

VALIDITY OF MANITOBA LAWS AFTER FOREST: WHAT IS TO BE DONE?

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I

When Manitoba joined Confederation in 1870, her territory contained more French than English-speaking settlers.¹ The French metis in the Confederation negotiations had a principal concern — the survival, post-confederation, of their community. As everyone was aware, union with Canada implied massive immigration into Manitoba, principally from Ontario. That raised the spectre of assimilation. Sir Francis Hincks made this point expressly in the Canadian Parliament while debating the Manitoba Bill:

It was perfectly clear that when the difficulties were settled and the Queen's authority established that a vast emigration would be pouring into the country [Manitoba], from the four Provinces but principally, there was no doubt, from Ontario, and the original inhabitants would thus be placed in a hopeless minority²

In March 1870, the Riel provisional government sent three delegates to Ottawa to negotiate association between the Red River settlement and Canada. The delegates carried with them a "Bill of Rights" forming the chief part of their mandate. That Bill of Rights contained provisions designed to ensure the survival of French. Clause 17 provided that the Lieutenant-Governor be familiar with both English and French; clause 18 provided that the Judges of the Supreme Court speak English and French. Clause 16 dealt expressly with the language of government:

That both the English and French languages be common in the Legislature, and in the courts; and that all public documents, as well as the Acts of the Legislature, be published in both languages.³

Clause 16 was regarded as a fundamental constitutional guarantee for Franco-Manitobans. It assured them full participation in the machinery of government without the necessity of assimilating. Clause 16, without substantive modification, became Section 23 of the *Manitoba Act*,⁴ by which *Act* the Red River settlement joined Confederation. Section 23 provides:

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1. According to a census charged to reflect the population on the 16th day of July, 1890 — the day after joining the Union — Manitoba was composed of 11,963 inhabitants, as follows: Whites, 1,565; Indians, 558; French metis, 5,757; English metis, 4,083: D. Gunn and C. Tuttle, *History of Manitoba* (1880) 467.
2. *Dominion Debates, 1870*, Vol. 1, found in W.L. Morton, *Manitoba: The Birth of a Province* (1965) 184. There is some evidence that Canada expressly contemplated assimilating the French metis. For example, there is this letter from John A. Macdonald to Joseph Rose, Fed. 23, 1870, in J. Pope, *Correspondence of Sir John Macdonald*, Oxford University Press (1921) 1289: "We must never subject the Government there to the humiliations offered to McTavish. These impulsive half-breeds have got spoilt by this *emeute*, and must be kept down by a strong hand until they are swamped by the influx of settlers." No doubt Macdonald and some of his colleagues entertained such sentiments. But I do not think they were unambiguously held or necessarily controlling. More to the point is the fact that Macdonald originally drew boundaries for the Province excluding the English settlement of Portage la Prairie (2,100 inhabitants). It was thought Manitoba would attract emigration from Quebec, resulting in a French province. Macdonald planned a second province to the North to be formed subsequently. The plan was dropped upon formidable objection from Toronto members. See *Dominion Debates 1870*, Vol. 1, 1287-1320, *Supra*. This was done with the concurrence of the Red River delegates: See *Alexander Begg's Journal of the Red River Resistance* found in Ewart, *Infra*, n. 3, at 381. In fact, Rev. N.J. Ritchot, one of the delegates of the provisional government, and the influential Bishop A.-A. Tache searched in Quebec for immigrants and leaders after passage of the Manitoba Bill.
3. The *Bill of Rights* as well as earlier drafts of the "Bill" are reproduced in J.S. Ewart, *The Manitoba School Question and an Historical Account of the Red River Outbreak in 1869 and 1870* (1894) 364 ff.
4. S.C. 1870, c. 3.

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.⁵

Rev. N.-J. Ritchot, one of the three Red River delegates to the Ottawa negotiations, remarked on Section 23 in his *Journal*: "23. This clause is in conformity with article 16 of our instructions. . . ."⁶ *The Manitoba Act* was retroactively confirmed by the Imperial Parliament in 1871.⁷ It therefore forms part of fundamental Canadian constitutional law, beyond the powers of the Manitoba Legislature or the Federal Parliament to abridge.⁸

Immigration from Ontario proceeded rapidly, as expected, after Manitoba joined the Union. Franco-Manitobans quickly became a minority. English settlement, however, was territorially separate from French; the two cultures were concentrated in different districts. Territorial separation prevented assimilation and preserved the cultural duality of the Province.

In this condition French flourished. Provincial legislation encouraged it. Provision was made for bilingual municipal notices. Similar legislation stipulated for bilingual proclamations, electoral forms, and voters notices. Mixed juries in criminal trials were an affirmed right; in some districts mixed juries were allowed by legislation in civil cases.⁹

There were certain difficulties. In 1874, Mr. W.F. Luxton, who was committed to abolishing separate schools, was elected to the Manitoba Legislature. Resolutions so providing were introduced in the Assembly; some modification to the educational system was made in 1876. In 1879, an attempt was made to limit the official use of French. Despite these disturbances, the French community remained secure, without public criticism from the English and without public complaint from the French.¹⁰

This relatively easy state of affairs came to an abrupt end in 1885, with the suppression of the Metis rebellion and the hanging of Riel. Racial and religious feelings became supercharged. Intensity of feeling reached a peak when the Mercier Government in Quebec passed the *Jesuits Estate Act* (1888). That *Act* dealt with compensation moneys payable to the Jesuit Order for the loss of their Quebec Estates. The *Act* provided that the Pope should allocate the money in respect of certain disputed claims. While the affair inflamed feelings in Ontario and Quebec, Dalton McCarthy, a Conservative MP, carried it to Manitoba. The issue, he said, gave the politician

5. S.C. 1870, c. 3.

6. The *Journal* was destroyed in a fire. It was photocopied by Prof. Stanley before the fire and is now reprinted in W.L. Morton, *Supra* n. 2, at 132, 159.

7. *The British North America Act, 1871*, 34 & 35 Vict., c. 28, s. 5 (U.K.).

8. *Bertrand v. Dussault* (1909) (St. Boniface Cty. Ct.), reported in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445, 458-60 (Man. C.A.); *A.-G. Manitoba v. Forest* (1979), 30 N.R. 213 (S.C.C.); see also *A.-G. Quebec v. Blaikie, Durand and Goldstein* (1979), 30 N.R. 225 (S.C.C.).

9. *Report of the Royal Commission on Bilingualism and Biculturalism* (1967), Vol. 1, at 50.

10. W.L. Morton, *Manitoba: A History* (1957) 240.

“something . . . to live for; we have the power to save this country from fratricidal strife, the power to make this a British country in fact as it is in name.”¹¹

McCarthy stirred up sufficient animosity as to make Manitoba respond. In 1890, provincial legislation abolished the then prevailing system of dual sectarian schools.¹² The system was replaced by a single system of non-sectarian schools paid for by public funds. All Manitobans had to contribute to the supporting tax base. Sectarian separate schools — French Catholic schools — lost all provincial financial support. At the same time, Manitoba unilaterally cut down the constitutional guarantees in Section 23 of the *Manitoba Act*, by providing in its *Official Language Act*:

[T]he English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court. . .

The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.¹³

The school *Acts* were challenged immediately. In *City of Winnipeg v. Barrett*,¹⁴ the *Acts* were held constitutionally valid. In *Brophy v. A.-G. Manitoba*,¹⁵ the Privy Council explained that while *intra vires*, the *Acts* did affect rights of the Roman Catholic minority in such sense as to entitle them to apply to the Governor-General in Council to make remedial laws under provisions of Section 22 of the *Manitoba Act*. Application to the Governor-General in Council was made. The Dominion government asked the Manitoba government to restore Catholic educational rights. Manitoba refused. Dominion remedial legislation was prepared. Before it could be passed, the Bowell government was defeated. Laurier came to power in 1896. In 1897, his government reached a compromise with the Greenway government in Manitoba on the school question.¹⁶

Because the controversy centered on the education *Acts*, and because a compromise ultimately was reached, no attack was made against the *Official Language Act* until 1909. In that year, the St. Boniface County Court ruled the *Language Act* unconstitutional.¹⁷ The judgment was ignored. It was not even reported. In 1976, the same St. Boniface County Court again ruled the *Language Act* unconstitutional.¹⁸ That judgment also was ignored. The Attorney General of Manitoba stated “the Crown does not accept the ruling of the Court with respect to the constitutionality of the Official Languages Act . . .”¹⁹ Mr. Justice Monnin of the Manitoba Court of

11. Report of a speech by Dalton McCarthy at Portage La Prairie on Aug. 5, 1889, in *The Manitoba Free Press*, Aug. 7, 1889 found in Clark, *The Manitoba School Question: Majority Rule or Minority Rights* (1968) 36.

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

13. S.M. 1890, c. 14.

14. [1892] A.C. 445.

15. [1895] A.C. 202.

16. *An Act to amend The Public School Act*, S.M. 1897, c. 27.

17. *Bertrand v. Dussault*, *Supra* n. 8.

18. *R. v. Forest* (1976), 74 D.L.R. (3d) 704 (Cty. Ct.).

19. *Re Forest and Registrar of Court of Appeal of Manitoba*, *Supra* n. 8, at 458.

Appeal thought that was "arrogant." He said: "A more arrogant abuse of authority I have yet to encounter."²⁰ Now the Supreme Court of Canada unanimously has ruled the *Language Act* constitutionally defective.²¹

Since 1890, the *Acts* of the Manitoba legislature have been published in English only, in conformity with the *Official Language Act* but plainly in the teeth of the Constitution. The Supreme Court, in striking down the Manitoba *Official Language Act*,²² appears to have removed all vestige of constitutional legitimacy for continued publication in English alone. This must cast doubt on the constitutional validity of those Manitoba statutes published in English only contrary to constitutional requirements. At least, to the extent the constitution has any bite, there must be such doubt.

Does that mean that a husband married pursuant to *The Marriage Act*²³ may defend against divorce and alimony proceedings by asserting that he is not married because *The Marriage Act* is unconstitutional for want of publication in French? May a taxpayer refuse a demand to pay provincial income tax pursuant to *The Income Tax Act (Manitoba)*²⁴ on the ground that the *Act*, as published, is *ultra vires* Manitoba? May a person charged with having liquor in his vehicle contrary to *The Highway Traffic Act*²⁵ enter a defence based on unconstitutionality? In short, has Manitoba, since 1890, been living in a state of nature? It seems virtually certain that the Courts shortly will be asked these questions.

"*Fiat justitia, ruat coelum* [let justice be done even though the Heaven's fall]," said Judge Dureault²⁶ in holding the Manitoba *Official Language Act ultra vires*. "The Constitution does not allow reasons of State to influence our judgments". He was quoting Lord Mansfield²⁷ by way of reply to counsel's contention that the Court should have regard to the consequences which a declaration that the *Language Act* was unconstitutional would occasion for Manitoba. Judge Dureault continued: "So much for the consequences."²⁸

So now comes the question. What are the consequences? The judgments of the Supreme Court of Canada²⁹ striking down the Manitoba *Official Language Act*³⁰ and Title I, Chapter III of the Quebec *Charter of the French Language*³¹ do not say. Never has a judgment of the Supreme Court deliberately been more silent on such an important effect of its rulings; never has such silence brooded more portentous in Canadian law.

20. *Ibid.*

21. *A.-G. Manitoba v. Forest, Supra* n. 8.

22. *Ibid.*

23. R.S.M. 1970, c. M-50.

24. R.S.M. 1970, c. I-10.

25. R.S.M. 1970, c. H-60, s. 191(1).

26. *Supra* n. 18, at 717.

27. *R. v. Wilkes* (1770), 4 Burr. 2527, at 2561, 98 E.R. 327, at 347 (K.B.).

28. *Supra* n. 18, at 717.

29. *A.-G. Manitoba v. Forest, Supra* n. 8; *A.-G. Que. v. Blaikie, Durand and Goldstein, Supra* n. 8.

30. S.M. 1890, c. 3.

31. S.Q. 1977, c. 5, ss. 7-13.

II

It is necessary to have regard to precisely what the Supreme Court said in the *Forest* and *Blaikie* cases. In *Forest*, the issue before the Court was a specific constitutional question, fixed by order of the Chief Justice. The question was:

Are the provisions of *The Official Language Act* or any of those provisions ultra-vires or inoperative insofar as they abrogate the provisions of S.23 of the Manitoba Act?

The Supreme Court did not answer that question directly. Rather, it dismissed the appeal. In the *Blaikie* cases, the Court was asked an analogous question: "Whether certain sections of Quebec's *Charter of the French Language* were inoperative or ultra-vires for conflict with S. 133 of the *British North America Act*."³² The Court responded identically. No answer was given; the appeals were dismissed.

That being so, the orders of the Courts of Appeal stand in both cases. In *Forest*, the Court of Appeal answered the constitutional question directly.³³ But in *Blaikie*, the Court of Appeal dismissed the Appeal. So the trial judgment stands. At trial, Chief Justice Deschenes ruled on the constitutional question.

But the answer given in Manitoba differs from the answer given in Quebec. In Manitoba, Chief Justice Freedman gave an extremely narrow ruling. He dealt with the specific prejudice suffered by Mr. Forest. The order of the Court declares that the *Official Language Act* "is inoperative insofar as it abrogates the right to use the French language in the Courts of Manitoba, as conferred by S. 23 of the Manitoba Act. . . ." That, however, did not imply all Manitoba Statutes published only in English were nugatory. Chief Justice Freedman continued:

I would not be prepared to declare that all the statutes of Manitoba since 1890 are constitutionally invalid. . . It does not follow, however, that a failure to comply with the provisions of S. 133 or S. 23 has the effect of rendering the statutes invalid. British law draws a clear distinction between directory and mandatory statutes, and a further distinction between those mandatory statutes that result in nullities and those mandatory statutes that result in irregularities.³⁴

The Quebec Superior Court did not so limit itself. The judgment of Chief Justice Deschenes maintained plaintiffs' action for a declaration of

32. S. 133 of the *British North America Act*, 1867, 30 & 31 Vict., c. 3 (U.K.) is in roughly equivalent terms to s. 23 of the *Manitoba Act*. It was inserted in the *BNA Act* at the insistence of the Quebec representatives to the London and Quebec Conferences, and, as explained by Hon. Georges-Etienne Cartier, it protects:

the English minority of Lower Canada relative to the use of its language, because in the local parliament of Lower Canada, the majority would be composed of French Canadians. The members of the Conference had wanted that this majority be unable to enact the abolition of the use of the English language in the local legislature of Lower Canada, just as the English majority in the Federal legislature would be able to do it to the French Language. *Debats parlementaires sur la question de la confederation des Provinces de l'Amerique Britannique du Nord*, 3^e session, 8^e Parlement Provincial du Canada (Que., 1865) 943.

33. At first instance, [1978] 5 W.W.R. 721, the Court of Queen's Bench denied Forest standing. Accordingly, it did not answer the constitutional question. The Queen's Bench was reversed on the standing question by the Court of Appeal, [1979] 4 W.W.R. 229 which thus chose to rule on the merits as a court of original jurisdiction. This is rather ironic, for in earlier proceedings (1977), 77 D.L.R. (3d) 445, the Court of Appeal refused to hear Forest as a court of original jurisdiction. It sent him to the Queen's Bench where the standing issue arose.

34. *A.-G. Manitoba v. Forest*, *Supra*, n. 8, at 247-48.

ultra vires against Sections 7-13 of the *Charter of the French Language* in these terms:

[La Cour] constate et declare la nullite totale, au motif d'*ultra vires*, du Chapitre III du Titre premier de la *Charte de la langue francaise*.³⁵

(Trans.: [The Court] notices and declares the total nullity for reason of *ultra vires*, of Chapter III of Title I of the *Charter of the French Language*.)

In the reasons for judgment³⁶ Chief Justice Deschenes elaborates:

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'.³⁷

It is tempting to conclude from this, as does Chief Justice Freedman,³⁸ that bills must be passed and published in both languages in order to result in valid statutes. But that is not precisely what the Quebec Court said. Chief Justice Deschenes ruled Section 9 of the *Charter ultra vires* because Section 9 attributes "official" character to the French text of statutes exclusively. The Constitution, by contrast, impliedly attributes "official status" to both the French and English texts of statutes. Chief Justice Deschenes did not go on to consider the situation where the text is available in one language only. Clearly, if the text is available in both languages, both must be "official." But if the text is not available in both languages, but only in one language, is that one text any less official? Is it invalid? The Manitoba Court thinks not. The Quebec Court does not say.

III

Mandatory-Directory Distinction

There are several legal doctrines capable of supporting the view that Manitoba statutes passed in English alone nevertheless are valid. Chief Justice Freedman refers to one such doctrine: the legal distinction between mandatory and directory enactments. The distinction arises in the situation where a statute requires that something be done or be done in a particular way, but is silent as to the consequences of failure to comply. Common Law distinguishes between mandatory and directory enactments in this way: mandatory enactments imply "nullification for disobedience;"³⁹ directory enactments may be ignored with impunity, unless some specific penalty is stipulated for in the statute. "If an absolute enactment is neglected, the thing being done is invalid and void, but, if the enactment is merely direc-

35. *Blaikie v. P.G. du Que.*, [1978] C.S. 37, 40.

36. *Id.*, at 58. The Court states that the reasons for judgment are "an integral part of the judgment." *Blaikie v. A.G. Que.* (1978), 85 D.L.R. (3d) 252 at 282 (English trans.).

37. *Id.*, at 264.

38. *Forest v. A.-G. Manitoba* (1979), 4 W.W.R. 229, at 247: "Counsel for Mr. Forest suggested. . . that s. 23 requires bills to be passed in French in order to result in valid statutes. . . . It is indeed the view expressed by the Quebec Court of Appeal in the *Blaikie* case." Moreover, in *Société Asbestos Liée c. Société Nationale de L'Amiant*, No. 09-001, 065-796 (1979), Unreported (Que. C.A.), while the Supreme Court was deliberating in *Blaikie*, the Quebec Court of Appeal unanimously adopted this interpretation of its ruling in the *Blaikie* case. Mr. Justice Lajoie said, "La conclusion de la Cour Supérieure et de la Cour d'Appel dans la cause de *Blaikie* consequence que les lois adoptées en conformité de ces articles, sans respecter l'article 133 de l'A.A.N.B. sont aussi nulles de nullité totale, non simplement d'un vice de forme." *Id.*, at 27. The *Asbestos* case has been appealed to the Supreme Court.

39. *Liverpool Borough Bank v. Turner* (1860), 2 G.F. & J. 502, at 508, 45 E.R. 715 (Ch.); *Res. ex. Rel. Hogg v. Dean*, [1917] 2 W.W.R. 943 (Alta. S.C.).

tory, it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not. . . ."⁴⁰

Generally speaking, the requirement to publish subordinate legislation is mandatory (or absolute); statutory rules are invalid unless published as directed.⁴¹ This is not, however, an invariable rule. The courts have been astute to point out that there is no general principle to distinguish when enabling Acts as absolute and when directory.⁴² It is necessary to examine the whole scope of each particular statute to try to find the real intention of the Legislature.⁴³

That being said, it is important to realize that Manitoba's situation is not in all respects a case of first impression. Courts have faced before non-compliance with some seemingly mandatory rule in the situation where invalidation of acts done would work inconvenience or chaos. For example, in *Montreal Street Railway Co. v. Normandin*, the Privy Council had to consider objections taken to neglect of a statutory duty to revise Quebec jury lists. The lists had not been revised for several years. Old lists had been used. It appeared that it would be impossible immediately to prepare new lists in compliance with the Statute. If non-compliance with the statutory requirements rendered the lists void, no jury trials could be held for some considerable time.

The Privy Council refused to hold lists void. 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.⁴⁴

This principle applies to the illegal election of school trustees⁴⁵ and to the irregular appointment of a taxation appeals officer.⁴⁶ It also applies to the non-publication of an order-in-council contrary to mandatory statutory requirements. If, however, no serious general inconvenience will result from declaring the order invalid, and where the order easily may be replaced by a new order, the court will invalidate the order.⁴⁷

The *Normandin* principle has been applied in New Zealand to rescue statutes threatened by failure to observe mandatory constitutional pro-

40. *Re South Oxford Prov. Election; Mayberry v. Sinclair* (1914), 32 O.L.R. 1, at 9 (C.A.).

41. *R. v. Goertzen and Goertzen* (1949), 2 W.W.R. 1208 (Man. Ct. Ct.); *Craies on Statute Law* (7th ed. 1971) 317. This is often provided for by statute. For example, *The Regulations Act*, R.S.M. 1970, c. R-60, s. 4(1), requires all regulations to be published in the Manitoba Gazette within one month of filing. Under s. 4(5), failure to comply renders the regulation invalid as against a person who has not had actual notice thereof.

42. *R. v. Goertzen, Ibid.*; *Re South Oxford Borough Prov. Election*, *Supra* n. 40; *Re Nakoneshny* (1954), 20 C.R. 131, 13 W.W.R. (N.S.) 647 (Sask. Ct. Ct.), *aff'd* on other grounds 22 C.R. 64, 15 W.W.R. (N.S.) 451 (Sask. C.A.); *Liverpool Borough Bank v. Turner*, *Supra* n. 39.

43. *Lacourse v. McLellan*, [1929] 3 D.L.R. 73 (Sask. C.A.), *Liverpool Borough Bank v. Turner*, *Supra* n. 39; *Cullimore v. Lyme Regis Corp.*, [1962] 1 Q.B. 718.

44. *Montreal Street Rwy. Co. v. Normandin*, [1917] A.C. 170 at 175 (P.C.).

45. *The King ex rel. Anderson v. Buchanan* (1909), 44 N.S.R. 112 (C.A.).

46. *Morrison v. Min. of Customs and Excise*, [1928] 2 D.L.R. 759, at 762-63 (Ex.).

47. *R. v. Goertzen*, *Supra* n. 41.

cedure. In *Simpson v. A.G. New Zealand*,⁴⁸ plaintiffs challenged the validity of a parliamentary election. The New Zealand Constitution requires the Governor-General to issue election writs within seven days of the dissolution of Parliament. The writs were circulated late. The question was whether the Parliament had been validly elected. If the answer were no, all Acts passed by the Parliament would be invalid. Grave public inconvenience would thereby result. The New Zealand Supreme Court applied the *Normandin* principle to find the constitutional requirements directory. The statutes, thus, were valid.

Clearly, a declaration of invalidity against all Manitoba statutes since 1890 would work serious general inconvenience. Marriages could not be performed; taxes could not be collected. Provincial penal, and highway codes could not be enforced. The machinery of government would grind to a halt. As Locke said: "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society."⁴⁹ The declaration would work injustice to the general population. It would not promote the objects of Section 23 of the *Manitoba Act* — the guarantee of equality to Franco-Manitobans in the machinery of government. From this point of view, the *Normandin* principle would be relevant.

Discretionary Relief

A second mechanism capable of supporting the validity of Manitoba's English only statutes inheres in the remedial network through which an attacker must proceed. The attacker must ask for a declaration of *ultra vires* against the statutes. There is no question but that the Court has a discretion to grant or refuse declaratory orders.⁵⁰ Of course, it is shocking to think that unconstitutional behaviour by a Legislature ought to be, or could be condoned *de facto* by the use of judicial discretion to refuse a remedy.⁵¹ But that is a very different proposition than asserting that the Court could not exercise its discretion to arrange the relief given such that Manitoba had time to translate its statutes.

One factor which influences the way courts exercise their discretion to grant prerogative relief is the consideration whether chaos would result from the Court's order. That was an important consideration in *R. v. Paddington Valuation Officer, Ex p. Peachey Property Corp.*⁵² In this case, the Peachey Property Corporation complained that it was badly treated in regard to the rates on certain properties. Some of its properties were rated too high, said Peachey. The reason was because the Valuation Officer had prepared the valuation list on the wrong footing. The whole list, said Peachey, was wrong. It appeared that valuation lists throughout England

48. [1955] N.Z.L.R. 271 (S.C. and C.A.).

49. Quoted by Lord Wilberforce in *H.L. Carl Zeiss-Stiftung v. Rayner (No. 2)* (1966), 2 All E.R. 536 at 577 (H.L.).

50. *Thorson v. A.G. Canada*, [1975] 1 S.C.R. 138, at 145, 43 D.L.R. (3d) 1, at 6, per Laskin, J.: "The Courts are quite able to control declaratory actions. . . through discretion."

51. "In all discretionary remedies it is well known and settled that in certain circumstances — I will not say in all of them, but in a great many of them — the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way. . ." per Lord Greene, M.R., *R. v. Stafford Justices, ex p. Stafford Corp.*, [1940] 2 K.B. 33 at 43 (C.A.).

52. [1966] 1 Q.B. 380.

had been prepared on a similar footing. So if the Paddington list were wrong, so too were lists in the whole country, and for many years too.

Peachey sought *certiorari* quashing the lists and *mandamus* requiring the Valuation Officer to prepare new lists in the proper way. In considering opposing counsel's contention that the result would be chaos, Lord Denning, M.R. said:

No doubt if the list is in due course avoided, *certiorari* must eventually go to quash it. But I see no reason why a *mandamus* should not issue in advance of the *certiorari*. If the existing list has been compiled on the wrong footing the Court can order the valuation officer to make a new list on the right footing. . . . Once the new list is made and is ready to take effect, the court can quash the old list. In that case everything done under the old list will remain good. The rates that have been demanded and paid cannot be recovered back. . . . By this solution, all chaos is avoided. The existing list will remain good until it is replaced by a new list and then it will be quashed by *certiorari*.⁵³

Arguably, Manitoba could bring itself within this principle. If asked, the Court could direct a *mandamus* requiring that Manitoba statutes be published in conformity with Section 23. Some time limit could be attached to the order. A declaration of invalidity could be withheld until that time had expired. If Manitoba acts diligently, all chaos could be thus avoided.⁵⁴

Necessity

A third (if more doubtful) doctrine which may be marshalled in support of Manitoba's statutes is the principle of necessity or, what is closely allied to it, invocation of the legal maxim, *salus populi suprema lex*. It is well established that Courts of Justice may sit *ex necessitate*. If, for example, a judge is disqualified for bias and there is none other competent to act, then that judge must sit *ex necessitate*.⁵⁵ The rule is exceptional, resting on grounds of public policy "justified only by strict and imperious necessity."⁵⁶ A version of the principle has been invoked to support the illegal election of school trustees in circumstances where the trustees continued in office for some time and none other could claim to have been elected. "[T]he interests of the public and innocent parties may be considered," said the Court in refusing to issue a *quo warranto* to remove the trustees.⁵⁷

May the illegal acts of a legislature be nevertheless recognized as valid on a like principle of necessity? It is repugnant to think that an unconstitutional *Act* continued for some time may for that reason alone achieve *de facto* legitimate status. But if all else fails and the alternative is chaos, necessity may well be the ultimate answer. It is hard to think it preferable that in the intervening years before Manitoba's statutes are translated, the

53. *Id.*, at 402-03.

54. *De facto*, this is what the Supreme Court has done by its ruling in the *Forest* case. Manitoba has been given time. It will take time before another case reaches the Supreme Court. Manitoba should be astute to use that time to best advantage. If there is further delay or obstruction in the task of translation, that would be a proper consideration for the court to weigh in devising remedial relief in future litigation.

55. *Judges v. A.-G. Sask.*, [1937] 1 W.W.R. 508 (P.C.); *Re Caccamo and M.M.I.* (1977), 75 D.L.R. (3d) 720, (Fed. C.A.); *Stewart v. Bd. of Govs. of Wadena Union Hosp.*, [1978] 6 W.W.R. 199 Sask. Q.B.; R. Sedgewick, "Disqualification on the Ground of Bias as Applied to Administrative Tribunals" (1945), 23 Can. B. Rev. 453 at 467.

56. Sedgewick, *Id.*, at 467.

57. *The King ex rel. Anderson v. Buchanan Supra* n. 45.

Province should become Locke's theoretical anomaly, "a government without laws. . . inconsistent with human society."

Parliamentary Sovereignty

A fourth (but very *dubitante*) doctrine emanates from certain British views about parliamentary sovereignty. It is said that an act passed by Parliament and inscribed on the Parliamentary roll is unchallengeable for procedural defect in a court of law. It is for Parliament itself to correct the error. This view gathers strength from certain *obiter* remarks of Lord Campbell in *Edinburgh and Dalkeith Ry. Co. v. Wauchope*:

I think it right to say a word or two upon the point that has been raised with regard to an Act of Parliament being held inoperative by a Court of Justice because the forms prescribed by the two Houses to be observed in the passing of a bill have not been exactly followed. . . . I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a Bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced to Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.⁵⁸

By this view, the courts are powerless to invalidate an enrolled statute for reason of procedural defect.

There are two reasons why such a view ought to be inapplicable to Manitoba's situation. First, this theory of parliamentary sovereignty now has very few supporters, even in England. By the new view, sovereignty is a legal concept. The courts must enforce statutes certainly, but they equally have the duty to scrutinize enactment procedure to make sure that Parliament has acted and expressed its will. Rules as to the manner and form of legislation logically are prior to the sovereign; they identify the sovereign and what it has done. Validity of acts, thus, depends on compliance with mandatory constitutional procedure.⁵⁹

Secondly, the *Wauchope obiter* at its highest applies to self-imposed parliamentary procedures. It certainly does not apply to procedures emanating from a written constitution imposed by a superior legislative body. The *Wauchope* principle must bend before the requisites of the written constitution. By the written constitution

[T]he bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution, are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.⁶⁰

There is no authority or constitutional principle by which courts are powerless to investigate procedural defect in such circumstances. These are

58. (1842), 8 Cl. & F. 710, at 723-25, 8 E.R. 279 at 284-85 (H.L.). See also *Lee v. Bude and Torrington Junction Rwy. Co.* (1870-71), 6 C.P. 576, at 581. (If an Act of Parliament has been passed improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it.)

59. See R.F. Heuston, *Essays in Constitutional Law* (2nd ed. 1964) Ch. 1; G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957) 23 ff.; R.E.T. Latham, *The Law and the Commonwealth* (1949) 523.

60. *Amax Potash v. Govt. of Sask.* (1977), 2 S.C.R. 576, at 590; 71 D.L.R. (3d) 1, at 10.

the circumstances, as distinct from the *Wauchope* facts, in which Manitoba's difficulties arise.

In any event, it strains credulity to pretend that Section 23 of the Manitoba *Act* is merely procedural. The Section originated in the negotiations and compromise between Canada's two great peoples. It was meant to protect both of them. Certainly it was meant to protect Franco-Manitobans. Section 23 is not a matter of constitutional procedure; it is a matter of constitutional right. It is strange to think deliberate violation of that right is immune from judicial review.

Constitutional Amendment

Finally, I have heard it suggested several times in conversation that an amendment should be sought to the *British North America Act, 1871*⁶¹ to ratify what Manitoba has done. Clearly, the Federal Government would have to concur in Manitoba's request to Westminster to amend the *Act*.⁶² It is far from certain the Government of Canada would do so. Laying that hypothetical difficulty to one side, it is by no means certain that the Governments of Manitoba and Canada, acting without unanimous provincial consent, legally could achieve such a change. While the distribution of powers is not *directly* in question, the position of French Canada is — whether in ability to move to Manitoba with appropriate constitutional safeguards, or otherwise. This may well be one of the "rights or privileges of any of the 'supreme' legislative bodies governing the 'autonomous' Canadian community"⁶³ with which, by convention, Westminster could not properly interfere unless unanimous provincial consent is obtained.

Even if these supposed amendment difficulties be more perceived than real, still the suggested solution is repellent. It is inappropriate for the Government of Manitoba illegally to have disadvantaged Franco-Manitobans, and to seek retroactive validation of that action. It is especially shocking when one considers that Franco-Manitobans are no longer sufficiently numerous politically to protect themselves. From the largest segment of the Red River population in 1870, today they number just over 60,000 souls, roughly 6.6% of the province.⁶⁴ Such an amendment would be unfair, abhorrent to the moral sense.

IV

While one recognizes that several legal doctrines may be relevant to the validity of Manitoba's post-1890 statutes, that is not the end of the matter. There is a further question. One must ask, as a matter of constitutional policy, the desirability of applying these doctrines.

61. 34 & 35 Vict. c. 28 (U.K.), found in R.S.C. 1970, Appendix II, No. 11, at 289.

62. There have been nine requests by provinces for amendments to the *BNA Act*. All have been refused. "The provincial authorities — either executive or legislative — have no *locus standi* to move the British Parliament or Government with a view to securing an amendment to the federal Constitution." P. Gerin-Lajoie, *Constitutional Amendment in Canada* (1950, repr. 1966) 138.

63. *Id.*, at 158. See also W. Lederman, "The process of Constitutional Amendment for Canada" (1966-67), 12 McGill L.J. 371 at 379.

64. *Report of the Royal Commission on Bilingualism and Biculturalism*, *Supra* n. 9, at 28-29.

Any court asked to rule on this question is caught between the horns of a dilemma. If the statutes are invalidated, the result is chaos, "a government without laws . . . inconsistent with human society." If the foregoing doctrines are applied, the Constitution becomes a toothless tiger. We live under a written constitution, but it has no bite. The document, which in Manitoba's case seeks to guarantee fundamental constitutional protection to citizens of the federating unit, can be ignored with impunity.

Certainly, this latter is the result if one applies the *Normandin* principle to make the requirements of Section 23 directory. Manitoba flouts the constitutional rights of Franco-Manitobans, but nothing happens. Such is also the case if the publication directive of Section 23 be held to be an unreviewable procedural requirement under the *Wauchope obiter*.

The result would not be quite so bad if discretion were applied to the remedial mechanisms as in the *Peachey Property* case. Nor again would these results follow if the necessity doctrine were employed. Prejudice caused to Franco-Manitobans by 90 years of unconstitutional behaviour would go unremedied, but the statutes could be ordered translated. Even here, however, it is hard to see how Manitoba — which has only a handful of French-speaking judges — could comply with the Section 23 requirement that pleadings in courts may be in French.

In the *Aeronautics Reference*, Lord Sankey, L.C. made this important observation:

Inasmuch as the [BNA] Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.⁶⁵

How true are these words in Manitoba's case. Franco-Manitobans entered the union upon a specific negotiated guarantee of linguistic rights. Is it sound constitutional policy now to legitimate the unconstitutional destruction of those rights by judicial ingenuity? Is it just? I answer as a constitutional lawyer and as a citizen: It is not!

V

Constitutional law acts negatively. When the ordinary act of a legislative body conflicts with the constitution, the constitution is supreme; inconsistent legislative acts must give way.⁶⁶ They are inoperative or *ultra vires*.

This, however, is not the only possibility, nor do all nations living under written constitutions so limit themselves. Constitutional law also acts positively. If constitutional right be infringed by illegal legislative action,

65. *Re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, at 70 (P.C.).

66. *Marbury v. Madison* (1803), 5 U.S. 137; 1 Cranch 137.

the courts may order the right restored. If necessary, the court can cast affirmative duties on the government to repair the damage done by unconstitutional action.

The theory of a positively acting constitutional law poses the greatest challenge to Canadian constitutionalism. It raises profound questions about the relationship between the courts and the legislatures. A search light is thrown on the legitimacy and authority of judicial power. No doubt a court would impose affirmative duties on a government only with the greatest reluctance. Nevertheless, how much greater must be the reluctance for a court to stand by impotently while aggression of the majority, acting through a legislature, tramples constitutional right into the dust.

This is the spirit which animated the United States Supreme Court when it held that state imposed segregation by race in public education violated the constitutional guarantee to equal protection of the laws.⁶⁷ Because implementation of that broad principle under varying local conditions raised difficulties, the Court asked for further argument on the question of relief. The Attorneys General of all affected states were invited to present their views. The Court concluded:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.⁶⁸

Chief Justice Warren went on to consider the remedial powers of the federal district courts to which the cases were remanded for local supervision. His words have become a landmark in the affirmative duty jurisprudence.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power Courts of equity may properly take into account the public interest in the elimination of such obstacles [to implementation of non-discriminatory public education] in a systematic and effective manner [T]he courts may consider problems related to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially non-discriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.⁶⁹

Progress towards a unitary school system was slow. Many school boards failed to respond. Others resisted. In *Green v. County School Bd. of New Kent*, the Court tightened its grip on school administrations: "The burden on a school board today is to come forward with a plan that pro-

67. *Brown v. Board of Education* (Brown I) (1954), 347 U.S. 483, at 495.

68. *Brown v. Board of Education* (Brown II) (1955), 349 U.S. 294, at 299.

69. *Id.*, at 300.

mises realistically to work, and promises realistically to work *now*.”⁷⁰ In *Swann v. Charlotte-Mecklenburg Bd. of Education*, the Court made clear that

[I]f school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked Judicial authority enters only when local authority defaults. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system⁷¹

The Supreme Court went on to lay down broad guidelines for lower courts charged with constructing remedies.

The power of federal district courts to devise remedies implementing affirmative duties of government has been widely employed in America. It is used to integrate schools by assigning black children in urban centers to affluent white suburban schools and white children to the black urban cores. Large scale busing, involving millions of children, is required to effectuate the Court's decrees.⁷² State Legislatures have been required to draw congressional districts so that “as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.”⁷³ The physical design of mental health facilities and the minimum forms of medical care to be administered therein has been stipulated for by the federal courts.⁷⁴ Physical and social aspects of penal detention have been specified.⁷⁵ In some of the cases,⁷⁶ the courts get remarkably detailed in their orders, including such things as prison refuse facilities, numbers and classification of staff to be employed in mental hospitals, conditions of lighting, ventilation and food storage in penitentiaries. In *Wyatt v. Stickney*⁷⁷ and *Pugh v. Locke*⁷⁸ the orders of the Court are drafted in the form of legislative codes and are about as long. The Court in *Wyatt v. Stickney* virtually required the Legislature to meet in special session to appropriate funds; otherwise “the Court will be compelled to grant plaintiffs' motion to add various state officials and agencies as additional parties to this litigation and to utilize other avenues of fund raising”.⁷⁹ The Supreme Court summed up the limits of judicial remedial making power in *Milliken v. Bradley*: “But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”⁸⁰

70. *Green v. County School Bd. of New Kent* (1968), 391 U.S. 430, at 439.

71. (1971), 402 U.S. 1, at 15-16.

72. *Ibid.*

73. *Wesberry v. Sanders* (1964), 376 U.S. 1, at 7-8.

74. *Wyatt v. Stickney* (1972) 344 F. Supp. 373 (Ala. Dt. Ct.).

75. *Pugh v. Locke* (1976), 406 F. Supp. 318 (Ala. Dt. Ct.).

76. Other examples are available in *Donaldson v. O'Connor* (1974), 493 F. (2d) 507 (5th Cir.). An excellent analysis of the affirmative duty cases is to be had in A. Cox, *The Role of the Supreme Court in American Government* (1976) Ch. IV.

77. *Supra* n. 74.

78. *Supra* n. 75.

79. *Supra* n. 74, at 394 n. 14. The plaintiff's motion asked that the State Mental Health Board be directed to sell or encumber portions of its extensive land holdings as a means of providing funds to implement the relief requested. *Id.*, at 393.

80. *Milliken v. Bradley* (1974), 418 U.S. 717, at 746.

Constitutional law, acting in this positive way, is exceptional, quite unlike any other development in the history of jurisprudence. The Courts' orders impose precise positive duties to act; they require funds to implement; they are prospective; they affect millions of people.⁸¹ They reorder priorities for the expenditure of public funds. They cause profound changes in society. In every way the judicial orders resemble legislation.

These novel features of the affirmative duty cases are not mentioned by way of objection to the legal development. Nor should they blind us to basic constitutional realities. Constitutional right had been denied by state-imposed legislative schemes. The rights could be vindicated only by positive action of the government. The legislatures were recalcitrant. The basic question in each case was: how far would the court go to protect the constitution's integrity?

VI

How far *ought* the Supreme Court of Canada to go in Manitoba's case? The answer depends on several factors: the nature of the rights denied; a weighing of public and private interests, the posture assumed by the Manitoba government. Some would add another consideration: that the Supreme Court of Canada is not constitutionally entrenched, as is the United States Supreme Court, but owes its existence rather to an ordinary federal statute of 1875.⁸² It is said, accordingly, that the Court has less justification to assume an activist stance. In my view, that argument rings hollow. We are dealing with nothing less than legislative subversion of the constitution. If the fear be that the Legislature will subvert the Court for trying to protect the constitution, that is a risk I would be prepared to assume. In any event, there is no need for a court to possess a constitutional review jurisdiction if it is unable or unwilling to carry out that function.

The nature of the right Manitoba has denied is very specific. Section 23 provides for the mandatory use of French in legislative records and journals, and publishing of legislative acts. Manitoba proscribed this. Section 23 also provides for the permissive use of French in Court proceedings. Manitoba proscribed this too.

What prejudice has been caused by Manitoba's ninety-year denial of these rights? It seems to me that there are three forms of prejudice suffered. First, Franco-Manitobans have suffered certain social disabilities. They have been kept out of the legal profession. They cannot plead in the courts in French; they cannot file court documents in French; they cannot have access to Manitoba legislation in French. This is the stock in trade of the lawyer: his mouth, his pen, and his statutes. If Franco-Manitobans were to have full participation in the legal profession, they had to assimilate. They still do. Secondly, Franco-Manitobans have suffered certain legal disabilities. They were guaranteed a bilingual court system. They did not get

81. See Cox, *Supra* n. 76, at 87: "[D]esegregation decrees have all the qualities of social legislation. They pertain to the future. They are mandatory, they govern millions of people. They reorder people's lives in a way that benefits some and disappoints others in order to achieve social objectives."

82. *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11; now *Supreme Court Act*, R.S.C. 1970, c. S-19.

it. Criminally accused were tried in English; civil trials were conducted in English. This will continue. Third, Franco-Manitobans have suffered certain political disabilities. Records of debates were available only in English. So was legislation. Full participation in the political process required a certain facility in English (or assimilation). But this will change, at least in part. The Manitoba Attorney General's Department has said that it is going to translate current provincial statutes, private acts, municipal acts and legislative records and journals.⁸³ Counsel for the legislature says the process will take years to complete.⁸⁴

What interests are involved? I think it clear that Manitoba's 60,000 French-speaking inhabitants have important interests in having these disabilities removed. In certain ways, their status has been attacked. Secondly, in a country predicated on cultural and linguistic duality,⁸⁵ such as Canada, there is a public interest of the highest importance in protecting the constitutional guarantees of English and French minorities wherever found. Our common destiny together depends on this basic understanding. If temporary majorities are allowed to use their power to subvert the constitution and attempt to exterminate or disable the other group, then no one anywhere in Canada has any linguistic or cultural security. Either we are committed to protect our basic constitutional understandings, or we must live in fear of majoritarian aggression. Our country cannot survive in this latter way. Finally, there must be the sober realization that Manitoba's personnel resources are very much limited. There are very few bilingual judges or lawyers, and no French-unilingual ones. A cadre of French-speaking judges and lawyers cannot be produced overnight. The constitution cannot command the impossible.

What posture has the Manitoba government assumed? Its record is not flattering. It authored the illegal legislation in 1890. It refused to obey a declaration of unconstitutionality in 1909. It refused to respond to a declaration of unconstitutionality in 1976. It was arrogant; it said it did not accept the ruling of the court; it abused its authority.⁸⁶ Even now, there is no indication that Manitoba intends to comply with the letter or spirit of Section 23. It appears willing to take the easiest step only — translation of statutes, records, and journals.

VII

The Supreme Court ought to go very far indeed. Manitoba's time has run out.

Procedurally, the court's jurisdiction could be engaged in a variety of ways. Two examples lie close to hand. A public spirited citizen could bring a class action on behalf of all prejudiced Franco-Manitobans asking for certain forms of mandatory relief. Or, in a defence based on constitutional defect, to an information under a provincial statute — such as a parking ticket or other traffic offence — the court could invite *amicus curiae* briefs from interested parties on the question of relief.

83. "Translating All Laws Will Be A Long Process, Manitoba Declares," *The Globe and Mail*, Jan. 5, 1980.

84. *Ibid.*

85. I need not rehearse here the principles of duality. Suffice it to say that in these times of constitutional reform, every serious commentator has reaffirmed them.

86. See text, *Supra* n. 17-20.

An appropriate first step, remedially, would be the imposition on the Manitoba Attorney General, as a party defendant, to come forward with a plan that promises within realistic time limits to comply prospectively with the specific requirements of Section 23. That means a plan must be devised to move towards a bilingual court structure as well as a translation program. In the interim, a court translation system could be provided. Alternatively, a travelling French-speaking circuit court or courts could be formed to conduct civil and criminal trials in French on request.⁸⁷ Secondly, the Attorney General should have the duty to prepare a realistic plan that will compensate Franco-Manitobans for the past exclusion from the legal profession. Third, the Attorney General should have the duty to bring forward a realistic plan that will compensate Franco-Manitobans for political disabilities caused by the illegal government action.

If the Manitoba government is dilatory or recalcitrant, the Court itself on request could fashion constitutional relief. Or, the case could be sent back to first instance for this purpose. The nature of relief is a matter for pleading and proof, but certain examples come readily to mind. The establishment of a program of legal studies leading to the LL.B. degree could be ordered established in the French language.⁸⁸ Canada has this capacity. The University of Ottawa has such a program currently in advanced startup stages. So does McGill. The University of Moncton shortly will graduate its first French-speaking common law class. Some students in the Ottawa French program are Franco-Manitobans. They view Ottawa's program as their first hope ever to enter the legal profession while maintaining their cultural and linguistic heritage.⁸⁹ If the Manitoba legislature refuses to appropriate funds to implement the order, Manitoba lands could be encumbered or sold.

Constitutional relief by imposition of affirmative duties on government chaffs against the hitherto known limits of Canadian constitutionalism. It challenges to the utmost the theorist of Canadian Government. So be it. The alternatives are decidedly unappealing. Manitoba's statutes cannot be invalidated. Nor can the Canadian constitution become a toothless mouthing of platitudes, without any bite and incapable of affording protection. A fair, reasonable, and just (if novel) solution lies close to the hand that dares to grasp.

87. I am grateful to my wife, Prof. Sanda Magnet, for this suggestion.

88. Again I owe this suggestion to my wife, Prof. Sanda Magnet.

89. The Attorney General of Ontario, Mr. McMurtry came to the University of Ottawa early in 1979 to deliver a short speech on Ontario's bilingual court plans and to dialogue with the French common law students. Several of the students spoke out publicly and forcefully made these points. Some indicated a desire to return to Manitoba, but wondered how that would be possible.

