Reference re: Manitoba Language Rights

The Reference power is a uniquely Canadian aspect of the legal system. This means that government is able to submit a "reference question" to the Supreme Court on constitutional matters that haven't yet and may not ever become a court case. For example, the government can ask whether a law that they are drafting would be constitutional.

In , the Government of Canada asked the Supreme Court four questions dealing with whether it was constitutionally required for the Government of Manitoba to pass laws in both English and French and whether laws that did not do this would have to be struck down.

The decision that resulted from this Reference deals with a number of critical constitutional issues, from language rights to constitutional supremacy to the rule of law and the "doctrine of necessity". This reference case is unusual for starting from mutual agreement that the constitution had been violated, for a long time and repeatedly. Disagreement rested, chiefly, on whether and which consequences should be applied.

Chain of Events Leading to the Reference

Relevant historical context begins in 1870, just after the Red River Rebellion. [1] To make peace, the *Manitoba Act* was drafted between the Métis and the Government of Canada, giving the Métis their own province. [2] The act was "entrenched" into the *Constitution Act, 1867* , meaning that, in 1871, the *Manitoba Act* became part of the Constitution. [3] All statutes – normal laws – must comply with the Constitution. If they do not, they can be struck down by a court. Section 23, of the *Manitoba Act* was at issue in the Manitoba Reference case. Section 23 reads:

"Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, *or in or from all or any of the Courts of the Province, The Acts of the Legislature shall be Printed and published in both those languages."* ***[4]***

Perhaps because of the majority Métis population, who are French-speaking, Manitoba emulated Quebec's system of bilingualism in its legislatures and courts. Section 23 lays out that requirement and is similar to section 133 of the *Constitution Act, 1867*, which requires bilingual enactment of laws by the legislature of Quebec. [5]

At the insistence of the Government of Canada, the *Manitoba Act* had left all un-owned land (Crown land) and the natural resources on that land under federal ownership. [6] In other cases, the provinces had received that power. The federal government wanted control in

this area of policy, worried that the Métis would interfere with "white" settlement to the province. [7] As well, Manitoba in 1870 was much smaller than it is now, limited to the Métis stronghold. Its territory was extended in 1881 by the *Manitoba Boundaries Extension Act*. [8] As settlement continued, demographics in Manitoba changed. Combined with the province's expanded size, settlement patterns resulted in a francophone minority of roughly one-tenth of the population by 1890. [9]

The large Anglophone majority prompted Manitoba's *Official Language Act, 1890*, which declared Manitoba to be a unilingual province. [10] After that, Manitoba's legislature passed laws only in English.

Because the *Manitoba Act* is part of the Canadian Constitution, it cannot be overruled by an ordinary law. It wasn't long before the *Official Language Act, 1890* was ruled unconstitutional. In an 1892 case held in St. Boniface County Court, *Pellant v. Hebert*, Judge Prud'homme ruled the *Act* unconstitutional when considering the admissibility of bilingual documents submitted to the court. Manitoba ignored the ruling, neither appealing nor changing the legislation. [11] In *Bertrand v. Dussault*, 1909, it was once again ruled unconstitutional. However, paying no heed to the ruling of the Court, the *Official Language Act* remained in use. Manitoba's legislature continued enacting its laws in English only. [12]

In 1976, the *Official Language Act* was ruled unconstitutional for a third time, in *R. v. Forest*. Again, the province made no changes to comply with the ruling. A challenge reached the Supreme Court of Canada in 1979. In *Attorney General of Manitoba v. Forest*, the highest court found the *Official Language Act* to be unconstitutional. [13]

The Manitoba legislature reacted in 1980 by making a new law, *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes.* This act repealed the *Official Language Act* and took steps to deal with ninety years of legislation that was in English only. [14]

The Reference

Manitoba had a problem: many unilingual laws had been passed after 1890. The Supreme Court ruled that Manitoba had violated the Constitution when it declared itself an English province, meaning that all unilingual laws were unconstitutional. Did that mean all laws instituted after 1890 were completely invalid? Did laws actually have to be written and passed bilingually or was it okay to translate them afterwards? Did the new *Act* that they had created actually fix the constitutional problem? Manitoba's entire legal system occupied a state of limbo, providing the impetus to file a reference with the Supreme Court.

In 1984, the Government of Canada submitted to the Supreme Court of Canada. [15] Four questions were asked. Summarised, the questions were:

1. Is s.23 of the *Manitoba Act* mandatory or directory? Will the courts enforce the section by striking down laws not enacted bilingually?

2. Are all laws that were not bilingually enacted invalid?

3. Are all of the invalid laws completely without "force and effect"?

4. Manitoba passed an Act in 1980 which attempted to fix the problem of unilingual legislation. Is that Act unconstitutional?

Seven "interveners" – people or organizations not directly involved in the case, but given the ability to offer their input – were allowed. In 1985, the Supreme Court rendered a unanimous decision.

Question #1

Is Section 23 Mandatory or Directory?

The Supreme Court had to decide whether section 23 of the *Manitoba Act* created a "mandatory" obligation or only a "directory" one. If a mandatory obligation is disobeyed, the violating law will be declared invalid. Violating a directory obligation carries a less drastic consequence. The mandatory vs. directory issue came up because of a court case which was, at the time, awaiting the Supreme Court of Canada's decision. In the case of *Bilodeau v. Attorney General of Manitoba*, Manitoba's 1970 *Highway Traffic Act* and *The Summary Convictions Act* were under challenge because they were enacted in English only. The Manitoba Court of Appeal had ruled that, while these two laws did violate s.23 of the *Manitoba Act*, they were valid because s.23 was only "directory" and not "mandatory". [16]

The Supreme Court ruled that s.23 was mandatory, for several reasons. It looked at grammatical meaning, intended textual meaning, desired effect, and the impact of using directory vs. mandatory distinctions in constitutional interpretation.

The Court established that s.23 of the *Manitoba Act* and s.133 of the Constitution Act, 1867 were "coterminous" – comparable, similar. In the decision, what they said about one section applied to the other. [17] Because of this, the Court looked at both to decide whether s.23 is a mandatory or directory requirement. Drawing on the *Interpretation Act*, 1970, the Court determined that the word "shall" (in French, "seront" or "sera obligatoire") indicated a mandatory requirement, in contrast to the permissive word "may". [18] Both sections used "shall" when referring to the bilingual legislation requirement.

Next, the Court ruled that the s.23 was created to guarantee access for French and English speakers to their legislature, laws, and courts. [19] This guarantee must indicate a mandatory obligation, to be meaningful.

The Supreme Court then moved, more generally, onto the doctrine of mandatory vs. directory obligations. *Montreal Street Railway Co. v. Normandin*, often the point of reference for the mandatory vs. directory doctrine, describes the application of "directory" obligations as being to prevent "serious general inconvenience or injustice." [20] The standard for applying this doctrine is vague and asks judges to look at consequences in order to interpret whether a rule is mandatory or directory.

Constitutional supremacy is at the heart of our legal system. It holds that our Constitution is separate from and above other laws. Unlike statutes, the Supreme Court held that interpretation of the Constitution should not be shaped by the use of a doctrine which is applied for the sake of expediency. As such, it ruled that the mandatory-directory doctrine is not to be applied when the constitutionality of a law is at issue. The Constitution is assumed to be mandatory. [21]

Questions #2 and #3

The Supreme Court Gets "Meta": Defining its own Role

The SCC ruled that Section 23 of the *Manitoba Act* establishes a mandatory duty on the Government of Manitoba. [22] Essentially, all legislation must be bilingual in form in order to be constitutional. What is the consequence for laws that don't comply with this obligation?

In beginning to answer reference questions 2 and 3, whether unilingual laws would all be struck down, the Supreme Court first reviewed to the role of the judiciary.

Canada is a country governed by constitutional supremacy, which limits the ways in which branches of government can act. Government action is granted legitimacy by virtue of a constitutional mandate. The Supreme Court pointed out that, at least in part, this is meant to protect minorities from tyranny of the majority. [23] It is the judiciary's role to protect constitutional supremacy, the "supreme law" of Canada. Judges fulfil this duty by being "unsuffering of laws inconsistent with it." [24] This is termed the invalidity doctrine. The Supreme Court described precedent for the invalidity doctrine, from the *Colonial Laws Validity Act, 1865* to s.52 of the *Constitution Act, 1982*. [25]

The Court also pointed to past cases where failure to enact, print, or publish legislation in both official languages has meant the invalidation of that legislation: *Société Asbestos Ltée v. Société nationale de l'amiante*; *Procureur générale du Québec v. Collier*; and *Procureur générale du Québec v. Brunet*. [26]

Yes, provincial legislation that wasn't enacted in the format required by s.23 of the *Manitoba Act* (bilingually) was invalid and of no force and effect. [27] Effectively, it was erased from Manitoban law.

Coping with Anarchy: Constitutional Supremacy and the Rule of Law

The judiciary has a duty to protect constitutional supremacy, which usually aligns with its duty to preserve the rule of law. represented a rare case where the two values were in conflict.

The result of invalidating unconstitutional laws would likely have been chaos. The Supreme Court referred to a "legal vacuum" that would have been created. [28] Among the laws that Manitoba established since 1890, it granted women suffrage and changed the number of representatives in the legislature – the composition of the current legislature would have

been invalid, in effect. Courts, local governments, school boards, ministries, public officials, tribunals, and other groups would have lost legal authority to act. [29]

If this had happened, it would have destroyed the existing legal order. Nearly all existing provincial law in Manitoba would have been open to challenge. This clearly would have damaged the rule of law.

In dealing with this, the Supreme Court began by deciding that the "rule of law" was a legally enforceable constitutional principle.

In Canada, we have both a written and "unwritten" Constitution. We do have written documents that make up our *Constitution*. But the Court also enforces principles that do not appear as a part of the Constitution's text. Some constitutional principles are held as implicitly a part of our Constitution, whether in the documents themselves, in the historical development of them, or in the Constitution's use over time. [30] The *Patriation Reference* (1981) enforced federalism as a constitutional principle. [31] The *Secession Reference* (1998), decided after this ruling, articulated four constitutional principles: federalism, rule of law/constitutionalism, respect for minorities, and democracy. [32]

How did the Supreme Court present the rule of law as a constitutional principle? It began by asserting that the rule of law has two requirements. First, law is supreme: it is above government and individuals. [33] Second, law is a tool for securing social order. This means that an actual body of law has to exist, to set expectations for citizens and promote the "normative order". [34] Rule of law, the Court affirmed, is a prerequisite of democratic society. More than that, it pointed to the preamble of both the *Constitution Act, 1867* and the *Constitution Act, 1982*. [35]

In the *Constitution Act, 1867*, the preamble declares that we will have a constitution "similar in principle to that of the United Kingdom." [36] The Court's decision showed how the rule of law was important to constitutionalism in the United Kingdom. As well, the *Constitution Act, 1982* explicitly names the rule of law in its preamble. [37] Finally, the rule of law is a necessary foundation for any constitution and must be considered a fundamental principle of it, the Court said. [38]

With the legitimacy of considering the rule of law set up, the Court considered how to enforce the legislature's duty to comply with the Constitution but also ensure the continued rule of law in Manitoba, avoiding a legal vacuum.

Selecting a Remedy

is chiefly about what "remedy" to apply, given the need to enforce constitutional supremacy while simultaneously protecting the rule of law. A remedy is the action which a court orders in a case where a violation has been found. Often, in constitutional cases, the remedy is striking down a law or overturning a conviction. In the hearing, several potential remedies were forwarded.

The first remedy proposed that the offending laws should all be struck down and the

legislature should deal with its own mess – possibly by amending the Constitution. It was ruled out. [39] The Court found that striking down all of the laws which offended the Constitution would create a great deal of uncertainty, harming the rule of law.

Arguing for the Attorney General of Manitoba, counsel posited that it should be left to the Lieutenant Governor to refuse royal assent when violations of section 23 occur. The Court had two problems with this. First, though the Lieutenant Governor has what is called a "royal prerogative" to refuse royal assent if he/she wants to, this power hasn't been used in a long time. Second, leaving the duty to refuse royal assent to the Lieutenant Governor would make the executive responsible for guaranteeing constitutional language rights, which is the role of the court. [40]

The Court found a similar problem with another proposal. The *Constitution Act, 1867*, gives the federal government power to disallow any law made by the provincial government. [41] This power hasn't been used since 1943 and would, again, pass the court's crucial duty onto another branch of government. [42]The Court did not endorse the notion that deciding whether unilingual laws were invalid should have been up to some other branch of government.

The *de facto* doctrine, *res judicata*, and the doctrine of mistake of law were all offered as ways to prevent anarchy if the Court were to declare all unilingual laws invalid. As piecemeal solutions which would not have affected many situations, these were not given much consideration. [43]

The Court would have to fulfil its duty by declaring the offending laws invalid, it ruled. But it would be impossible for Manitoba to instantly translate, re-enact and publish ninety years of legislation. What should happen during the time that Manitoba was doing this?

In the end, the Supreme Court declared that Manitoba's invalid laws would have temporary force and effect for a period of time during which the province was to re-enact the legislation bilingually. [44] To justify this, the Court drew on the doctrine of state necessity.

The Doctrine of State Necessity: Justifying the Remedy

Under the doctrine of state necessity, the government's actions undertaken during a public emergency can be declared valid, even though those actions would ordinarily be illegal, if the action promotes the rule of law. The Supreme Court used precedents from four different countries to support the doctrine's application to this case. [45]

The Supreme Court applied the doctrine of state necessity to Manitoba's situation. It declared that, although Manitoba's unilingual laws have always been invalid, they would have legal force during a minimal period of time where the province was expected to make its legislation bilingual. It was considered a state necessity because there would be anarchy without the laws.

Lastly, with respect to the fourth reference question, the court had to determine whether the Act created by Manitoba's legislature, *An Act Respecting the Operation of Section 23 of*

the Manitoba Act in Regard to Statutes, met the constitutional requirements of s.23 of the *Manitoba Act*.

Question #4

Constitutionality of the 1980 Law

Though its title is long, *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes (1980 Act)* is quite short in that it contains only 8 sections. There was some controversy over whether the Act had been enacted in English and then translated into French or enacted bilingually. The Supreme Court said that evidence was inconclusive on this question, but that the Act would be invalid if it had been unilingually enacted.

At any rate, 5 of the 8 sections were found to be unconstitutional. Part of this had to do with Manitoba's use of official translations as a remedy. A bill must actually come into force – be enacted – bilingually in order to fulfil the requirements of section 23. [46] As well, the English and French texts of legislation must both have official status and must be used simultaneously.

Section 4(1) says that, if legislation is unilingual, it can be translated and the translation given to the Clerk of the House. If the Speaker's designated aid certifies it as a true translation, the translated version officially becomes a part of the unilingual bill. The Supreme Court ruled this unconstitutional on the basis of s.23 of the *Manitoba Act* [47] because it does not meet the requirement that a bill be enacted bilingually. The Supreme Court also ruled it unconstitutional because it usurps the Lieutenant Governor's role, by giving the Clerk of the House the power to give the translations status as law. Only the Lieutenant Governor can give a law royal assent. [48]

Sections 2(a) and 5 of the act deal with what happens if a conflict in meaning appears between the English and French versions. In section 2(a), preference is to be given to the original version, if the law was originally enacted in only one language. Section 5 says that if there is confusion about which provision a law is referring to when it mentions legislation before 1981, it refers to the provision in the English version. Both of these were declared unconstitutional for not giving the English and French versions equal status. [49]

Inseparable from these unconstitutional provisions, sections 1, 3, and 2(b) were also declared unconstitutional. [50] So, the Supreme Court struck down sections 1 through 5 of the *1980 Act*. The Supreme Court took no issue with sections 6, 7, and 8, assuming the *1980 Act* was enacted bilingually. [51]

In , the Supreme Court considered a true legal quagmire, in the end employing the doctrine of state necessity to balance the rule of law with the need to invalidate unconstitutional legislation. The Court's decision stands as a reaffirmation of constitutional supremacy, a refusal to employ the mandatory vs. directory doctrine to the constitution, and a resurfacing point for several rules and legal doctrines.

Further Reading:

Michael Beaupré, “Judicial Review of the Legislative Process: The Case of Manitoba Language Rights”*Canadian Parliamentary Review* (1987) 10:4, online: Canadian Parliamentary Review <http://www.revparl.ca/english/issue.asp?param=123&art=750>.

Natasha Dubé, “Minority Language Rights in Canada” *Centre for Constitutional Studies* (August 2008).

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[1] Claude Bélanger, “The Manitoba Act [1870]” *The Quebec History Encyclopedia* (n.d.), online: Quebec History, Marianapolis College <http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/ManitobaAct.html> .

[2] *Manitoba Act*, SC 1870 (33 Vict), c 3.

[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, App II, No 5.

[4] *Supra* note 2.

[5] *Supra* note 3.

[6] *Supra* note 2.

[7] *Ibid*.

[8] *Manitoba Boundaries Extension Act*, RSC 1881 (44 Vict), c 14.

[9] Cornelius J. Jaenen, “The French Presence in the West, 1734-1874” *The Manitoba Historical Society*(1992), online: Manitoba Historical Society. <http://www.mhs.mb.ca/docs/mb_history/24/frenchpresence.shtml>.

[10] *Official Language Act*, RSM 1890, c 14.

[11] Raymond Hébert, *Manitoba's French-Language Crisis: A Cautionary Tale* (Montreal : McGill-Queen's University Press, 2004).

[12] *Ibid*.

[13] *Ibid*.

[14] *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes,* RSM 1980, c 3.

[15] *Re Manitoba Language Rights*, [1985] 1 SCR 721 .

[16] *Bilodeau v. A.G. (Man.)*, [1986] 1 SCR 449.

[17] *Manitoba Language Reference, supra* note 15 at para 131.

[18] *Manitoba Language Reference, supra* note 15 at paras 25-29.

[19] *Manitoba Language Reference, supra* note 15 at paras 30-33.

[20] *Montreal Railway Co. v. Normandin,* [1917] AC 170 at paras 174-175; *Manitoba Language Reference, supra* note 15 at para 37.

[21] *Manitoba Language Reference, supra* note 15 at paras 34-40.

[22] *Manitoba Language Reference, supra* note 15 at para 45.

[23] *Manitoba Language Reference, supra* note 15 at para 47.

[24] *Manitoba Language Reference, supra* note 15 at para 48.

[25] *Manitoba Language Reference, supra* note 15 at paras 49-52.

[26] *Manitoba Language Reference, supra* note 15 at para 53.

[27] *Manitoba Language Reference, supra* note 15 at para 54.

[28] *Manitoba Language Reference, supra* note 15 at para 55.

[29] *Manitoba Language Reference, supra* note 15 at paras 56, 57.

[30] Luc Tremblay, "Les Principes Constitutionnels Non Écrits" *Review of Constitutional Studies* vol.17 no.1 (1 November 2012), online : Centre for Constitutional Studies.

[31] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 75 .

[32] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

[33] *Manitoba Language Reference, supra* note 15 at para 59.

[34] *Manitoba Language Reference, supra* note 15 at para 60.

[35] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(UK), 1982, c 11.

[36] *Supra* note 3.

[37] *Supra* note 34.

[38] *Manitoba Language Reference, supra* note 15 at para 64.

[39] *Manitoba Language Reference, supra* note 15 at para 68.

[40] *Manitoba Language Reference, supra* note 15 at para 69-70.

[41] "Constitutional Keywords: Reservation and Disallowance" *Centre for Constitutional*

Studies (n.d.).

[42] *Manitoba Language Reference, supra* note 15 at para 71.

[43] *Manitoba Language Reference, supra* note 15 at paras 74-82.

[44] *Manitoba Language Reference, supra* note 15 at para 83.

[45] *Manitoba Language Reference, supra* note 15 at paras 86-95.

USA, pertaining to the American Civil War: *Horn v. Lockhart, Texas v. White, United States v. Insurance Companies, and Baldy v. Hunter*; Southern Rhodesia: dissenting opinion in *Madzimbamuto v. Lardner-Burke*; Pakistan: *Special Reference No. 1 of 1955*; Cyprus: *Attorney General of the Republic v. Mustafa Ibrahim*, 1964.

[46] Drawing on precedent related to s.133 of the *Constitution Act, 1867*, the court brought up *Blaikie No.1*. In this case, the court ruled that, for Quebec, bilingual printing and publication is insufficient to meet s.133.

[47] Section 4(2) and 4(3) elaborate on the process described in Section 4(1), so the Supreme Court ruled them unconstitutional as well. Section 4(2) describes how the Clerk should express that a certified translation has been presented to him and section 4(3) makes arrangements for the Deputy Speaker to act for the Speaker if he is not available.

[48] *Manitoba Language Reference, supra* note 15 at paras 131-136.

[49] *Manitoba Language Reference, supra* note 15 at paras 140-141.

[50] Section 1 just defines “official language” as English or French. It is meaningless outside of the context of the bill. Section 3 deals with administrative needs arising from section 2. The Supreme Court ruled that it could not be severed from section 2(a). Section 2(b) says that if the bill was printed in both languages when it was first distributed, conflicts of meaning between languages should be resolved by the spirit and intent of the legislation. The court did not take issue with this, except in relation to section 2(a).

[51] Section 6 assigns the bill a chapter number in Manitoba’s list of statutes. Section 7 repeals the 1890*Official Language Act*, which made English the only official language of Manitoba. Section 8 says that the Act will come into force when it gets royal assent.