

## INTRODUCTION

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During the summer last year, I was discussing various ideas for what is traditionally known as the Manitoba Law Journal 'Special Issue' with Professor Dale Gibson. He proposed the present topic, and my first thoughts were: Who else but us! When else but now? Throughout the following year, with Professors Gibson's and John Irvine's inexhaustible assistance, the executive's help and support, and Susan Billinkoff's special efforts in soliciting articles, the summer's conversations grew into the issue before you.

What also developed throughout the year was a fascination with the whole story surrounding the Supreme Court's June, 1985, declaration that all of Manitoba's laws are unconstitutional. Certainly the cluster of incidents leading up to this proclamation is one of the most, if not the most, significant event in Manitoba's legal and political history. It was thus felt by the executive that to dedicate one issue of the Journal to this remarkable story was not only our privilege, but our responsibility.

Within this complicated and often confusing saga, there is one question of particular fascination to me: why did it take Manitoba almost a hundred years to conclude that the province never had the capacity to unilaterally amend its constitution in 1890? The section at the centre of the issue is, of course, section one of Premier Greenway's *The Official Language Act*, which reads:

1 Any statute or law to the contrary notwithstanding, the English language only shall be used in the records and journals of the House of Assembly for the Province of Manitoba, and in any pleadings or process in or issuing from any court in the Province of Manitoba. The Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language.<sup>1</sup>

There is no doubt that the intention implicit in this section was to sterilize section 23 of the *Manitoba Act* of 1870:

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.<sup>2</sup>

However, at the same time the Government so blatantly attempted to deviate from this Constitutional guarantee, it enshrined forever their doubt that they had the capacity to do so: "2. This Act shall only apply so far as this Legislature has jurisdiction so to enact".<sup>3</sup>

It is, in retrospect, curious that the Government should build its apprehension into the legislation in this way. But what is even more remarkable

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1. *An Act to Provide that the English Language Be the Official Language of the Province of Manitoba*, S.M. 1890, c. 14, s. 1 (hereinafter referred to as *The Official Language Act*).

2. *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*).

3. *The Official Language Act*, s. 2.

is that almost as soon as the ink was dry, the Government overcame its evident insecurity.

The first challenge to *The Official Language Act* came quickly, albeit ineffectively. In 1892<sup>4</sup>, Mr. Pellant challenged Mr. Hébert's ability to run for public office, on the basis that he was only semi-literate in English. Furthermore, Pellant alleged that the consequent court documents filed by Hébert were defective as they were in French, contrary to section 1 of *The Official Language Act*. Judge Prud'homme of the County Court of St. Boniface declared in his judgment that this *Act* was *ultra vires* the Legislature of Manitoba. He stated: "La clause 133 de l'Acte de l'Amérique britannique du Nord, ou son équivalente, la clause 23, de l'Acte du Manitoba, ne tombe pas dans la série ou les classes de clauses régies par la titre 'Constitution Provinciales', auquel réfère la clause 92"<sup>5</sup>. Although the judgment was published in a local francophone newspaper<sup>6</sup>, it did not appear in any of the law reports and it remained lost, and certainly ignored by the Provincial Government for several decades.<sup>7</sup>

The second challenge came in 1909, and again the judgment was rendered by Judge Prud'homme of the St. Boniface County Court. In this case, *Bertrand v. Dussault and Lavoie*<sup>8</sup>, the defendants sought to set aside the plaintiff's Statement of Claim, as it had been drafted in French; again, contrary to section 1 of *The Official Language Act*. Not surprisingly, the constitutionality of the *Act* fell once more into question. For Prud'homme J. (as it had been for him in the aforementioned case, and it would be for his brethren to follow) the key was whether section 133 of the *Constitution Act, 1867*<sup>9</sup>, interpreted to be connected to section 23 of the *Manitoba Act* by virtue of their essential similarity, could be properly amended by the Provincial Legislature. He noted that the Province was authorized to unilaterally amend certain provisions of the *Constitution Act*, pursuant to section 92, which provides:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that it is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Prud'homme J. concluded that the reference to the 'Constitution of the Province' could mean only one thing: sections 58 to 90 (inclusively), following the fifth Chapter Heading, the 'Constitution of the Province'. Consequently, Prud'homme J. once more held that the Province lacked the authority to amend section 133 of the *Constitution Act*, and, by analogy, its twin section, section 23 of the *Manitoba Act*. He stated:

4. *Pellant v. Hébert* (1892), reported in 1981 12 R.G.D. 242 (Man. Co. Ct.).

5. *Ibid.*, at 243.

6. *Le Manitoba*, mercredi, 9 mars 1892.

7. J.E. Magnet, *supra*, n. 4 at 241, notes that the case was only recently discovered after notes about the case were found in a subterranean vault underneath the Law Court's Building in Winnipeg.

8. The judgment of this case was reproduced in full in *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445, at 458. [1977] 5 W.W.R. 347 (Man. C.A.).

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

The fathers of Confederation wishing to settle that vexed question once for all, have advisedly placed it de hors the control or legislative power of provincial Legislatures. The same privilege as to their language is conceded to the French minority of Manitoba as to the English minority of Quebec by provisions which the Legislatures of these provinces cannot alter in any shape or form.<sup>10</sup>

Again, Prud'homme's judgment was unreported and again, it was ignored by the Provincial Government.

The third challenge, *Dumas v. Baribault*, came in 1916, and reached the Manitoba Court of Appeal, although, as Freedman C.J.M. later noted, the case was "not proceeded with".<sup>11</sup> Little else is known about the case; but it should come as no surprise that it was buried along with the two other challenges and, as Commissioner Yalden notes<sup>12</sup>, with apt cynicism, any other cases that have so far escaped discovery.

It is hard to imagine how even one of these judgments, little less three, could have been ignored by the Government. In an analogous situation, Monnin J.A., as he then was, stated in a dissenting judgment:

I am at a loss to understand how the custodian of the constitutional rights of the citizens of this Province, the Attorney-General, can indicate that he will not accept a ruling of a properly constituted tribunal, albeit one of the inferior ones, and how he can state that he does not intend to appeal the ruling and that in the future he does not regard the ruling as creating a binding precedent. A more arrogant abuse of authority I have yet to encounter.<sup>13</sup>

Whether malevolence was a minor or major force behind the Government's willful blindness, it seems that other circumstances certainly played a part in its passivity.

Some authors have suggested that the fact that all of these judgments were rendered by inferior courts may have diminished the impact of their conclusions. Although this fact may explain why the cases initially escaped the attention of journalists or report editors, it cannot explain why the Court's dramatic and unambiguous conclusions weren't soon after seized upon.

A more satisfactory explanation may be found by considering the relationship between Anglo and Franco-Manitobans at the time.

Prior to 1870, the Hudson's Bay Company, pursuant to its Royal Charter of 1670, governed over Rupertsland, a large territory encompassing what is now Western Canada. Up until 1811<sup>14</sup>, English was the only language used officially, but then, in an attempt to communicate more effectively with the many Francophones along the Red River, inroads were made on the practice of unilingualism. By 1869, almost 55 per cent of the population was Francophone<sup>15</sup> and there was an increasing desire for the French and

10. *Supra*, n. 8, at 462.

11. See *Forest v. Attorney-General of Manitoba* (1979), 98 D.L.R. (3d) 405 at 422, [1979] 4 W.W.R. 229 at 246, 47 C.C.C. (2d) 417 at 433.

12. M. Yalden, "The Language Cases in Some Historical Perspective" (1981), 2 S.C.L.R. 431 at 433.

13. *Supra* n. 8, at 458 D.L.R.

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

15. C. J. Jaenen, "The History of French in Manitoba: Local Initiative or External Imposition?" in *Language and Society*, No. 13 (Spring 1984) 10-11.

Métis people to establish a government sensitive and protective of their linguistic and educational needs. This desire turned into a necessity when, after it became clear that the Hudson's Bay Company was transferring the land to the Government of Canada, it was reported in the *Nor'Wester* that the Honorable William McDougall, a well known Upper Canadian politician, had been appointed Lieutenant-Governor of the North-West Territory. A committee, an adaptation of the Métis council of the buffalo hunt, was established and headed in name by John Bruce, but in fact, by the then secretary, Louis Riel.<sup>16</sup>

A provisional government was established, which set out to establish negotiations with the Government of Canada to introduce the territory into Confederation as a province. The first version of a Bill of Rights was drafted on November 16, 1869, and eventually, in April, 1870, a contingent consisting of Judge John Black of St. Andrew's, Reverend Noel-Joseph Ritchot of St. Norbert and Alfred H. Scott of Winnipeg, set off with the fourth version of the Bill to negotiate the terms of entry into Confederation. This fourth Bill provided, inter alia, that the province be bilingual (Article 1) and called for the continuation of confessional schools (Article VII). These terms were accepted into the *Manitoba Act, 1870*, no doubt because of the Federal Government's fear of further antagonizing an already volatile community. It also made sense at the time, given the almost fifty-fifty population split of Anglo and Franco-Manitobans. And it also made sense politically. The French and Métis communities were extremely distrustful. Turmoil and conflict had resulted, and their fears had to be assuaged. As Eugene Forsay stated, "without this provision (section 23) . . . there would have been no Manitoba".<sup>17</sup>

This symbiosis, however, did not last long. For a variety of reasons, including the establishment of the railway through Western Canada, and the ever increasing need for agricultural land, the next twenty years marked a time of incredible growth in Manitoba. Unfortunately for the French and Métis communities, most of the immigrants were Anglophones. By 1881 the Francophones represented only 15.6 per cent and by 1901, only 6.3 per cent of the population declared French as their mother-tongue.<sup>18</sup>

Likewise, although anti-French and anti-Catholic feelings had always existed in the province, the situation worsened under the combined impact of the Protestant Anglophone immigration and the Riel-led Northwest Rebellion of 1885. Prejudice flourished, and eventually, led to the enactment of *The Official Language Act* of 1890.

Within this context, it is perhaps easier to understand how the Manitoba Government could ignore with impunity the subsequent constitutional challenges to this legislation. The majority of constituents were Anglophone, and a momentum against the French had been established. Francophones were not politically in a position to stop this movement and,

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16. For a much more elaborate discussion, see W. L. Morton, *Manitoba, A History* 121.

17. E. Forsey, "Language and the Law" (1980), *Language and Society* 19, at 20.

18. *Supra* n. 15.

in any event, their efforts were primarily directed to preserving their also-threatened parochial school system. This isn't altogether surprising. After all, very few Francophones had to deal with the Legislature or the courts on a day-to-day basis. The potential abrogation of their educational system, on the other hand, affected everyone; it threatened the Francophones' faith and their culture. After all, if these two crucial qualities were lost, assimilation seemed inevitable, and the right to use French in the courts or the Legislature would become essentially meaningless.

Thus, the language rights cases slipped through without anyone really noticing.

Interestingly, we have come full circle. Now that linguistic rights have been re-established in Manitoba, there seems to be a renewed commitment within the French community to the preservation of the Francophone educational system and culture. This time, however, their weapon and shield will not be section 23 of the *Manitoba Act, 1870*, but rather sections 15 and 23 of the *Canadian Charter of Rights and Freedoms*. Hopefully, we won't have to wait another hundred years for a final resolution of rights in Manitoba.

