IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 55 of the Supreme Court Act, R.S.C. 1970, c. s-l9, as amended.

AND IN THE MATTER OF A Reference by the Governor in Council concerning language rights under section 23 of the Manitoba Act, 1870 and section 133 of the Constitution Act, 1867 and set out in Order-in Council P.C. 1984-1136 dated the 4th day of April, 1984.

FACTUM OF THE SOCIETE FRANCO-MANITOBAINE

IN THE SUPREME COURT OF CANADA

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Factum of the Société Franco-Manitobaine
Statement of Facts

PART I

STATEMENT OF FACTS

1. The Province of Manitoba was created as a Province of Canada by the Manitoba Act in 1870. Section 23 of that Act provides that both the English and French languages "shall be used in the respective Records and Journals" of the Houses of Legislature and that "The Acts of the Legislature shall be printed and published in both those languages".

2. The Records and Journals of the Houses of Legislature - the Journaux du Conseil Législatif, the Journal des Votes et Procedes de l'Assemblée Législative and the Manitoba Gazette - were printed and published in both English and French from 1870 until 1890. The Acts of the Legislature were printed and published in both English and French from 1870 until 1890.

3. In 1890 the Legislature of Manitoba enacted that "The English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba" and that "The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language": Official Language Act, S.M. 1890, c. 14.

4. The Province of Manitoba ceased publication of the French version of Legislative Records, Journals and Acts in 1890.

5. The 1890 Act was challenged immediately before the Manitoba courts. It was ruled ultra vires in 1892. Judge Prud'homme stated: Je suis donc d'opinion que le c. 14, 53 Vict. est ultra vires de la législature du Manitoba et que la clause 23, de l'Acte du Manitoba, ne peut pas être changée et encore moins abrogée par la législature de cette province": Pellant v. Hebert, 9 mars 1892, reported in (1981), 12 R.G.D. 242.

6. The Legislature and Government of Manitoba ignored this ruling in that the 1890 Act remained in successive revisions of the Statutes of Manitoba; the Government did not resume bilingual publication of Legislative Records, Journals or Acts.

7. In 1909, the 1890 Act was again challenged in Manitoba Courts and again ruled unconstitutional: Bertrand v. Dussault (Jan. 30, 1909), reported in (1977), 77 D.L.R. (3d) 458-62.

8. The Legislature and Government of Manitoba refused to accept this second court ruling in that the 1890 Act remained in successive revisions of the Statutes of Manitoba; the Government did not resume bilingual publication of Legislative Records, Journals or Acts.

9. In 1976, a third attack was mounted against the 1890 Act. The Act was ruled unconstitutional: R. v Forest (1976), 74 D.L.R. (3d) 704 (Man. Co. Ct).

10. The then Attorney-General (now Premier) of Manitoba stated after the Court's ruling: "The Crown does not accept the ruling of the Court with respect to the Constitutionality of the Official Languages Act". This prompted the Chief Justice of Manitoba to say in written reasons: "A more arrogant abuse of authority I have yet to encounter": Re Forest (1977), 77 D.L.R. (3d) 445, 458 (Man. C.A.). Nevertheless, the Legislature and Government continued to ignore the Court's ruling. The 1890 Act remained on the Manitoba statute books; bilingual publication of Legislative Records, Journals or Acts was not resumed.

11. In 1979, the constitutionality of the 1890 Act was tested a fourth time before this Court. In unanimous reasons, this Court ruled the 1890 Act unconstitutional: A.G. Manitoba v. Forest, [1979] 2 S.C.R. 1032.

12. Since that ruling, the Government of Manitoba has not resumed bilingual publication of Legislative Records or Journals.

13. In 1980, 9 of 115 statutes enacted by the Manitoba Legislature were printed and published in French.

14. In 1981, none of the statutes enacted by the Manitoba Legislature was printed and published in French.

15. On April 17, 1982, subsequent to Bilodeau v. A.G. Manitoba (1981), 10 Man. R. (2d) 298 (C.A.) the Constitution Act, 1982 reaffirmed the position of s. 23 of the Manitoba Act as part of the Federal Constitution which was declared to be the "supreme law of Canada".

Constitution Act, 1982, sec. 52(2)(b), Schedule I, no. 2.

The Constitution Act, 1982 further provided that any law inconsistent with the provisions of the Constitution is "of no force or effect".

Constitution Act, 1982, sec. 52(1).

16. On May 17, 1983 the Government of Canada and the Government of Manitoba, with the participation of the Société Franco-Manitobaine, reached agreement to amend section s. 23 of the Manitoba Act by extending constitutional guarantees to embrace bilingual services from the provincial public sector in exchange for a ten year delay to complete the translation of Manitoba legislation. Pursuant to this agreement the Government of Manitoba introduced the Constitution Amendment Proclamation, 1983 (Manitoba Act) into the Legislative Assembly on July 4, 1983.

17. On October 6, 1983 the House of Commons, by resolution "endorsed, on behalf of all Canadians, the essence of the agreement reached by the Government of Canada and the Government of Manitoba with the participation of the Société Franco-Manitobaine" and invited "the Government and Legislative Assembly of Manitoba to take action as expeditiously as possible in order to fulfill their constitutional obligations" (Hansard, p. 27816). On Feb. 24, 1984 the House of Commons, by resolution, "urge[d] the Legislative Assembly of Manitoba to consider such resolutions...in an urgent manner so as to ensure...timely passage" (Hansard, p. 1710).

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18. After prolonged refusal by the provincial opposition to enter the House, the Manitoba Legislature was prorogued on February 27, 1984, without having adopted the resolution.

PART II

THE POINTS IN ISSUE AND THE INTERVENANT'S POSITION WITH RESPECT THERETO

Question 1

Are the requirements of section 133 of the Constitution Act, 1867 and of section 23 of the Manitoba Act, 1870 respecting the use of both the English and French languages in

(a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and

(b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba

mandatory?

Intervenant's Position

YES

Question 2

Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French Languages invalid by reason of section 23 of the Manitoba Act, 1870?

Intervenant's Position

YES

Question 3

If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and if so, to what extent and under what conditions?

Intervenant's Position

Unilingual texts have no legal force or effect. However, all private rights acquired or penalties imposed thereunder prior to the opinion of this Court are de facto valid. The Manitoba Legislature exists de jure and may exercise full legislative power in conformity with the Constitution until the expiry of its mandate.

Question 4

Are any of the provisions of An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes, enacted by S.M. 1980, Ch. 3, inconsistent with the provisions of section 23 of the Manitoba Act, 1870, and if so are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?

Intervenant's Position

Sections 2(a) and 3 to 5 of the Act are invalid and of no legal force or effect.

PART III

ARGUMENT

Governing Constitutional Principles

1. The Manitoba Act, 33 Vict., c. 3 (Can.) is part of the Constitution of Canada. The Constitution of Canada is the supreme law of Canada.

Constitution Act, 1982, s. 52(2)(b), Schedule I, no 2, s. 52(1).
A.G. Manitoba v. Forest, [1979] 2 S.C.R. 1032.

2. The Constitution of Canada creates the Legislature and Government of Manitoba and endows those organs with legal capacity and powers. The Legislature and Government of Manitoba cannot rise above the commands of the constitution which gave them birth.

Manitoba Act, ss. 6-12.

3. The Constitution of Canada commands that "The Acts of the Legislature shall be printed and published in both [English and French]". Implicit in this is a "requirement of enactment in both languages".

Manitoba Act, s. 23
Blaikie v. A,G. Quebec, [1979] 2 S.C.R. 1016, 1022.

4. The Rule of Law is a fundamental precept of the Constitution of Canada. The Rule of Law requires that government officials faithfully discharge all obligations imposed on them by the Constitution and domestic law. This Court recently explained that

> "The 'rule of law' is a highly textured expression ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." (my emphasis)
>
> Reference re Proposed Resolution Respecting the Constitution of Canada, (1981) 1 S.C.R. 753, 805-6.

5. If officers of the Government, or the Legislature, could refuse to carry out their constitutional duties, and act according to their own arbitrary priorities, the Rule of Law would be at an end.

> Roncarelli v. Duplessis, [1959] S.C.R. 121, 142-3.

6. Where a government official is under a public duty, "if he refuses to act in the discharge of that duty, he is amenable to the ordinary process of the courts" which will compel him to perform that duty.

> The Queen v. Leong Ba Chai, [1954] S.C.R. 10

The Courts will compel Government officials, in their personal capacity, to carry out all duties imposed by statute or other legal instrument on the theory that if the official wrongfully refuses to perform his duty he commits jurisdictional error and is acting only in his personal capacity.

> "the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the Superior Court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorised by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute."
> .
>
> A.G. Canada v. Inuit Tapirisat of Canada (1981), 115 D.L.R. (3d) 1, 14 (S.C.C.).
> Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997.
> Re Doctors Hospital and Minister of Health (1976), 12 O.R. (2d) 164 (Div. Ct.).

In constitutional cases "the fundamental nature of the Constitution implies an inherent and entrenched jurisdiction in the courts to adjudicate in constitutional matters". This jurisdiction must extend to insuring that constitutional obligations are performed, as well as to checking illegal exercises of power.

A.G. Canada v. Canard, [1976] 1 S.C.R. 170, 202-03.

7. It is submitted that where, as here, officers of the Government and Legislature of Manitoba have failed to perform obligations imposed by the Constitution, those officers commit jurisdictional error in both an administrative and constitutional law sense, and may be compelled in their personal capacity to perform their duty.

QUESTION 1

Distinction Between Imperative and Permissive Enactments

8. The Interpretation Acts distinguish between imperative and permissive enactments. Imperative enactments require a thing to be done, leaving the responsible official with no discretion. Permissive enactments empower a thing to be done, leaving the official with discretion whether to do it. The command of the Manitoba Act, s. 23 that "The Acts of the Legislature shall be printed in both [English and French]" is imperative because the Interpretation Act so specifies, and because the text contrasts the "shall" of this clause with the permissive "may" used in other clauses of s. 23 in an obvious and deliberate way.

Interpretation Act, R.S.C. 1970, c. I-23, s. 28.
The Interpretation Act, C.C.S.M., c. I-80, s. 8(3).

Distinction Between Mandatory and Directory Enactments

9. In a limited class of cases relating to imperative enactments, the common law makes a further distinction between mandatory and directory enactments. The distinction is relevant where an imperative enactment requires that a thing be done within a certain time, or in a certain way, and the thing is done otherwise or not done at all.

Wade, Administrative Law (5th), p. 218.

10. If certain conditions are met, the common law excuses non-observance of statutory commands. The statute is said to be directory. Failure to comply with its terms is overlooked in that subsequent transactions are upheld.

11. The conditions which must be met before a statute is held directory are:

(a) Application of the doctrine must not interfere with any protection for the persons that the statute means to protect.

Town of Trenton v. Dyer et al. (1895), 24 S.C.R. 474. In this case the Ontario Assessment Act required the clerk to prepare an assessment roll annually and to deliver the roll to the collector of taxes. No delivery had been made. This Court rejected a submission that the statute was directory because "we must consider the provision as one introduced for the protection of the ratepayer and therefore obligatory"; p. 477.

Waechter v. Pinkerton (1903), 6 O.L.R. 241, aff'd 6 O.L.R. 244. Section 109 of the Assessment Act required statute labour to be rated against each of an owner's lots separately. A global rating had been made. The court concentrated

attention on protections the statute meant to accord the owner. "There are many reasons why it should not be held merely directory in this case. The owner ought to have a right to deal with each lot or parcel of his land burthened only with the taxes against it"; p. 243.

R. v. McDevitt (1917), 39 O.L.R. 138, 140. Per Middleton, J.: "In the event of the officer disobeying, the question remains as to the effect of his disobedience on the thing done. Was the matter in which there was disobedience so essential and fundamental that the non-compliance with the statute rendered it void, or was it so subsidiary and collateral that it may safely be ignored? A provision that falls in this latter category is commonly called 'directory'. This designation is confusing and misleading. The real question in each case is: has the accused in truth been prejudiced by the departure from that which the statute has laid down? If he has, the Court must protect him. If he has not, the Court should not interfere and defeat the general aim and object of the legislation because of an immaterial error on the part of an officer appointed to carry the law into operation."

(b) Application of the doctrine must not make the statute futile.

Colonist Printing and Publishing Co. v. Dunsmuir (1902), 33 S.C.R. 679, 686. Per Taschereau J.: "The respondent's contention that these enactments are merely directory cannot prevail. They are conditions under which the legislative authority has authorized the creation of the company.... They cannot

be read out of the statute as the respondent would ask us to do. If not imperative the enactment would be futile and unnecessary."

Fauteux v. Ethier (1912), 47 S.C.R. 185. In this case the form of nomination papers filed with the returning officer at an election for the House of Commons contravened the Dominion Elections Act in failing to mention the residence or description of the candidate. In rejecting a submission that the Act was directory only this Court said, p. 192: " ... we should not attempt to rewrite the Act or to strain the clear, precise language of its sections so as to render them innocuous". The irregular nomination was rejected and the opposing candidate elected by acclamation.

(c) Application of the doctrine, in the particular circumstances of the case, must not defeat the main object of the Legislature.

Montreal Street Railway Co. v. Normandin, [1917] A.C. 170 (P.C.). In this case, the Railway appealed an adverse jury verdict for damages for personal injuries. A Quebec statute provided for annual revision of jury lists. The revision had been neglected for several years; old lists had been used. The Privy Council found that an important object of the statute was "to prevent the selection of particular individuals for any jury, commonly called packing" (p. 175), and that no evidence of packing appeared in the case. Thus, a ruling that the Quebec Act was directory could not defeat the main object of the Legislature, to prevent jury packing, in the particular circumstances. In this connection, Sir Arthur Channel said:

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not Promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done;" (emphasis added).

Inconvenience, by itself, will not move a court to hold that a statute is directory if such a ruling would defeat the main object of the legislature. Sir Arthur Channel went on to consider the case where the object of the Legislature - prevention of packed juries - would be defeated by a ruling that the statute was directory. In such a case, he said, the statute must be construed as mandatory, and the jury verdict set aside.

> "So to hold would not, of course, prevent the Courts granting new trials in cases where there was reason to think that a fair trial had not been held;" (p. 176).

Re South Oxford Provincial Election (1914), 32 O.L.R. 1 (C.A.). Provisions of the Election Act requiring the returning officer to "stamp" every ballot paper held mandatory. Ballots contravening the provision were rejected. Per Clute, J.: "The object of the Act is to secure complete secrecy in voting ... The clause requiring the official stamp

> prevents fraud ... To permit ballot papers not so stamped to be used ... would deprive the public of that protection which Parliament intended to secure for them ... Having regard for the object of the act, the importance of the provision, and its necessity to reach that object, I am of opinion that s. 71(2) is imperative and absolute, and that non compliance therewith renders the ballot paper void" (pp. 7-8,10).

12. The mandatory/directory doctrine is sparingly applied by the Courts. As long ago as 1857 Martin, B. said:

> "I do not question that, in construing Acts, language seemingly positive may sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when, as in this case, it would really be to make a new law instead of that made by the Legislature."
> Bowman v. Blyth (1857), 7 E. & B. 47, 48.

And Russel, J. said:

> "The temptation is very great, where the consequences of holding a statute to be imperative are seriously inconvenient, to strain a point in favor of the contention that it is merely directory, and I note that Hardcastle quotes Mr. Sedgewick to the effect that 'the pratice of correcting the evasion or disregard of statutes by treating them as merely directory has been carried beyond the line of sound discretion'."
> R. ex. rel. Anderson v. Buchanan (1909), 44 N.S.R. 112, 130, (C.A.).

13. Every case cited by the Court of Appeal for Manitoba to support a directory construction of s. 23 in Bilodeau's case, either (a) satisfies all three conditions of para. 11, or (b) construes the statute considered as mandatory, making the out of context remarks relied on obiter. There are no exceptions.

Howard v. Bodington (1877), 2 P.D. 203. A requirement of the Public Worship Regulation Act that service of a document on the respondent be within 21 days of a certain event held mandatory. Lord Penzance said that it would interfere with protection the statute accords to the respondent if he could be brought into Court at a later date. The fact that harm would occur to the person the statute meant to protect, Lord Penzance continued, distinguished this case from cases where the statute was held directory (p. 216).

Liverpool Borough Bank v. Turner (1860), 30 L.J. Ch. 379. Formalities required by the Merchant Shipping Act for the validity of a ship mortgage held mandatory.

Caldow v. Pixwell (1877), 2 C.P.D. 562. The Ecclesiastical Dilapidations Act, 1871 required the bishop within three months to direct the surveyor to report what sum was necessary to make good dilapidations for which a late incumbent was liable. The bishop so directed the surveyor outside of the time limitations. The central issue was whether "the primary object of the Legislature was that the buildings of a benefice should be kept in repair" (per counsel for the plaintiff, p. 563), or whether the object of the statute "was to provide for the benefit of a new incumbent" (per counsel for the defendant, p. 564). Denman, J. held that the object was to keep the buildings in repair; "it does not create a power or privilege for the benefit of the new incumbent as a private person" (p. 566). Thus, the time limitation was held directory as there was no interference with persons the statute meant to protect, and the other conditions of para. 11 were satisfied.

Montreal St. Ry. Co. v. Normandin, [1917] A.C. 170 (P.C.). A provision for the revision of jury lists was held directory as the object of the statute was to prevent packed juries, and there was no packed jury in the particular case. The Privy Council left standing the judgement of Monet, J. below who found that although breaches of the law had occurred "the appellants could not avail themselves of them because they had not proved any prejudice to have been suffered by them in consequence" (p. 178). Their Lordships also held that the decision of Monet, J. did not have the effect of weakening any of the protections of the Act (p. 178). All other conditions of para. 11 were satisfied.

Clayton v. Heffron (1960), 105 C.L.R. 214. At issue in this case was the ability of the Legislative Assembly of N.S.W. to abolish the Legislative Council. Under s. 5B of the Constitution Act, if the Legislative Assembly passes a bill which is twice rejected by the Legislative Council, a procedure is specified to break the deadlock between the two Houses. There is to be a "free conference" of the managers of both Houses. The Standing Orders of the Legislative Council stipulated that if a free conference is requested by the Assembly, the Council "shall agree to the conference". The Assembly requested a conference; the Council refused. It was submitted that failure to hold a free conference invalidated the Act abolishing the Council.

> The High Court of Australia drew a sharp distinction between "legislative power and the procedure for its exercise" (p. 246). The Court held that the stipulation for a free conference is a matter of parliamentary procedure and continued: "the matter of procedure prescribed is a matter affecting the process in Parliament of legislating a matter at once outside the ordinary scope of inquiry by the courts" (p. 246). As a matter of parliamentary procedure, deviation from the rule was for Parliament only to correct.
>
> This ruling distinguishes the case absolutely from the case at bar. In Forest, and Blaikie no. 1, this Court held that s. 23 of the Manitoba Act and s. 133 of the Constitution Act are not mere matters of parliamentary procedure for the Legislative Assemblies of Manitoba and Quebec in that it is beyond the power of the Manitoba and Quebec Assemblies to change the requirement. All matters of parliamentary procedure are directory as far as the Courts are concerned; the Courts cannot correct deviation from them. Reliance on Clayton v. Heffron evades the issue as to whether entrenched provisions like secs. 23 and 133 - distinct from matters of parliamentary procedure - may be directory.

14. In the circumstances of the case at bar, none of the three conditions precedent for holding statutes directory, specified in para. 11, is satisfied.

(a) A ruling that s. 23 of the Manitoba Act and s. 133 of the Constitution Act are directory would interfere seriously with the protection for the persons these provisions mean to protect. Section 23 of the Mantitoba Act and s. 133 of the Consti-

tution Act mean to protect the French and English speaking minorities of Manitoba and Quebec. This Court concluded in Jones v. A.G.N.B., [1975] 2 S.C.R. 182, 193 that "S. 133 provides special protection in the use of English and French". In Blaikie v. A.G. Quebec, [1979] 2 S.C.R. 1016, 1025 this Court adopted the reasons of the Quebec Court of Appeal, [1978] C.A. 351, 353, 95 D.L.R. (3d) 42, 45, which held that "the basic requirement" of s. 133 is "that minority rights be respected". In Bertrand v. Dussault, supra, Judge Prud'homme held that "the same privilege as to their language is conceded to the French minority in Manitoba as to the English minority of Quebec by provisions which the Legislatures of those Provinces cannot alter in any shape or form". A ruling that secs. 23 and 133 are directory would remove these protections for the Franco-Manitoban and Anglo-Quebec minorities.

(b) A ruling that secs. 23 and 133 are directory would make the sections futile. Secs. 23 and 133 effectively would be read out of the Constitution; the Government of Manitoba would be free to continue to ignore the commands of s. 23 with impunity; the Government of Quebec would be invited to adopt the same position.

(c) A ruling that secs. 23 and 133 are directory, in the particular circumstances of this case, would defeat the main objective of the Legislature. The object of s. 23 is to make

> "the standing of the French language in Manitoba the same as that of the English language in Quebec or to be more correct, the evident intent of those sections is to perpetuate both languages in these two provinces".
>
> Bertrand v. Dussault, Co. Ct. St. Boniface, Jan 30, 1909. Cited approvingly by

Deschênes, C.J. in Blaikie v. A.G. Quebec (1978), 85 D.L.R. (3d) 252, 279 in reasons specifically adopted by this Court "on matters of detail and of history": [1979] 2 S.C.R. 1016, 1027.
Forest v. A.G. Manitoba (1979), 98 D.L.R. (3d) 405, 415 (Man. C.A.); aff'd, [1979], 2 S.C.R. 1032.

The object of the sections would be defeated inasmuch as Quebec would have bilingual laws at the sufferance of the Quebec Legislature; Manitoba would have unilingual laws. The legal position of the English and French languages would be nullified in Manitoba and Quebec.

For all of these reasons it is submitted that s. 23 of the Manitoba Act and s. 133 of the Constitution Act are mandatory.

QUESTION 2

15. In Blaikie v. A.G. Quebec, [1979] 2 S.C.R. 1016, 1022 this Court held:

"It was urged before this Court that there was no requirement of enactment in both languages, as contrasted with printing and publishing. However, if full weight is given to every word of s. 133 it becomes apparent that this requirement is implicit. What is required to be printed and published in both languages is described as 'Acts' and texts do not become 'Acts' without enactment."

Manitoba statutes in one language only are invalid in the most radical sense: such texts "do not become 'Acts"'. Invalidity in this sense results whenever mandatory requirements of the legislative process are violated. For example, in Gallant v. The King, [1949] 2 D.L.R. 425 (P.E.I.S.C.) the Lieutenant Governor of Prince Edward Island withheld Royal Assent from the

'Cullen Amendment' to the Prohibition Act. Subsequently, the Lieutenant-Governor's successor gave Royal Assent. On challenge, Chief Justice Campbell held the Amendment "invalid" in the radical sense, because when Royal Assent was first refused the Lieutenant governor was functus.

> "I therefore hold that the Cullen Amendment never received the Royal Assent, and never became law ...": (p. 431).

16. Canadian Courts are unanimous that failure to respect mandatory requirements to enact, print and publish statutes in both official languages results in radical invalidity.

> Société Asbestos Ltée c. Société Nationale de l'Amiante (1979) C.A. 342. Per Lajoie, J.A.: "La conclusion de la Cour supérieure et de la cour d'Appel dans la cause de Blaikie à la nullité totale des articles 7 à 13 de la Chartre de la Langue Française entraîne la consequence que les lois adoptées en conformité de ces articles, sans respecter l'article 133 de la A.A.N.B., sont aussi nulles de nullité totale, non simplement affectées d'un vice de forme. Je ne crois pas que le droit de l'Assemblée Nationale d'adopter plus tard, conformement à la constitution, les mêmes lois en leurs donnant un effet rétroactif puisse faire obstacle à l'émission d'une ordonnance d'injunction." Per Montgomery, J.A.: "I have had the advantage of reading the notes of my colleague, Mr. Justice Lajoie. I agree with him ... In particular, I agree with him that Bills nos. 70 and 121 were not validly enacted, having regard to the decision of our Court in the Blaikie case ..." (p. 355).
>
> P.G. Québec v. Linda Collier, C.S. Montreal, May 30, 1983, no. 500-36-000 189-830. Striking teachers were ordered back to work by Bills 70 and 105. New working conditions were imposed by Sessional Papers filed with the Labour

> Commissioner General. In reply to the argument that the Sessional Papers escaped the discipline of s. 133 of the Constitution Act, 1867, Chief Justice Deschenes held ''La loi 105 et ces trois documents sessionelles ne sont pas divisibles; le vice qui affecte ceci affecte la législation dans son ensemble. Or, ce vice constitutionnel est fatale".
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> P.G. Québec. c. Brunet Cour des Poursuites Sommaires Québec, April 29, 1983, no. 200-27-004622-832, revs'd on other grounds, C.S. Québec, December 8, 1983, no. 36-49-83. Per Dutil, J.: "Le tribunal ... declare que les textes ... auraient dû être publiés, imprimés et adoptés dans les deux langues. Cette abstention d'agir de cette façon vicie, à notre sens, l'existence même de ces 'documents sessionnels comme loi' et les entache de nullité absolue" (at p. 76).
>
> P.G. Québec v. Albert, Cour des Poursuites Sommaires, Qué, le 24 mars, 1983, no. 200-27-3500-831, at p. 67, rev'd on other grounds, C.S. Que, April 11, 1983, no. 200-27-3500-831.

17. By s. 52(2)(b) and Schedule I no. 2 of the Constitution Act, 1982, s. 23 of the Manitoba Act, as part of the Federal Constitution, is declared to be "the supreme law of Canada". The Constitution Act, 1982 states the effect of inconsistency between laws and the Constitution precisely.

> "52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is, to the extent of the inconsistency, of no force or effect".

In Strayer, The Canadian Constitution and the Courts, (2nd, 1983), it is stated, at p. 33:

> "Now we need look no further than s. 52 of the Constitution Act, 1982 for the principle of supremacy of the Constitution ... and for the intended consequence of supremacy; that is, the invalidity of inconsistent laws."

18. Section 52 codifies and reaffirms a fundamental tenet of Constitutional Law consistently applied by this Court and all courts supervising entrenched Constitutional guarantees. In Law Society of Upper Canada v. Skapinker, S.C.C. May 3, 1984, this Court cited approvingly the classic statement of this theory by Chief Justice Marshall in Marbury v. Madison (1803 5 U.S. 137; 1 Cranch 49, 68-69):

> "The question whether an act, repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. ... Certainly those who have framed written constitutions I contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> "This theory is essentially attached to a written constitution, and, is consequently to be considered, by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject."

19. Passage of time cannot validate an unconstitutional act.

> "Their Lordships entertain no doubt that time alone will not validate an act which when challenged is found to be ultra vires; nor

> will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment".
>
> Proprietary Articles Trade Association v. A.G. Canada, [1931] A.C. 310, 317 (P.C.)

20. The legal order is predicated on the existence of effective and consistently applied sanctions. The rule of law cannot survive widespread perception that Courts will not dare to condemn illegal conduct if the illegality is sufficiently huge, blatant, political and intimidating.

21. Manitoba politicians have encouraged the perception that this Court will not impeach Manitoba's admittedly unconstitutional actions.

> Mr. Lyon: "there is no real substantive threat in the Bilodeau case."
>
> Mr. Filmon: "We believed earlier that the government, as per its own advice from Mr. Twaddle, had nothing to fear from going to the Supreme Court."
>
> Mr. Enns: "We will win the [Bilodeau] case to begin with."
>
> Debates and Proceedings of the Legislative Assembly of Manitoba, July 12, 1983, (p. 4271); Feb 15, 1984 (p. 6075); Feb. 15, 1984 (p. 6059).

Perceptions such as these cripple the capacity of litigants to settle their own problems, and dwarf the rule of law as the basis of Canadian political culture.

On the view that this Court would not condemn English only publication of Legislative Records, Journals and Acts, the Government and Legislature of Manitoba blithely continue publishing English only Records, Journals and Regulations and have made little serious effort to publish French statutes. This behaviour continues notwithstanding the judgment of four separate Courts since 1892, and notwithstanding the unanimous

judgment of this Court almost five years ago which left fully potent the rigorous command of s. 23 for bilingual publication. The belief that this Court would not invalidate illegal Manitoba legislation destroyed the ability of willing Federal and Manitoba governments to find a political solution to the problems caused by longstanding constitutional defiance.

22. For all these reasons it is submitted that those statutes and regulations of Manitoba, embraced by this Court's ruling in Blaikie no. 2, which were not printed and published in English and French are invalid.

QUESTION 3

De Facto Doctrine

23. Since 1431, the common law consistently has confirmed that all may rely on the reputation of officials with whom they deal. The public need not investigate the title of officials to their offices, and are put at no risk if subsequently the officer proves not to be a good officer in point of law.

> "the rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no title are ... legal and binding."
> O'Neil v. A.G. Canada (1896), 26 S.C.R. 122, 130.
> See also: Ihe Queen v. Gibson (1896), 29 N.S.R. 4.
> Abbot of Fountaine's Case (1431) Y.B. 9 H. VI, f. 32.
> R. v. Bedford Level (1805), 6 East 356
> McDowell v. United States, 159 U.S. 596, 602 (1895).

24. The de facto doctrine is an inseverable element of the structure of civil government. Without such a doctrine there would be

> "...consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right

> anything done by the officers taking the law into their own hands."
>
> Scadding v. Lorant (1851), 3 H.L.C. 417, 447.

As explained by a Canadian Judge:

> "The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coersion, submit to, acknowledge or invoke the authority assumed by the governments, corporate bodies, or officers, above mentioned."
>
> Constantineau, A Treatise on the De Facto Doctrine (Canada Law Book, 1910), p. 4
> R. v. Lisle (1738), 95 E.R. 345, 346.

25. The de facto doctrine has been applied repeatedly to validate the acts of officials acting under unconstitutional laws subsequently adjudged invalid. Prior to a judgment of unconstitutionality, it is clear that:

(a) The actions of municipal corporations and other political subdivisions organized under unconstitutional statutes bind.

> Ashley v. Bd. of Supervisors, 60 F. 55 (C.C.A., 1893). Presque Isle County resisted payment of its bonds by arguing unconstitutionality of the statute under which it was organized. Per Severens, J.: "taxes have been levied under its authority; deeds and mortgages have been registered in its records, and titles have been gained or lost by such registration, the estates of deceased persons have been settled in its Court of probate; the rights of parties have been adjudicated, and remedies awarded, by the Circuit Court, in sessions at its county seat, and accused persons have been tried, convicted and sentenced to imprisonment by that Court"

(p. 62). ... "we apprehend the rule to be that an unconstitutional and void law may yet be color of authority to support, as against anybody but the state, a public or private corporation de facto, where such corporation is of a kind which is recognized by, and its existence is consistent with, the paramount law ... in the state" (p. 64).

Riley v. Township of Garfield, 49 P. 84 (S.C. Kan., 1897). Bondholder successfully sought to compel township trustees and board of county commissioners to levy a tax to pay interest coupons on bonds issued by the board. Act creating county government held void in prior court decision. Per Allen, J: "We are driven to the alternative of holding either that all the acts of those who are recognized as public officers of Garfield county between the time when its organization was proclaimed by the Governor and its dissolution by the judgment of this court were void, or that they were valid as the acts of officers de facto. The better reason and weight of authority seems to support the latter, and to make the acts of those acting under a law duly passed by the legislature valid until the act is declared unconstitutional by a competent tribunal" (p. 86).

State of Kansas v. Hodgson, 326 P. 2d 752 (S.C. Kan., 1958). Kansas act establishing a political subdivision, a watershed district, held "unconstitutional and void" (p. 762). Per Fatzer, J.: "From the time the district was created and established until the date this opinion is filed, it had de facto existence and the acts of the defendant directors were the acts of de facto officers, binding as such, between the people of the district and third persons dealing with them as public officers" (p. 763).

(b) Taxes collected and fines imposed are not refundable, unless paid under protest or duress.

Vancouver Growers Ltd. v. Snow Ltd, [1937] 4 D.L.R. 128 (B.C.C.A.).

Moneys paid to provincial marketing board pursuant to statute subsequently declared unconstitutional. Accounting action for return of money unsuccessful.

Cushen v. City of Hamilton (1902), 4 O.L.R. 265 (C.A.).

Moneys paid to municipality for licence fee to operate butchershop under by-law subsequently declared ultra vires. Action to recover the money paid unsuccessful.

Callaghan v. Sanders, 339 F. Supp. 814 (U.S.D.C., 1971).

Plaintiffs fined for traffic violations under statutory section subsequently found unconstitutional. Per Johnson, C.J.: "It has long been settled that when one pays a fine voluntarily under mistake of law that fine cannot be recovered unless payment was induced by the fraud or unjust advantage of the one receiving it" (p. 818).

Prillman v. City of Canon City, 360 P. (2d) 812 (S.C. Colo., 1961). Per Hall, C.J.: "'Money paid under an unconstitutional or invalid statute or ordinance, without any circumstances of compulsion is paid under a mistake of law, and so cannot be recovered'".

(c) All official actions of courts, judges, persons exercising statutory powers and public officials are unassailable.

Burt v. Winona & St. P.R. Co., 18 N.W. 285 (S.C. Minn., 1884). Judgment of a municipal court attacked for unconstitutionality of law creating court. Per Gilfillan, C.J.: "where a court or office has been established by an act of the Legislature apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a de facto court or office. In other words, that people shall not be made to suffer because misled by the apparent legality of such public institutions" (pp. 287-8).

Beaver v. Hall, 217 S.W. 649 (S.C. Tenn., 1920). Conviction in criminal court attacked where, subsequent to conviction, act creating criminal court ruled unconstitutional. Per McKinney, J.: "Public policy makes it necessary to recognize the proceedings of courts created by the Legislature where the Legislature has the power to create such courts, where such courts have the colour of legality and regularity, and where their acts and proceedings are acquiesced in by the public and are not objected to by the relators... the same consideration of public policy that led the courts to adopt the de facto doctrine as a means of protecting the rights of the public who deal with officers acting under colour of authority should be invoked in this case to protect the acts of a tribunal organized under an act of the Legislature, apparently valid, until there has been a judicial determination of the invalidity of such a court. We are unable to see how such a holding could work any hardship. To hold otherwise might result most disastrously" (p. 654).

State v. Poulin, 74 A. 119 (S.C. Me. 1909). Conviction challenged where special prosecuting attorney appointed under law ruled unconstitutional. Per Spear, J: "the de facto doctrine is exotic, and was ingrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers.... To protect those who deal with officers apparently holding office under colour of law in such manner as to warrant the public in assuming that they are officers, and in dealing with them as such the law validates their acts as to the public and third persons on the ground that as to them, although not officers de jure they are officers in fact, whose acts public policy requires to be construed as valid... This doctrine is thoroughly established..." (p. 121).

See generally, Field, The Effect of an Unconstitutional Statute (U. Minn. Press, 1935).

26. The de facto doctrine has important limits which protect fundamental doctrines in Canadian constitutional law, and the precept of regularity basic to the rule of law. These are:

(a) The de facto doctrine applies only where the potential to act constitutionally exists. The doctrine cannot apply where the legislative result achieved lies wholly beyond the powers of the enacting legislature, as if, for example, the legislative result invades powers of another order of government in a federal system.

State v. Bailey, 118 N.W. 676 (S.C. Minn., 1908). Conviction in Court created under statute subsequently ruled unconstitutional attacked unsuccessfully. Per Brown, J.:

"Courts in attempting to adhere to the abstract rule that there must in all cases be a de jure office have in cases where a de facto corporation has been held to exist invented a theory of potential existence to take the place of the lawfully created office" (p. 678).

City of Winter Haven v. Klemm, 181 So. 153, 170 (S.C. Fla., 1938).

Beaver v. Hall, supra.

Ashley v. Bd. of Supervisors, supra.

Burt v. Winona & St. P.Ry. Co, supra.

Norton v. Shelby Co., 118 U.S. 425, 6 S. Ct. 1121 (1886). Tennessee legislature created a board of commissioners to exercise powers of the County Court. The County Court was known to the constitution of the State; the board of commissioners was not. No potential existed for the state validly to create the board of commissioners. In the face of immediate public opposition, the board of commissioners issued railroad bonds. The liability of the county on these bonds was challenged successfully. The Court rejected Counsel's contention, rightly, it is submitted, that "it is sufficient [to engage the de facto doctrine] if the office be provided for by any legislative act, however invalid". On its Acts, Norton stands for the proposition that offices wholly invalid, in the sense that no potential exists to create them under any circumstances, cannot give color of authority to de facto officers. This is on all fours with the vast majority of the authorities, and with the justifiable limits of the de facto doctrine. Mr. Justice Field went on to say, obiter, that to imbue an official with de facto power, there must be a de jure office (p. 1127). This wide obiter is at odds with the authorities [how can there be a de facto court or municipal corporation on this view?],

is severly criticized by the commentators [Field, The Effect of an Unconstitutional Statute, supra, p. 91; Pannam, Unconstitutional Statutes and De Facto Officers (1966-7), 2 Fed. L. Rev. 37, 56] and cannot be considered correct. Norton v. Shelby County has been explained as being consistent with the "potentiality doctrine" by the Federal Court of Appeals in Speer v. Board of County Commissioners, 88 F. 749, 764 (C.C.A., 1898).

Tooke, De Facto Municipal Corporations Under Unconstitutional Statutes (1928), 37 Yale L.J. 935, 947-8: "The existence of a de facto office based on a de jure existence in potentia by recognition in the State Constitution or in general statutes has frequently been applied to sustain public acts by those purporting to act as officers under an unconstitutional statute or before the statute creating the office has gone into effect".

(b) There can be no de facto officer if there is a de jure officer in possession of the office. Nor can de facto status arise by ousting a de jure officer. The acts of de facto officers find only where there is peaceful, good faith entry to the office, under colour of lawful authority.

Tooke, De Facto Municipal Corporations (1928), 37 Yale L.J. 935, 943 (see authorities cited therein).

(c) A ruling of unconstitutionality destroys the capacity of de facto officers to perform further valid acts. All colour of authority disappears. No one in good faith could suppose any longer that the officer has the authority claimed. The reason for validating the acts to which individuals submitted collapses, in consequence of which the law withdraws its protection.

R v. Bedford Level (1805), 6 East 356. Acts of deputy recording officer acting

after the death of his principal bind de facto, but only until the death of the principal is known).
State v. Carroll, 9 Am. Rep. 409, 423 (Conn, 1871).
The De Facto Officer Doctrine (1963), 63 Col. L. Rev. 909, 912.

De Facto Doctrine Applied to Manitoba

27. In the instant case, Manitoba undoubtedly has potential to act constitutionally. The Legislature could have enacted and may yet enact all of the challenged statutes by adhering to constitutional requirements. Statutory designees entered peacefully upon their offices, under color of legality. All conditions for applying the de facto doctrine to actions performed under invalid Manitoba legislation are operative.

28. It is submitted that all actions hitherto performed pursuant to invalid Manitoba legislation by Manitoba political subdivisions, public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials are unassailable by reason of s. 23 or the judgment of this Court. All rights acquired, taxes collected and penalties imposed are as valid as if no ruling of invalidity were pronounced.

29. It is submitted that the authority of entities, officers and officials deriving power to act de facto under Manitoba legislation comes to an end with this Court's ruling of invalidity.

Manitoba Legislature Exists De Jure

30. The Constitution of Canada provides that "there shall be a Legislature for the Province" of Manitoba (Manitoba Act, s. 9) which shall hold "a sitting ... at least once every twelve months"

(Constitution Act, 1982, s. 5). The Constitution of Canada endows the Legislature of Manitoba with legislative power (Manitoba Act, s. 2; Constitution Act, 1867, secs. 92 ff.). The existence of the Manitoba Legislature, its powers and inherent capacities do not depend on any provincial statute, and are unaffected by invalidation of provincial laws.

31. The Lieutenant Governor and Executive Council of Manitoba are creatures of the Constitution of Canada; they are unaffected by invalidity of provincial laws.

Manitoba Act, secs. 6,7.
Constitution Act, 1982, sec. 41(a).

32. The election of members of the present Legislative Assembly of Manitoba was commenced by order of the Lieutenant-Governor in 1981. Summoning of the Legislature is an important prerogative of the Crown, exercised by the Lieutenant Governor, which is unaffected by invalidity of Manitoba laws.

Simpson v. A.G. New Zealand, [1955] N.Z.L.R. 271, 279, 280-1.

33. The Elections Act, C.C.S.M. E-30 was thought to be valid when voters registered to vote and returned the present members of the Legislative Assembly in 1981. Voters entitled to vote under that Act were de facto voters, and their action of voting conferred on the presently sitting members of the Assembly a valid mandate for five years, in the same way as the decision of a de facto judge appointed under an unconstitutional statute validly convicts and penalizes an accused, or the issuance of bonds by a de facto municipal corporation organized under an unconstitutional statute creates valid obligations to repay.

34. Elections held under unconstitutional statutes may nevertheless be valid.

> Field, The Effect of an Unconstitutional Statute (1935), p. 5: "An election may be valid although the law authorizing or regulating it is unconstitutional, the

> question of its validity being determined by the law of elections, not by any doctrine of unconstitutionality".
>
> American and English Encyclopedia of Law, vol. 6, p. 289, cited approvingly in State v. Ruhe, 52 P. 274, 276 (S.C. Nev., 1898): "if a registry is had under an unconstitutional law, and an election held upon the basis of such registry, there can be little, if any, doubt that the election will be held valid unless it is shown that a sufficient number of legal voters to have changed the result were prevented by such law from casting their ballot".

35. American Courts leave no doubt that legislatures elected under unconstitutional statutes are de jure legislatures. In Baker v. Carr, 369 U.S. 186 (1962) the United States Supreme Court invalidated the statute apportioning Tennessee legislative districts for conflict with the equal protection clause. No further elections could be held under that statute. The Court implicitly and explicitly recognized the continuing validity of the Legislature's mandate: implicitly, because the Court stated that the Legislature should consider the problem and brings its apportionment statute into conformity with the Constitution. Mr. Justice Douglas was explicit:

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair [unconstitutional] apportionment scheme, is nonetheless a legislature empowered to act ... is plainly correct" (p. 251).

In Maryland Committee for Fair Representation v. Tawes, 84 S. Ct. 1429 (1964) the Supreme Court held Maryland's apportionment statutes unconstitutional. Again the court clearly foresaw that the legislature, though elected under the invalid statute, was a legislature de jure, and able to act until the expiry of its mandate. Chief Justice Warren stated:

> "...since all Maryland legislators are elected to serve four-year terms the next election ... will not be conducted until 1966. Thus, sufficient time exists for the Maryland Legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections" (p. 1440).

An Annotation, 12 L. ed. (2d) 1282, at 1288-91 notes 44 instances where state apportionment legislation has been held to be invalid. In none of these cases did the court rule that the legislatures elected under invalid statutes were without power to act until the expiry of their mandate.

36. The Legislative Assembly of Manitoba has inherent and exclusive power to deal with matters affecting the due return of its members. No court has power, absent delegation from the Legislature, to inquire into the return of members to the Assembly.

> "Until comparatively recent times, all controversies respecting the return of members were decided by the House to which the member had been returned, and the House of Commons always jealously guarded its jurisdiction in this respect from interference from outside. By the Controverted Elections Act power was delegated to Courts thereby constituted to deal with disputed elections in the manner therein specified. General jurisdiction over the return of members was not by these Acts conferred upon the Courts. No case has been cited to me, and I have found none, in which the Court has assumed directly to interfere with the return of a Member of the Legislature otherwise than under the Controverted Elections Act. In my opinion the jurisdiction to do so is confined to the Courts established by those acts."
>
> Davis v. Barlow (1910), 15 W.L.R. 49, 51.
> Cross v. Carstairs (1913), 47 S.C.R. 559, 562.

37. It is submitted that the Legislature of Manitoba survives intact the invalidity of its legislative progeny. The present members are de jure members of a de jure legislature, endowed with full provincial legislative power until the expiry of their mandate.

The Legislature is fully competent to choose its legislative priorities. It could, for example, in both languages, pass ex abundante cautela an act validating all private rights acquired under invalidated statutes. It could, in both languages, re-enact the identical statutes in whatever order of priority and with whatever urgency it chooses. It could adopt an omnibus enactment procedure as did Quebec (L.Q. 1979, c. 61) to bring into force the 989 pages of public general acts ready to be published in French (847 pages have already been published in French: see Appendix, Part I). It could accept the "invitation" (House of Commons Debates, Oct. 6, 1983, p. 27816) or the "urging" (Debates, Feb. 24, 1984, p. 1710) of the House of Commons to pass a resolution under s. 43 of the Constitution Act, 1982 to obtain a delay for statute translation in exchange for bilingual provincial government services. (The House of Commons is twice on record as ready to respond to such a resolution.) The priorities of the Manitoba Legislature are a matter for it alone; they do not concern this Court.

Necessity

38. There can be no question of applying the doctrine of state necessity in this case. That doctrine never applies to a regularly functioning constitutional order: George Stratton's Case (1779), 21 Howell's State Trials 1056, 1224. It is relevant only during wars or revolutions "when a usurper is in control of a territory" and the question arises how far "subjects of the lawful Sovereign ... should recognize, obey and give effect to the commands of the usurper": Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645, 726, (P.C.). The Legislature and Government of Manitoba are not usurpers. They are creatures of the Constitution of Canada. Unconstitutional failure to print Acts in French does

not make governmental structures in Manitoba usurpers, able to claim obedience to all unconstitutional commands by necessity, any more than would passage of an ultra vires act. Unless or until the authorities in Manitoba are considered to be in a state of revolution, this Court can only give effect to the Constitution. No question of necessity is remotely involved.

> Amax Potash v. Gov't of Saskatchewan, [1977] 2 S.C.R. 576,590.

39. Even as explained in the context of wars and revolutions, the doctrine of state necessity could not be applied in this case. State necessity has important limits. These are:

(a) No action is justifiable if it defeats or is intended to defeat the just rights of citizens under the Constitution.

> Texas v. White 74 U.S. 700, 734 (1869). Action successfully prosecuted by State of Texas to recover bonds sold by insurgent State Military Board to aid rebellion against United States. Per Chase, C.J.: "Acts necessary to peace and good order among citizens ... which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void."
>
> Horn v. Lockhart, 84 U.S. 570, 580 (1873). Executor could not defend accounting action brought by legatees by showing funds invested with approval of State Probate Court, in Confederate bonds, pursuant to laws of rebellious state. The bonds were issued to prosecute war against the United States. Per Field, J.: "We admit that the acts of the

several states in their individual capacities, and of their different departments of government executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding."

United States v. Insurance Cos., 89 U.S. 99, 102 (1875).

Baldy v. Hunter, 171 U.S. 388, 401 (1898).

Sokoloff v. National City Bank, 145 N.E. 917, 918 (N.Y.C.A., 1924). Per Cardozo, J.: "We learned in litigations following our Civil War ... [that] acts or decrees of the rebellious governments ... were held to be nullities when they worked injustice to citizens of the Union..."

Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.). Madzimbamuto was detained under emergency regulations validly made under the 1961 Constitution of Southern Rhodesia. Subsequently, the Smith regime issued a Declaration of Independence, declaring sovereignty and purporting to adopt a new Constitution. The United Kingdom Parliament legislated that Southern Rhodesia continued as a British Dominion and that any act done except as authorized by an Act of the U.K. Parliament was void. Thereafter, Madzimbamuto was detained under fresh emergency regulations made by the Smith regime. The Privy Council held these regulations invalid as pursuant to the Smith Constitution and not to an Act of the U.K. Parliament; M.'s detention, accordingly, was unlawful. The question then arose whether Acts of the Smith regime could be valid on the principle of necessity or, as it was also called, 'implied mandate from the lawful sovereign'. Lord Reid for the

majority held that if there were "a general principle, depending on implied mandate from the lawful sovereign, which recognizes the need to preserve law and order in a territory controlled by a usurper", that principle could not apply. "[N]o such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the Sovereignty of Her Majesty" (p. 729).

Lord Pearce, dissenting, would have applied the principle of implied mandate "subject ... to the facts fulfilling three necessary qualifications" (p. 740). Condition 2 is material here. Lord Pearce stated it as follows: "2. Do the declaration of emergency and the detention order impair the citizen's rights under the Constitution?" (p. 741). Lord Pearce explained: "In one sense, any recognition of an unlawful order adverse to a citizen impairs his rights under the Constitution, since he would be better off if the unlawful order were not recognized. But this is not the true sense or the sense intended by the American cases... The true question is whether the Act, if done by the lawful authorities, would conflict with his rights under the Constitution" (p. 741).

(b) Political authorities must proclaim emergencies, or take necessary extra-constitutional actions. Courts cannot suspend the Constitution. The role of the Courts is to review whether extra-constitutional actions, when taken, were justified by the circumstances.

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, 463-4. Per Beetz, J.: "It is the duty of the Courts to uphold the Constitution, not to seal its suspension, and they cannot decide that a suspension is legitimate unless the highly exceptional power to suspend it has been expressly invoked by Parliament. Also,

they cannot entertain a submission implicitly asking them to make findings of fact justifying even a temporary interference with the normal constitutional process unless Parliament has first assumed responsibility for affirming in plain words that the facts are such as to justify the interference. The responsibility of the Courts arises after the affirmation has been made. If there is no such affirmation, the Constitution receives its normal application. Otherwise, it is the Courts which are indirectly called upon to proclaim the state of emergency, whereas it is essential that this be done by a politically responsible body" (dissenting opinion).

Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.) Per Lord Reid: "It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to [extra-constitutional] laws made [by] the usurping Government to such extent as may be necessary for that purpose" (p. 731).

Lord Pearce found "obviously of great importance" (p. 742) the Governor's message to the Southern Rhodesian people to "maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service" (p. 737-8). Lord Pearce concluded that the Governor's directive "made it perfectly clear that the lawful Government was not seeking to impose its will by causing day to day chaos. It was relying on other sanctions and pressures" (p. 739).

Federation of Pakistan v. Tamizuddin Khan, P.L.R. 1956 W.P. 306

The Indian Independence Act granted independence to Pakistan and provided for a Constituent Assembly with power to amend the

Constitution. Section 6(3) required royal assent to legislation on pain of nullity. In 1948, the Constituent Assembly purported to dispense with royal assent in the legislative process.

The Constituent Assembly met for seven years, and enacted 44 'amendments to the Constitution' pursuant to this procedure. In 1954, the Governor General dissolved the Constituent Assembly on the view that the constitutional machinery had broken down and the Assembly had lost the confidence of the people. The Governor General convened a Council of Ministers to govern pending elections.

The respondent, President of the Constituent Assembly, filed a petition to prevent the dissolution of the Assembly. The Federal Court refused to issue the writ.

The Government of India (Fifth Amendment) Act, 1954, which purported to confer jurisdiction to grant prerogative writs, was held void for want of royal assent. Rule 62, which purported to do away with the necessity for royal assent, was itself held void for want of royal assent.

Per Muhammad Munir, C.J., at p. 394-5: "I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country. Unless any rule of estoppel requires us to pronounce merely purported legislation

as complete and valid legislation we have no option but to pronounce it void and to leave it to the relevant authorities under the Constitution or to the country to set right the position in any way it may be open to them" (emphasis added).

Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598.

Subsequent to Tamizuddin Khan's case, the Governor General summoned a Constituent Convention. He then proclaimed an emergency, and assumed to himself the power, temporarily, to validate and declare enforceable all laws required to preserve the State.

The question raised was "whether in an emergency of the character described in the Reference there is any law by which the Head of the State may, when the Legislature is not in existence, temporarily assume to himself legislative powers with a view to preventing the state and society from dissolution." The Court held that by the common law of necessity, the Governor General had the power to validate the laws retrospectively.

Nowhere in Special Reference No. 1 was it suggested that the Court had jurisdiction to hold invalidly enacted laws valid by necessity. Rather, it was held that an appropriate political authority, the Governor General, possessed temporary provisional power, based on necessity, to take political steps to meet a political crisis.

(c) The lawful authorities must be unable to deal with the crisis constitutionally.

Madzimbamato v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.). Lord Pearce, dissenting, held the necessity/implied mandate doctrine applicable because "The lawful Government has not attempted or purported to make any provision

for such matters [hospitals, police courts, etc.] or for any lawful needs of the country, because it cannot" (p. 740).

Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598. The Governor assumed extra-constitutional power to himself to validate all laws necessary to preserve the state. The lawful authorities could not solve the crisis within the Constitution because the legislature was not in existence.

So too with the American civil war cases. The lawful governments had been displaced and could make no provision for the functioning of the state.

(d) No action is justifiable if it runs contrary to the policy of the lawful government.

Sokoloff v. National City Bank, 145 N.E. 914 (N.Y.C.A., 1924). Per Cardozo, J.: "following our Civil War ... acts or decrees of the rebellious governments ... were held to be nullities when they ... were in conflict with its [the United States'] public policy. On the other hand, acts or decrees that were ... consistent with public policy were sustained to the same extent as if the governments were lawful" (p. 918-19).

Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.).

Lord Pearce stated "three necessary qualifications" for applying the state necessity doctrine. Requirement 3 was conformity to public policy. "Is this declaration of emergency intended directly to help or does it directly help the usurpation or does it run counter to the policy of the lawful government? Is it, in a word, against public policy? (p. 741)" (emphasis added).

40. None of the four conditions required to invoke state necessity is satisfied in the instant case.

(a) The Constitution guarantees the right, when the Manitoba legislature enacts laws, to have those laws enacted, printed and published in both English and French. If state necessity is invoked, temporarily or permanently, the Court approves knowing invasion of the just rights of citizens under the Constitution, particularly the rights guaranteed to the Franco-Manitoban minority.

(b) To rely on state necessity here is to request the Court to suspend the Constitution. No emergency existed at the time Manitoba enacted any of the unilingual legislation. This is not a case where the political authorities acted extra-constitutionally in emergency circumstances and seek to justify their actions by necessity post facto. Nor is it a case where validation is sought for the extra-constitutional acts of a usurping government on the basis of implied mandate from the lawful sovereign to prevent chaos. (The sovereign's mandate, in any event, was made express in 1982, and requires the Court to declare extra-constitutional laws "of no force or effect".) This is a case where the lawful authorities have acted illegally, have taken little or no steps to rectify their unlawful actions and are now asking the Court to suspend the Constitution to remove penalties for their illegal behavior.

(c) The Manitoba legislature exists de jure and is imbued with plenary power to respond to invalidation of its legislative progeny. It may selectively re-enact legislation in both languages, it may accept Parliament's invitation and urging to join in a s. 43 Constitutiona1 amendment giving a delay to comply with s. 23, or do otherwise as it sees fit. The lawful authorities are fully able to deal with the situation.

(d) Validation of unilingual laws runs directly contrary to clear and consistent public policy. Public policy as expressed in sections 16 - 23, and

52 of the Constitution Act, 1982 is to broaden official language rights and rigorously protect them. Public policy, as expressed by this Court, requires that entrenched language rights "be considered broadly". Language rights require an "enlarged appreciation". "The proper approach to an entrenched [language right] is to make it effective through the range of institutions [to which it applies]".

> A.G. Quebec v. Blaikie, [1979] 2 S.C.R. 1016, 1028, 1030.

Public policy is expressed in the Parliamentary resolutions of October 6, 1983 and February 24, 1984 inviting and urging the Manitoba Legislature to fulfill its constitutional obligations and to expand entrenched language guarantees.

The Fathers of Confederation left no doubt about public policy with respect to the entrenched status of the French language. Hon. John A. MacDonald said in the Parliamentary Debates of 1865:

> "It was agreed at the Conference to embody the provisions [for official bilingualism] in the Imperial Act ... This was proposed by the Canadian government, for fear an accident might arise subsequently, and it was assented to by the deputation from each Province that the use of the French language should form one of the principles upon which the Confederation should be established, and that its use, as at present, should be guaranteed by the Imperial Act."
>
> Parliamentary Debates on Confederation of the British North American Provinces (Kings Printer, 1951), p. 944.

The Attorney General of the Republic v. Mustafa Ibrahim [1964] Cyprus Law Reports 195

41. The constitution of Cyprus contained provisions for sharing power between Turkish and Greek Cypriots. The constitution established a High Court of Justice, composed of Greek and Turkish Judges and a neutral, i.e. non-Cypriot, President; and a Supreme Constitutional Court, similarly composed. Turkish Cypriots charged with offences against Greek Cypriots were to be tried by 'mixed' courts. All laws were to be enacted in both Turkish and Greek. These basic articles could not be altered by any means whatsoever (p. 223).

In 1963, Turkish insurgents took control of Turkish areas of Cyprus. Turkish judges either refused or were unable to convene court in areas outside Turkish communities. Mixed courts guaranteed by the constitution could not be constituted. It was impossible to enact laws in Turkish, because of the lack of translators.

The Cypriot Parliament enacted a temporary measure to deal with the situation. Law 33 of 1964 established a new Supreme Court, which had all the jurisdiction of the High Court and Supreme Constitutional Court, and was comprised solely of Greek Cypriot judges. Law 33 was enacted in Greek only. In an appeal by the Attorney-General from a bail application, the respondent challenged the legality of the proceedings, as the Court, and the law establishing the Court, did not comply with the basic articles of the constitution.

The Court held that war-like conditions prevailing at the time of enactment of the laws justified Parliament in acting outside the express provisions of the constitution; accordingly, Law 33 had been validly enacted.

The Court noted (p. 236) that no attempt had been made to repeal any of the relevant provisions of the Constitution, and that the law was "an urgent measure and a temporary one" (p. 227). Triantafyllides, J. continued:

> "An act of constitutional effect made by the government at a time of necessity, in contravention, however, of the Constitution, remains unconstitutional, but it has to be applied ... " (p. 238).

The doctrine of necessity laid down in Ibrahim is that the government, in a time of crisis which cannot be dealt with under the constitution, may temporarily take extra-constitutional steps to deal with the emergency. Nowhere is it suggested that a court may deem invalid laws to be valid because to hold otherwise would be to cause inconvenience or chaos. Nor is it suggested that the government may act outside of the constitution except when absolutely necessary.

Ibrahim is inapplicable to the present case, because no necessity caused the Manitoba government to enact laws in English only. Nor, with the realization that the actions of the last 90 years have been illegal, has the Manitoba government taken steps to meet the alleged emergency. Instead, the government asks the court virtually to repeal s. 23. Such a ruling finds no support in Ibrahim, and would be an unprecedented, unwarranted, and uncontrollable expansion of the necessity doctrine.

42. For all these reasons it is submitted that the doctrine of state necessity has no application to the instant case.

43. If, contrary to Intervenant's submission, this Court finds the doctrine of state necessity relevant, it is submitted in the alternative that the doctrine has but limited application. All courts agree that emergencies capable of suspending the regular constitutional order must be temporary, and the measures taken must be proportionate to the circumstances.

> Fort Frances Pulp and Power Co. v. Manitoba Free Press, [1923] A.C. 695, 708 (P.C.).
> Reference re Anti-Inflation Act, [1976] 2

S.C.R. 373, 425, 461 ("one of those limits [of the emergency power] is the temporary nature of the crisis").
Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598, 657, 731.
A.G. Cyprus v. Ibrahim, [1964] Cyprus Law Reports 195, 227, 265.

In the instant case, Manitoba laws may remain in force by necessity only for a temporary period. The period must be no longer than that required for the Legislature to translate into French and re-enact in French and English all unilingual legislation. It is submitted that one year is sufficient because:

(a) 22,000 pages of Manitoba legislation require translation (See Appendix, part I);
(b) 44 translators are required to complete this task in one year (see Appendix, part II);
(c) Translators are ready, willing and able to do the job (see Appendix, parts II - V).

Question 4

Constitutional Requirements in the Legislative Process

Enactment of Both Language Versions

44. Section 23 of the Manitoba Act requires that English and French "at the same time must be used in the records and journals of the Legislature". This extends to simultaneous use of English and French in "the Bills discussed and the laws adopted by the House" at all stages of debate.

Blaikie v. A.G. Quebec (1978), 85 D.L.R. (3d) 252, 260-1, adopted by this Court on "matters of detail and of history", [1979] 2 S.C.R. 1016, 1027.

Section 23 equally requires simultaneous enactment of all laws in both English and French, including "passing and assent in these two languages".

Blaikie v. A.G. Quebec (1978), 85 D.L.R. (3d) 252, 264 (C.S.) as adopted by this Court, [1979] 2 S.C.R. 1016, 1022, 1027.

45. Sections 8 and 10 of the Charter of the French Language [Bill 101], L.Q. 1977, C. 5 provide:

> "8. Legislative bills shall be drafted in the [French] language. They shall also be tabled in the Assemblée nationale, passed and assented to in that language.
>
> 10. An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration."

These provisions were struck down by this Court as offensive to the requirements noted in para. 44: (Blaikie #1, [1979] 2 S.C.R. 1016. In Société Asbestos Ltée v. Société Nationale de l'Amiante, [1979] C.A. 342 the Quebec Court of Appeal held offensive to s. 133 a unilingual French Act of the Quebec Legislature, even though a certified English translation was available.

Equal Authenticity of Both Language Versions

46. Section 23 requires that English and French versions of Acts be equally authentic. In Blaikie v. A.G. Quebec (1978), 85 D.L.R. (3d) 252, 264 (C.S.) Chief Justice Deschênes stated:

> "The Court therefore holds to its conclusion that the requirement of the printing and publishing of the laws in the two languages, French and English, necessarily implies that of their passing and assent in these two languages in a way that the two versions possess this character that Bill 22 called 'authentic' and that the Charter qualifies rather as 'official'."

In the Court of Appeal, Mme. Justice Dubé made the same point:

> ... s. 133 of the British North America Act, 1867, on the other hand, seeks to put the French language and the English language on

> exactly the same footing of equality before the Legislature and before the Courts of Quebec, as well as before the Houses of the Parliament of Canada and before the Courts of Canada" ((1978), 95 D.L.R. (3d), 42, 51).

On further appeal, this Court held that s. 133 not only provides but requires that official status be given to both French and English: [1979] 2 S.C.R. 1016, 1023.

47. These cases settle that both texts must be equally official or authentic in the sense that both must proceed through the legislative process together, and receive the sanction of the Legislature in order for either to become law. Once both versions are approved by the Legislature, both versions enjoy equal authority as law.

48. The Legislature cannot interfere with the official or authentic status of either version by indirect means, such as, for example, directing the courts to admit only one version in proceedings, or directing the courts to accord greater weight to one version in interpretation.

49. It is submitted that the Legislature cannot demean the official or authentic status of one language version by stipulating that in cases of interpretational problems only English (or only French) shall prevail.

> The King v. Dubois, [1935] S.C.R. 378, 401-403.

Royal Assent

50. Manitoba legislation requires the assent of the Lieutenant Governor to become law.

> Manitoba Act, s. 9.
> Constitution Act, 1982, s. 41(a).
> Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.).

S.M. 1980, c .3

51. S.M. 1980, c. 3 ("The Act") infringes constitutional requirements in the legislative process in important ways.

(a) The Act contemplates enactment in one language only. Section 3(1) provides for introducing unilingual Bills into the Assembly and distributing them to members. Section 3(1) requires the Clerk to certify in which language unilingual bills were printed. Section 4(1) stipulates for unilingual introduction and enactment followed by translation. This deprives Assembly members, and the public, of their fundamental right to consider all Bills proposed, in the language of choice. It directly infringes the requirement for passing and assent in both languages.

(b) The Act attributes inferior status to French versions of statutes. Section 3(2) "conclusively" deems that the Bills for all Acts before 1980 were printed in English when first distributed to Assembly members. Section 2(a) stipulates that where the two languages versions conflict, English "prevails". These provisions go so far as to attribute inferior status to the French versions of Manitoba legislation enacted in both languages from 1870-1890. The majority, if not all, statutes enacted after 1980 are certified to be printed in English when first distributed, thus confirming that the illegal practice of attributing inferior status to French texts of statutes continues.

Section 5 deems all cross references to be targeted to the English text. This purposefully diverts attention from the French text; makes the French text correspondingly more difficult to use; and attributes superior status to the English text. This attribution of superiority could be very blatant, as in the case where reference is made to a line in an Act to define a term. The term will be defined in English only.

(c) Section 4(1) attempts to dispense with Royal Assent. Section 4(1) provides that where a certified translation is deposited with the Clerk of the House it shall "be valid and of the same effect" as the unilingual version which proceeded through the Assembly. This would eliminate Royal Assent in making the translation authentic or official.

52. Sections 4(2) - 4(3) are inseverable parts of the statutory machinery which provides for unilingual enactment with corresponding attribution of inferiority to French texts. It is submitted that sections 2(a) and 3 - 5 of S.M. 1980, c. 3 are inconsistent with section 23 of the Manitoba Act, invalid and of no legal force or effect.

PART IV

ORDER SOUGHT

The Intervenant respectfully asks that this Court answer the questions posed as follows.

Question 1

YES

Question 2

YES

Question 3

Unilingual texts have no legal force or effect. However, all private rights acquired or penalties imposed thereunder prior to the opinion of this Court are de facto valid. The Manitoba Legislature exists de jure and may exercise full legislative power in conformity with the Constitution until the expiry of its mandate.

Question 4

Sections 2(a) and 3 to 5 of the Act are invalid and of no legal force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

OTTAWA, Ontario
May 19, 1984

_____
JOSEPH ELIOT MAGNET, ESQ.
Counsel, Société Franco-Manitobaine

Factum of the Société Franco-Manitobaine
List of Authorities

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