His action has been bribery and corruption."

This tradition of vigilance established by Bowen is not merely an academic anachronism. It is an enduring part of Alberta's political memory, a legacy continued by Alberta Lieutenant Governors Ralph Steinhauer, Gordon Towers, Bud Olsen, Lois Hole and – most recently – Norman Kwong.

Ralph Steinhauer shows his mettle

Throughout his tenure, Ralph Steinhauer, Alberta's first Aboriginal Lieutenant Governor, championed native rights in the province in opposition to the policies of Premier Peter Lougheed. On early example occurred in October 1976. That month, Steinhauer delivered a controversial speech at the University of Calgary enumerating the injustices suffered by native people both past and present going so far as to raise the possibility of refusing assent to legislation that would be detrimental to native rights and interests. Steinhauer also described his frustration at being an aboriginal Lieutenant Governor, "It [native affairs] has become a hot political issue but my lips now must be officially sealed on political questions-although sometimes I feel like I am going to blow up."[21] Nonetheless, Steinhauer felt a responsibility to "depart from the traditional political neutrality."[22] Steinhauer also seemed aware that his outspoken behaviour might cost him his job, "If I get too controversial, I suppose they will be looking for a new Lieutenant Governor."[23]

In July 1976, several Alberta native chiefs joined Steinhauer at ceremonies hosted by the Queen at Buckingham Palace in commemoration of the signing of Treaties 6 and 7. Steinhauer had convinced Peter Lougheed to support and finance the trip and secured the Governor General's permission by asserting, "it is the wish of the native people that a representative deputation of Chiefs…should visit the United Kingdom."[24] Although, a Royal Visit to Canada was planned for the following year, Steinhauer argued, "Alberta's Indians attach special significance to their being able to travel to visit her in her own home."[25] The Governor General's

permission, however, was conditional. The Governor General and the federal government wanted assurance that the visit to England would not be a political event "to draw attention to problems which are of concern to the Indian people of this country."[26] Steinhauer promised to ensure the occasion's political neutrality. Upon being presented to Her Majesty, however, Steinhauer promptly raised native issues for discussion.

Upon return to Edmonton, Steinhauer's account of the events in London appeared in a sympathetic article written by Jim Davies of the *Edmonton Journal*:

> I was just stating facts. Because of the *Indian Act*, aren't we wards of the government? Isn't that a fact? You should read the act. Just about every clause begins 'With the consent of the governor-in-council the Indians shall…[27]

Steinhauer saw no incongruity between the Lieutenant Governor's role and political commentary, "The Queen has the right to speak out. If I'm the representative of the Queen here, I have the same privilege."[28] Steinhauer would also detail his philosophy on the role of the Lieutenant Governor. Having no regrets over his comments made in London Steinhauer would not make apologies, "The truth has got to come out. When you state facts, things come out that are not that pleasant to the ears of government."[29]

Pondering Refusal of Assent

Controversy over First Nations concerns also came to a head over amendments to the *Land Titles Act*. As the *Calgary Albertan* reported on April 18, 1977, the amendments were aimed at,

> …blocking any attempt by Alberta Indians to declare an interest in land in the northern area of the province, including the Athabasca oil sands. A caveat declaring an interest in the lands was filed by some Indian bands in 1975 and a court hearing was due to be held. The provincial government, worried by comments made when the Supreme Court of Canada ruled on a similar point recently, rushed in with amendments to plug any possible loopholes that might favour the Indian case.[30]

The Supreme Court decision in question was the *Paulette Caveat Case* in the Northwest Territories, which concerned the Alberta government to the extent that the Attorney General of Alberta unsuccessfully petitioned the court to intervene.

The proposed Bill 29, the *Land Title Amendment Act,* would place restrictions on the filing of caveats on Crown land which option was frequently employed by native groups in securing land claims. The use of caveats was "an attempt to forbid registration of any person as Transferee of ownership of, or of any instrument affecting the said estate or interest."[31] Native groups could file a caveat preventing the development or sale of land until their land claim challenges were resolved. The most disconcerting caveat in the eyes of the provincial government was the Syncrude or Whitehead Caveat, which threatened to delay oil sands development and transfer ownership of the land from the Crown to natives including mineral and surface rights as guaranteed by treaty. Lieutenant Governor Steinhauer spoke against the legislation and hinted that he was considering withholding Royal Assent. Steinhauer had been asked to refuse Royal Assent by native leaders including the prominent leader of The Métis Association of Alberta, Stan Daniels whose press release of May 2, 1977 read,

> In our opinion, this bill is directed against Native People and infringes on the Federal Governments right to legislate in the area of Native Affairs. By denying us the right to file a caveat, the Provincial Government is saying that the native people don't have an aboriginal right. These rights have been recognized in the Treaties and settlements given to both registered and non-registered Native people over the last 100 years.[32]

The Alberta Human Rights and Civil Liberties Association apprised the Lieutenant Governor of their objections on May 5, 1977 recommending the Alberta Attorney General refer the legislation to the Alberta Supreme Court to determine whether it violated the *Alberta Bill of Rights*. The Association added, "it was suggested by several native groups that you may, in fact, feel obligated to resign rather than give Royal Assent to this Bill."[33]

Steinhauer refused to resign over the matter noting later that he would sign the legislation "If the Bill is within the constitution, I have no choice, I have to sign…I checked into it."[34] In fact, the Lieutenant Governor did not get the best possible advice on the matter. While the changes to the *Land Titles Act* did not explicitly violate any section of the *B.N.A Act, 1867*, the legislation did violate the spirit, or convention, of the Constitution. The new legislation prevented natives from obtaining rights guaranteed under other Constitutional documents, the native treaties. The Crown had failed to uphold their treaty obligations under Treaty 6, 7 and 8, such as providing reserve land.

However, Steinhauer did eventually conclude that Bill 29 did not stifle native land claims, "The bill does not completely kill the rights of the Indian people to negotiate land claims," as there was "a way around" the revisions, "In any case it's a caveat worth the paper it's written on? It's just a stalling procedure."[35]

Soon thereafter, allegations arose that Premier Lougheed had petitioned Prime Minister Pierre Trudeau

to restrain Lieutenant Governor Steinhauer. Grant Notley, leader of the Alberta New Democrats, raised the question of whether or not Lougheed had intervened in the Alberta Legislature. "In light of statements attributed to His Honour the Lieutenant Governor concerning federal requests that he restrain public comments, particularly with respect to native questions, is the Premier in a position to assure the Legislature that at no time was there any provincial representation to federal authorities with respect to statements made by His Honour?"[36] Lougheed balked at answering the question in the House arguing that such questions violated the privileges of the House.

Steinhauer later admitted to getting in to "hot water," resulting in an order from Ottawa (not Edmonton) to "cool his mouth off."[37] Steinhauer described the threshold for his outspokenness, "In this job you can speak out providing you don't condemn too much."[38]

Had he chosen to refuse Royal Assent, would Steinhauer have been justified? It is an important question. Had Canadian politicians adequately addressed native problems? On November 6, 1981, Eugene Steinhauer, President of the Indian Association of Alberta and brother of the former Lieutenant Governor, wrote to Premier Peter Lougheed noting that the provincial government had ratified the Constitution binding native groups without consultation,

> We understand that Dick Johnston, of your office, has gone to England to talk about our Rights. In this case we must tell you that the Alberta government has no legal or Constitutional jurisdiction to speak on our behalf in England.[39]

Minority rights must be protected and the Lieutenant Governor, as a guardian of the Constitution, is bound to ensure such protections. A Lieutenant Governor with a strong consideration for native rights might have provided recourse for natives and averted the travesty of failing to include Canada's first nations in the Constitutional negotiations of 1978 to 1982. It is doubtful that Lougheed would have been able to proceed in this manner had Steinhauer still been Lieutenant Governor.

Refusing Orders-in-Council

Keith Brownsey has compared the number of bills passed by the Alberta Legislature with the number of orders-in-council signed by the Lieutenant Governor. In 2004, there were 591 Orders-in-Councils, but only 35 bills. While the passing of bills involves debate, the issuing of Orders-in-Councils does not. Some of the Orders-in-Council issued by the Klein government were substantial in scope and they included, "regulations for the generation, sale and transmission of electricity, the creation of regional health districts, and back-to-work legislation for teachers."[40] Many of these measures, along with other Orders-in-Councils, should have been submitted as bills and withstood public scrutiny.

Circumventing the Legislature is part of the problem with the parliamentary process in Alberta. Alberta's history of large majority governments has entrenched the practice of public spending via Orders-in-Council the approval of which is at the discretion of the Lieutenant Governor. Some Alberta Lieutenant Governors have felt compelled to remind the executive that this process subverts and circumvents the democratic process. Two of the Lieutenant Governors that served in the 1990s raised concerns on the way the government uses Orders-in-Council.

In February 1993, Lieutenant Governor Gordon Towers refused the advice of one of his Alberta ministers when he declined to sign an Order-in-Council that he felt inappropriate. The Order-in-Council was a 1.5 million grant proposed by Economic Development Minister Ken Kowalski. Gordon Towers noted, "If I hadn't had the situation corrected within the department, within the ministers, within the Cabinet, then I would have gone to the Premier…"[41] Towers insisted the Office of Lieutenant Governor "is not just a rubber stamp."[42]

At least one Alberta cabinet minister expressed surprise at Lieutenant Governor Tower's intervention. Ernie Isley, who had brought forth the Order-in-Council noted, "I was not surprised he had the power…but I was surprised he used the authority . . . I can remember him holding it up and a subsequent discussion on it ... He was justified in feeling comfortable before he signed it."[43] Liberal Treasury Critic Mike Percy noted at the time that Tower's actions exhibited "the integrity of the lieutenant-governor. It was the right thing to do."[44] Despite the fact that Lieutenant Governor Gordon Towers, and his successor Bud Olsen, were from different political parties, they shared the same concerns over the use of special warrants and Orders-in-Council. Lieutenant Governor Bud Olson noted concern,

> that the government had resorted to paying its bills in the past without legislature scrutiny 'because that to me is wrong.' He made it clear that, unless it was an emergency situation, he would view dimly any special warrants that cross his desk and hinted strongly he could refuse to sign, 'It would be very, very tempting to say,' 'Try this in the legislature first and see what they think of it…That's what I would be tempted to say and I think I'm in my Constitutional duty doing it that way.'[45]

Recent Examples of Intervention

One need look no further than the two most recent incumbents, Lois Hole and Norman Kwong for examples of intervention by Alberta Lieutenant Governors.

Early in her term, Hole prompted a fierce political debate over the role of the Lieutenant Governor with comments on Bill 11, which would have permitted the privatization of some health care services. Her Honour's comments came on March 15, 2000, during a charity event in Red Deer. Hole admitted that, although her family typically chose not to talk politics with her, her son had asked: "What will you do with the health bill?"[46]

It is clear the remark was not intended to threaten the Premier with a withholding of royal assent. As Ken Munro has noted, "The innocent comment soon became blown out of all proportion with some mischievous individuals in the press suggesting that the Lieutenant Governor was going to refuse assent if "Bill 11" passed through the Legislative process."[47] Nancy Macbeth, the Liberal leader, noted that while Hole's comments were unusual for a Lieutenant Governor, they nonetheless had merit: "She's close to the people and hearing that they're saying and the government isn't."[48] Regardless of the Lieutenant Governor's intentions, a debate arose over the Lieutenant Governor's right to express personal opinion.

At the time, Constitutional scholars such as Allan Tupper commented on the Lieutenant Governor's right to refuse the advice of the Premier on assenting to legislation. As Tupper wrote, "…my view is that a Lieutenant Governor not giving assent to a bill passed by a majority government would be unconstitutional. I would go past that and say that it's no longer an operative part of the Canadian Constitution."[49] However, laws are not made inoperative by lack of use; laws must be amended or repealed. Popular opinion seemed to disagree. The *Edmonton Journal* editorialized thus: "As Lieutenant Governor, it is her job – indeed, her primary responsibility – to remain aloof from the political debates that occasionally divide members of the legislature and the people who democratically chose them in an election."[50] At odds with this sentiment, however, is the Lieutenant Governor's job description as provided by the *Constitution Act*, 1867. Hole's comments were merely conveying to the public that as Lieutenant Governor she would be ensuring that the Premier realized that the legislation was controversial and that there was widespread opposition to it. She ensured that the Premier would have the best interests of Albertans in mind.

Another reporter with the *Edmonton Journal* noted Lois Hole's Bill 11 comments were a "break with tradition."[51] However, where did this so-called tradition originate? The reactions provided by political observers seemed rather unusual considering that Alberta has had a tradition of interventionist Lieutenant Governors since it had become a province.

On January 21, 2005 during his installation ceremony at Government House, Alberta's new Lieutenant Governor, Norman Kwong, provoked controversy over his comments on Alberta's proposed smoking ban. Kwong openly disagreed with Premier Klein who felt that a province-wide smoking ban in public places and work environments was unfair. Klein had noted, "Let's not be overboard on this issue."[52] The Premier also felt that those employed in a smoking environment should find another job if they found the practice distasteful. The new Lieutenant Governor hoped his comments would encourage youngsters not to adopt the harmful practice, "I hate to jump on people, the way they live their lives…But if you asked me if I was in favour or not, I think I'd have to be in favour of a ban."[53] While these comments were contrary to the Premier's position they did not conflict with the established positions of several government departments and organizations, which found the proposed ban helpful to the general health of Alberta's citizenry. Iris Evans, Klein's own health minister, had proposed the smoking ban. The proponents for the smoking ban included AADAC (Alberta Alcohol and Drug Abuse Commission) whose senior manager for tobacco reduction Lloyd Carr argued, "The more you limit the places where people can smoke, the more quit attempts they will make."[54] The Chief Medical Officer for the Capital Health Region concurred with the ban, "In terms of preventing exposure to environmental (second-hand) tobacco smoke, particularly for people who are working in places like bars, I think it is important to have a smoking ban."[55]

Under such pressure, Klein was forced to admit that he was in the minority and rather than dismissing the smoking ban with an executive veto. Klein promised instead to consult his caucus, "We will have a debate through the (standing) policy committees, and I will make sure that those are open, and then in the legislature."[56] In an effort to ensure that children were not becoming smokers, Kwong provided open support to a majority in favour of a ban helping to force a more democratic resolution of the issue. And despite provincially employed experts weighing in on the issue to the detriment of the Premier's position, somehow the Lieutenant Governor's comments were seen as inappropriate. The *Regina Leader Post* reported that "newly appointed Alberta Lt.-Gov. Norman Kwong shunned royal protocol and waded into the contentious smoking debate Thursday, publicly dis-

agreeing with Premier Ralph Klein's stand opposing a province- wide ban on smoking in public places and at work."[57] Larry Johnrude and Bill Mah of the *Edmonton Journal* noted almost verbatim, the criticism of the *Leader Post*. Clearly, the shunning of royal protocol was a disastrous offence from the media's perspective, but the shunning of democratic debate by the Premier was less so. The criticisms were echoed by members of the general public including one Thomas Koch of Spring Lake, Alberta, who criticized the Lieutenant Governor,

> Under a Constitutional democracy, the role of the monarch and her representatives is largely ceremonial and involves political activity only in dissolving the legislature and swearing in of democratically elected representatives…Kwong might consider cutting a few ribbons, hosting a few afternoon teas and leave the politics to the voters and their elected representatives.[58]

Koch had failed to note that it was the democratic majority that favoured the ban, a fact that would be subsequently seen when the smoking ban was passed in the Legislature. The whole controversy was perhaps exaggerated but if we view democracy as being the will of the people the Lieutenant Governor was not going against the democratic process. He was supporting it.

Notes

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