Defining "Constitution of the province" — The Crux of the Manitoha Language Controversy

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The author presents an historical account of the passage by the Manitoba Legislature in 1890 of the *Official Language Act*, which abolished the use of the French language in the courts and the Legislature of the province. She examines the constitutional validity of the Legislature's action under the now-repealed subsection 92(1) of the *Constitution Act, 1867*, which allowed a legislature to amend the "Constitution of the province, except as regards the Office of the Lieutenant Governor." The author argues that the historical ambiguity of the term "Constitution of the province" allowed the government to pass the *Act*, which has since been found *ultra vires* by the Supreme Court of Canada. She concludes that the lack of any firm definition of such terms can only lead to future constitutional controversies.

L'auteur présente un compte-rendu historique de l'adoption, par la Législature du Manitoba en 1890, du *Official Language Act* qui abolissait l'usage du français dans les tribunaux et à la Législature de la province. Elle étudie la validité constitutionnelle de l'action législative à la lumière du paragraphe 92(1) (aujourd'hui abrogé) de la *Loi constitutionnelle de 1867*, qui permettait à la législature d'amender la « constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur. » L'auteur soutient que l'ambiguïté historique des termes « constitution de la province » est responsable du fait que le gouvernement ait adopté une loi qui fut, par la suite, déclarée *ultra vires* par la Cour suprême du Canada. Elle conclut que l'absence d'une définition précise de ces termes ne peut que mener à de nouvelles controverses constitutionnelles.

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When Manitoba became Canada's fifth province in 1870, its population "was approximately 55 percent French speaking and 45 percent English speaking, although it is clear that many members of each community were, in fact, able to speak both of those languages."[1] It was therefore not surprising that the *Manitoba Act, 1870*,[2] the federal statute which provided for the government of the new province, should contain a section authorizing the use of either language in the Legislature and Courts of the province and requiring the use of both languages in legislative records, journals and acts. The relevant section reads as follows:

> 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 British North America 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.[3]

The similarity between section 23 of the *Manitoba Act* and section 133 of the *Constitution Act, 1867*[4] should be noted immediately. The latter reads as follows:

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; 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 this Act, and in all or from all or any of the Courts of Quebec.
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> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[5]

Section 133 was intended to safeguard specific rights of the French-speaking minority in Canada and the English-speaking minority in Quebec. The immediate intent of section 23 of the *Manitoba Act* was to safeguard the rights of the large English-speaking minority in Manitoba. If a shift in population rendered the French-speaking group the minority, the *Act* would then presumably protect French-language rights in the Legislature and the

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[1]Manitoba, Legislative Assembly, *Debates and Proceedings* at 2002 (7 April 1980, S. Lyon, presenting for second reading *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*).

[2]*An Act to Amend and Continue the Act 32 and 33 Victoria, Chapter 3; and to Establish and Provide for the Government of the Province of Manitoba*, S.C. 1870, c. 3, reprinted in R.S.C. 1970, App. II at 247 [hereinafter the *Manitoba Act, 1870*].

[3]*Ibid.*, s. 23.

[4]*Constitution Act, 1867* enacted as *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[5]*Ibid.*, s. 133.

Courts. At the time of passage, these provisions do not appear to have aroused much interest or controversy; there was neither debate on clause 23 nor any amendment to it during the committee stage of the Bill.[6] Again this is not surprising; the bilingual nature of the population of the new province made such provisions essential.

In 1870 it seemed likely that the surplus population of both English- and French-speaking Canada would settle in Manitoba and that the bilingual character of the new province would be maintained. The pattern of immigration, however, turned out to be quite different. Most of the settlers who arrived in the 1870s and 1880s came from English-speaking rural Ontario, whereas French-speaking Quebeckers who chose to leave their province tended to go south to the New England states. By the mid-1880s French-speaking Manitobans had become a definite minority.[7]

As French declined in importance, English-speaking Manitobans increasingly objected to the maintenance of bilingualism in the Legislature and Courts of the province, on the grounds that it was irrelevant, cumbersome and expensive. The Liberal government of Premier Thomas Greenway, which took office after the general election of 1888, responded to this sentiment by sponsoring changes in the province's language laws. By Order in Council in September 1889, the government suspended publication of the French part of the *Manitoba Gazette*. This action, it might be argued, was not in conflict with section 23 of the *Manitoba Act* because the *Manitoba Gazette* was not a record, journal or act of the Legislature. The *Gazette* had, however, been published in both languages since the province was established in 1870 and the change to English only was a first step towards making the province officially unilingual.[8]

The next step was peculiar, though the approach may have been intentional. Early in February 1890, Premier Greenway gave notice of a motion

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[6]Canada, *House of Commons Debates* at 1407-38 (9 May 1870).

[7]*Debates and Proceedings, supra*, note 1 at 2002-3. For a more detailed description of the pattern of immigration to Manitoba, see W.L. Morton, *Manitoba: A History* (Toronto: University of Toronto Press, 1967) c. 7-10.

[8]An article, "French Wiped Out" *Manitoba Daily Free Press* (12 February 1890) 4 at 4, reported the defeat of a motion in the Legislative Assembly protesting the suspension of the French part of the *Manitoba Gazette* by Order in Council in September 1889. Since regulations that can properly be described as delegated legislation have now been included in the definition of "Acts of the Legislature" and these regulations are published in the *Manitoba Gazette*, there is presumably a requirement to publish the *Gazette* or at least part of it in both official languages. See *Reference Re Manitoba Language Rights* (1985), [1985] 1 S.C.R. 721 at 743-44, (*sub nom. Reference Re Language Rights under the Manitoba Act, 1870*) 19 D.L.R. (4th) 1 at 18-19.

to amend the rules of the House in various particulars, the principal amendment being to strike out the words "in both languages" from the rule concerning publication of records and journals.[9] This move was peculiar in that it was clearly unconstitutional to change a rule that was based on a constitutional or statutory requirement; if such a change was desired, the higher-ranking document should have been amended first by the authority that had the power to do it. The Greenway goverument may have adopted the approach it did, however, to make it appear that this was a simple change to the rules, rather than a constitutional or statutory amendment.

This approach did not go uncontested. During the debate on the motion there were assertions that proposed changes in the rules of the House were usually referred to a special committee, but Premier Greenway, quoting Bourinot,[10] insisted that the House had power to amend its rules without the advice of such a committee. The first edition of Bourinot's *Parliamentary Procedure and Practice* had been published in 1884; it noted that when a revision of the rules was considered necessary, a special committee was generally appointed, but that rules might be amended or repealed by the House, on giving the notice required for all motions.[11] Here Bourinot appears to have been making a distinction between a complete revision of the rules and the amendment or repeal of individual rules. The Greenway motion clearly dealt with amendments rather than with a complete revision and was thus arguably in order. The problem, however, was that it proposed to amend at least one rule in a way that would make it conflict with section 23 of the *Manitoba Act*. A legislative body normally has the power to amend its rules, but not in a way that will make them conflict with the laws of the province or the country. In spite of the protest of a French-speaking member that the Greenway motion was out of order, the Speaker ruled (probably incorrectly) in the Government's favour.[12] Consequently, on 11 February 1890, the rules were amended as the Greenway government desired.[13]

The Goverument's next step was a more daring one. Later in the same session, it introduced in the Legislature *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba.*[14] The Bill was a short one and its text bore no reference to official language. The first of its two sections read as follows:

> Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the

[9]"The First Skirmish" *Manitoba Daily Free Press* (4 February 1890) 5 at 5.

[10]Reported in "French Wiped Out", *supra*, note 8 at 4.

[11]J.G. Bourinot, *Parliamentary Procedure and Practice* (Montreal: Dawson Bros, 1884) at 213-15.

[12]Reported in "French Wiped Out", *supra*, note 8 at 4.

[13]*Ibid.* at 5.

[14]S.M. 1890, c. 14 [hereinafter the *Official Language Act*].

> Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.[15]

The second section seemed to suggest that the Greenway government had doubts about the constitutionality of the legislation it was sponsoring. "This Act", it stated, "shall only apply so far as this Legislature has jurisdiction so to enact."[16]

During the debate on second reading of the Bill on 19 March 1890, the Attorney General indicated that its intent was "to give effect to the general policy of the House with respect to the use of one language." Referring to section 2, James Prendergast,[17] a leading opponent of the Bill, asserted that "it would be as sensible for the legislature to pass an act with reference to the office of the Governor-General and to add this saving clause." Joseph Martin, the Attorney General,[18] declared bluntly that the Bill would place the French language in Manitoba on exactly the same footing as any other "foreign language" and demanded to know what right the French had to use their language officially in that province. When Prendergast replied "[j]ust the same right that the English minority has to use English in the Province of Quebec", another member, James Harrower, retorted, "[t]hat's a very different thing." Attorney-General Martin elaborated this point of view by explaining that the English in Quebec were using the language of the British Empire of which Canada was a part.[19] Historically, there might have been some justification for this argument, but constitutionally there was none: section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba*

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[15]*Ibid.*, s. 1.

[16]*Ibid.*, s. 2.

[17]James Émile Pierre Prendergast, born and educated in Quebec City, had been a member of the Legislative Assembly of Manitoba since 1885. Originally a supporter of the Greenway government, he had been a member of the Executive Council, serving as Provincial Secretary from January 1888 to August 1889. He resigned because of differences with his colleagues regarding the language and schools questions. The 1889 *Canadian Parliamentary Companion* (Ottawa: Durie, 1889) at 343 described him as a Liberal; in the next edition (Ottawa: Durie, 1891) at 356, he is listed as a Conservative-Liberal.

[18]A native of Ontario, Joseph Martin is not to be confused with Alphonse Fortunat Martin, a Franco-Manitoban member of the Legislative Assembly, originally from Rimouski, Quebec, who favoured "the maintenance of the dual language and Separate Schools": 1891 *Canadian Parliamentary Companion, ibid.* at 353.

[19]The debate on the second reading of the bill is reported in "A Busy Sitting" *Manitoba Daily Free Press* (20 March 1890) 5 at 5.

Act were equally the law of the land.[20] The protests of the defenders of the use of the French language were in vain. Commenting on them many years later in his history of Manitoba, W.L. Morton wrote:

> The French members, led by A.F. Martin and Prendergast, made a spirited defence of the rights of the French language, but they received no support and no overt sympathy. It is plain from the reports of the debates that they expected none, and had no hope of altering the determination of the majority, but were speaking for the record and for posterity.[21]

Having passed its three readings in the Legislative Assembly, the Bill received Royal Assent on 31 March 1890.[22]

An obvious question to ask is whether the Manitoba Legislature had the authority to pass an act which was clearly in conflict with section 23 of the *Manitoba Act*, a federal statute providing for the government of the province. An intuitive response would surely be that a provincial legislature cannot amend a federal statute. But of course the answer is not so simple. Firstly, the status of the *Manitoba Act* is different from that of an ordinary federal statute. British and Canadian authorities admitted at the time of its passage to some doubt as to its constitutionality, and a United Kingdom statute, the *Constitution Act, 1871*, was passed to confirm it and to attempt to give the constitution of the Province of Manitoba the same status as the constitutions of the four original provinces.[23] Specifically, it was provided by section 6 of this *Act* that except with regard to the boundaries of the

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[20]It is true that the 1867 *Act* is a statute of the United Kingdom, whereas the *Manitoba Act, 1870* was passed by the Canadian Parliament. Since the *Constitution Act, 1867* does not give the Canadian Parliament authority to establish new provinces, the *Constitution Act, 1871* enacted as *British North America Act, 1871* (U.K.), 34 & 35 Vict., c. 28 was passed to confirm the *Manitoba Act* and to give the Canadian Parliament authority to "establish new Provinces in any territories forming ... part of the Dominion of Canada" (s. 2). Although this provision is said still to be in force (see Item 5 of the Schedule to the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11), it must now be read in conjunction with s. 42(f) of the *Constitution Act, 1982*, which provides that "notwithstanding any other law or practice", an amendment to the Constitution of Canada relating to the establishment of new provinces "may be made only in accordance with subsection 38(1)", that is, the general procedure for amending the Constitution of Canada. See *infra*, notes 53-55.

[21]Morton, *supra*, note 7 at 248.

[22]Noted in S.M. 1890, c. 14.

[23]Writing as Acting Minister of Justice, Sir George-Étienne Cartier had stated: "[I]t is absolutely necessary that the province of Manitoba, as well as any which may hereafter be erected, should hold the same status as the four provinces now [comprising] the Dominion, — and British Columbia, when it comes in, — and, like them, should hold its constitution, subject only to alteration by the Imperial Legislature." Report of the Acting Minister of Justice (29 February 1871) Ottawa, reprinted in W.E. Hodgins, compiler, *Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation: 1867-1895* (Ottawa: Government Printing Bureau, 1896) 11.

province (and even in that case it needed the provincial legislature's consent), the Parliament of Canada did not have the power to amend the *Manitoba Act*, "so far as it relates to the Province of Manitoba".[24] But whether the Legislature of Manitoba had power indirectly to amend section 23 of the *Manitoba Act* depended on the definition of "Constitution of the province".

To determine the meaning of this term it is necessary to look at both the *Constitution Act, 1867*, and the *Manitoba Act, 1870*. The former originally consisted of a preamble, eleven parts divided into 147 sections and five schedules. The parts of particular concern are Parts V and IX. Part V is entitled "Provincial Constitutions" and consists of sections 58-90 inclusive. Part IX is entitled "Miscellaneous Provisions" and consists of sections 127-144 inclusive. The *Manitoba Act, 1870*, is not divided into parts, but its sections are arranged in much the same order as those of the *Constitution Act, 1867*; there are omissions from the former because some sections of the latter are made to apply to Manitoba without having to be restated in the *Manitoba Act*.[25] A comparison of the two *Acts* will show that sections 6-21 of the *Manitoba Act* contain provisions comparable to some of those included in the "Provincial Constitutions" part of the *Constitution Act*. For instance, section 6 of the *Manitoba Act* corresponds to section 58 of the *Constitution Act*; sections 59-62 of the *Constitution Act* are not restated in the *Manitoba Act*, but under section 2 of the latter apply to that province. Thus, it seems logical to conclude that sections 6-21 of the *Manitoba Act* and any provisions contained in sections 58-90 of the *Constitution Act* that apply to Manitoba are part of the Constitution of the Province of Manitoba. A more difficult question is whether any other sections of either of these *Acts* can be regarded as part of the "Constitution of the province". In particular we are concerned with section 23 of the *Manitoba Act* which corresponds to section 133 of the *Constitution Act*; the latter section, as we have seen, is outside the "Provincial Constitutions" Part.

The reason why it is important to define "Constitution of the province" is because another section of the *Constitution Act* — subsection 92(1) which was included in Part VI, "Distribution of Legislative Powers" — gave each provincial legislature authority to amend "the Constitution of the province, except as regards the Office of Lieutenant Governor." Under section 2 of the *Manitoba Act*, this provision applied to Manitoba; thus the Legislature of Manitoba had authority to amend indirectly at least some sections of the *Manitoba Act* and, as they affected that province, some sections of the *Constitution Act*. For instance, section 9 of the *Manitoba Act* provided that

[24]*Constitution Act, 1871, supra*, note 20, s. 6. For the provisions relating to boundaries, see s. 3.

[25]*Manitoba Act, 1870, supra*, note 2, s. 2.

the Legislature of the province should consist of the Lieutenant Governor and two Houses, the Legislative Council and the Legislative Assembly, while sections 10-13 dealt with matters relating to the Legislative Council. In 1876, an act of the Legislature of Manitoba abolished the Legislative Council,[26] thus, in effect, indirectly amending section 9 and repealing sections 10-13 of the *Manitoba Act*. These sections were unquestionably part of the provincial constitution; the amendment and repeals did not relate to the office of the Lieutenant Governor, so under subsection 92(1) of the *Constitution Act* they were *intra vires* the Manitoba Legislature.[27] But the constitutionality of the 1890 *Act*, altering the status of the French language, was open to question because section 23 of the *Manitoba Act*, if treated as corresponding to section 133 of the *Constitution Act, 1867*, was outside the "Provincial Constitutions" Part of the *Act*. Could sections other than 6 to 21 of the *Manitoba Act* be regarded as part of the "Constitution of the province" or not? The Greenway government's contention presumably was that the Manitoba Legislature could indirectly alter any section of the *Manitoba Act* that did not pertain to the office of Lieutenant Governor, the boundaries of the province, or to the province's relations with Ottawa (for example, representation of the province in the Parliament of Canada).[28]

Under section 90 of the *Constitution Act*, the Lieutenant Governor of a province may reserve a bill passed by the Legislature for the signification of the Governor General's pleasure. Unless the Governor General assents to it within one year of the day on which it was presented to the Lieutenant Governor for signature, it does not come into force. On the other hand, if the Lieutenant Governor assents to a bill, thus making it a law of the province, the Governor General may disallow it within the same period.[29] Although these provisions have never been repealed they have gradually fallen into disuse, but in 1890 they were still an important part of the Canadian Constitution. As soon as the 1890 language Bill was passed by the Legislative Assembly and before the Lieutenant Governor assented to it, James Prendergast, on behalf of himself and five other members of the Manitoba Legislature, wrote to Lieutenant Governor John Schultz "to most humbly submit

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[26]*An Act to Diminish the Expenses of the Legislature of the Province of Manitoba in Certain Respects*, S.M. 1876, c. 28, s. 2.

[27]S. 6 of the *Constitution Act, 1871*, *supra*, note 20, seems to restrict the amending power of the Legislature of Manitoba to matters relating to elections. Surely this was not its intent since one of the objects of the *Act* was to ensure that Manitoba's status was the same as that of the four original provinces. See *supra*, note 24.

[28]*Manitoba Act, 1870*, *supra*, note 2, ss 3-4.

[29]S. 90 of the *Constitution Act, 1867* applies, with appropriate modifications, certain federal provisions to the provinces. Among them are the provisions for reservation and disallowance contained in ss 55-57.

that the said bill is *ultra vires*, for reasons more fully set out in the memorandum hereto annexed."[30] The memorandum is a well-written constitutional document explaining in detail the similarity between section 133 of the *Constitution Act* and section 23 of the *Manitoba Act*, giving some historical background, and showing conclusively that the language Bill was *ultra vires* the Manitoba Legislature.[31] Although neither the letter nor the memorandum requested the Lieutenant Governor to reserve the Bill, this was presumably the intent. The Lieutenant Governor chose not to reserve the Bill but, on 31 March 1890, the day that he assented to it, he forwarded Prendergast's letter and memorandum to the Secretary of State for Canada.[32] These documents would help the federal government to decide whether to advise the Governor General to disallow the *Act*.

Following Royal Assent, petitions were sent to the Governor General requesting disallowance of the *Official Language Act*.[33] One from "the French Canadian Convention, Manitoba", was described as "[t]he petition of Her Gracious Majesty's subjects of French origin in the province of Manitoba".[34] Another was sent by the members of the Legislature who had supported Prendergast's appeal to the Lieutenant Governor; Prendergast did not sign this petition, which was a much shorter and less effective document than the earlier one.[35]

The protests of the French-speaking minority were once more in vain for on 21 March 1891, as the time for disallowance was running out, Sir John Thompson, Minister of Justice (later Prime Minister of Canada), recommended to the Governor General in Council that "the Act be left to its operation."[36] His reasoning was as follows:

> The power of the provincial legislature to amend or repeal this section [*i.e.* section 23] of the Manitoba Act, so confirmed, admits of great doubt. The validity of the Act under consideration may be very easily tested by legal proceedings on the part of any person in Manitoba, who is disposed to insist on the use of the French language in the pleadings and process of the courts or in the journals and Acts of Assembly. As it is apparent that a large section of the people of the province desire that English alone shall be used in such matters, and that a very considerable section desire the provisions of [the]

[30]Letter from J.E.P. Prendergast to J. Schultz (27 March 1890) Winnipeg, reprinted in Hodgins, *supra*, note 23, 919.

[31]Reprinted in Hodgins, *ibid.* at 919-21.

[32]Letter from J. Schultz (Lieutenant Governor of Manitoba) to the Secretary of State (31 March 1890) Winnipeg, reprinted in Hodgins, *ibid.*, 918.

[33]See Letter from J. Schultz, *ibid.* at 921-26.

[34]Reprinted in Hodgins, *supra*, note 23, 921.

[35]Petition from Members representing the French population in the Legislature of Manitoba to the Governor General, reprinted in Hodgins, *ibid.*, 925.

[36]Report of the Minister of Justice (21 March 1981) Ottawa, reprinted in Hodgins, *ibid.*, 927 at 929.

> Manitoba Act upheld in this particular, there can be little doubt that a decision of the legal tribunals will be sought at an early date, as to the validity of the present legislation. A [j]udicial determination of that question will be more permanent and satisfactory than a decision of it by the power of disallowance.[37]

Thompson's recommendation was approved by the Governor General in Council on 4 April 1891.[38]

In an original unpublished version of this paper, I stated incorrectly that the Minister of Justice was mistaken in his view that a court decision would be sought at an early date. I did not then know about the case of *Pellant* v. *Hébert*, in which Judge Prud'homme of the County Court of St Boniface ruled in 1892 that the *Official Language Act* was *ultra vires* the Legislature of Manitoba. In the course of his judgment he declared "[l]a clause 133 de l'*Acte de l'Amérique britannique du Nord*, ou son équivalente, la clause 23, de l'*Acte du Manitoba*, ne tombe pas dans la série ou les classes de clauses régies par la titre 'Constitutions Provinciales', auquel réfère la clause 92." The decision was published in *Le Manitoba*, a French-language newspaper, on 9 March 1892.[39] It was not reported in the law reports, however, and the Government and Legislature of Manitoba ignored it. After being lost for many years, the reasons for judgment were published in 1981 at the end of an article by Professor Joseph Eliot Magnet.

There was a further challenge to the 1890 *Act* in 1909. Once again, in the case of *Bertrand* v. *Dussault*, Judge Prud'homme declared the *Act* to be *ultra vires* the Legislature of Manitoba. This case too was unreported and apparently unknown or ignored until 1977, when it was discovered and quoted in full by Mr Justice Monnin of the Manitoba Court of Appeal in a dissenting judgment.[40]

It seems astonishing that the Government and Legislature of Manitoba paid no attention to these two cases and treated the 1890 *Act*, which continued to appear in successive revisions of the statutes, as if it were *intra vires* the Manitoba Legislature. Perhaps they thought it was safe to ignore the decisions of a County Court. It is even more surprising that French-speaking Manitobans let the matter drop. The only reasonable explanation seems to be that for them other concerns were more pressing. The *Official Language Act* was not the only statute prejudicial to their interests that

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[37]*Ibid.* at 928.

[38]See Report of the Minister of Justice approved by the Governor General in Council (4 April 1891) Ottawa, reprinted in Hodgins, *supra*, note 23, 926.

[39]Reprinted in J.E. Magnet, "Court Ordered Bilingualism" (1981) 12 R.G.D. 237 at 243.

[40]*Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 at 458-62, [1977] 5 W.W.R. 347.

resulted from the 1890 legislative session. Two other acts concerning education had also been passed[41] and in the years following 1890 the Manitoba schools question was to overshadow the Manitoba language controversy.[42] Franco-Manitobans were more concerned about the use of French as a language of instruction and Roman Catholic religious education in the schools than they were about bilingualism in the Legislature and the Courts. The schools question was part of their daily lives or of that of their children; probably relatively few of them had business in the Courts or read any records of the Legislature. For ninety years, then, the Legislature and the Courts were unilingual.

Renewed interest in the *Official Language Act* arose in 1915 when part of the Laurier-Greenway compromise, which had settled the Manitoba schools question,[43] was abrogated as a result of the provincial government's decision to make the teaching in languages other than English illegal. This led to attacks on the constitutional validity of the *Official Language Act*; one case relating to the question, *Dumas* v. *Baribault*, reached the Manitoba Court of Appeal, but was not proceeded with there.[44]

Not until 1979 did the Supreme Court of Canada have the opportunity to question the constitutionality of the *Official Language Act*. In 1976, Georges Forest, a resident of Manitoba, was charged with a parking violation and sought an acquittal on the ground that the ticket was issued in English, whereas it should have been in both English and French. This argument was rejected and Forest was convicted in Provincial Court, being fined $5.00 and costs. He filed an appeal — in French — against the conviction in the County Court of St Boniface. The Manitoba Attorney General argued that the appeal was invalid because the documents, being in French, did not comply with the *Official Language Act*. Forest contended that the *Act* itself

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[41]*An Act Respecting Public Schools*, S.M. 1890, c. 38; *An Act Respecting the Department of Education*, S.M. 1890, c. 37.

[42]In March 1890, the Greenway government suspended public funding of Roman Catholic schools. Two Privy Council decisions upheld the validity of the Manitoba government's law, though they also affirmed the federal government's power to restore the school privileges. The Manitoba government's action prompted considerable national debate and, in 1896, the Liberal government of Wilfrid Laurier came to power in response to the Conservatives' failure to resolve the Manitoba schools question. Laurier reached a compromise with the provincial government, whereby separate schools would not receive public funding but certain schools received privileges to give religious instruction and to conduct classes in French. See G. Bale, "Law, Politics and the Manitoba Schools Question: Supreme Court and Privy Council" (1985) 63 Can. Bar Rev. 461.

[43]See *ibid.*

[44]This case was noted by Chief Justice Freedman in the course of delivering his judgment in *Forest* v. *A.G. Manitoba* (1979), 98 D.L.R. (3d) 405 at 422, [1979] 4 W.W.R. 229, 47 C.C.C. (2d) 405 (Man. C.A.) [hereinafter cited to D.L.R.], aff'd by the S.C.C., *infra*, note 50.

was *ultra vires* the Legislature of Manitoba and the County Court Judge, in a judgment delivered on 14 December 1976, agreed with him.[45]

The Attorney General of Manitoba then declared that although he did not accept this ruling, he did not intend to appeal it "at this time". Waiving his earlier objection that the appeal documents were in French, he was now prepared to proceed on the merits of the appeal of the parking conviction.[46]

Forest's aim, however, was to litigate the language question. After unsuccessful attempts to do so,[47] he applied to the Court of Queen's Bench for a declaration that the *Official Language Act* was *ultra vires*. The Court rejected his application on the ground that he lacked standing, having already obtained the relief he sought in the County Court.[48] Forest then appealed to the Court of Appeal, which not only declared it unfair to deny Forest standing in the Court of Queen's Bench since, in effect, it penalized him for winning in the County Court, but also found the *Official Language Act ultra vires* the Legislature of Manitoba because it was in conflict with section 23 of the *Manitoba Act, 1870*.[49] The Attorney General appealed unsuccessfully to the Supreme Court of Canada, which upheld the decision of the Court of Appeal.[50] Thus, it was clear that section 23 of the *Manitoba Act* was not part of the "Constitution of the province" as that expression was used in subsection 92(1) of the *Constitution Act, 1867*.

The *Blaikie* case, which originated in Quebec and concerned the status of the English language in the Legislature and Courts of that province, was decided by the Supreme Court of Canada on the same day and in the same way as *Forest*. Dealing at greater length than did the *Forest* case with the problem of defining "Constitution of the province", the Court observed that:

> [Section] 133 [of the *Constitution Act, 1867*] is not part of the Constitution of the Province within s. 92(1) but is rather part of the Constitution of Canada and of Quebec in an indivisible sense, giving official status to French and English in the Parliament and in the Courts of Canada as well as in the Legislature and Courts of Quebec.[51]

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[45]*R.* v. *Forest* (1976), 74 D.L.R. (3d) 704, [1977] 1 W.W.R. 363, 34 C.C.C. (2d) 108.

[46]The various steps taken in the *Forest* case were outlined by Chief Justice Freedman in *Forest* v. *A.G. Manitoba*, *supra*, note 44 at 409-11.

[47]See *ibid.*

[48]*Forest* v. *A.G. Manitoba* (1978), 90 D.L.R. (3d) 230, [1978] 5 W.W.R. 721 (Man. Q.B.).

[49]*Forest*, *supra*, note 44.

[50]*A.G. Manitoba* v. *Forest* (1979), [1979] 2 S.C.R. 1032, 101 D.L.R. (3d) 385, 30 N.R. 213, [1980] 2 W.W.R. 758, 2 Man. R. (2d) 109, 49 C.C.C. (2d) 353.

[51]*A.G. Quebec* v. *Blaikie* (1979), [1979] 2 S.C.R. 1016 at 1025, 101 D.L.R. (3d) 394, 30 N.R. 225, 49 C.C.C. (2d) 359.

This statement can be applied with appropriate modifications to section 23 of the *Manitoba Act.*

The decisions of the Supreme Court of Canada in the *Blaikie* and *Forest* cases have been given constitutional endorsement by the *Constitution Act, 1982.* It repealed subsection 92(1) of the 1867 *Act,* which allowed a provincial legislature to amend "the Constitution of the province, except as regards the Office of the Lieutenant Governor",[52] replacing it with a new provision (section 45 of the *Constitution Act, 1982*) which reads as follows: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province." Section 41 deals with amendments to the Constitution of Canada requiring unanimous consent (that is, authorization by resolutions) of federal and all provincial legislatures. Under paragraph 41(a) an amendment relating to "the office of the Queen, the Governor General and the Lieutenant Governor of a province" requires such consent.[53] So too, under paragraph 41(c), does an amendment relating to "the use of the English or the French language", but this provision is subject to section 43, which deals with amendments to the Constitution of Canada relating to any provision that applies to one or more, but not to all, provinces. Thus although the expression "Constitution of the province" is used without definition in section 45 of the *Constitution Act, 1982,* just as it was in subsection 92(1) of the *Constitution Act, 1867,* it is now clear that a provincial legislature cannot unilaterally amend a constitutional provision relating to the use of the English or the French language within the province. Such an amendment can be made by proclamation issued by the Governor General under the Great Seal of Canada when authorized by resolutions of the Senate, the House of Commons, and the Legislative Assembly of each province to which the amendment applies.[54] Thus, an amendment to section 23 of the *Manitoba Act* requires federal approval as well as that of the Legislature of Manitoba.

Notwithstanding the Supreme Court decisions in *Forest* and *Blaikie,* the endorsement of these decisions in the *Constitution Act, 1982* and subsequent developments in the Manitoba language controversy,[55] there is still no explicit definition of "Constitution of the province" comparable to that provided for "Constitution of Canada" in subsection 52(2) of the *Constitution Act, 1982.* This will continue to be a fertile source of controversy: the Canadian federal system comprises a bewildering and overlapping number of constitutional forms — a federal constitution, provincial constitutions

[52]*Constitution Act, 1982, supra,* note 20, s. 53(1) and Item 1(4) of Schedule.

[53]It would have been better to use "or" instead of "and" in this paragraph. Surely the amendment does not have to relate to all three offices to require unanimous consent.

[54]*Constitution Act, 1982, supra,* note 20, s. 43. Under circumstances outlined in s. 47, a constitutional amendment can be made without Senate approval.

[55]See *Reference Re Manitoba Language Rights, supra,* note 8.

and provisions such as section 23 of the *Manitoba Act* and section 133 of the *Constitution Act, 1867*, which are part of the constitutions of Canada and of a province. It is precisely owing to this unique structure that defining expressions such as "Constitution of the province" becomes crucial. This short discussion has demonstrated that the ambiguity inherent in the term "Constitution of the province" has been at the root of major constitutional problems in Canadian history and that, as long as such ambiguities remain unresolved, they are likely to be at the crux of future constitutional controversy.