circulated Jan 27

SUBMISSION OF THE MANITOBA GOVERNMENT
TO THE SPECIAL JOINT COMMITTEE ON THE
CONSTITUTION OF CANADA - JANUARY 19,1981

A MAJORITY OF PROVINCIAL GOVERNMENTS HAVE OBJECTED TO THE SCOPE OF THE PROPOSED FEDERAL LEGISLATION ON CONSTITUTIONAL CHANGE. SOME INDIVIDUALS AND ORGANIZATIONS HAVE ALSO CRITICIZED THE LEGISLATION ON THE BASIS THAT IT DOES NOT GO FAR ENOUGH. IN THE MIDST OF DIFFERING VIEWS ABOUT THE CONTENT OF LEGISLATION IT IS RESPECTFULLY SUBMITTED THAT ONE SHOULD NOT FORGET THAT THE PROCESS IN WHICH THE FEDERAL GOVERNMENT IS NOW ENGAGED IS A BREACH OF GOOD FAITH AND VIOLATION OF THE FEDERAL SYSTEM.

THE LEGAL VALIDITY OF THE FEDERAL ACTION IS AT PRESENT BEFORE THE COURTS AND WILL NOT BE DEBATED IN THIS PAPER. WHAT IS OBJECTED TO IS THE ASSUMPTION THAT IN A FEDERAL STATE ONE OF THE PARTNERS TO THE FEDERATION MAY UNILATERALLY CHANGE THE TERMS OF THAT FEDERATION. WE MUST ASK WHETHER ANY FEDERAL SYSTEM CAN SURVIVE THE ADOPTION OF SUCH AN APPROACH. IS IT IN FACT ANY MORE LEGITIMATE FOR THE FEDERAL GOVERNMENT TO AMEND PROVINCIAL RIGHTS WITHOUT PROVINCIAL CONSENT THAN IT WOULD BE FOR THE PROVINCIAL GOVERNMENTS TO TAKE AWAY FEDERAL POWERS WITHOUT FEDERAL CONSENT?

THE GENIUS OF FEDERALISM IS ITS ABILITY TO RECONCILE AND HARMONIZE THE NEEDS OF SECURITY AND STRENGTH WITH THE INNATE DESIRE OF PEOPLE TO BE FREE AND TO EXPRESS THEIR INDIVIDUALITY

AND CULTURAL DIVERSITY IN THEIR SOCIAL ORGANIZATIONS. THE GOAL IS, AS PRIME MINISTER LESTER B. PEARSON EXPRESSED IT IN THE 1965 FAVREAU WHITE PAPER ON CONSTITUTIONAL AMENDMENT, TO DEVELOP A NATION BASED ON UNITY WITHOUT UNIFORMITY. INDEED, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL HAS INDICATED THAT THIS WAS THE CONDITION ON WHICH MINORITIES ENTERED INTO THE FEDERATION, AND THAT IT IS NOT "LEGITIMATE" TO "IMPOSE A NEW AND DIFFERENT CONTRACT UPON THE FEDERATING BODIES." (Note 1) THAT THE CONSTITUTION ACT, 1980, AFFECTS PROVINCIAL RIGHTS CANNOT BE DENIED, BECAUSE SECTION 29 OF THE ACT SPECIFICALLY SAYS SO. THIS DENIAL OF THE ESSENCE OF FEDERALISM IS PARTICULARLY SEVERE BECAUSE CANADA IS ONE OF THE FEW FEDERATIONS WHERE THERE IS NO REGIONAL PROTECTION IN THE NATIONAL GOVERNMENT. ALTHOUGH IT WAS INTENDED THAT THE CANADIAN SENATE PLAY THAT ROLE, IT IS SUGGESTED WITH RESPECT THAT THAT INTENTION CAN NEVER BE ACCOMPLISHED AS LONG AS SENATORS ARE APPOINTED SOLELY BY THE FEDERAL GOVERNMENT.

THE FEDERAL ACTION IS ALSO DESTRUCTIVE OF THE CONCEPT OF THE SOVEREIGNTY OF THE PROVINCES. IN ORDER TO PROTECT REGIONAL INTERESTS AND THE RIGHTS OF MINORITIES, OUR PROVINCIAL LEGISLATURES WERE CREATED SOVEREIGN BODIES, AS SOVEREIGN IN THEIR SPHERES DEFINED BY THE CONSTITUTION AS PARLIAMENT IS IN ITS OWN SPHERE.

Note 1: Re: Aerial Navigation (1932) A.C. 54 - p. 70

THE FEDERAL ACTION VIOLATES THE RIGHTS NOT ONLY OF THE LEGISLATURES BUT OF THE CITIZENS AS WELL, BECAUSE THE DIVISION OF POWERS IN THE PRESENT CONSTITUTION WAS DESIGNED TO PROTECT THE RIGHTS OF CITIZENS. ONE CANNOT DO BETTER THAN TO QUOTE THE WORDS OF THIBAUDEAU RINFRET, FORMER CHIEF JUSTICE OF CANADA:

> THE CONSTITUTION OF CANADA DOES NOT BELONG EITHER TO PARLIAMENT, OR TO THE LEGISLATURES; IT BELONGS TO THE COUNTRY AND IT IS THERE THAT THE CITIZENS OF THE COUNTRY WILL FIND THE PROTECTION OF THE RIGHTS TO WHICH THEY ARE ENTITLED. IT IS PART OF THAT PROTECTION THAT PARLIAMENT CAN LEGISLATE ONLY ON THE SUBJECT MATTERS REFERRED TO IT BY SECTION 91 AND THAT EACH PROVINCE CAN LEGISLATE EXCLUSIVELY ON THE SUBJECT MATTERS REFERRED TO IT BY SECTION 92. THE COUNTRY IS ENTITLED TO INSIST THAT LEGISLATION ADOPTED UNDER SECTION 91 SHOULD BE PASSED EXCLUSIVELY BY THE PARLIAMENT OF CANADA IN THE SAME WAY AS THE PEOPLE OF EACH PROVINCE ARE ENTITLED TO INSIST THAT LEGISLATION CONCERNING THE MATTERS ENUMERATED IN SECTION 92 SHOULD COME EXCLUSIVELY FROM THEIR RESPECTIVE LEGISLATURES. IN EACH CASE THE MEMBERS ELECTED TO PARTLIAMENT OR TO THE LEGISLATURES ARE THE ONLY ONES ENTRUSTED WITH THE POWER AND THE DUTY TO LEGISLATE CONCERNING THE SUBJECTS EXCLUSIVELY DISTRIBUTED BY THE CONSTITUTIONAL ACT TO EACH OF THEM. (Note 2)

IN A FEDERAL STATE THE FEDERAL PARLIAMENT MUST ALWAYS BE UNUSUALLY SENSITIVE TO THE RIGHTS OF ITS SMALLER AND SOMETIMES LESS INFLUENTIAL PARTNERS. THE PROPOSED FEDERAL ACTION BREAKS A GREAT CANADIAN HISTORICAL TRADITION WHICH HAS EXISTED FOR 113 YEARS, BECAUSE IN THE YEARS WHICH HAVE ELAPSED SINCE

Note 2: A.G. Nova Scotia v. A. G. Canada (1951) S.C.R. 31 - p. 34

CONFEDERATION NO AMENDMENT HAS ALTERED THE POWERS OF THE PROVINCIAL LEGISLATURES WITHOUT THE CONSENT OF THE PROVINCES CONCERNED.

THE CANADIAN FEDERAL SYSTEM IS ONE WHICH CAN OPERATE ONLY WITH CONSTANT COOPERATION BETWEEN THE FEDERAL AND PROVINCIAL GOVERNMENTS. THERE ARE MANY ACTIVITIES OVER WHICH LEGISLATION JURISDICTION OVERLAPS; THERE ARE AREAS OF JURISDICTION WHERE THE CONSTITUTION WAS DESIGNED TO ALLOW FOR BOTH A FEDERAL AND A PROVINCIAL VOICE; AND THERE ARE AREAS WHERE THE TWO LEVELS OF GOVERNMENT HAVE REARRANGED LEGISLATION DIVISIONS BY DELEGATION TO SUBORDINATE BODIES. THE PROPOSED FEDERAL ACTION DISRUPTS THE PRESENT INTRICATE SYSTEM OF FEDERAL-PROVINCIAL RELATIONSHIPS WHICH HAVE SERVED CANADA WELL. INEVITABLY IT WILL LEAD TO FEELINGS OF FRUSTRATION AND FUTURE NON-COOPERATION.

THUS IT IS SUGGESTED THAT THE PROCESS ITSELF IN WHICH THE FEDERAL GOVERNMENT IS ENGAGED IS UNWARRANTED AND DESTRUCTIVE. IT IS DESTRUCTIVE OF THE FEDERAL SYSTEM, OF CANADIAN HISTORICAL TRADITIONS, OF THE SOVEREIGNTY OF THE PROVINCES. OF FUTURE GOVERNMENTAL RELATIONSHIPS, AND OF THE RIGHTS OF CANADIAN CITIZENS. ANY FEDERAL SUCCESS IN THE PROCESS WOULD BE TEMPORARY AND WOULD BE QUICKLY OFFSET BY THE ENSUING REACTIONS.

WE BELIEVE THAT IT IS IMPORTANT TO REMEMBER THE POSITION OF THE CANADIAN PARLIAMENT IN 1949 WHEN IT ASKED THE IMPERIAL PARLIAMENT FOR FINAL RESPONSIBILITY OVER AMENDMENTS TO THE CONSTITUTION OF CANADA. IN PREPARING THE APPROPRIATE RESOLUTION FOR TRANSMISSION TO LONDON, PARLIAMENT SPECIFICALLY EXCLUDED FROM ITS OPERATION MATTERS EXCLUSIVELY ASSIGNED TO PROVINCIAL LEGISLATURES, AND RIGHTS AND PRIVILEGES GRANTED TO A PROVINCIAL LEGISLATURE OR GOVERNMENTS. IN 1949, THEREFORE, THE CANADIAN GOVERNMENT WAS OF OPINION THAT PARLIAMENT DID NOT HAVE THE RIGHT TO AMEND PROVINCIAL POWERS. THE ATTEMPT IN THE CONSTITUTION ACT, 1980, TO ARROGATE TO THE PARLIAMENT OF CANADA POWERS WITHIN PROVINCIAL JURISDICTION MUST BE SEEN AS ILLEGAL AND IMPROPER ACCORDING TO PARLIAMENT'S OWN JUDGMENT IN 1949.

THE GOVERNMENT OF MANITOBA WISHES TO EMPHASIZE THAT IT SUPPORTS PATRIATION OF THE CANADIAN CONSTITUTION, TOGETHER WITH AN AMENDING PROCEDURE BASED ON THE VANCOUVER FORMULA. THE VANCOUVER FORMULA REQUIRES THE ASSENT OF PARLIAMENT AND TWO-THIRDS OF THE PROVINCES WITH AT LEAST FIFTY PERCENT OF THE POPULATION, AND WITH SPECIAL PROTECTION FOR PROVINCES WHOSE RIGHTS, POWERS AND PRIVILEGES ARE BEING AFFECTED. IT SHOULD BE REMEMBERED THAT THE VANCOUVER FORMULA CARRIED THE GENERAL APPROVAL OF ALL GOVERNMENT EXCEPT THE FEDERAL GOVERNMENT. IT IS SUBMITTED THAT THAT FORMULA IS EASILY UNDERSTABLE, FAIR AND JUST. IT AVOIDS MANY OF THE

DIFFICULTIES FOUND IN EARLIER AMENDING PROPOSALS, AND WITH NEEDED REFINEMENTS PROVIDES A GOOD BASIS FOR FUTURE CONSTITUTIONAL REFORM.

THE PROPOSED AMENDMENTS TO THE CONSTITUTION ACT, 1980, ANNOUNCED BY THE FEDERAL MINISTER OF JUSTICE ON JANUARY 12, 1981 DO NOT MEET THE OBJECTIONS REFERRED TO ABOVE.

IN THE PRESENT CLIMATE OF CONFRONTRATION, WHAT CAN BE DONE TO COMPLETE THE PROCESS OF CONSTITUTIONAL CHANGE? MANITOBA SUGGESTS THAT THE PRESENT FEDERAL GOVERNMENT PROPOSALS BE ABANDONED AND THAT THE FIRST MINISTERS BE RECONVENED TO MEET AT THE BARGAINING TABLE AND TO PERSIST IN NEGOTIATIONS. THAT WAS THE SUGGESTION OF THE PREMIER OF MANITOBA AT THE CONCLUSION OF THE SEPTEMBER MEETING OF FIRST MINISTERS AND THAT IS THE CONTINUING RECOMMENDATION OF THE MANITOBA GOVERNMENT TO THE JOINT COMMITTEE AT THE PRESENT TIME. IN MEETING AGAIN AT THE BARGAINING TABLE, THE ELEVEN GOVERNMENTS CONCERNED WILL BE ABLE TO SEEK THAT SPIRIT OF COMPROMISE WHICH HERETOFORE HAS CHARACTERIZED FEDERAL-PROVINCIAL RELATIONS AND WHICH MUST BE RESTORED IF OUR FEDERAL SYSTEM IS TO CONTINUE TO FUNCTION.