

CANADA / JUDGMENT

Reference re Manitoba Language Rights

[1992] 1 SCR 212

COURT

Supreme Court of Canada

DECIDED

23 January 1992

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Reference re Manitoba Language Rights

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Date

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Report

[1992] 1 SCR 212

Case number

18606

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Manitoba

Subjects

Constitutional law

Notes

SCC Case Information: 18606

Decision Content

Reference re Manitoba Language Rights, [1992] 1 S.C.R. 212

IN THE MATTER OF Section 55 of the
Supreme Court Act, R.S.C. 1970, c. S-19;
AND IN THE MATTER OF a Reference
by the Governor in Council concerning
certain language rights under Section 23
of the Manitoba Act, 1870, and Section 133
of the Constitution Act, 1867 and set out
in Order-in-Council P.C. 1984-1136 dated
the 5th day of April 1984;
AND IN THE MATTER OF a Special Hearing to
establish the minimum period necessary for
translation, re-enactment, printing and publishing of:

1. unilingual Acts of the Legislature of Manitoba
which would be currently in force were it not
for their constitutional defect; and
2. the unilingual repealed and spent Acts of the
Legislature of Manitoba;
pursuant to the opinion of the Supreme Court
of Canada dated the 13th day of June 1985.

Indexed as: Reference re Manitoba Language Rights

File No.: 18606.

1991: October 8; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin,
Stevenson and Iacobucci JJ.

special hearing on manitoba language rights

Constitutional law -- Language guarantees -- Scope of s. 23 of Manitoba Act, 1870 -- Instruments of legislative nature -- Whether s. 23 applicable to certain types of orders in council and to documents incorporated by reference in legislation -- Whether orders in council fall within phrase "Records and Journals" of legislature in s. 23 -- Criteria for determining legislative nature -- Extension of time period for compliance with s. 23 -- Period of temporary validity extended -- Retroactivity -- Manitoba Act, 1870, S.C. 1870, c. 3, s. 23.

Following the judgment of this Court in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, a dispute arose among the parties concerned as to which instruments had to be translated, re-enacted, printed and published, pursuant to s. 23 of the Manitoba Act, 1870, in order to comply with the judgment. To solve the dispute, this Court agreed to hear new questions put forward by the parties to determine whether certain types of orders in council and documents incorporated by reference in the "Acts of the Legislature" fell within the scope of s. 23.

Held: Section 23 of the Manitoba Act, 1870 applies to orders in council which are of a legislative nature and, under certain conditions, to documents incorporated by reference in the legislation.

(1) Orders in Council

The requirements of s. 23 of the Manitoba Act, 1870 apply to orders in council which are determined to be of "a legislative nature". To make this determination, the form, content and effect of the instrument in question must be considered. The criteria indicative of a legislative nature do not operate cumulatively. An instrument may be determined to be legislative in form, though not in content, and under the criteria it would nonetheless be determined to be of a legislative nature. With respect to form, sufficient connection between the legislature and the instrument is indicative of a legislative nature. This connection is established where the instrument is, pursuant to legislation, enacted by the government, or made subject to the approval of the government. With respect to content and effect, the following are indicative of a legislative nature: the instrument embodies a rule of conduct; the instrument has the force of law; and the instrument applies to an undetermined number of persons.

Orders in council as a category do not fall within the phrase "Records and Journals" of the House in s. 23 of the Manitoba Act, 1870. The scope of that phrase must be limited to those documents which are actually tabled in the Legislative Assembly.

(2) Documents Incorporated by Reference in Legislation

The requirements of s. 23 also apply to documents incorporated by reference in Acts of the Manitoba Legislature if the following conditions are met: (a) the primary instrument in which the document is incorporated is "a legislative instrument"; (b) the incorporation is a true incorporation in that the document is an integral part of the primary instrument as if reproduced therein; and (c) the document was generated by the Government of Manitoba. Where a document is created by the legislature or the executive or where the document requires ministerial or legislative approval to give it life, the connection between the government and the document is sufficiently strong to conclude that the document is generated by the government itself. Even

where the document is generated by an outside source -- for example, another government or a non-governmental body -- it will still attract s. 23 obligations unless it can be shown that there was a bona fide purpose behind its incorporation without translation.

(3) Extension of Time Period for Compliance

The period of temporary validity of Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect will be extended for a period of time to be determined by agreement between the parties. The period of temporary validity is hereby extended for three months from the date this judgment is handed down. The parties must reach an agreement with respect to the further extension of the time period within those three months, or apply to this Court for a determination of the issue.

(4) Retroactivity

Instruments enacted unilingually by the Government of Manitoba between the handing down of Reference re Manitoba Language Rights and the handing down of this judgment, now deemed to fall within the scope of s. 23, will be rendered valid retroactively provided that compliance with s. 23 is achieved within the time period outlined above. The period of temporary validity will not, however, apply to any unilingual Acts of the Legislature enacted after the date of this judgment.

Cases Cited

Referred to: Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016; Attorney General of Quebec v. Blaikie, [1981] 1 S.C.R. 312; MacDonald v. City of Montreal, [1986] 1 S.C.R. 460; Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549; Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377; Re Manitoba Language Rights Order, [1985] 2 S.C.R. 347; Re Manitoba Language Rights Order, [1990] 3 S.C.R. 1417; Attorney-General of Quebec v. Collier (1985), 23 D.L.R. (4th) 339, [1985] C.A. 559, aff'd [1990] 1 S.C.R. 260.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 93, 133.

Manitoba Act, 1870, S.C. 1870, c. 3, s. 23.

Authors Cited

Canada. House of Commons. Special Committee on Statutory Instruments. Third Report of the Special Committee on Statutory Instruments. Ottawa: Queen's Printer, 1969.

SPECIAL HEARING concerning certain language rights under s. 23 of the Manitoba Act, 1870.

D. Martin Low, Q.C., and Warren J. Newman, for the Attorney General of Canada.

Jean-Yves Bernard, Louis Rochette and Marise Visocchi, for the Attorney General of Quebec.

Donna J. Miller and Deborah L. Carlson, for the Attorney General of Manitoba.

Michel Bastarache and Antoine F. Hacault, for the Société franco-manitobaine.

Vaughan L. Baird, Q.C., for Roger Bilodeau.

François Dumaine, for the Fédération des francophones hors Québec.

Stephen A. Scott and Victoria Percival-Hilton, for Alliance Quebec.

The following is the judgment delivered by

//The Court//

The Court

I. The Facts

On June 13, 1985, this Court issued a judgment in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, which determined that the requirements of s. 133 of the Constitution Act, 1867 and of s. 23 of the Manitoba Act, 1870, S.C. 1870, c. 3, with respect to the use of both the English and French languages in the Records and Journals and in the Acts of Parliament and of the Legislatures of Manitoba and Quebec are mandatory. Consequently it was held that all statutes and regulations of the province of Manitoba that were not printed and published in both English and French were invalid, but they were deemed to have temporary force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication.

The parties and interveners arrived at a consent agreement with respect to this minimum period which was given effect by this Court on November 4, 1985, [1985] 2 S.C.R. 347. The Order issued dictated that the period would continue to December 31, 1988, for "the Continuing Consolidation of the Statutes of Manitoba" and "the Regulations of Manitoba" and to December 31, 1990 for "all other laws of Manitoba" (p. 349).

The Government of Manitoba then devised a set of criteria for discerning which instruments had to be translated, re-enacted, printed and published in order to comply with this Court's judgment. Essentially, this involved a determination of whether the various instruments were considered to be "of a legislative nature".

This course of action has given rise to a dispute between the parties, the Attorney General of Manitoba and the Société franco-manitobaine ("SFM"), with respect to which types of orders in council are subject to the judgment. It is the position of the Attorney General that only those orders in council which are "of a legislative nature" fall within the judgment and the position of the SFM that virtually all orders in council fall within the judgment.

A similar dispute exists between the parties with respect to documents incorporated by reference in the "Acts of the Legislature". The Attorney General of Manitoba takes the position that only those documents which are: (1) created by the Government of Manitoba; (2) of a legislative nature; and (3) an integral part of the legislation in which they have been incorporated must comply with the requirements of s. 23. The SFM takes the position that all documents incorporated by reference in legislation must comply with the requirements of s. 23.

The parties jointly applied to this Court to settle these disputes and in an Order dated December 7, 1990 (varied on December 14) this Court agreed to hear six questions put forward by the parties. The Court also ordered that the temporary validity of laws referred to in paragraph 2(a) of the Order of November 4, 1985 be extended until judgment is handed down in this matter: [1990] 3 S.C.R. 1417.

The six questions put forward by the parties for resolution are reproduced below:

1. Are any or all of the types of orders in council described below, and listed in the materials provided in the casebook or orders in council similar in character thereto, subject to:
 - (i) s. 23 of the Manitoba Act, 1870;
 - (ii) the first paragraph of the Order of this Court dated November 4, 1985?
 - (a) Orders in council establishing government departments, health and social services district boards and committees of cabinet;
 - (b) Orders in council authorizing a Minister or a Crown corporation to enter into a contract;
 - (c) Orders in council authorizing the issuing of grants to municipalities or community groups;
 - (d) Orders in council relating to appointments and, in particular:
 - (i) appointing judges and members of quasi-judicial tribunals; and
 - (ii) appointing persons to positions in the civil service or to Crown corporations.
 - (e) Orders in council affecting the rights or responsibilities of a specific person or persons, such as the issuing of a licence or permit to such person or persons.
2. Are any or all of the types of instruments or documents described below, and listed in the materials provided in the casebook or instruments or documents similar in character thereto, subject to:
 - (i) s. 23 of the Manitoba Act, 1870;
 - (ii) the first paragraph of the Order of this Court dated November 4, 1985?
 - (a) Contracts attached to orders in council authorizing a Minister or a Crown corporation to enter into that contract;

- (b) Schedules attached to orders in council authorizing grants to municipalities or community groups and:
 - (i) setting the terms and conditions on which those grants are to be made; or
 - (ii) listing the recipient groups.
- (c) Schedules attached to orders in council described in question 1(e).
- 3. If the answer to either the first question or the second question is affirmative with respect to any or all of the types of orders in council, or instruments or documents described therein, what principles or criteria apply to determine the extent to which orders in council, or instruments or documents described therein, are subject to s. 23 of the Manitoba Act, 1870?
- 4. Are any or all of the types of instruments or documents described below, and listed in the materials provided in the casebook or instruments or documents similar in character thereto, subject to:
 - (i) s. 23 of the Manitoba Act, 1870; or
 - (ii) the first paragraph of the Order of this Court dated November 4, 1985?
- (a) Instruments or documents created by non-governmental organisations or persons and incorporated by reference in the laws of Manitoba;
- (b) Instruments or documents created by governments other than that of the Province of Manitoba, including departments, boards and agencies of such governments, and incorporated by reference in the laws of Manitoba;
- (c) Instruments or documents created by international organizations or persons and incorporated by reference in the laws of Manitoba;
- (d) Instruments or documents created by departments, boards and agencies of the government of the Province of Manitoba and incorporated by reference in the laws of Manitoba.
- 5. If the answer to the fourth question is affirmative with respect to any or all of the types of instruments or documents described therein, what principles or criteria apply to determine the extent to which these instruments or documents are subject to s. 23 of the Manitoba Act, 1870?
- 6. (a) If the obligations of the Province of Manitoba pursuant to s. 23 of the Manitoba Act, 1870 are more extensive than its practice, can the period of temporary validity established pursuant to the Order of this Court dated November 4, 1985, be extended, or a further period be established, to cover the orders in council, instruments or documents in question, as well as the rights, obligations and legal effects thereof, in order to allow the Province to conform to its constitutional obligations?

- (b) Can such orders in council, instruments or documents, as well as the rights, obligations and legal effects thereof, if invalid, be rendered valid retroactively, and if so by what means?

II. Relevant Constitutional Provisions

Section 23 of the Manitoba Act, 1870, S.C. 1870, c. 3 (reprinted in R.S.C., 1985, App. II, No. 8), provides:

23. 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 Constitution 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.

The requirements of s. 133 of the Constitution Act, 1867 are virtually identical. Section 133 provides:

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

III. Analysis

Orders in Council

The Scope of Section 23

In the case from which this reference originates, *Reference re Manitoba Language Rights*, supra, this Court's remarks with respect to the scope of s. 23 of the Manitoba Act, 1870 were limited to the following, at p. 744:

In this judgment, all references to "Acts of the Legislature" are intended to encompass all statutes, regulations and delegated legislation of the Manitoba Legislature, enacted since 1890, that are covered by this Court's judgments in *Blaikie No. 1* and *Blaikie No. 2*.

Thus, the necessary starting point in the present request for further clarification with respect to the scope of s. 23 is a return to the *Blaikie* decisions.

In *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 ("Blaikie No. 2"), the question of the scope of s. 133 of the Constitution Act, 1867, was addressed, particularly, whether it extended to delegated legislation as distinct from the orders in council and ministerial orders or regulations considered in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 ("Blaikie No. 1"). The Court articulated the following principles to guide the interpretation of s. 133, and by implication s. 23:

First, the proliferation of these other regulations was at least as unforeseeable as that of Government regulations which, unlike municipal and school board by-laws could not have been originally intended to escape the operation of s. 133 of the B.N.A. Act.

Second, while the ordinary meaning of the words "Acts ... of the Legislature" in s. 133 must be departed from to prevent the requirements of the section from being frustrated, it cannot be stretched beyond what is necessary to accomplish this purpose.

(*Blaikie No. 2*, at p. 328.)

Working within these principles, this Court concluded in that case that s. 133 applies to regulations enacted by the Government of Quebec, a minister or a group of ministers, and to regulations of the civil administration and of semi-public agencies which, to come into force, are subject to the approval of that Government, a minister or a group of ministers. The application of the section to such regulations was explicitly narrowed to those which constitute delegated legislation properly so called and not rules or directives of internal management. This Court further concluded that the section applies to rules of practice enacted by courts and quasi-judicial tribunals, but not to the by-laws of municipal or school bodies even when subject to the approval of the Government, a minister or a group of ministers.

In the case presently before us, we are asked by the intervener Alliance Quebec to extend the scope of s. 23 still further than indicated above, although not so far as to obliterate the distinction between delegated legislation and rules or directives of internal management. It submits that s. 23 ought to apply to executive acts as well as to legislative ones to achieve the purpose of making official bilingualism a reality with respect to public administration generally as well as to courts and the legislature. The SFM does not go so far, but nonetheless submits that the purpose of s. 23 requires that it apply to any document which touches on the rights, interests or privileges of the Manitoba public as distinct from documents which simply establish directives from the internal regime of civil administration.

There can be no doubt, as stated in *Reference re Manitoba Language Rights*, *supra*, at p. 739, that the purpose of s. 23 is:

... to ensure full and equal access to the legislature, the laws and the courts for francophones and anglophones alike.

The Court is bound to ensure that this purpose is not undermined. Consistently with this approach, this Court has acknowledged the necessity of moving beyond an unduly strict interpretation of the phrase "Acts of the Legislature". However, as noted above, the Court has also

stressed that the words of the section cannot be stretched beyond what is necessary to meet its purpose. Therefore, while meeting the purpose of this section requires moving beyond the strict meaning of the phrase "Acts of the Legislature", these cannot be extended to instruments which are not of a legislative nature. The Court must, therefore, approach the issues here in a manner that attempts to give a generous meaning to "Acts of the Legislature", while not applying it to the plethora of other instruments issued by contemporary governments.

In so determining the scope of s. 23, it is important to place the section within the proper historical context. It, like ss. 93 and 133 of the Constitution Act, 1867, is an embodiment of a political compromise. It is not a sweeping guarantee designed to achieve complete linguistic equality, but rather a compromise designed to achieve a level of harmony in the demographic reality of Manitoban society. The following statement of Beetz J. in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at p. 496, regarding s. 133 is applicable here:

This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

See also *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 578, and *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2. To extend the application of s. 23 beyond instruments of a legislative nature would be to improve upon this constitutional compromise under the guise of interpretation.

Criteria Indicative of a Legislative Nature

A determination that the scope of s. 23 is limited to application to instruments of a legislative nature does not, however, end the inquiry. It is necessary to propose some criteria by which legislative instruments can be distinguished from other types of instruments. It is neither possible nor desirable to propose an ironclad test given the proliferation of instruments generated by contemporary governments. But it is both possible and necessary to provide governments with general criteria which will be indicative of whether or not an instrument must comply with the section. These criteria can be roughly divided into the headings of form, content and effect. It should be noted here, however, that these criteria do not operate cumulatively. An instrument may be determined to be legislative in form, though not in content, and under the following criteria it would nonetheless be determined to be of a legislative nature.

The appropriate starting point is once again *Blaikie No. 2*, supra, where this Court emphasized the importance of the connection between the legislature and the instrument in question (at pp. 328-29):

This connexion is the decisive factor in so far as the subjection of Government regulations to s. 133 of the B.N.A. Act is concerned.

This Court there concluded that sufficient connection is established where the instrument is, pursuant to legislation, enacted by the Government or where it is made subject to the approval of the Government, in short, wherever "positive action of the Government is required to breathe life into [it]" (p. 329).

It was argued by the SFM that if orders in council cannot always be considered "Acts of the Legislature", they would nonetheless, in their form, fall within the phrase "Records and Journals" of the House. We do not find that the latter phrase can be so broadly interpreted. Its scope must be limited to those documents which are actually tabled in the Legislative Assembly.

With respect to content and effect, the Attorney General of Manitoba proposed as a starting point the following definition of regulation taken from the MacGuigan Committee in its report on Statutory Instruments (1969), at p. 14:

[A] regulation is a rule of conduct, enacted by a regulation-making authority pursuant to an Act of Parliament, which has the force of law for an undetermined number of persons;

In its original context the definition relates specifically to regulations, but it provides assistance in developing a general definition of the phrase "of a legislative nature".

The phrases from the above quotation which require elaboration in relation to the content and effect of orders in council are "rule of conduct", "force of law" and "an undetermined number of persons". A "rule of conduct" can be described as a rule which sets norms or standards of conduct, which determine the manner in which rights are exercised and responsibilities are fulfilled. Pairing this with the phrase "force of law", the rule must be unilateral and have binding legal effect. Finally, it must also apply to "an undetermined number of persons", that is, it must be of general application rather than directed at specific individuals or situations.

We emphasize again that the application of these criteria is directed toward meeting a constitutional minimum. Legislatures will often find it appropriate or desirable to translate instruments that go beyond these criteria. Obviously, this is a practice which is to be encouraged.

We further acknowledge that grey areas will arise where the application of the broad criteria outlined here will not provide a clear answer as to whether a particular instrument must be translated. Despite the parameters delineated earlier with respect to the requirements of the type of right under consideration here, it is a constitutional right and retains the force of its constitutional status. It would be wise for legislatures, in cases of doubt, to resolve that doubt in favour of the constitutional right.

Application of the Criteria

It is not possible to provide definitive answers with respect to some of the broad categories of orders in council listed by the parties in this action in constitutional questions 1 and 2. However, a general indication of how the criteria listed above might apply to these general categories, and how they would apply to specific examples within those categories can be given.

Question 1(a) relates to orders in council establishing: (1) health and social services district boards; (2) government departments; and (3) committees of cabinet. Both parties agree that orders in council establishing health and social services district boards should be translated. The Attorney General of Manitoba concedes that this is so because the establishment of such boards impacts on the rights and responsibilities of the public, or at least has the potential to do so. This sort of action can affect the level and type of health services provided to the Manitoba public and may also give rise to general rules relating to access to services. Given the practice adopted by the Attorney General of Manitoba, it is unnecessary for this Court to provide a pronouncement on whether orders in council establishing health and social services districts will in every case constitute instruments of a legislative nature.

The Attorney General of Manitoba distinguishes orders in council establishing government departments and committees of cabinet from the above stating that they do not determine public rights and responsibilities. While it is conceivable that orders in council establishing government departments would not, it cannot be said that this would always be the case given the broad range of responsibilities that are undertaken by various departments. It seems that here too there is at least the potential to determine public rights and responsibilities. Consider, for example, the potential impact on the public of changes to the Department of Education. Orders in council establishing committees of cabinet are less likely to impinge on the public, being political creatures rather than statutory ones. In light of the above, we decline to provide a general answer with respect to such general categories. Specific instruments which fall in these general categories must be considered and assessed individually.

Question 1(b) relates to orders in council authorizing a Minister or a Crown corporation to enter into a contract. Generally, an instrument of this kind does not embody a rule of conduct which has the force of law and it clearly does not apply to an undetermined number of persons. The case may be different where the contract is entered into pursuant to statute, essentially as a substitute for enacting a regulation.

The instruments referred to in questions 1 (c) and (e), relating to orders in council authorizing the issuing of grants to municipalities or community groups and to orders in council affecting the rights or responsibilities of a specific person or persons such as the issuing of a licence or permit to such person or persons, do not fall within s. 23 for the same reasons. Again, they do not embody a rule of conduct, nor do they have the force of law for an undetermined number of persons. Such grants and licences affect only identifiable and limited groups of people.

Question 1(d) relates to orders in council with respect to appointments generally and appointments of judges and members of quasi-judicial tribunals, and of persons to positions in the civil service and Crown corporations particularly. Specific appointments of persons to positions in the civil service and Crown corporations clearly do not meet any of the criteria which determine an instrument to be of a legislative nature. Generally, the same is true of appointments of judges and members of quasi-judicial tribunals. While persons appointed to such positions are thereby invested with "law-making" authority in so far as their role in developing the common law requires, the investment of this authority in a particular individual does not alter the rights and responsibilities of the public under existing legislation.

However, it is clear that exceptions to this general rule exist. One such exception raised in argument is the orders in council which authorized the creation of Manitoba's Aboriginal Justice Inquiry. This instrument did more than name two persons to preside over the Inquiry. It created broad-ranging powers which had not previously existed, for example subpoena powers, that clearly determined some of the rights and responsibilities of the Manitoba public. This type of order in council is subject to the requirements of s. 23.

Question 2 refers to a number of contracts and schedules which might be attached to the orders in council referred to in questions 1(b), (c) and (e). In most cases the instruments to which they would be attached are not subject to s. 23, as determined above; consequently these documents will rarely be subject to s. 23 either.

Documents Incorporated by Reference

The second aspect of this case which must be addressed relates to documents incorporated by reference in "Acts of the Legislature". The question posed is which of these documents must be translated in accordance with the terms of this Court's earlier judgment in *Reference re Manitoba Language Rights*, supra. Again the Attorney General of Manitoba seeks to limit the documents which are required to be translated while the SFM essentially argues that all such documents are required to be translated.

The Threshold Questions

At the outset of this inquiry two threshold questions must be answered. First, is the primary instrument in which the document is incorporated an "Act of the Legislature"? Second, what is meant by "incorporation"? It is relatively easy to answer the first question. The first portion of this judgment relating to orders in council was directed toward determining what comprises an "Act of the Legislature". If the primary instrument in which the document is incorporated is not, on the application of the above criteria, "of a legislative nature" and is not itself subject to s. 23, obviously neither is the incorporated document.

The second question requires elaboration. Some documents are simply mentioned in legislative instruments; they need not be consulted before the operation of the instrument in question can be understood. Others are "incorporated by reference" in the sense that they are an integral part

of the primary instrument as if reproduced therein. It is this latter type of incorporation that can be termed "true incorporation" and that potentially attracts translation obligations under s. 23. A clear example of a true incorporation can be found in *Attorney General of Quebec v. Collier* (1985), 23 D.L.R. (4th) 339, [1985] C.A. 559 (upheld by this Court, [1990] 2 S.C.R. 260). There it was held that unilingual session papers effectively formed the substance of two bills which had been passed in both official languages (at p. 346 D.L.R.):

[translation] The two Acts themselves contain nothing or almost nothing which could, in itself, be considered as an implementation of its objectives. Therefore, everything is contained in the sessional papers and nothing in the actual provisions of the Act, aside from the reference to the sessional papers themselves. The papers are, therefore, in my view, the very essence and substance of Bills 70 and 105, which, without the papers, have no *raison d'être*. . . . [T]he sessional papers to which these two Acts refer are an integral part of them.

The Bona Fide Test

Once the two threshold questions have been answered in the affirmative, the central issue becomes whether or not there is a bona fide reason for incorporation without translation. To make this determination, the origin of the document and the purpose of its incorporation must be examined. If the document originates from the legislature which has incorporated it, it is clear that that document must be translated in accordance with the requirements of s. 23. It will be a rare occasion when a legislature can justify the incorporation of a document effectively generated by itself without translation. As was the case in *Collier*, supra, the incorporation will be found to be an ineffective attempt to skirt the constitutional translation guarantees with which we are here concerned.

As to how it might be determined whether the document is in fact generated by a government itself, it is useful to look to the connection referred to earlier between a government and a given instrument as articulated in *Blaikie* (No. 2), supra. Where a document is created by the legislature or the executive or where the document requires ministerial or legislative approval to give it life, the connection between the government and the document is sufficiently strong to conclude that the document is generated by the government itself.

The issue is more complex when the document in question originates from an independent body. There are a number of legitimate reasons why a legislature would choose to incorporate outside documents. If a legislature incorporated wholesale the legislation of another jurisdiction which it could just as easily enact for itself, the action would clearly not meet the bona fide test. For example, it would not be acceptable for Manitoba to incorporate Saskatchewan's Personal Property Security Act by reference instead of enacting its own version of the legislation and to thereby avoid the requirements of s. 23. However, one jurisdiction sometimes incorporates the legislation of another by reference to allow for inter-governmental cooperation on particular issues. A good example of this practice is legislation providing for the reciprocal enforcement of orders made under the family law acts of different provinces. In this example, it is the original legislation which is authoritative so its incorporation would obviously not be intended as an

evasion of s. 23 obligations.

Another situation where incorporation without translation is likely to be bona fide is one which involves the incorporation of standards set by a non-governmental standard setting body, for example, safety standards developed by a national or international body. Here it is usually legitimate for the legislature to rely on the technical expertise of such bodies. Specific examples provided to this Court in evidence included the incorporation in the Manitoba Highway Traffic Act of "Standards respecting motorcycle helmets" developed by the British Standards Institute and the incorporation in the Steam and Pressure Plants Regulation of "American National Standards Institute Safety Requirements for the Storage and Handling of Anhydrous Ammonia".

In cases such as those described in the paragraph above, translation is impracticable because of the fact that these standards are continually revised by the standard setting bodies. It would be difficult for a legislature to maintain an authoritative translation in the face of this practice. Sometimes in cases where international or national standards are used, translations are already available. But where they are not, it would defeat the purpose of incorporating an outside document to require translation in compliance with s. 23 and, in any event, it is unlikely that translation would guarantee accessibility to materials which are, practically speaking, inaccessible to the majority of citizens because of their technical nature.

Application of the Test

The questions put to this Court by the parties with respect to documents incorporated by reference in "Acts of the Legislature" are very general; consequently our responses must also be general. The specific examples raised above in the articulation of the bona fide test will be more useful in future attempts to apply the test than will be the following responses with respect to the types of documents raised in question 4.

Question 4(d) relates to instruments or documents created by departments, boards and agencies of the Government of the province of Manitoba and incorporated by reference in the laws of Manitoba. As articulated above, these will fall within s. 23 and will have to meet its translation requirements.

Question 4(b) relates to instruments or documents created by governments other than that of the province of Manitoba, including departments, boards and agencies of such governments, and incorporated by reference in the laws of Manitoba. These must meet the requirements of s. 23 unless it can be demonstrated that the incorporation without translation is a bona fide one within the meaning of the test outlined above.

Questions 4(a) and (c) relate to instruments or documents created by non-governmental and international organisations or persons and incorporated by reference in the laws of Manitoba. These will rarely require compliance with s. 23 because the bona fide test articulated above will more easily be met thereby justifying non-compliance.

Extension of Time Period for Compliance

In the original Manitoba language reference from which this case arises, the Government of the province of Manitoba was given a maximum time period of temporary validity within which it had to comply with the terms of the judgment. That time period, arrived at by consent of the parties, was to extend to December 31, 1990 with respect to the kinds of instruments we are concerned with here. That date was subsequently extended until the handing down of this judgment. We are convinced that, in light of the genuine dispute which arose here as to the scope of this Court's previous judgment, a further extension of the time period is warranted for the same reasons a period of temporary validity was granted originally.

The duration of that time period should once again be left to an agreement between the parties. If the parties are unable to agree, they can return to this Court for guidance. To ensure that the instruments in question do not lose their force in the interim, we grant an extension of three months from the date this judgment is handed down within which the parties must arrive at an agreement with respect to the full duration of the extension, or return to this Court for a determination.

Retroactivity of Instruments Enacted in the Interim

The parties have also inquired as to whether instruments enacted by the Government of the province of Manitoba only in English subsequent to this Court's judgment in *Reference re Manitoba Language Rights*, supra, but which are now deemed to fall within the scope of s. 23, can be rendered valid retroactively.

In *Reference re Manitoba Language Rights*, this Court took the position that (at p. 769):

The period of temporary validity will not apply to any unilingual Acts of the Legislature enacted after the date of judgment. From the date of judgment, laws which are not enacted, printed and published in both languages will be invalid and of no force and effect ab initio.

Once again, however, given that a genuine dispute has arisen as to the scope of this Court's previous judgment, we find it appropriate to give such instruments the benefit of the extension of the compliance period. These instruments are declared temporarily valid for the three-month period provided for above, and will continue that validity provided that their compliance with s. 23 is achieved within the time period agreed upon by the parties.

IV. Conclusions and Disposition

Orders in Council

The requirements of s. 23 of the Manitoba Act, 1870 apply to orders in council which are determined to be of "a legislative nature".

To make this determination, the form, content and effect of the instrument in question must be considered:

- (a) With respect to form, sufficient connection between the legislature and the instrument is indicative of a legislative nature. This connection is established where the instrument is, pursuant to legislation, enacted by the Government or made subject to the approval of the Government.
- (b) With respect to content and effect, the following are indicative of a legislative nature:
 - (i) The instrument embodies a rule of conduct;
 - (ii) The instrument has the force of law; and
 - (iii) The instrument applies to an undetermined number of persons.

Documents Incorporated by Reference

The requirements of s. 23 also apply to documents incorporated by reference in Acts of the Manitoba Legislature if the following conditions are met:

- (a) The primary instrument in which the document is incorporated is a legislative instrument within the meaning articulated above;
- (b) The incorporation is a true incorporation in that the document is an integral part of the primary instrument as if reproduced therein; and
- (c) The document was generated by the Manitoba Government.

Even where the document is generated by an outside source, for example another government or a non-governmental body, it will still attract s. 23 obligations unless it can be shown that there was a bona fide purpose behind incorporation of it without translation.

Extension of Time Period for Compliance

The period of temporary validity of Acts of the Manitoba Legislature which would currently be in force were it not for their constitutional defect will be extended for a period of time to be determined by agreement between the parties. The period of temporary validity is hereby extended for three months from the date this judgment is handed down. The parties must reach an agreement with respect to the further extension of the time period within those three months, or apply to this Court for a determination of the issue.

Retroactivity

Instruments enacted unilingually by the Government of Manitoba in between the handing down of Reference re Manitoba Language Rights, *supra*, and the handing down of this judgment, now deemed to fall within the scope of s. 23, will be rendered valid retroactively provided that compliance with s. 23 is achieved within the time period outlined above. The period of temporary validity will not, however, apply to any unilingual Acts of the Legislature enacted after the date of this judgment.

Judgment accordingly.

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Solicitors for the Attorney General of Quebec: Jean-Yves Bernard, Louis Rochette and Marise Visocchi, Ste-Foy.

Solicitor for the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitors for the Société franco-manitobaine: Michel Bastarache, Ottawa; Thompson, Dorfman, Sweatman, Winnipeg.

Solicitors for Roger Bilodeau: Baker, Zivot & Co., Winnipeg.

Solicitor for the Fédération des francophones hors Québec: François Dumaine, Ottawa.

Solicitor for Alliance Quebec: Stephen A. Scott, Montréal.

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