CONSTITUTIONALLY ENTRENCHED LINGUISTIC MINORITY RIGHTS: THE FOREST *AND* BLAIKIE *DECISIONS*

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At the time of Confederation in 1867, and later when Manitoba entered the federation in 1870, certain language guarantees were sought to safeguard linguistic minorities in Quebec and Manitoba.[1] The provisions of section 133 of the *Constitution Act, 1867*,[2] and section 23 of the *Manitoba Act, 1870*,[3] which entrenched, constitutionally, specific forms of minority language rights, are strikingly similar. This similarity, indeed replication, of the provisions in section 133 of the *Constitution Act, 1867* by section 23 of the *Manitoba Act* did not arise by accident.[4] Furthermore, each of these provisions constituted a *sine qua non* of the two separate deals which brought Quebec and Manitoba into Confederation.[5]

As a result of a changing political climate throughout ensuing years, attempts were made by the provinces of Manitoba and Quebec to abrogate these linguistic guarantees by legislative Acts.[6] Thus arose serious questions as to the nature of provincial powers, *vis-a-vis* the unilateral alteration of constitutional rights and the accessibility of the legislative and judicial systems for previously protected linguistic minorities.

The separate court challenges which were eventually launched in both provinces sought to contest the validity of these provincial Acts and thereby re-assert the perceived constitutional rights of English and French speaking minorities. Consequently, the courts of Quebec and Manitoba, and eventually the Supreme Court of Canada, were provided with an opportunity to define the extent of the constitutional rights afforded certain linguistic minorities in Quebec and Manitoba.

I. Climbing the Court Ladder

A. The Manitoba Situation

When the Province of Manitoba entered Confederation, it did so by virtue of the *Manitoba Act*, a statute enacted by the Dominion Parliament and later confirmed by the British Parliament. Certain guarantees relating to language were included in section 23 of the *Manitoba Act*, which reads:

> 23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislatures, and both those languages shall be used in the respective

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1. See Jill Duncan, "Introduction" (1986), 15/3 M.L.J. 251.

2. *Constitution Act, 1867*, enacted as *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.) (hereinafter referred to as the *Constitution Act, 1867*).

3. *Manitoba Act, 1870*, S.C. 1870, c. 3, as confirmed by the *Constitution Act, 1871*, enacted as *British North America Act, 1871*, 34-35 Vict., c. 28 (U.K.) (hereinafter referred to as the *Manitoba Act*).

4. See *Forest v. Attorney-General of Manitoba* (1979), 98 D.L.R. (3d) 405 at 415, [1979] 4 W.W.R. 229 (C.A.), where Freedman C.J.M. (as he then was) states that the draftsmen of section 23 of the *Manitoba Act* intended to reproduce *mutatis mutandis*, a counterpart of section 133 of the *Constitution Act, 1867*.

5. M. Yalden, "The Language Cases in Some Historical Perspective" (1981), 2 S.C.L.R. 431 at 432.

6. In Manitoba by *An Act to Provide that the English Language Shall Be the Official Language of the Province of Manitoba*, S.M. 1890, c. 14 (hereinafter referred to as *The Official Language Act*) and in Quebec by the *Charter of the French Language*, S.Q. 1977, c. 5.

> 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.[7]

With the passage of *The Official Language Act* in 1890, the Legislature of the Province of Manitoba attempted, *inter alia,* to rescind the right to the use of the French language laid down in the *Manitoba Act.* The germane sections of *The Official Language Act* read:

> 1(1) Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the Legislative Assembly of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba.
>
> (2) The Acts of the Legislature of Manitoba need be printed and published only in the English language.
>
> 2. This Act applies only so far as the Legislature has jurisdiction to enact.[8]

The validity of *The Official Language Act* of 1890 was first put in issue in 1892. However, a satisfactory and binding conclusion to this initial challenge did not result.[9] Consequently, the laws and the practices of government in Manitoba continued to be controlled by what was ostensibly an illegal *Act* of the Legislature.

B. Monsieur Forest's Challenge

When George Forest, a resident of St. Boniface (a suburb of Winnipeg), was served with a unilingual municipal parking ticket in 1976, he objected on the basis of a provision in *The City of Winnipeg Act*[10] which required that bilingual municipal notices be issued to residents of St. Boniface. Regardless of his objection, Forest was convicted in Provincial Judge's Court of a parking offense and fined $5.00 and costs on August 18, 1976.[11]

On September 9, 1976 Forest filed an appeal written in French with the County Court of St. Boniface, thereby relying on section 23 of the *Manitoba Act.* The Attorney-General of Manitoba maintained that there was no valid appeal before the County Court due to a violation of the English-only provisions of section 1 of *The Official Language Act.* As a result, the constitutionality of *The Official Language Act* was questioned and on December 14, 1976, in a preliminary decision, it was found to be unconstitutional by His Honour Judge Dureault (as he then was).[12]

Judge Dureault's reasoning was based on a consideration of the historical development of language rights in Canada and Manitoba, as revealed in part by various imperial, federal and provincial enactments.[13] In concluding that section 23 of the *Manitoba Act* could not be amended directly

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7. *Manitoba Act*, s. 23.
8. *The Official Language Act*, s. 1-2.
9. *Supra*, n. 1.
10. *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 80(3).
11. *R.* v. *Forest*, Man. Prov. Ct. unreported, McTavish J., April 18, 1976.
12. *R.* v. *Forest* (1976), 74 D.L.R. (3d) 704, [1977] 1 W.W.R. 363 (Man. Co. Ct.).
13. *Ibid.*, D.L.R. at 715. For a more detailed examination of the historical development of language rights in Canada see *supra* n. 5.

by the provincial legislature, Judge Dureault also dismissed the possibility of indirect amendment under the guise of the provincial powers over civil procedure under subsection 92(14) of the *Constitution Act, 1867*.[14]

Following the delivery of this judgement, the Attorney-General of Manitoba stated in writing that the Crown did not intend to appeal this preliminary decision, but would proceed instead with the merits of the appeal made by Forest.[15] The Attorney-General also stated that the Crown agreed to proceed in French for the purposes of Forest's appeal, but that this case was not to be considered a binding precedent for future litigation.[16]

At this point, Forest's attack broadened. He requested that French copies of the relevant statutes be provided to him. This the Attorney-General agreed to do, but only if Forest would pay the $17,000 cost of translating such statutes. In response, Forest attempted to file a French language application requesting a *mandamus* order from the Court of Queen's Bench, directing that the statutes be provided to him. The Registrar of the Court refused to accept the documents on the basis that it was contrary to *The Official Language Act*.[17]

Following this rejection, the Registrar of the Manitoba Court of Appeal also refused to allow filing of French documents so as to not prejudice the constitutionality of *The Official Language Act*.[18] In response, Forest filed an Originating Note of Motion in the Court of Appeal requesting that it order its officials to file his *mandamus* application. The Manitoba Court of Appeal held itself to be a *forum non conveniens* and dismissed the application, with leave to bring the appropriate proceedings in the Court of Queen's Bench.[19]

On November 1, 1977, Forest issued a Statement of Claim in the Manitoba Court of Queen's Bench seeking a declaration that *The Official Language Act* was *ultra vires* the Province of Manitoba. In the Statement of Defence filed by the Attorney General of Manitoba, a question as to Forest's standing to bring such an issue before the Court was raised for the first time — some 16 months, after the commencement of proceedings between the parties.[20]

In the Court of Queen's Bench, Chief Justice Dewar denied Forest standing and consequently did not deal with the substantive matters of the issue.[21] In denying standing, Chief Justice Dewar declined to exercise his

14. *Ibid.*, D.L.R. at 713.
15. As stated by Chief Justice Freedman in *Forest* v. *Attorney-General of Manitoba*, *supra* n. 4, D.L.R. at 410.
16. See R.W. Kerr, "Blaikie and Forest: The Declatory Action as a Remedy Against Unconstitutional Legislation" (1980), 26 McGill L.J. 97 at 99.
17. *Ibid.*
18. *Ibid.*
19. *Forest* v. *Registrar of Manitoba Court of Appeal* (1977), 77 D.L.R. (3d) 445, [1977] 5 W.W.R. 347 (Man. C.A.).
20. A fact pointed out by Chief Justice Freedman in *Forest* v. *Attorney-General of Manitoba*, *supra* n. 4, D.L.R. at 411.
21. *Forest* v. *Attorney-General of Manitoba* (1978), 90 D.L.R. (3d) 230, [1978] 5 W.W.R. 721 (Man. Q.B.).

discretion on the basis that there were already proceedings pending between the parties (the County Court appeal, which Forest had adjourned *sine die*) and that Forest was attempting to re-litigate a point on which he had already succeeded.[22]

C. Partial Success in the Court of Appeal

On April 25, 1979, the Manitoba Court of Appeal held that George Forest possessed the necessary standing, entitling him to an adjudication by the Court of Queen's Bench and by the Court of Appeal.[23] In so doing, the Court rested its decision solely upon the exercise of the discretionary powers it possesses.[24]

Among the controlling factors which influenced the Court of Appeal in granting standing was the denial, on the part of the Attorney-General of Manitoba, of Forest's request to refer the validity of *The Official Language Act* to the Court.[25] As the Court pointed out, to deny Forest standing would have effectively immunized the impugned legislation from judicial review.[26] Concomitant were Forest's long efforts in an important cause which would allow the Court to lawfully determine the substantive issues.[27]

The Court of Appeal observed that the constitutionality of *The Official Language Act* rested on the thesis that the provisions of section 23 of the *Manitoba Act* could be amended by the unilateral act of the Manitoba Legislature.[28] The Court also gave as its starting point section 133 of the *Constitution Act, 1867,* and declared that section 23 was, *mutatis mutandis,* a counterpart of section 133.[29]

Expressly adopting the Quebec Superior Court's reasoning in *Blaikie* v. *Attorney-General of Quebec,*[30] the Manitoba Court of Appeal concluded that section 133, and therefore section 23, evidenced the intention of the Fathers of Confederation to remove all questions of the use of the two languages from the legislative intervention of a single assembly.[31]

Furthermore, the Court noted that the *Manitoba Act* did not merely create the Province of Manitoba, it also created a union between Manitoba and Canada, and therefore, its constitutional provisions did not only apply to Manitoba but also to the union.[32] On this basis, the Legislature of the Province of Manitoba was incapable of unilaterally amending section 23.[33]

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22. *Ibid.*, D.L.R. at 237. The Chief Justice clearly recognized a discretion in this matter pursuant to the decisions of *Thorson* v. *Attorney-General of Canada (No. 2)*, [1975] 1 S.C.R. 138 and *Nova Scotia Board of Censors* v. *McNiel*, [1976] 2 S.C.R. 265, which recognized the validity of the action for declatory relief in constitutional matters. For further reading on this topic see *supra* n. 16.

23. *Supra* n. 4.

24. *Ibid.*, D.L.R. at 413. Furthermore, the Court vested its power to do so on *Thorson* v. *Attorney-General of Canada (No. 2)*, *supra* n. 22.

25. *Supra* n. 4, D.L.R. at 409.

26. *Ibid.*

27. *Ibid.*, D.L.R. at 408.

28. *Ibid.*, D.L.R. at 420.

29. *Supra* n. 4.

30. (1978), 85 D.L.R. (3d) 252 (hereinafter referred to as *Blaikie*).

31. *Supra* n. 4, D.L.R. at 419.

32. *Ibid.* D.L.R. at 420.

33. *Ibid.* Chief Justice Freedman equated the province's inability to amend section 23 to its inability to unilaterally amend any other sections of the union such as sections 91 and 92 of the *Constitution Act, 1867*.

While the Manitoba Court of Appeal adopted certain aspects of the Quebec Superior Court's decision in *Blaikie,* it expressly disagreed with one aspect of Chief Justice Deschênes' reasoning concerning the provincial power of amendment. Chief Justice Deschênes had held that the unilateral provincial power to amend the "Constitution of the Province", pursuant to subsection 92(1) of the *Constitution Act, 1867,* was limited to those items enumerated under Part V of the *Constitution Act, 1867,* which is entitled "Provincial Constitutions".[34] As section 133 was not included under Part V, it could not be considered as being part of the "Constitution of the Province" and accordingly subject to amendment by a unilateral provincial Act.

In rejecting this reasoning, the Manitoba Court of Appeal stated that a provision which, in its ordinary meaning, contains constitutional aspects should not be excluded from the "Constitution of the Province" under subsection 92(1), simply because of its relative position in the *Constitution Act, 1867.*[35]

D. Partial Invalidity

In pressing his claim, George Forest had requested that the Court of Appeal declare *The Official Language Act* unconstitutional in its entirety.[35a] Moreover, both Forest and the Attorney-General of Canada (as an intervenor) urged the Court to declare that section 23 of the *Manitoba Act* required that all Acts of the Legislature be passed in French to be valid.[36]

On the first of these points the Manitoba Court of Appeal rejected the submission that section 2 of *The Official Language Act* was a colorable attempt to make an *ultra vires* statute *intra vires.*[37] In so doing, Chief Justice Freedman (speaking for the Court) said that he could not "attribute to the Legislature of the day such deviousness".[38] Consequently, *The Official Language Act* was declared inoperative only to the extent that it abrogated the rights conferred by section 23 of the *Manitoba Act.*[39]

Secondly, while acknowledging that the Quebec Court of Appeal's decision in *Blaikie,*[40] upholding the necessity of concurrent, bilingual enactment, may be correct and that section 23 of the *Manitoba Act* would require official versions of statutes to exist in both languages, the Manitoba Court of Appeal was not prepared to declare that all statutes passed by the Legislature since 1890 were constitutionally invalid.[41] Indeed, the Court noted that Manitoba statutes prior to 1890 were not in fact enacted in French.[42] According to the Court, a clear distinction between directory and manda-

34. *Supra* n. 30, at 271.
35. *Supra* n. 4, D.L.R. at 422.
35a. *Supra* n. 4, D.L.R. at 422.
36. *Ibid.*, D.L.R. at 423.
37. *Ibid.*, D.L.R. at 421.
38. *Ibid.*
39. *Ibid.*, D.L.R. at 422.
40. *Attorney-General of Quebec* v. *Blaikie* (1978), 95 D.L.R. (3d) 42 (Que. C.A.).
41. *Supra* n. 4, D.L.R. at 423.
42. *Ibid.* A point made in an Agreed Statement of Facts between the parties.

tory statutes, and a further distinction between those mandatory statutes resulting in nullities and those resulting in mere irregularities, could be made which would allow for the continued operation of all unilingual laws.[43]

Moreover, Chief Justice Freedman suggested that the Court would be unable to make any declaration at all if the statute constituting the Manitoba Court of Appeal was invalid.[44]

On an additional point, the Manitoba Court of Appeal ruled that the provisions of the *Manitoba Act,* did not preclude the Province from enacting laws in relation to the subject-matter of section 23, as there was an obvious need for subordinate regulatory enactments to give effect to the language guarantee.[45]

E. The Quebec Situation

At the time of Union, the Province of Quebec entered into Confederation by virtue of the *Constitution Act, 1867;* section 133 reads as follows:

> 133. 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 or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[46]

With the passage of the *Charter of the French Language,*[47] (Bill 101), the Legislature of the Province of Quebec attempted, *inter alia,* to rescind the right to the use of the English Language laid down in section 133. The germane section of the *Charter* of 1977 read:

> CHAPTER III
>
> THE LANGUAGE OF THE LEGISLATURE AND THE COURTS
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> 7. French is the language of the legislature and the courts in Quebec.
>
> 8. Legislative bills shall be drafted in the official language. They shall also be tabled in the National Assembly, passed and assented to in that language.
>
> 9. Only the French text of the statutes and regulations is official.
>
> 10. An English version of every legislative bill, statute and regulation shall be printed and published by the civil administration.
>
> 11. Artificial persons addressing themselves to the courts and to bodies discharging judicial or quasi-judicial functions shall do so in the official language, and shall use the official language in pleading before them unless all the parties to the action agree to their pleading in English.
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> 12. Procedural documents issued by bodies discharging judicial or quasi-judicial functions or drawn up and sent by the advocates practising before them shall be drawn up in the

43. *Ibid.*
44. *Ibid.*
45. *Ibid.*
46. *Constitution Act, 1867,* s. 133.
47. *Charter of the French Language,* S.Q. 1977, c. 5.

official language. Such documents may, however, be drawn up in another language if the natural person for whose intention they are issued expressly consents thereto.

13. The judgments rendered in Quebec by the courts and by bodies discharging judicial or quasi-judicial functions must be drawn up in French or be accompanied by a duly authenticated French version. Only the French version of the judgment is official.[48]

F. The Lawyers' Challenge

In response to the Passage of Bill 101, three members of the Quebec Bar, Peter M. Blaikie, Roland Durand, and Yoine Goldstein launched an action in the Quebec Superior Court seeking a declaration that Chapter III of the *Charter of the French Language* was *ultra vires* the Quebec Legislature.[49] Once they had brought themselves within the "sufficient interest" provisions required by The Code of Civil Procedure,[50] the Plaintiffs were not challenged as to their standing by the Attorney-General of Quebec.

At trial, Chief Justice Deschênes raised the presumption of legislative competence and then went on to outline the two major questions before the Court.[51] Firstly, did Chapter III of Bill 101 violate section 133 of *The Constitution Act, 1867,* particularly with regard to the language of the legislative and the justice systems? Secondly, if Bill 101 was in violation, were its provisions nevertheless valid in that the Quebec National Assembly could unilaterally amend section 133?

Chief Justice Deschênes answered the first of these questions in the affirmative. In so holding, he ruled that articles 7 through 10 of Bill 101 were aimed at establishing a unilingual system in the matter of legislation.[52] According to Chief Justice Deschênes, this was incompatible with the provisions of section 133. The requirement that "both these languages should be used in the . . . Records and Journals"[53] applied so as to compel simultaneity in the use of both French and English in all bills discussed and laws adopted by the National Assembly.[54] This finding was fortified by Chief Justice Deschênes's use of legislative history to illustrate the intention of the Fathers of Confederation — *viz.*, the Rules and Regulations of the 1861 Legislative Assembly of Canada.[55]

Moreover, the Court pointed out that each version of an Act had to be equally authentic; the printing and publishing of laws in two languages implied the concurrent passage and assent of both versions.[56] The Chief Justice held that such a requirement extended beyond the mere Acts of the National Assembly and included delegated legislation.[57]

48. *Charter of the French Language*, S.Q. 1977, c. 5.
49. *Blaikie* v. *Attorney-General of Quebec*, *supra* n. 30. This action was accompanied by a parallel suit launched on the basis of an incompatibility with human rights legislation: *Laurier* v. *Attorney-General of Quebec*.
50. *The Code of Civil Procedure*, S.Q. 1965, c. 80, s. 55.
51. *Supra* n. 30, at 256. The presumption is that a legislature intends to enact measures within its legislative competence.
52. *Ibid.*, at 257.
53. *Constitution Act, 1867*, s. 133.
54. *Supra* n. 30, at 260-1.
55. *Ibid.*, at 261.
56. *Ibid.*, at 264.
57. *Ibid.*, at 264-5.

To Chief Justice Deschênes, it did not matter that an unforeseen development in delegated legislation by the Fathers of Confederation had resulted in a silence within the provisions of the *Constitution Act, 1867*. Silence did not preclude the inclusion of delegated legislation within the ambit of section 133.[58] This was especially so when to hold otherwise would have allowed the Legislature to delegate general powers of regulation to the Lieutenant-Governor in Council, in order to circumvent the requirements of 133. Chief Justice Deschênes ruled that there was an intimate relationship between the original power of a provincial Act and the power of any delegated legislation, and that the National Assembly was unable to release a delegated power from the constitutional obligations that bound the Legislature.[59] Leaving no doubt as to his view on the potential for such a circumvention, Chief Justice Deschênes said: "It is repugnant to think that the Canadian constitutional act can provide an opening for such manipulations".[60]

That articles 11, 12 and 13 of Chapter III of the *Charter of the French Language*[61] were intended to severely limit the use of English in Quebec courts seems beyond doubt. Article 11 imposes French before the courts for artificial persons, article 12 does so for all procedural documents and article 13 establishes that only the French version of a judgment has official status. In ruling that these provisions of Bill 101 were invalid, Chief Justice Deschênes stated that the word "Courts" used in section 133 of the *Constitution Act, 1867* should be given a global definition and thereby extended not only to federal and provincial judicial tribunals, but also to administrative agencies which exercise judicial or quasi-judicial powers.[62]

As to the second point, Chief Justice Deschênes ruled that section 133 was not subject to unilateral amendment by the Quebec Assembly.[63] The Attorney-General of Quebec had argued that subsection 92(1) of *The Constitution Act, 1867* had empowered the Province to amend its own constitution and that section 133 formed a part thereof.[64] However, the Chief Justice held that the unilateral provincial power of amendment contained in subsection 92(1) was limited to those items enumerated under Part V of the *Constitution Act, 1867*, which is entitled "Provincial Constitutions".[65] According to the learned Chief Justice, section 133 was not included under Part V and, therefore, could not be considered as being part of the "Constitution of the Province" as defined by subsection 92(1).

Significantly, Chief Justice Deschênes referred to parliamentary history, specifically the Confederation Debates,[66] in concluding that the intent

58. *Ibid.*, at 265.

59. *Ibid.*

60. *Ibid.*

61. *Charter of the French Language*, S.Q. 1977, c. 5.

62. *Supra* n. 30, at 267. Chief Justice Deschênes first put forward this "global definition" of courts in *Attorney-General of Canada* v. *Human Rights Commission*, Que. Superior Ct. unreported, Suit No. 05-003538-772, March 22, 1977.

63. *Ibid.*, at 280-2.

64. Subsection 92(1) reads: "The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of the Lieutenant-Governor".

65. *Supra* n. 30, at 271.

66. Can. Leg. Ass. Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3rd Sess., 8th Provincial Parliament of Canada, at 944 (March 10, 1865).

of the Fathers of Confederation was, "to remove the question of the use of the two languages . . . from the possibility of the arbitrary, or capricious or even very simply of the wish perceived legitimate by the majority. . . ."[67] In addition, the learned Chief Justice adopted the Supreme Court of Canada's characterization of section 133 as "a constitutionally based right"[68] in declaring that the federal and provincial aspects of section 133 were indivisible and consequently a "reciprocal constitutional guarantee",[69] beyond unilateral amendment.

G. Affirmed by the Court of Appeal

In a unanimous judgement delivered on November 27, 1978, the Quebec Court of Appeal upheld the Superior Court's decision declaring that Chapter III of the *Charter of the French Language*[70] was *ultra vires* the Province of Quebec.[71] According to the Court of Appeal, the Province of Quebec did not have the power to unilaterally amend section 133 of the *Constitution Act, 1867*. All seven Justices agreed with Chief Justice Deschênes that the Provincial power of amendment contained in subsection 92(1) of the *Constitution Act, 1867* was limited to those items enumerated under Part V of the *Constitution Act, 1867*. However, the line of reasoning by which each Justice reached a decision differed.

Mr. Justice Lamer (Kaufman, Bérnier, Mayrand JJ.A., concurring) stated that all power of amendment lay exclusively with the enacting Legislature except to the extent that it delegated the authority to do so.[72] Relying on the use of identical expressions contained in subsection 92(1) and the heading of Part V,[73] Mr. Justice Lamer concluded that it could not be shown that the U.K. Parliament had intended to delegate the power of amendment to the Provinces beyond those items contained in Part V.[74] In the process, he offered these views on the significance to be attached to chapter headings in constitutional interpretations:

> The headings of chapters do not have as much force as the words that are used in the body of the section but, nevertheless, have more importance than that attributed to ordinary marginal notes which we must consider when attempting to understand the meaning which the different sections have in relation to one another.[75]

In the circumstances, Mr. Justice Lamer was of the view that it was unnecessary to consider anything beyond the text of the statute and its legislative history; he expressly declined to determine the validity of the utilization of parliamentary history made by Chief Justice Deschênes.[76]

Mr. Justice Bélanger (Kaufman, Bérnier, Mayrand JJ.A., concurring) stated that the correctness of utilizing parliamentary history as an aid to

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67. *Ibid.*, at 273-274.
68. *Ibid.*, at 274 *per Jones* v. *Attorney-General of Canada*, [1975] 2 S.C.R. 182.
69. *Ibid.*, at 281-2.
70. *Charter of the French Language*, S.Q. 1977, c. 5.
71. *Supra* n. 40.
72. *Ibid.*, at 57.
73. Subsection 92(1) uses "Constitution of the Province", whereas Part V is headed "Provincial Constitutions".
74. *Supra* n. 40, at 63.
75. *Ibid.*
76. *Ibid.*, at 56.

constitutional interpretation could be gleaned from the Supreme Court of Canada's decision in *Jones* v. *Attorney-General of Canada*.[77] According to the learned Justice of Appeal, such a practice would be correct where an ambiguity existed relative to the scope of the constitutional Act itself and not to the true object of a law passed pursuant to a power conferred by that Act.[78] However, Mr. Justice Bélanger felt it unnecessary to have recourse to extrinsic material in this instance.[79] Conversely, Mr. Justice Dubé seemed to ignore any such distinction in rejecting outright the use of parliamentary history as an interpretative aid.[80]

In the result, the Quebec Court of Appeal held that there was no intention on the part of the U.K. Parliament to delegate amending powers to the Provinces over rights which were integral to the reciprocal relationship characterized by section 133.[81] Consequently, the Court did not directly consider the extent of the requirements contained in section 133.

II. Seeking a Definitive Ruling

A. Companion Decisions in the Supreme Court of Canada

Following the appeals launched by the Attorneys-General of Quebec and Manitoba, the Supreme Court of Canada rendered companion,[82] unanimous decisions on December 13, 1979.[83] The Court dealt at length with the issues raised in *Blaikie* and then went on to inquire as to whether anything in the *Forest* case would require a different verdict.[84]

In *Blaikie,* the Supreme Court expressly adopted Chief Justice Deschênes's reasoning that the power conferred by subsection 92(1) of the *Constitution Act, 1867,* did not extend beyond Part V of that same document.[85] Consequently, Chapter III of Bill 101 was *ultra vires* the Province of Quebec.

In *Forest,* the Supreme Court of Canada ruled that the provincial amending powers of subsection 92(1) did not extend to the *Manitoba Act*.[86] Although it could be said that the *Manitoba Act,* was the "Constitution of The Province", the Court ruled that it was not intended that subsection 92(1) should operate so as to allow unilateral provincial amendment over that statute or any other statutory provisions beyond those of Part V of the

77. *Ibid.*, at 48, *per* Laskin C.J.C. in *Jones* v. *Attorney-General of Canada, supra* n. 68.

78. *Ibid.*

79. *Ibid.*

80. *Ibid.*, at 55.

81. *Ibid.*, at 49.

82. Described as such in K. Lysyk, "Developments in Constitutional Law: The 1980-81 Term" [1982] 3 S.C.L.R. 65 at 98.

83. *Forest* v. *Attorney-General of Manitoba,* [1979] 2 S.C.R. 1032, [1980] 2 W.W.R. 758, (*sub. nom Attorney-General of Manitoba* v. *Forest*) 101 D.L.R. (3d) 385, 49 C.C.C. (2d) 353 (hereinafter referred to as *Forest*).

Blaikie v. *Attorney-General of Quebec,* [1979] 2 S.C.R. 1016, (*sub. nom Attorney-General of Quebec* v. *Blaikie*) 101 D.L.R. (3d) 394, 49 C.C.C. (2d) 359 (hereinafter referred to as *Blaikie*). Both decisions were delivered *per curiam,* joining a very few important cases previously so rendered. For a detailed list of these cases see: P.W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985) at 169.

84. *Forest, supra* n. 83, C.C.C. at 356.

85. *Supra* n. 83, C.C.C. at 365-6.

86. *Supra* n. 83, C.C.C. at 357.

Constitution Act, 1867.[87] Furthermore, the Supreme Court noted that the *Manitoba Act*, taken by itself, conferred no general power of amendment on the Province.[88]

Beyond this point, the Supreme Court of Canada had little to say in the *Forest* decision. Consequently, the significance of the *Blaikie* ruling should not be underestimated in its application, albeit unspecified, to the Province of Manitoba.

In *Blaikie*, the Supreme Court of Canada adopted Lord Sankey's "living tree" metaphor[89] in outlining the necessity of construing constitutional documents broadly.[90] The Court adopted a "robust and expanding interpretation"[91] towards section 133 in finding that lesser rights exist, notwithstanding an absence of express language mandating them. According to the Court, it was necessary that "[t]he greater must include the lesser".[92]

Regulations issued under the authority of Quebec statutes were held to be "Acts" within the purview of section 133. Consequently, both "Acts" and regulations required printing and publishing in both languages; to hold otherwise would truncate the requirements of section 133.[93] Furthermore, simultaneity in the use of both languages was implicit.[94]

The meaning of the words "Records and Journals" used in section 133 embraced five separate items. Minute books, the Journals, Votes and Proceedings, Bills and Laws Adopted were all identified as having a mandatory bilingual requirement.[95]

Noting the rudimentary state of administrative law in 1867, the Supreme Court extended the language guarantee of section 133 beyond "courts in the traditional sense".[96] Included under the protective umbrella were all statutory adjudicative agencies.[97] According to the Court "it would be overly technical"[98] to refuse to extend the provisions of section 133 to administrative tribunals so as to allow the Province of Quebec to circumvent the language guarantees made therein.[99]

On an additional matter, the Court expressly affirmed Chief Justice Deschênes's use of parliamentary history as fortified by the Quebec Court of Appeal.[100]

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87. *Ibid.*

88. *Ibid.*, C.C.C. at 358; where the Supreme Court of Canada points out that the Province of Manitoba is only able to amend those items set out in section 6 of the *Constitution Act*, 1871, the U.K. Statute confirming the *Manitoba Act*, 1870.

89. Put forward in *Edwards* v. *Attorney-General of Manitoba*, [1930] A.C. 124.

90. *Supra* n. 80, C.C.C. at 368.

91. Characterized as such by Prof. Magnet in, "The Charter's Official Language Provisions: The Implementation of Entrenched Bilingualism" [1982] 4 S.C.L.R. 163 at 169.

92. *Supra* n. 80, C.C.C. at 366.

93. *Ibid.*

94. *Ibid.* This follows from the Supreme Court's approving matters of detail and history as found by Chief Justice Deschênes at first instance in *Blaikie*, *supra* n. 30.

95. *Ibid.*

96. *Ibid.*, C.C.C. at 367.

97. *Ibid.*

98. *Ibid.*, C.C.C. at 368.

99. *Ibid.*

100. *Ibid.*, C.C.C. at 366. We are left to assume, however, that the Supreme Court of Canada is referring to Mr. Justice Bélanger's *obiter dictum vis-a-vis* the distinction between the scope of a constitutional Act and the constitutionality of all law.

B. Round Two: A Re-hearing

Following the pronouncements of judgement on December 13, 1979, the Attorney-General of Quebec requested a re-hearing pursuant to Supreme Court of Canada Rule 61 to obtain a declaration as to the scope of section 133 regarding delegated legislation. On March 27, 1980, a rehearing was ordered, limited to the following question:

> Does section 133 of the *British North America Act* apply to regulations or orders of statutory bodies or by-laws of municipalities and school boards . . . as distinct from orders in council and ministerial orders or regulations which were in issue in the appeal to this Court and which under the judgment of this Court of December 31, 1979 were held to be within the terms of section 133?[101]

In answering this question the Supreme Court of Canada further relied on what has been described as an "interpretive approach to constitutionally guaranteed rights, focusing on ensuring their effectiveness".[102] As Professor Lysyk, (as he then was) pointed out, the task facing the Court was to develop guiding principles that would assist in determining exactly what areas in the vast sea of delegated legislation were subject to section 133.[103] The Court acknowledged that this was a process that involved departing from the ordinary meaning of key words in section 133 so as to prevent the frustration of its objects without going beyond what was necessary to accomplish its purpose.[104]

During the rehearing, the Court was presented with evidence showing that there were well over two thousand agencies in Quebec that exercised some form of delegated law-making authority. In order to more effectively deal with the situation, the Surpeme Court declared that the requirements of section 133 did not extend to rules or directives of internal management[105] and then proceeded to divide the remaining regulations into four broad categories:

1. Regulations enacted by the Government;
2. By-laws of municipal corporations and school boards;
3. Regulations of administrative and semipublic agencies;
4. Court rules of practice.

On the first of these categories the Supreme Court held that regulations enacted by the Government, including those issued by a minister or group of ministers, were properly viewed as an extension of the legislative power of the Legislature.[106] Consequently, they were subject to the requirements of section 133. Regulations enacted by the government to alter those enacted by a subordinate body were also included in this class.[107]

101. *Attorney-General of Quebec* v. *Blaikie (No. 2)* (1981), 123 D.L.R. (3d) 15 at 20.
102. J. Laskin, "Mobility Rights Under the Charter" [1982] 4 S.C.L.R. 91.
103. *Supra* n. 82, at 99.
104. *Supra* n. 101, at 28.
105. *Ibid.*, at 21.
106. *Ibid.*, at 21-23.
107. *Ibid.*

As to the second category, the Supreme Court noted that municipal organizations had existed prior to 1867 and that their growth and the multiplication of their regulations was entirely foreseeable. Any silence on the part of the Fathers of Confederation in this regard could not be viewed as an oversight.[108] The Court, characterizing municipal institutions as a distinct yet subordinate order of government, held that the requirements of section 133 did not extend to municipal by-laws, even when they were subject to the approval of the Government.[109] This was also the case, *a fortiori*, with school boards, where any silence on the part of the *Constitution Act, 1867*, in regard to the language of school board regulations, was deemed purposeful.[110]

As to the regulations issued by administrative and semi-public agencies, the Court held that where these regulations are subject to government approval, a connection between the Legislature and the delegated legislation is established.[111] Thus, these regulations are within the ambit of section 133. Regulations merely subject to disallowance by the government have an independent status and consequently, fall outside the requirements of section 133.[112]

Lastly, the Supreme Court ruled that while Court rules of practise are not specifically included in section 133, they are to be included by intendment.[113] The judicial character of their subject matter and the potential deprivation of the freedom of choice of language compelled the Court to extend the guarantee of section 133 to encompass Court rules of practice.[114]

III. Conclusion

Thus the Supreme Court of Canada had defined the limits of the Provincial amending power in subsection 92(1) of the *Constitution Act, 1867* insofar as it related to entrenched constitutional provisions. Moreover, through its rehearing, the Court had defined the requirements of section 133. However, the Supreme Court of Canada left a few vital questions unanswered.

Assuming the requirements of section 133 apply *mutatis mutandis* to section 23 of the *Manitoba Act*, would the bilingual enactment provisions result in the invalidity of all deficient Acts and regulations of Manitoba?[115] What of the mandatory/directory distinction drawn by Chief Justice Freedman in the Manitoba Court of Appeal? The extent to which these and other

108. *Ibid.*, at 23-25.

109. *Ibid.*

110. *Ibid.*

111. *Ibid.*, at 28.

112. *Ibid.* at 29.

113. *Ibid.*, at 31.

114. *Ibid.*

115. To head off any potential difficulties, the Quebec National Assembly sat continuously until 6:30 a.m. on the day following the judgement to give approval to Bill 82, which established as official the English version of more than 200 acts that had been made law since the passage of Bill 101. See: Amy Booth "Little P.Q. Mileage in language ruling", *The Financial Post*, Dec. 22, 1979, at 23.

questions raised by the *Forest* and *Blaikie* decisions would affect the legal structures in the Provinces of Manitoba and Quebec was yet to be determined.