

**RELIANCE ON UNCONSTITUTIONAL LAWS:  
THE SAVING DOCTRINES AND OTHER PROTECTIONS\***  
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**Introduction**

There has been much talk about the vast numbers of spent and repealed statutes that the Manitoba Government has undertaken to re-enact in bilingual form as a consequence of the ruling in the *Manitoba Language Reference*<sup>1</sup> that unilingual Manitoba legislation is invalid. But what about the even larger number of laws that will *not* be translated and re-enacted?

No laws enacted prior to 1970 will be re-enacted unless they were still in force at that time, as part of the *Revised Statutes, 1970*, or otherwise. In the case of regulations, no spent or repealed material will be re-enacted at all. Countless millions of legal transactions were based, over the years, on linguistically invalid statutes and regulations that will never be retroactively validated, and an equally inestimable number of current legal rights are rooted in those transactions.

Will such legal rights be vulnerable to attack, on the basis of their unilingual origins, after expiry of the period of temporary validity declared by the Supreme Court of Canada? The authors believe that they will not. This belief is based on the existence of two distinct sources of existing legal protection for rights deriving from good-faith reliance on invalid laws:

- (a) the 'saving doctrines', and
- (b) limitation of actions legislation,

as well as the possibility of providing additional protection by:

- (c) retroactive validation legislation.

Each category of protection will be discussed separately.

**A. The Saving Doctrines**

The Supreme Court of Canada indicated in the *Manitoba Language Reference*<sup>2</sup> that many rights, obligations and other effects based upon legislation held to have been linguistically invalid will be preserved by various legal principles. The Court mentioned three such 'saving' doctrines in particular: *de facto*, *res judicata*, and mistake of law.<sup>3</sup> These principles will be examined, together with certain other legal principles that can play similar 'saving' roles.

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1. *Reference Re Language Rights Under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867* (referred to hereinafter as the *Manitoba Language Reference*) [1985] 4 W.W.R. 385 (S.C.C.).

2. *Ibid.*, at 413-5.

3. *Ibid.*

## 1. De Facto Officers

Recognition of the legal efficacy of acts done under the colour of right by unauthorized public officers and by those who rely in good faith on the ostensible authority of such officers, is, as the Court observed: "of ancient and venerable origin".<sup>4</sup>

The scope of the *de facto* officer doctrine is very wide. As the Supreme Court said:

It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable.<sup>5</sup>

The Court referred, in support of this conclusion, to a number of early English cases where the *de facto* doctrine first appeared. In *Parker v. Kett*, Holt C.J. recognized the acts of invalidly appointed stewards:

They held, that admitting that the authority originally was defective, yet they were sufficient stewards *de facto*, and the surrender for that reason good. Doubtless a steward *de facto* may take a surrender. Then such steward is no other, than he who has the reputation of being steward, and yet is not a good steward in point of law . . . for if a colourable steward assembles the tenants, and they do their service, the acts are good that he does, as an under steward after the death of the chief steward, or the clerk of the lord of the manor who holds court without the contradiction or disturbance of the lord, though he has no patent, nor any express authority to be steward; and the reason is this, because the tenants are not obliged to examine the authority of the steward whether it be lawful or not, nor is he compellable to give account of it to them.<sup>6</sup>

*Scadding v. Lorant*<sup>7</sup> was a case involving a complaint that taxes promulgated by a municipal body were invalid because the officials authorizing them had been defectively appointed. It was specifically argued that necessity provided a basis for the authority of *de facto* officers. The Court decided that regardless of the admitted invalidity of their appointments, the acts of the officials, including the passing of rates of taxation pursuant to a statutory authority, had *de facto* validity. The rationale for this principle was explained as follows:

With regard to the competence of the vestrymen, who were vestrymen *de facto*, but not vestrymen *de jure*, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.<sup>8</sup>

4. *Ibid.*, at 414. See, generally, A. Constantineau, *The De Facto Doctrine*, 1910.

5. *Ibid.*, at 414-5.

6. (1702), 1 Raym. Ld. 658, at 660-61, 91 E.R. 1338, at 1340 (K.B.).

7. (1851), 111 H.L.C. 418, 10 E.R. 164 (H.L.).

8. *Ibid.*, at 446, at 175.

The *de facto* doctrine has been similarly applied to municipal officers exercising ministerial duties, such as the admission of a 'free man' into a borough,<sup>9</sup> or the registration of transfers of land received by an unauthorized delegate of a municipal Registrar.<sup>10</sup>

The principle has been extended on several occasions to include judicial and quasi-judicial acts and pronouncements. The validity of a distress warrant issued by a Magistrate whose appointment to that office was not properly constituted was upheld in *The Company of Proprietors of the Margate Pier v. Hannam*.<sup>11</sup> The Court felt that although it was illegal for the Justice to act as a properly qualified magistrate, his acts in that office were unquestionably valid:

The proper effect, therefore, as it seems to us, of the third section, is only to make it unlawful for him to act as such; but not to make his acts invalid. Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that acts done once should be sustained . . .<sup>12</sup>

The *de facto* doctrine made the jump to Canadian courts in the late 1800s and was first recognized by the Supreme Court of Canada in *O'Neil v. Attorney General of Canada*.<sup>13</sup> The *O'Neil* decision cited the English cases mentioned above, as well as other English authority and several American cases upholding acts of *de facto* officers. The Supreme Court ultimately found a warrant issued by a Montreal police chief and magistrate to be valid on the ground that the technical defects in his appointment were insufficient to invalidate it. Strong C.J., would have applied the *de facto* principle in any event:

But even were this not so, and if the appellant's contention that Louis Seraphin Bissonnette is only to be regarded as having been properly qualified to act as a regularly appointed and sworn officer for one year from 1st May, 1885, should be strictly correct in point of law, I should still hold that he *de facto* filled the office of deputy, and that being such *de facto* officer, the proceedings taken by him now impeached are not to be vitiated by reason of his not having annually renewed his oath of office. The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and *a fortiori* to those appointed for the performance of mere ministerial duties such as a head constable.<sup>14</sup>

That same year, a Nova Scotia court used the *de facto* principle, bolstered by references to numerous instances of its use in Britain and the United States, to give *de facto* status to a police constable whose appointment had been defective.<sup>15</sup>

9. *Adnam v. Wilks*, (1827), 6 B. & C. 237, 108 E.R. 441 (K.B.).

10. *The King v. The Corporation of the Bedford Level*, (1805), 6 East, 356, 102 E.R. 1323 (K.B.).

11. (1819), 3 B & Ald. 266, 106 E.R. 661, (K.B.).

12. *Ibid.*, at 271, at 663.

13. (1896), 26 S.C.R. 122 (S.C.C.).

14. *Ibid.*, at 130-1.

15. *The Queen v. James Gibson* (1896), 29 N.S.R. 4 (S.C.N.S. en banc).

Once received into Canadian law, this doctrine was applied in a number of early 20th century cases. Three such cases dealt with the enforceability of tax rates passed by improperly appointed municipal trustees. The Appeal Division of the New Brunswick Supreme Court, for example, held in *Gunter v. Trustees of School District No. 3, Prince William*,<sup>16</sup> that the acts of *de facto* trustees were binding against taxpayers:

It seems unnecessary to elaborate upon the *de facto* doctrine. Its value is recognized and its application is very general. Many authorities were cited by counsel for defendants. I need refer to only a few.

"The *de facto* doctrine is a rule or principle of law which . . . imparts validity to the official acts of persons who, under color of right or authority . . . exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage. The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coercion, submit to, acknowledge, or invoke the authority assumed by . . . officers, above mentioned:" Constantineau on the De Facto Doctrine, 1910, pp. 3-4.<sup>17</sup>

It seems clear, therefore, that the *de facto* officer doctrine has been widely accepted in Canadian law, and that it will be generally available to save the acts and effects of officers acting in pursuance of linguistically invalid legislation. In addition to the actions of purely administrative or ministerial officers, the doctrine also protects the consequences of others who exercise or rely upon *de facto* responsibilities: judges, administrative tribunals, and corporations. Each of these categories will be considered separately.

### a. Judges and Courts

As mentioned previously, the English courts extended the doctrine to acts of a "judicial character" in the *Margate Pier* case,<sup>18</sup> and the Supreme Court of Canada was prepared to give validity to an exercise of judicial discretion by a Police Magistrate in the *O'Neil* case.<sup>19</sup> Application of the doctrine in other jurisdictions seems to bear out its extension to judicial determinations. An American court, in *Burt v. Winona*,<sup>20</sup> decided that the acts of a Justice were valid, even though the statute which created that judicial office was found to be unconstitutional.

A similar conclusion was reached in two New Zealand cases concerning acts of a judicial nature. In *Re Aldridge*<sup>21</sup> the acts of an improperly appointed Judge were held to be valid, and in *Bilang v. Rigg*,<sup>22</sup> the grant of probate by an official of the High Court of Rhodesia was upheld and he was seen to be a *de facto* officer. It was alleged in *Bilang* that the Assistant Master

16. [1934] 3 D.L.R. 439. (See also *Lowe v. Causton Irrigation District*, [1933] 3 W.W.R. 151 (B.C.S.C.), and *Cudmore v. The Corporation of the District of Salmon Arm* (1936), 51 B.C.R. 280 (B.C.S.C.), which are to the same effect).

17. *Ibid.*, at 442.

18. *Supra* n. 11.

19. *Supra* n. 13.

20. 18 N.W. 285 (Minnesota 1884).

21. (1893), 15 N.Z.L.R. 361 (N.Z.C.A.).

22. [1972] N.Z.L.R. 954 (N.Z.S.C.).

of the Rhodesian High Court had been appointed by the illegal regime then running that country, and had not complied with the requirements of the British Government in taking office. Although the New Zealand Supreme Court found this to be so, it nevertheless upheld a grant of probate made by the Assistant Master, as it was necessary: "... to enforce the existing law on matters which arise from day to day concerning the property of those citizens who are unable to exercise such a right".<sup>23</sup>

The only contrary authority appears to be *Adams v. Adams*,<sup>24</sup> which was an English Probate Division decision refusing to recognize the validity of a divorce decree pronounced by a Judge appointed by the illegal government then in control of Rhodesia. That decision may be a product of the unusual political situation that prevailed concerning Britain's relationship with Rhodesia at the time. In any event, it has not been followed elsewhere. The New Zealand Supreme Court expressly declined to follow *Adams* in the *Bilang* case.<sup>25</sup> The overwhelming weight of authority supports the application of the *de facto* officer doctrine to the acts of judicial officers. In fact, the Supreme Court of Canada expressly stated in its reasons for judgment in the *Manitoba Language Reference*<sup>26</sup> that the doctrine applies to "courts" and "judges".

### b. Administrative Tribunals

A closely related issue is the status of decisions made by administrative tribunals. While there do not appear to be any cases applying the *de facto* officer doctrine to quasi-judicial bodies, logic demands that conclusion, given that the doctrine applies to the acts of both administrative and judicial officers.

### c. Corporations

What is the status of corporations organized under invalid legislation? There are two categories of corporations to consider: those created or registered under general corporations legislation, and those created by virtue of Special Acts of the Manitoba Legislature. Incorporations in the former category raise no special problems, since they are the result of acts by *de facto* public officers acting, in response to applications for incorporation, under the authority of ostensibly valid legislation. As the Supreme Court stated in the *Manitoba Language Reference*,<sup>27</sup> the *de facto* doctrine "recognizes and gives effect . . . to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organized".

The situation of Special Act corporations may appear to be different because of the fact that such corporations derive their existence and powers from private statutes passed for that purpose. It is submitted, however, that Special Act corporations are also protected by the *de facto* doctrine. Although

23. *Ibid.*, at 961.

24. [1970] 3 All E.R. 572.

25. *Supra* n. 22.

26. *Supra* n. 1, at 415.

27. *Ibid.*, at 414.

there are no Anglo-Canadian authorities recognizing *de facto* Special Act corporations, there are ample precedents for doing so from the United States, where it is common to find invalid statutory corporations being accorded *de facto* status. In *United States v. Insurance Companies*,<sup>28</sup> the United States Supreme Court decided that two insurance companies created by *Acts* of an illegal Confederate Legislative Assembly during the Civil War were legitimately created entities with capacity to bring legal action. The *de facto* officer doctrine was relied upon in support of this conclusion.<sup>29</sup> These American authorities may be seen as special instances of the application by United States courts of the *de facto* doctrine to the consequences of irregular legislative acts generally. That broader principle will be discussed next.

## 2. De Facto Laws

Strictly speaking, the *de facto* doctrine does not validate illegalities themselves, but only the *consequences* of acting in good faith in disregard of those illegalities. As the Supreme Court stated in the *Manitoba Language Reference*:

The application of the *de facto* doctrine is, however, limited to validating acts which are taken under invalid authority: it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional laws.<sup>30</sup>

It is important that the final sentence of the above quotation be understood in the context in which it was stated. Taken out of context, it might be thought to mean that the legal consequences of invalid self-executing laws (as opposed to those which authorize a government official to do something) cannot be preserved. Such an interpretation would be mistaken, it is submitted, for two reasons:

- the legal consequences of invalid regulations, which are laws created under statutory authority by public officers, are preserved by the *de facto* officer principle; and
- the legal consequences of statutes are preserved by the doctrine of state necessity, to which the Court referred in a subsequent part of its reasons for judgment.

Each of these reasons will now be addressed.

### a. Regulations

To the extent that regulations authorized public officers to take measures with respect to the legal rights, obligations or other effects of citizens, those rights, obligations and effects have the full protection of the *de facto* officer principle. This is the case for the vast majority of Manitoba's spent or repealed regulations.

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28. 89 U.S. 99 (1874).

29. See: Warren, "Collateral Attack on Incorporation. A. De Facto Corporations" (1907), 20 Harv. L.R. 456; and Field, *The Effect of an Unconstitutional Statute* (1935).

30. *Supra* n. 1, at 414.

To the extent that regulations were self-executing, in the sense that they purported to create or extinguish rights, obligations or effects directly, without the further intervention or assistance of a public officer, the situation may be thought to be different. But, it is submitted that it is not different in substance. The executive and administrative authorities who created the regulations in reliance upon ostensible statutory authority were themselves *de facto* officers. Good faith reliance by Manitobans upon the regulations created by those *de facto* officers will therefore be fully protected by the *de facto* officer principle. While direct Canadian or Commonwealth authority supporting this conclusion does not appear to exist, it follows logically from the nature of the *de facto* officer principle, and it is supported by United States authorities to be discussed below.

It is also supported by academic commentaries on a recent New Zealand case in which the question arose, but was side-stepped by the court. The case was *Ualesi v. Ministry of Transport*<sup>31</sup> which involved New Zealand legislation that required all Ministers of the Crown to be members of the General Assembly. When the government changed, following the 1978 election, Ministers were appointed and began exercising their powers before the General Assembly was called into session. One of the acts done before that date was the creation of certain breathalyzer regulations under ministerial authority bestowed by statute. The legality of the regulations was challenged on the ground that no lawful Minister existed when it was enacted. The Court rejected the challenge, holding that persons newly elected to the General Assembly were 'members', even though the Assembly had not yet met. The commentators, both of whom disagreed with that conclusion, were of the opinion that the challenge to the regulation would nevertheless have failed, since it could be supported as the product of a *de facto* officer.<sup>32</sup>

The *Ualesi* type of situation can be distinguished from the Manitoba situation in one respect: Manitoba's spent and repealed regulations were doubly illegal. Not only were they authorized by invalid unilingual legislation; they were also created in an invalid unilingual manner. It is submitted, however, that this factual distinction ought not to lead to a different legal result. The linguistically invalid manner in which the regulations were expressed was not a new and distinct illegality; it was part and parcel of the same unconstitutional act that invalidated the authority to enact the regulations in the first place. It was the same defective constitutional amendment — the *Official Language Act, 1890*<sup>33</sup> — that purported to authorize *both* the enactment of unilingual enabling legislation and the unilingual expression of regulations. The *de facto* public officers who created regulations in English did so in compliance with ostensibly valid legislation.

#### **b. Statutes: State Necessity**

Preservation of the legal consequences of constitutionally invalid statutes presents a somewhat different question than the case of regulations. It is submitted that the result is nevertheless the same. The doctrine of state necessity requires that rights, obligations and other effects flowing from

31. [1980] 1 N.Z.L.R. 575 (N.Z.H.C.).

32. F.M. Brookfield, "On Dissolved Houses and De Facto Ministers: Ualesi's Case" (1981), 9 N.Z.U.R. 379; P.A. Joseph, "The Startling Reality - Toward Unconstitutional Government", [1981] N.Z.L.J. 26.

33. S.M. 1890, c.14.

unconstitutional statutes should be preserved. It also removes any lingering doubt as to the validity of the consequences of unconstitutional regulations.

Considerations of necessity exercise an omnipresent influence in every legal system. At the most fundamental level, it is the necessity for an ordered society that underlies the 'rule of law' and all positive legal arrangements based upon it. In the *Manitoba Language Reference* the Supreme Court put it this way: "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life."<sup>34</sup>

Because of the imperfection of all human institutions, the principle of necessity must also play a continuing 'stand-by' role in even fully mature legal systems, permitting them to accommodate unexpected developments. To a considerable extent, this 'saving' power of necessity is normally exercised through doctrines and procedures already built into the system. The *War Measures Act*,<sup>35</sup> and Parliament's power to deal with national emergencies by means of its jurisdiction over "peace order and good government" are illustrations. Many of the 'saving' measures that are now built into the system — such as the necessity defence in tort law and the *de facto* officer doctrine discussed above — are no doubt the products of crises encountered in years gone by.

Occasionally, necessity requires the development of an altogether new legal principle to deal with an unprecedented situation. The Court's ruling in the *Manitoba Language Reference*, that unconstitutional laws can be given temporary validity for a period of time sufficient to remedy the defect, is an example. Another is the House of Lords' ruling in 1966 that, in spite of its past decisions to the contrary, it would henceforth be empowered to overrule its own previous decisions.<sup>36</sup>

It is submitted that the extraordinary circumstances created by the judicial declaration that 95 years' statutes and regulations in Manitoba are unconstitutional fully justify the recognition, on the basis of state necessity, of the legal principle that rights, obligations and other effects flowing from good faith reliance upon ostensibly valid statutes have the same *de facto* validity as those that flow from the actions of *de facto* public officers. Strong support for that conclusion can be found in British and Canadian constitutional history, in the extension of the *de facto* principle to laws by the Supreme Court of the United States, and in the recognition by the Supreme Court of Canada of the 'state necessity' principle in the *Manitoba Language Reference* itself.

The readiness of the Anglo-Canadian legal system to accept the *de facto* validity of insurrectionary regimes where necessity requires it is long-standing. It plays a role in the recognition of new foreign governments, of

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34. *Supra* n. 1, at 408.

35. R.S.C. 1970, c.W2.

36. Statement July 26, 1966: [1966] 3 All E.R. 77.



course, but it has always been available, when needed, to repair irregularities in the domestic legal system as well. As Professor Hogg has pointed out:

Even the United Kingdom has had breaks in legal continuity: in 1649, when Charles I was executed and the Commonwealth was established under Cromwell; in 1660, when the Stuarts were restored to the throne; and in 1689, when William and Mary assumed the throne under the Bill of Rights.<sup>37</sup>

Those irregularities were all apparently disregarded, for practical purposes, by the English courts. Sir Ivor Jennings described their aftermath as follows:

... judges, as sensible men, acquiesced in the assumption of power by the Long Parliament, the restoration of Charles II, the accession of William and Mary under the Bill of Rights, and the accession of the Hanoverians under the Act of Settlement. . . . If the judges had wished, they could have questioned all the Acts and Ordinances of the Long Parliament which did not receive the Royal Assent, all the Acts of the Parliaments of Charles II and James II because the Long Parliament had never lawfully been dissolved, and all the Acts of Parliament since 1688 because no Parliament since then has been summoned by a King lawfully entitled under the law as understood by Coke. They never did. . . .<sup>38</sup>

Canada has occasionally experienced similar situations of *de facto* government by illegal or irregular regimes. In Manitoba's case the two most noteworthy instances of *de facto* government involved: (a) Manitoba's exercise of jurisdiction over a large disputed territory east of its present easterly boundary between 1881 and 1884, when the Privy Council recognized Ontario's jurisdiction;<sup>39</sup> and (b) Louis Riel's illegal Provisional Governments, which administered part of what is now known as Manitoba between November, 1869, and August 24, 1870.

The Riel Provisional Governments made laws, maintained order, appointed judges, and administered justice during the period when they were in *de facto* control of the area. A fuller description of their governmental activities will be found in the Appendix to this article. When properly constituted authorities took over the government of the province, after August, 1870, all non-insurrectionary governmental acts done by the Riel regime appear to have been respected. Licences, laws and office-holders appear to have been left in place until the new authorities were able to replace them. No known claims of legal liability were ever advanced with respect to ordinary acts of purported judicial or governmental authority carried out by members of this *de facto* regime.

In the United States, where even more dramatic examples of *de facto* governmental and legislative activities took place in the southern Confederate States during the Civil War, claims of illegality were advanced after the war, but they were, in the case of normal, non-revolutionary activities, rejected by the Supreme Court of that country. The Court was faced with a situation parallel to that of Manitoba today. A sizeable body of statute laws, most of it relating to the normal regulation of everyday life, had been enacted by illegal legislatures. If the consequences of these statutes were

37. *Constitutional Law of Canada* (2nd ed. 1985) 104.

38. *The Law and the Constitution* (5th ed., 1959) 159.

39. See: C. Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (1981) 14, ff.

not preserved, legal disruption would have resulted. The Supreme Court avoided that consequence by recognizing, in a series of decisions, that the principle of state necessity required an extension of the *de facto* principle to preserve the rights, obligations and other effects of unconstitutional statutes.

The first such decision was rendered in *Texas v. White*.<sup>40</sup> It concerned the validity of Treasury Bonds which had not been signed by the Texas Governor, the insurgent Confederate government having abolished the requirement for his signature. The Supreme Court ruled the Confederate government and all of its Acts to be void and illegal. It was acknowledged, however, that it was the only 'actual' government existing in the State, and, therefore, that some of its Acts were effectual:

It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.<sup>41</sup>

While the bonds in this particular case, and the Confederate *Act* validating them, were ruled invalid, the general principles expressed by the Court were applied, and somewhat refined, in a number of subsequent decisions, many of which held Acts of the Confederate Legislature, and citizens' reliance upon those Acts, to be valid.

The Confederate governments were referred to as '*de facto*' governments. Comparisons to the *de facto* officer principle, then recognized in the United States and Britain, were implicit in the earlier decisions and became explicit in *United States v. Insurance Companies*.<sup>42</sup> This case involved the status of two insurance companies created by *Acts* of a Confederate Legislature. In holding the corporations and their enabling statutes to be valid, the United States Supreme Court summarized its earlier decisions, and said:

But it does not follow from this that it was not a legislature, the acts of which were in force when they were made, and are in force now. If not a legislature of the State *de jure*, it was at least a legislature *de facto*. It was the only law-making body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States. Now, while it must be held that all their acts in hostility to that Constitution, or to the Union of which the State was an inseparable member, have no validity, no good reason can be assigned why all their other enactments, not forbidden by the Constitution, should not have the force which the law generally accords to the action of *de facto* public officers.<sup>43</sup>

The Court then went on to discuss the traditional *de facto* officer doctrine. It is clear that its recognition of the legislative actions of unconstitutional governments was seen as an extension of that principle.

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40. 74 U.S. 700 (1868).

41. *Ibid.*, at 733.

42. *Supra* n. 28.

43. *Ibid.*, at 101.

The American Civil War cases were addressed at length by the Judicial Committee of the British Privy Council in relation to a constitutional crisis in Southern Rhodesia, the former British colony now known as Zimbabwe. While Rhodesia was still technically a colony, Ian Smith's government issued a declaration of unilateral independence, in contravention of the existing Constitution. During the succeeding years the Smith government passed its own purported constitution, and its Legislature enacted much legislation. The Judicial Committee of the Privy Council was asked to rule in *Madzimbamuto v. Lardner-Burke*<sup>44</sup> on the validity of this government and regulations made under its auspices. Rhodesia's own courts had found the government to be a *de facto* entity and had upheld the regulations.<sup>45</sup>

The Privy Council reviewed the American Civil War cases and labelled them 'state of necessity' decisions, apparently ignoring the *de facto* principles expressed in them. A majority of the Privy Council found the government in Rhodesia to be unconstitutional. They refused to recognize the *de facto* validity of the Smith regime or its laws because they felt that the ability of the United Kingdom Parliament to legislate for the colony meant that there was no legal void, and no 'necessity'.

Lord Pearce, in dissent, relied on the American case law to support his view that although the Smith government was illegal, many of its laws had *de facto* validity. He restated the test found in *Texas v. White*:

I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, i.e., (c) is tantamount to a test of public policy.<sup>46</sup>

He found that the majority of Acts passed by the illegal government would meet these guidelines, and that a wide application of *de facto* validity would therefore be possible.

It should be noted that the majority of the Privy Council in *Madzimbamuto* did not reject the *de facto* motion; it simply held that there was not a sufficiently pressing necessity to involve it. Nor did they deny that it is sometimes necessary to recognize the *de facto* validity of invalid laws. They simply did not agree with the dissenter, Lord Pearce, that there was a sufficient necessity to do so in the particular circumstances.

The Supreme Court of Canada recognized the doctrine of state necessity, and of its role in preserving the legal consequences of reliance on unconstitutional laws, in *Manitoba Language Reference*:

Necessity in the context of governmental action provides a justification for otherwise illegal conduct of a government during a public emergency. In order to ensure rule of law, the courts will recognize as valid the constitutionally invalid Acts of the legislature. According

44. [1969] 1 A.C. 645.

45. See: F.M. Brookfield, "The Courts, Kelsen and the Rhodesian Revolution" (1969), 19 U.T.L.J. 326. See also: *R. v. Ndhlovu*, [1968] 4 S.A. 515 (Rho. App. Div.).

46. *Supra* n. 44, at 732.

to Professor Stavsky, "The Doctrine of State Necessity in Pakistan" (1983), 167 Cornell Int. L.H. 341, at p. 344: "If narrowly and carefully applied, *the doctrine constitutes an affirmation of the rule of law*".

The courts have applied the doctrine of necessity in a variety of circumstances. A number of cases have involved challenges to the laws of an illegal and insurrectionary government. In the aftermath of the American Civil War, the question arose as to the validity of laws passed by the Confederate States. The courts in addressing this question were primarily concerned with ensuring that the rule of law be upheld. The principle which emerges from these cases can be summarized as follows: During a period of insurrection, when territory is under the control and dominance of an unlawful, hostile government and it is therefore impossible for the lawful authorities to legislate for the peace and good order of the area, the laws passed by the usurping government which are necessary to the maintenance of organized society and which are not in themselves unconstitutional will be given force and effect: see *Texas v. White*, 74 U.S. 700, 19 L. Ed. 227 (1869); *Horn v. Lockhart*, 84 U.S. 570, 21 L. Ed. 657 (1873); *U.S. v. Ins. Cos.*, 89 U.S. 99, 22 L. Ed. 816 (1875); *Baldy v. Hunter*, 171 U.S. 388, 43 L. Ed. 208 (1898).

The general principles and concerns which underlie these cases are best stated by Mr. Justice Field in *Horn v. Lockhart*, at pp. 580-81 [p. 660 L. Ed.]:

"We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution."<sup>47</sup>

The Court then made reference to the *Madzimbamuto* decision, leaving little doubt that it preferred the approach of the dissenter, Lord Pearce.<sup>48</sup>

It must be acknowledged that this recognition of state necessity was for the limited purpose of according temporary validity to unilingual laws, and that the Court found the cases cited not to be 'directly' applicable to the larger question addressed in this article:

It should be noted that neither the American cases on necessity, nor the comments of Lord Pearce in *Madzimbamuto*, can be applied directly to the present case. All of these cases are concerned with insurrectionary governments; the present case is not. But even more fundamental than this distinction is the fact that all of these cases require that the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the Constitution. In the present case, the laws in question *do* impair these rights.<sup>49</sup>

It is submitted, however, that neither of the grounds for distinction mentioned in this passage precludes a recognition, on the ground of state necessity, of the *de facto* validity of rights, obligations and other effects arising from spent or repealed unilingual statutes of Manitoba.

As to the first ground of distinction — that the Manitoba governments that enacted these laws were not insurrectionary — it is submitted that if

47. *Supra* n. 1, at 416-7.

48. *Ibid.*, 417-8.

49. *Ibid.*, 418.

the legal consequences of the laws of a revolutionary government can be accorded *de facto* validity, *a fortiori*, those of a peaceful and democratically elected government should also be so treated. On a scale of governmental irregularity, with unauthorized acts by government officials at one end, and revolution at the other, the linguistic invalidity of Manitoba's laws would fall somewhere in the middle. It would make neither logical nor common sense to hold that the consequences of the two forms of illegality at the opposite ends of the scale can be given *de facto* validity, but that those in the middle cannot. This conclusion finds support in the fact that the Court, after reference to cases from Cyprus and Palestine in which revolutionary regimes were not involved,<sup>50</sup> applied the state necessity principle, in conjunction with the 'rule of law', to grant temporary validity of Manitoba's unconstitutional laws.

The second basis suggested by the Court for distinguishing the American *de facto* law cases — "that the laws saved by the application of the doctrine not impair the rights of the citizens guaranteed by the Constitution" — would certainly preclude the use of the doctrine to preserve the validity of *current* unilingual laws, but it is submitted that it does not affect the application of the doctrine to protect most of the rights, obligations and other effects based upon *spent or repealed* laws. The essence of the constitutional right in question is the citizen's right of *access to the law* in both English and French. It would clearly impair that right to preserve current unilingual laws. It would not impair that right, however, merely to preserve the *legal consequences* of past laws that no longer exist and are, therefore, incapable of access in either language. The only consequences of past laws whose preservation would impair constitutional language rights would be those flowing from statutes like the *Official Language Act, 1890*, which provisions affect language rights directly.

It is submitted, therefore, that the basic principle of necessity, which underlies the *de facto* officer doctrine, has been extended by the United States Supreme Court to the situation of *de facto* laws, and has been similarly extended by this Court for the purpose of granting temporary validity to unconstitutional statutes, should be extended further for the purpose of preserving rights, obligations and other legal effects arising from spent or repealed unilingual Manitoba statutes.

Necessity must be demonstrated, of course. And since, in Milton's words, necessity is "the tyrant's plea", the onus lies on the Government of Manitoba to provide a convincing demonstration of necessity. It is submitted, however, that the necessity of preserving the supposed effects of past legislation is more than amply demonstrated by the facts that:

- (a) An infinitely complex network of supposed legal rights, obligations and other effects, affecting virtually every person in Manitoba and many others, is rooted in spent or repealed unilingual statutes and regulations of the province;

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50. *Ibid.*, at 418-422.

- (b) while many, probably most, of those legal consequences will be preserved by bilingual re-enactment of all Manitoba's public statutes since 1970, along with the other measures in Manitoba's compliance plan, it is likely that some consequences would not be preserved by such measures, and it is impossible to foresee fully the nature or extent of the consequences that would escape protection; and
- (c) the expenditures of time, energy and money that would be required to preserve those few unpreserved legal consequences by translating, re-enacting, printing and publishing all the rest of Manitoba's spent and repealed unilingual legislation would be prohibitive.

It is submitted, in short, that the undeniable need to ensure that the supposed legal *status quo* is preserved, coupled with the utter impracticability of bilingually re-enacting all of Manitoba's spent and repealed laws enacted between 1890 and 1970, constitutes an overwhelming state necessity to recognize the legal validity of rights, obligations and other effects flowing from Manitoba's pre-1970 unilingual legislation.

It should be noted that although reference is made to 'state' necessity, the primary need is not that of government. It is a need of those innocent *citizens* whose rights are involved, and who do not have it in their power to re-enact or alter the laws. From their perspective the necessity is altogether unavoidable. It should also be noted that the necessity is one that is shared equally by all Manitobans; the invalidity of spent and repealed unilingual legislation affects the legal rights, obligations and other effects of Anglophones and Francophones identically.

### 3. *Res Judicata*

Another principle by which many pre-existing rights and obligations may be preserved is *res judicata*. After the appeal process has been exhausted, or the appeal period has expired, the decisions of courts are final and binding, even if it should be discovered subsequently that the decision was legally defective for some reason.<sup>51</sup> The doctrine has twin rationales: (a) to protect the individual from multiple legal proceedings for the same matter; and (b) to ensure, as a matter of public policy, that there is a finality to the judicial process.<sup>52</sup> As the Supreme Court said in the *Manitoba Language Reference*: "Res judicata would preclude the re-opening of cases decided by the courts on the basis of invalid laws".<sup>53</sup>

The doctrine validates not only past convictions and sentences for provincial offences, and civil awards in tort, contract and property matters, but also other arrangements requiring judicial determination: grants of probate and administration in testamentary matters,<sup>54</sup> adoption orders,<sup>55</sup> and so on.

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51. *Re Blackwell* (1962), 34 D.L.R. (2d) 369 (Ont. C.A.).

52. See generally Spencer-Bower & Turner, *Res Judicata*, (2d ed., 1969).

53. *Supra* n. 1, at 415.

54. *Supra* n. 52, at 230; *Dickson v. Dickson* (1920), 53 N.S.R. 365 (N.S.C.A.).

55. *Supra* n. 52, at 30.

It applies as well to quasi-judicial decisions by arbitrators<sup>56</sup> and by administrative tribunals.<sup>57</sup> While *res judicata* is not applicable to purely administrative decisions, the *de facto* officer principle would cover such situations.

*Res judicata* applies only to tribunals having jurisdiction over the matters in question.<sup>58</sup> Since all Manitoba tribunals whose jurisdiction was based on invalid provincial legislation can be said for that reason to lack jurisdiction over past disputes, it may be contended that *res judicata* is not, strictly speaking, available to preserve their decisions. However, as indicated above, the *de facto* doctrine can be relied on to vest courts and other tribunals with sufficient jurisdiction to support *res judicata*. The Supreme Court of Canada included rights, obligations and other effects arising from the decisions of courts and judges among those which it described as "enforceable and unassailable" in the *Manitoba Language Reference*.<sup>59</sup>

#### 4. Mistake of Law

The Supreme Court also indicated in its decision that: "the doctrine of mistake of law might, in some circumstances, preclude recovery of moneys paid under invalid laws".<sup>60</sup> While there is currently considerable doubt about the status and significance of this doctrine, it is submitted that it can play a useful 'saving' role with respect to linguistically invalid Manitoba legislation.

The earlier law was quite firm. If a person paid money to another under a mutually mistaken belief that there was a legal obligation to make the payment, the courts would not order its return.<sup>61</sup> Nor would they allow recovery of taxes or other charges paid under *ultra vires* taxing measures, or other unauthorized demands, unless the payments were made under protest.<sup>62</sup> The law also precluded recovery of property sold without protest to officials pursuant to a legally invalid demand, on the ground that the sale was voluntary.<sup>63</sup>

There are signs in recent cases of a shifting judicial attitude toward these types of situations. The Judicial Committee of the Privy Council held in *Kiriri Cotton Co. Ltd. v. Dewani*<sup>64</sup> that the mistake of law defence does not apply unless the parties were *in pari delicto*; if the defendant was more to blame for the error than the plaintiff, recovery is possible. The Supreme Court of Canada accepted and applied this variation of the principle, by a

56. *Supra* n. 52, at 27; *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4, at 10 (C.A.); *Re Canada Permanent Trust Co. & Orvette Investments Ltd.* (1976), 11 O.R. 752 at 756 (Ont. C.A.).

57. *Halsbury's Laws of England* (4th) "Estoppel," para. 1565 & 1568. Lord J. of the British Columbia Supreme Court held to the contrary in *Re Fernie Memorial Hospital & Duthie* (1963) 42 W.W.R. 511, but the decision seems contrary to both authority and principle.

58. *Grant v. MacLaren* (1894), 23 S.C.R. 310 (S.C.C.); *Toronto Railway Co. v. Corporation of the City of Toronto*, [1904] A.C. 809 (P.C.).

59. *Supra* n. 1, at 414-5.

60. *Ibid.*

61. *Billie v. Lumley* (1802), 2 East. 469, 102 E.R. 448 (K.B.); *Brisbane v. Dacres* (1813), 5 Taunt. 143, 128 E.R. 641 (C.C.P.).

62. *Hancouver Growers Ltd. v. Snow Ltd.*, [1937] 4 D.L.R. 128 (B.C.C.A.); *Nepean Hydro v. Ontario Hydro*, [1982] 1 S.C.R. 347 (S.C.C.).

63. *McClintock v. The Commonwealth* (1947), 75 C.L.R. 1 (Aust. H.C. 2 of a 3 judge majority).

64. [1960] A.C. 192.

three to two majority, in *Eadie v. Township of Brantford*.<sup>65</sup> In the same case the Supreme Court also held that the mistake of law principle does not apply where the plaintiff's 'voluntary' payment was compelled in some way, including by "[a] practical compulsion created by urgent and pressing necessity".<sup>66</sup> A five judge panel of the Supreme Court had unanimously applied the compulsion exception in less necessitous circumstances and had also held that a mutual mistake by the plaintiff and a city employee as to the *existence* of an authorizing by-law constituted a mistake of *fact* (for which recovery is possible) rather than of law.<sup>67</sup> Professor Hogg, commenting on the trend of these cases observed that the effect of the old rule "has little intuitive appeal, and the courts have struggled to find ways of finding for the taxpayer".<sup>68</sup>

In *Nepean Hydro v. Ontario Hydro*,<sup>69</sup> which was the most recent decision of the Supreme Court of Canada applying the mistake of law doctrine, two of the five judges joined in a dissent, written by Dickson J., and called for a forthright acknowledgement that the distinction between mistake of law and mistake of fact had lost its usefulness. Nevertheless, even if the dissent in *Nepean* should become the law of the future, there is reason to believe that the doctrine of mutual mistake would not require *bona fide* levies collected under linguistically invalid statutes to be repaid or public funds expended on behalf of citizens to be refunded. Dickson J. asserted that money illegally paid should be returned if it would be unjust to retain it; the guiding factors should be "equity", "honesty" and "common justice". While there would, under these guidelines, be many occasions when unconstitutional levies should be returned, the current Manitoba situation is not one of them.

The unconstitutional factor — unilingual legislation — is a matter having no direct impact on the nature of the levy, or its collection, or the use of the proceeds. The illegality does not operate in a discriminatory way against any particular group of taxpayers; it affects everyone. The proceeds were used for appropriate governmental purposes by governments that were accepted as legitimate by everyone. Repayment to former taxpayers would require massive levies against present taxpayers, which would be wasteful to the extent that the same people were involved, and unjust to the extent that different people were involved. 'Common justice' would demand preservation of the *status quo*. It would appear, therefore, that whatever form the 'mistake of law' principle may take in future, it will not require the repayment of moneys paid in compliance with linguistically invalid legislation.

## 5. Restitution

While the 'mistake of law' principle would protect past conduct on the part of public authorities by *denying* restitution in certain circumstances, there are also situations in which restitution law would provide *positive protection* to supposed pre-existing rights. In the case of *Breckenridge*

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65. (1967), 63 D.L.R. (2d) 561.

66. *Ibid.*, headnote.

67. *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*, [1964] S.C.R. 326.

68. *Supra* n. 37, at 349.

69. *Supra* n. 62.



*Speedway Ltd. v. The Queen*,<sup>70</sup> a debtor attempted to avoid repayment of a loan by suing for the rescission of the contract on the ground that the legislation authorizing the loan was unconstitutional. The Supreme Court of Canada rejected the claim and upheld the plaintiff's counterclaim for repayment, holding that even if the statute were unconstitutional, there would be a restitutionary obligation to return the money: "[I]rrespective of the constitutional validity of the Act, the plaintiffs were under a legal obligation to pay back the funds of the defendant which they had received".<sup>71</sup>

## 6. Internal Defences

As Professor Hogg has pointed out,<sup>72</sup> the invalidity of a statute could only lead to liability if the unauthorized act complained of would constitute a tort or other legal wrong in the absence of statutory authorization. He refers to two Australian cases<sup>73</sup> in which liability was denied because the elements of common law torts could not be established.

Another good example, also cited by Hogg, is *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*,<sup>74</sup> in which the Supreme Court of Canada denied liability for intimidation on the part of government authorities who threatened the plaintiff with cancellation of a mineral lease in order to induce compliance with a statutory requirement that was ultimately held to be unconstitutional. Good faith reliance on what appeared to be the law deprived the defendants of the state of mind necessary to constitute the tort. In many other situations where someone might foreseeably wish to sue with respect to an act done on the basis of an invalid statute, similar 'built-in' defences would be available.

## 7. Special Immunities

The law also provides legal immunity for certain governmental and quasi-governmental activities. The immunity of governmental authorities for torts arising from 'policy' decisions would offer considerable protection, for example.<sup>75</sup> The immunity of judges, arbitrators, witnesses, and others who take part in judicial or quasi-judicial proceedings would also provide a defence to some foreseeable challenges.<sup>76</sup> If *The Proceedings Against the Crown Act*<sup>77</sup> were not in force with respect to the time at which some complained-of governmental act took place, the Crown would not be subject to any liability for tort, since there was none at common law.<sup>78</sup>

70. (1970), 9 D.L.R. (3d) 142 (S.C.C.).

71. *Ibid.*, 146.

72. *Supra* n. 37, at 349.

73. *James v. The Commonwealth* (1939), 62 C.L.R. 339 (Aust. H.C.); *supra* n. 63.

74. [1979] 1 S.C.R. 42.

75. *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg* (1972), 22 D.L.R. (3d) 470 (S.C.C.); *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.); *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co. Ltd.* (1973), 36 D.L.R. (3d) 413 (S.C.C.); *Barratt v. North Vancouver* (1981), 114 D.L.R. (3d) 577 (S.C.C.).

76. *Dicas v. Lord Brougham* (1833), 6 Car. & P. 249, 172 E.R. 1228 (K.B.); *Trapp v. Mackie*, [1979] 1 All E.R. 489 (H.L.).

77. C.C.S.M., c.P140.

78. See: *supra* n. 37, at 221 and Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971).

## 8. Conclusion

When the combined effect of the various saving doctrines considered above, and others that would undoubtedly come to mind in the face of particular fact situations, are taken into account, it is difficult to conceive of circumstances in which rights, obligations and other effects flowing from good faith reliance on the validity of past Manitoba laws would be altered by the ruling that such laws were unconstitutional. However, since it is impossible to foresee all ramifications of Manitoban's individual legal arrangements, it would be unwise to rely solely on the saving doctrines, and the Manitoba Government has not proposed to do so. By undertaking to translate and re-enact all public statutes back to and including the *Revised Statutes of Manitoba, 1970*, the Government has made available a second form of protection for established rights: *The Limitation of Actions Act*.

### B. Limitation of Actions

*The Limitation of Actions Act*,<sup>79</sup> and the other statutory limitation legislation listed in Schedule A of that *Act*, can play a large role in reducing the legal disruptiveness of the ruling that spent and repealed unilingual legislation was invalid. For most causes of action the limitation period is six years or less, though for some matters, chiefly related to real property, it is ten years. Periods longer than ten years are very rare. Since the current versions of many legislative provisions are older than the limitation period that would apply to an action based on invalidity of earlier versions, bilingual re-enactment of the *Revised Statutes of Manitoba, 1970*, and all subsequent public statutes would ensure that most potential actions would be statute-barred.

Traditionally, limitation legislation extinguished only the procedural right to sue, not the substantive rights in question. This left open the possibility of self-help remedies, or reliance on the substantive right as a defence to litigation by others. However, in the case of property rights, and matters related to them, sections 54 and 55 of Manitoba's *The Limitation of Actions Act* extinguish the substantive right as well. With respect to real property, this was confirmed in *Re Zurbyk and Orloff*,<sup>80</sup> *Pukacz v. Wyrzykowski*,<sup>81</sup> and *Fletcher v. Storoschuk*.<sup>82</sup> With respect to personal property, subsection (55(2)) has also been interpreted to extinguish substantive rights: *St. Vladimir College v. Champs Take Home Ltd.* where Nitikman J. said:

In my opinion, the basic purpose of s.55, particularly subs. (2), is to quiet title to a wrongfully converted chattel so that after the prescribed period of six years not only is the owner's action for the wrongful conversion extinguished but so is his title to the chattel in question.<sup>83</sup>

Limitation legislation does not result in total preservation of the legal situation prior to the stated periods, however. In certain cases of continuing wrongs, such as nuisances, the commencement of the period continues until

79. C.C.S.M., E. L150.

80. (1959), 28 W.W.R. 584 (Man. Q.B.).

81. (1967), 59 W.W.R. 180 (Man. Q.B.);

82. (1981), 128 D.L.R. (3d) 59 (Ont. C.A.).

83. [1975] 3 W.W.R. 83, at 85 (Man. Q.B.).

the most recent instance of wrongdoing. (This is not the case with wrongful possession of land, however, where the period runs from when the cause of action *first* accrued: section 26; and in the case of nuisance there is a twenty year 'prescription' period.) It is also true that the extinguishment of substantive rights under section 54 and section 55 applies only to property rights. While self-help is difficult to imagine with respect to intangible rights, and many intangible rights constitute property in any event, there may possibly be occasional situations involving rights of status, etc., in which the invalidity of past legislation may have current ramifications. These would be rare, however. Finally, there are a few circumstances in which limitation periods may be extended by reason of the minority or disability of the plaintiff (section 9), or of the existence of unknown material facts (section 15). Such extensions are subject to an ultimate limitation period of thirty years.

### C. Legislative Validation

The combined effect of the 'saving doctrines' and *The Limitation of Actions Act* will provide legal protection for the vast majority of rights, obligations and other effects of Manitoba's linguistically invalid legislation. It is possible that they will *all* be protected. But what if this conclusion is mistaken? Suppose that the courts give a narrower scope to the 'saving doctrines' or to the limitations legislation than is suggested above. Or that an unforeseeable situation arises to which neither the 'saving doctrines' nor the limitation legislation is applicable. Is there any other method by which rights could be protected from invalidity?

The authors believe that there is. Even if the other shields do not provide total protection in their present form, there is a substantial possibility that they could be expanded to do so by retroactive legislation.

The argument in support of that conclusion is based upon the undoubted facts that:

- (a) *De facto, res judicata*, and the other 'saving doctrines' are principles of common law, subject to legislative variation like all other such principles;
- (b) provincial legislatures have the constitutional jurisdiction under subsection 92(13) of the *Constitution Act, 1867*, to legislate in the area of "property and civil rights"; and
- (c) apart from provisions of the *Canadian Charter of Rights and Freedoms*, which will be discussed later, there is no constitutional prohibition against retroactive legislation.

Strong support for the legitimacy of legislation retroactively validating the consequences of unconstitutional conduct can be found in *Trustees of The Roman Catholic Separate Schools for the City of Ottawa v. Quebec Bank*,<sup>84</sup> a decision of the Judicial Committee of the Privy Council in a case

somewhat similar to the present situation. After the refusal of certain separate school trustees to abide by regulations of the provincial Department of Education, the Ontario Legislature passed a statute removing the trustees from office and replacing them with a Board of Commissioners. The Commissioners proceeded to administer the school district and to spend district funds and incur debts in the course of doing so. Meanwhile, the trustees challenged the constitutionality of the legislation by which they were removed, and they succeeded in having the Privy Council declare the statute *ultra vires* on the ground that it 'prejudicially affected' the rights of separate school supporters under section 93 of the *Constitution Act, 1867*. The triumphant trustees then sought the return of the money expended by the Commissioners for admittedly *bona fide* school district purposes. To protect the Commissioners and the district's bank from liability in this regard, the Ontario Legislature passed a retroactive statute validating the expenditures. The constitutionality of this second statute was again challenged before the Privy Council, but this time it was held to be a valid exercise of the Legislature's jurisdiction over "civil rights".

If that were the only authority available, the matter might seem beyond doubt. There are more recent decisions of the Privy Council and of the Supreme Court of Canada, however, that are capable of a contradictory interpretation. The principal Supreme Court case is *Amax Potash Ltd. v. Government of Saskatchewan*,<sup>85</sup> an interlocutory proceeding against a provincial government by a company for the return of what it claimed to be an unconstitutional tax, paid in protest. The Government raised in defence a provision of *The Proceedings Against the Crown Act* to the effect that the Crown was immune from suit for the consequences of unconstitutional legislation, and in this decision the Court held the provision to be *ultra vires*. Dickson J. stated, on behalf of the Court, that to permit the provision to operate "would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens".<sup>86</sup> He went on to say:

The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the Legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a State cannot take by unconstitutional means it cannot retain by unconstitutional means.<sup>87</sup>

This statement, read out of context, might lead one to the conclusion that the type of affirmatory legislation proposed herein would be unconstitutional.

An authority upon which the Supreme Court placed heavy reliance in the *Amax* case was a Privy Council decision in an Australian case: *Commissioner for Motor Transport v. Antill Ranger & Company Ltd.*<sup>88</sup> In that case a constitutional challenge was made to a New South Wales statute

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85. (1977), 71 D.L.R. (3d) 1. (S.C.C.).

86. *Ibid.*, 10.

87. *Ibid.*, 12.

88. [1956] A.C. 527.

that attempted retroactively to prevent recovery from the State of transport mileage charges that had been held by the Privy Council in an earlier case to have been unconstitutional. The statute purported to bar any legal proceeding for the recovery of the charges against the State or anyone acting on its behalf. It was held to be *ultra vires*. Viscount Simonds stated for the Judicial Committee:

Neither prospectively nor retrospectively . . . can a State law make lawful that which the Constitution says is unlawful. . . . [I]f the imposition of charges in respect of inter-State trade is invalid . . . it is . . . equally an offence to deny the right to recover them after they have been unlawfully enacted.<sup>89</sup>

No reference was made by the Privy Council to its earlier decision in the *Ottawa School Trustee* case, but the Supreme Court of Canada referred to and distinguished that case in *Amax*. Unfortunately, some of the grounds upon which Dickson J. suggested that the case could be distinguished are difficult to understand in terms of constitutional principles. He pointed out that the *Ottawa* case “was not concerned with federal-provincial division of powers nor with the assertion by a Province of a right to retain moneys exacted illegally and under protest”.<sup>90</sup> If these really were the key grounds for distinguishing the case, the legislation we are proposing would be equally distinguishable. One should be cautious about leaping to that conclusion, however. As Mr. Justice Dickson himself noted, the legislation in question in that case was also much broader than a mere tax-recovery denial statute.<sup>91</sup> It is, moreover, difficult to understand why the constitutional prohibition against self-immunity for unconstitutional acts should apply where the division of powers is concerned, but not where individual constitutional rights are concerned. B.L. Strayer’s book, *The Canadian Constitution and the Courts*, notes these points and concludes that the case’s “full implications are not yet clear”.<sup>92</sup>

There are, however, two other, more satisfactory, grounds for distinguishing the *Ottawa School Trustees* case, as well as the present situation, from both *Amax* and *Antill*. In the first place, the legislation involved in *Amax* and *Antill* was aimed at protecting the *governments themselves* — the constitutional wrongdoers — from the consequences of their own illegal actions. Dickson J. made a point of commenting in the *Amax* decision that it concerned only the part of the legislation in question that related to the liability of the Crown itself.<sup>93</sup> The *Antill* legislation included reference to persons acting on the Crown’s behalf, but its basic thrust was unquestionably to shield the Crown. In both the *Ottawa School Trustee* case and the present situation the main point of the statute was and would be to protect *innocent third parties* who relied on the ostensible validity of the legislation in question.

An even more satisfactory basis for distinction (which Dickson J. may have intended by noting the “striking difference in the factual position”

89. *Ibid.*, at 536-7.

90. *Supra* n. 85, at 13.

91. *Ibid.*, 10.

92. (1983) 94-5.

93. *Supra* n. 85, at 5.

between *Amax* and the *Ottawa School Trustees* case<sup>94</sup>) is the fact that in *Amax* and *Antill* the 'saving' legislation related to the essence of the constitutional violation, and attempted, in effect, to ratify the violation itself. In the *Ottawa* case, on the other hand, the constitutional violation had been substantially remedied, and the purpose of the statute was simply to protect those who had acted properly in innocent reliance on an apparently valid law. The sole question to which the Privy Council directed its attention in that case was whether the saving legislation "prejudicially affected" the education rights of the separate school supporters. It held that it did not:

They are now restored — that legislation having been held to be ultra vires — but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools.<sup>95</sup>

It appears, therefore, that neither the *Amax* case nor the *Antill* case would stand in the way of legislation validating the consequences of good faith reliance on past unilingual legislation.

Objections based on the *Canadian Charter of Rights and Freedoms*<sup>96</sup> might be raised to retroactive legitimation of prior legal proceedings and consequences, especially where offences and penalties were concerned. Such objections would not be supportable, however.

The only express reference to retroactive laws in the *Charter* are in subsections 11(g) and 11(i), which state that

Any person charged with an offence has the right . . .

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

. . .

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

It might also be argued that section 7 of the *Charter*, which prohibits deprivations of "life, liberty and security of the person" other than those that are in accordance with "principles of fundamental justice", implicitly contains an additional and more general restriction on retroactive laws. Neither section 11 nor section 7 would be likely to affect the type of retroactive legislation proposed here.

Since the *Charter* is not retroactive itself,<sup>97</sup> it cannot apply directly to events that occurred before it came into force on April 17, 1982. It would

94. *Ibid.*, 13.

95. *Supra* n. 84, at 237. The point being made here is also made by Strayer, *supra* n. 85, at 95-6.

96. *Canadian Charter of Rights and Freedoms*, being Schedule B to *Canada Act 1982*, c. 11 (U.K.).

97. *Re Attorneys-General of Canada and Stuart* (1982), 137 D.L.R. (3d) 740 (F.C.A.).

apply to legislation passed after that date which interfered with rights retroactively in ways that are now unconstitutional. It is difficult, however, to see how a retroactive legitimation of the consequences of Manitoba's linguistically invalid laws would contravene the *Charter*. So far as section 11 is concerned, a validation of past convictions or punishments would not result in anyone being "found guilty" retroactively; the finding of guilt occurred long ago. So far as section 7 is concerned, no one would be "deprived" of anything by the retroactive confirmation of supposed rights and obligations; indeed a *failure* to confirm would constitute a deprivation if the 'saving doctrines' and limitation periods could not provide complete protection, and certain rights based on linguistically invalid legislation were therefore lost.

In any event, section 1 of the *Charter* permits the guaranteed rights to be subjected to "such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society". It is inconceivable that a court would not regard the retroactive confirmation of the consequences of good-faith reliance upon linguistically invalid laws as a "reasonable limit". *Charter* concerns may accordingly be put aside.

We conclude that legislation of the type suggested above would be constitutionally permissible, so long as its prime concern was the protection of the rights of those who relied in good faith on the ostensible validity of the unilingual legislation, and so long as it did not purport to perpetuate the constitutional invalidity.<sup>98</sup>

Careful drafting would be necessary. If the statute purported to validate the *legislation itself* it would likely run afoul of the *Amax* decision. Even a statute that was restricted to the legal consequences of unilingual legislation would be challengeable if too broadly cast. For example, the private members' bill introduced in the Manitoba Legislature by Russell Doern in 1985,<sup>99</sup> which would have deemed "all legal consequences" to have been the same as if the Acts had been published in both languages, would likely have been found to be too sweeping if enacted. To ensure its constitutional validity, legitimating legislation should purport to do no more than to preserve the rights, obligations and other legal effects arising from good faith reliance on the apparent validity of the laws. It should clearly cover Regulations and other subordinate legislation as well as statutes. The Doern bill was too narrow in that respect since it referred only to "Acts purporting to be enacted by the Legislature".

While all of the above has related to the possibility of legitimizing legislation by the province, it should be borne in mind that if the provincial Legislature is found not to have the constitutional authority to enact it, the Parliament of Canada would probably have the power to do so under its

98. It should be added that this opinion places no reliance on two questionable British Columbia cases supporting 'saving' legislation similar to that in the *Antill* and *Amax* cases: *Vancouver Growers Ltd. v. Snow Ltd.*, [1937] 4 D.L.R. 128 (B.C.C.A. - criticized by Strayer, *supra* 92, at 92-3) and *Re Air Canada and Attorney-General of British Columbia* (1983), 150 D.L.R. (3d) 653 (B.C.C.A. - criticized by P. Hogg, *supra* n. 37, at 350).

99. Bill 7, 32nd Leg., 4th Sess., 1985.

residual or emergency power to make laws for the "peace, order and good government of Canada".<sup>100</sup> The safest type of legal legitimization would, of course, be in the form of a constitutional amendment approved by both the federal and provincial governments.

### Appendix

#### Riel's "De Facto" Government<sup>101</sup>

This is not Manitoba's first experience with a *de facto* government and *de facto* laws. Provisional Governments under the leadership of Louis Riel were in control of the colony from November, 1869, until the arrival of Garnet Wolseley's troops on August 24, 1870.

The Prime Minister, Sir John A. Macdonald, was well aware of the politico-legal significance of *de facto* government. G.F.G. Stanley, in *The Birth of Western Canada*, quotes from a letter, written in November 27, 1869, by Macdonald to the Governor-Designate, William McDougall (who never succeeded in establishing his presence in Manitoba):

An assumption of the Government by you, of course, puts an end to that of the Hudson's Bay Company authorities . . . no legal Government existing and anarchy must follow. In such a case . . . it is quite open by the Law of Nations for the inhabitants to form a Government ex necessitate for the protection of life and property, and such a Government has certain sovereign rights by the jus gentium which might be very convenient for the United States but exceedingly inconvenient for you. The temptation to an acknowledgment of such a Government by the United States, would be very great and ought not to be lightly risked.<sup>102</sup>

Stanley then quotes a statement by Macdonald in a Cabinet minute at about the same time:

While the issue of the Proclamation would put an end to the Government of the Hudson's Bay Company, it would not substitute

the Government of Canada, therefore such a Government is physically impossible until the armed resistance is ended; and thus a state of anarchy and confusion would ensue, and a legal status might be given to any Government *de facto* formed by the inhabitants for the protection of their lives and property.<sup>103</sup>

and concludes:

Although the law officers in Great Britain expressed the opinion "that the apprehensions of the Canadian Government are unfounded, and the insurgents or rioters (by which term they may be properly designated) will not be improved or strengthened by the transference of the territory from the Hudson's Bay Company to the Canadian Government," nevertheless it must be admitted that McDougall's ill-advised act in ending the Hudson's Bay Company government without being able to impose his own, gave a colour of justification, if not legality, to Riel's Provisional Government.<sup>104</sup>

Macdonald's fears materialized. The Hudson's Bay Company authorities having relinquished actual control (though they ultimately retained formal ownership until June 1870), and McDougall's entourage having

100. *Constitution Act, 1867*, Enacted as *British North America Act, 1867*, 30 & 31 Vict. c. 3, s. 91 (U.K.).

101. The research for this Appendix was carried out by Lee Gibson.

102. (1961) 84-5.

103. *Ibid.*

104. *Ibid.*



retreated back to Ottawa, Riel and his successive Provisional Governments were the sole *de facto* governmental authorities on the scene. The Supreme Court of Canada noted in the *Manitoba Language Reference* that the Provisional Government “attempted to unite the various segments of the Red River Colony and drew up a ‘Bill of Rights’ to be used in negotiations with Canada.”<sup>105</sup> It did much more than that.

Although it was concerned primarily with the insurrection and with suppressing resistance in the early months, the Provisional Government reorganized in March, 1870, after gaining the support and recognition of both English and French speaking parishes.<sup>106</sup> A “Legislative Assembly of Assiniboia” was elected on the basis of the following resolutions (which Stanley notes were “largely the work of the English speaking delegates to the Provisional Government”):

In the meantime the Provisional Government had continued to administer the political affairs of the Red River Settlement. On March 18th, the following resolutions were adopted:

“1. That we, the people of Assiniboia, without disregard to the Crown of England, under whose authority we live, have deemed it necessary for the protection of life and property and the securing of those rights and privileges we have seen in danger, to form a Provisional Government, which is the only acting authority in this country; and we do hereby ordain and establish the following Constitution:

“2. That the country hitherto known as Rupert’s Land and the North-West be henceforth known and styled ‘Assiniboia.’

“3. That our Assembly of Representatives be henceforth styled the ‘Legislative Assembly of Assiniboia.’

“4. That all legislative authority be vested in a President and Legislative Assembly composed of members elected by the people; and that at any future time another house, called a Senate, shall be established when deemed necessary by the President and Legislature.

“5. That the only qualification necessary for a member to serve in the Legislature be, that he shall have attained the age of twenty-three years; and he be a citizen of Assiniboia and a resident of the country for a term of at least five years; and he shall be a householder and have rateable property to the amount of £200 sterling; and that if an alien, he shall have first taken the oath of allegiance.”<sup>107</sup>

The Legislative Assembly of Assiniboia met for a total of 18 days (divided into three “Sessions”) between March 23, 1870, and June 24, 1870. Laws were passed relating to the Hay Privilege, Public Justice, a Military Force, Indemnity for Members, Liquor Laws, a Code of Laws, and approval of the *Manitoba Act*.<sup>108</sup> The Code of Laws is particularly noteworthy, having been carefully revised by an intersessional committee of the Assembly, and debated in detail over a period of several days in April and May. It came into force on May 20.

Arrangements for the administration of justice were also given much attention. A Chief Justice (James Ross) was appointed on March 26, and a number of local Magistrates and Justices of the Peace were appointed. And justice was administered. Dr. Bird conducted a Coroner’s Inquest into the December 24, 1869, death of Thomas Johnstone.<sup>109</sup> Magistrate Thomas

105. *Supra* n. 1, at 393.

106. Provincial Archives of Manitoba - M.G.3, A1, Box 1, #12, 13 and 14.

107. *Ibid.*

108. Provincial Archives of Manitoba - M.G.3, A1, Box 1, #15; Sessional Journal, Legislative Assembly of Assiniboia.

109. *New Nation*, Jan. 7, 1870.

Bunn presided at a Parliamentary Inquiry into the shooting death of Roderick Cook and committed George Raymond for trial, releasing him on bonds of \$250.00 for the accused and \$50.00 each for two sureties.<sup>110</sup>

Alexander Begg's *Red River Journal* noted many incidents of the *de facto* legal system that operated during these months, among them:

*3rd April, 1870* — Four policemen are now stationed in the town.

...

*11th April, 1870* — A man named Burr at Portage being reported as about to leave for B.C., with the intention of defrauding his creditors, a guard was sent up to attach his property and he himself is being brought down under arrest to answer the charges against him.

...

*9th May, 1870* — The police have been active today in arresting drunken and quarrelsome people — a great many cases came under their notice. The Country now is free from martial law and the laws are to be printed on Wednesday in book form and distributed.

...

*21st June, 1870* — Robert Tait has been created Sheriff but is hardly the appointment to give general satisfaction.

...

*29th June, 1870* — The Provisional Government has commenced collecting back duties ...<sup>111</sup>

On July 1, 1870, the *New Nation* carried the following story:

#### District Court

The first District Court under the regime of the Provisional Government was held on Tuesday last, at the Court House, Fort Garry. The court opened at 10 o'clock in the forenoon. A.G.B. Bannatyne, Esq., J.P., presided on the bench, with two associate Magistrates.

Several cases of petty debt were brought before the Court which did not occupy much time; the Court adjourning at 2 o'clock, till its next regular sitting.

We are glad to be able to state that the various Magisterial Commissions throughout the Settlement have been filled, and the legal business of the country will be conducted in future under the present regime with the same regularity as before any change of government.<sup>112</sup>

From all indications, these various acts of *de facto* government, carried out under the authority of a much more irregular regime than those which enacted Manitoba's unilingual statutes, were respected after properly constituted authorities took over Manitoba's management. The Executive Council Minutes for October 12, 1870, report a claim by Petty Court Judge A. Fiddler for salary during the previous year. The Council agreed to pay him only from July 16, 1870, stating that for the prior period he would have to look to "the previous government". While this constitutes a denial of continuing responsibility (and may incorporate a note of irony) it nevertheless acknowledges the existence and responsibility of a prior governmental regime. When the first Manitoba Legislature enacted *An Act Respecting*

110. *New Nation*, June 17, 1870.

111. *Champlain Society*, 1956.

112. *New Nation*, July 1, 1870.

*Licences*,<sup>113</sup> it provided, in section 6, for the continuation of licenses issued under prior regimes until their normal expiry dates. There is no known instance of legal liability having been awarded — or even claimed — with respect to ordinary judicial or governmental acts carried out by members of Riel's *de facto* regime.

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113. S.M. 1871, c.20.

