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Sydney B. Horton\*

The Manitoba Language Rights  
Reference and the Doctrine of  
Mandatory and Directory  
Provisions

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In the *Manitoba Language Rights Reference* the Supreme Court of Canada determined that although there exists in Anglo-Canadian law a doctrine that makes a distinction between statutory provisions that are mandatory, in the sense that failure to comply with them will lead to invalidity of the act in question, and those that are directory, in the sense that failure to comply will not necessarily lead to such invalidity, the doctrine should not be applied when the constitutionality of legislation is in issue.<sup>1</sup> I propose to examine the rejection of the doctrine in Canada, to contrast the Court's reasoning with examples of the application of the doctrine in Australia and New Zealand when the constitutionality of legislation was in issue, and to suggest why its rejection in Canada was unwise and unnecessary.

The Court rejected the doctrine while asserting its power to declare invalid laws not enacted in conformity with a manner and form requirement stipulated in the Constitution. This aspect of the case deserves comparison with the way other courts have dealt with manner and form requirements and is occasion to contemplate some possible consequences of the rejection of the mandatory and directory provision doctrine.

These issues emerge from three of the four questions posed in the *Reference*. Those three were: (1) are the requirements of s. 133 of the *Constitution Act, 1867* and of s. 23 of the *Manitoba Act, 1870* mandatory;<sup>2</sup> (2) are those statutes and regulations of Manitoba that were not printed and published in both English and French invalid by reason of s. 23 of the *Manitoba Act, 1870*; and (3) if the answer to (2) is affirmative, do those enactments that were not printed and published in English and French have any legal force and, if so, to what extent and under what circumstances.<sup>3</sup>

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1. *Reference concerning language rights under section 23 of the Manitoba Act, 1870 and section 133 of the Constitution Act, 1867*, [1985] 2 S.C.R. 347. Court of Canada rendered June 13, 1985, at 22.

2. *Manitoba Act, 1870*, R.S.C. 1970, App. II, No. 8; and *Constitution Act, 1867*, R.S.C. 1970, App. II No. 5, under the title *British North America Act, 1867*.

3. *Supra*, note 1 at 2.

The reference arose out of the Manitoba Legislature's failure after 1890 to comply with s. 23, a failure that persisted even after 1979 when the Supreme Court of Canada held in the *Forest*<sup>4</sup> case that Manitoba's *Official Language Act*<sup>5</sup> of 1890, which purported to authorize unilingual enactment and publication of Manitoba's Acts, was in conflict with s. 23 and therefore unconstitutional. The *Forest* case had not dealt with the issue of whether unilingual English Acts of Manitoba enacted in pursuance of the *Official Language Act* were themselves unconstitutional. That issue, with respect to two such Acts,<sup>6</sup> was before the Court in the appeal of the *Bilodeau* case,<sup>7</sup> but disposition of that case was deferred pending disposition of the *Reference* which raised the issue more broadly in relation to all such Acts.

Section 23 of the *Manitoba Act, 1870* states:

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 Supreme Court of Canada had already resolved two major problems in the interpretation of s. 23 when the *Manitoba Language Rights Reference* came before it. The effect of its decisions in *Forest*, dealing with s. 23, and in *Blaikie No. 1*<sup>8</sup> and *Blaikie No. 2*<sup>9</sup>, dealing with the virtually identical language of s. 133 of the *Constitution Act, 1867* and its operation in Quebec, was to establish that s. 23 requires not only bilingual printing and publication but also bilingual enactment of Acts; further, "Acts" in s. 23 encompasses not only statutes but also regulations ("delegated legislation") made by the Government, or a minister or group of ministers of the Government, or by other bodies or agencies subject to the approval of a minister or group of ministers. The *Reference* therefore questioned the validity of virtually the entire living body of the statutory law, including regulations, of Manitoba and most of what had previously been enacted and then repealed or become spent after having been in force for some time.

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4. *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032.

5. S.M. 1890, c. 14.

6. *Highway Traffic Act*, R.S.M. 1970, c. H-60; and *Summary Convictions Act*, R.S.M. 1970, c. S-230.

7. *Bilodeau v. Attorney-General of Manitoba*, [1981] 5 W.W.R. 393 (Man. C. A.).

8. *Attorney-General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016.

9. *Attorney-General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312.

Given the words of s. 23, the normal grammatical sense of “shall”, and the decisions in *Forest*<sup>10</sup> and *Blaikie No. 1*,<sup>11</sup> it is not surprising that the Supreme Court of Canada reiterated in the *Reference* that the provisions respecting the use of English and French in the Records, Journal, and Acts are “mandatory in the normally accepted grammatical sense of that term. That is, they are obligatory. They must be observed.”<sup>12</sup> The Court repeatedly used “mandatory”, “imperative” and “obligatory” interchangeably with reference to common usage.<sup>13</sup> One cannot reasonably gainsay this aspect of the Court’s conclusion, and counsel for the Attorney-General of Manitoba expressly accepted it when putting the proposition that in the jurist’s specialized usage of mandatory and directory the provisions should be classified as directory, thereby avoiding automatic invalidity in consequence of non-compliance.

The Court accepted that the distinction between mandatory and directory provisions exists in Anglo-Canadian law and described the distinction as being “between statutory provisions that are mandatory, in the sense that failure to comply with them will lead to invalidity of the Act in question, and directory, in the sense that failure to comply will not necessarily lead to such invalidity.”<sup>14</sup> The Court then quoted the following passage from *Montreal Street Railway Co. v Normandin*,<sup>15</sup> not only as authority for the existence and description of the distinction, but also as a springboard for its decision not to apply the distinction when the constitutionality of legislation is at issue:

When the provisions of the statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

There is a point that deserves emphasis here, all the more so because the Supreme Court of Canada did not express or pursue it. The leading cases show that the distinction between mandatory and directory provisions is not between those that must be obeyed and those that need not be. Both mandatory and directory provisions are obligatory. Both are to be observed. The distinction has only to do with the consequence of breach of the provision. If the provision is mandatory, invalidity of the

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10. *Supra*, note 4.

11. *Supra*, note 8.

12. *Supra*, note 1 at 20.

13. *Id.* at 14-20.

14. *Id.* at 20-21.

15. [1917] A.C. 170 at 174-75 (P.C.).

act in question is automatic; if the provision is directory, the consequence might be invalidity or some other remedy. The distinction is to be drawn by ascertaining the intention of the legislature and needs to be drawn only after it has been determined that the provision is indeed obligatory and that it has not been complied with. A provision is to be classified as mandatory only if the legislature intended that every breach of the provision was automatically to be invalid *ab initio*, regardless of the circumstances of the particular breach. The intention of the legislature is to be ascertained by normal methods of statutory interpretation, with special attention to the nature and purpose of the duty in question, and by weighing the consequences of holding the provision to be mandatory or directory.<sup>16</sup> Several judicial pronouncements support these comments. I now turn to some of them.

Sir Arthur Channell's words in *Montreal Street Railway Co.* have perhaps been more often quoted than studied. Under his formulation the characteristics of a directory provision include that it relates "to the performance of a public duty"; further, his words "the neglect of them, though punishable" are express recognition that there is or might be a remedy for a breach. The same point is made by Lord Penzance in *Howard v. Bodington*.<sup>17</sup>

A thing has been ordered by the Legislature to be done. What is the consequence if it is not done. In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be directory, they say that, although such provisions may not have been complied with, the subsequent proceedings do not fail.

This passage recognizes that irrespective of whether it is a mandatory or directory provision, the "thing has been ordered by the Legislature to be done". Thus, the doing of it is obligatory.

In *Simpson v. Attorney-General of New Zealand*,<sup>18</sup> a case concerning provisions of a constitution, Hutchison, J. A., expressed the point well:

. . . whether a provision in a statute is to be read as obligatory or merely as permissive is one question, and whether a provision expressed in an obligatory form is mandatory or merely directory is another question . . .

And in *Clayton v. Heffron*,<sup>19</sup> another case concerning constitutional provisions, the High Court of Australia recognized directory provisions as "legal requirements which it is unlawful to disregard".

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16. J. Evans, *Mandatory and Directory Rules* (1981), 1 *Legal Studies* 227.

17. (1877), 2 P. 203 at 210.

18. [1955] N.Z.L.R. 271 (N.Z.C.A.) at 281.

19. (1960), 105 C.L.R. 231 (H.C. of A) at 247.

I have chosen these extracts showing the obligatory nature of directory provisions because that is the point the Supreme Court of Canada did not express or pursue. In all other respects the formulation of the doctrine in these cases (*Montreal Street Railway Co.*; *Howard v. Bodington*; *Simpson; Clayton v. Heffron*) is similar to that given by the Supreme Court of Canada.

With reference to the consequences of breach of a directory provision, the Supreme Court of Canada's words are that breach "will not necessarily lead to invalidity". Those words import that invalidity is a possible, but not automatic, consequence of the breach. The Court's choice of words here seems significant for at least two reasons. First, many previous formulations of the doctrine have not referred to invalidity as a possible consequence of breach of a directory provision; rather they have merely driven home the point that invalidity is not automatic. The Supreme Court of Canada, while reiterating that invalidity is not automatic, has recognized that in principle it is possible. Second, the difference between automatic invalidity for breach of a directory provision would seem, on the analogy of things void and voidable, to be that under the former the act never existed in law whereas under the latter it did exist until it was declared invalid. Having spun this thread the Court did not weave it into the fabric of its decision.

The Supreme Court of Canada gives three principal reasons for its belief that the doctrine about mandatory and directory provisions should not be applied when the constitutionality of legislation is in issue.

One reason given is that "the doctrinal basis of the mandatory/directory distinction is difficult to ascertain". The Court thought that basis to be the serious general inconvenience or injustice Sir Arthur Channell spoke of in *Montreal Street Railway Co.*<sup>20</sup>. But that is a misconstrual of what Sir Arthur said. His words were that invalidity "would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature"<sup>21</sup>. In *Bilodeau*<sup>22</sup> in the Manitoba Court of Appeal, Freedman, C. J. M., saw those factors merely as two among other tests for drawing the distinction between mandatory and directory. He expressed the doctrinal basis as follows:

The rationale for this approach is that the legislature could not have intended widespread chaos to be the consequence of non-compliance with a particular statute.

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20. *Supra*, note 1 at 21.

21. *Id.*

22. *Supra*, note 7 at 401.

His thought is supported by the Courts in *Clayton v. Heffron*<sup>23</sup> and in *Simpson*<sup>24</sup>, both dealing with provisions in a constitution. Surely ascertaining the intention of the legislature whose enactments it is your duty to construe and apply is an appropriate doctrinal basis. And having ascertained that the provision in question is obligatory, surely it is appropriate to further explore the intention of the legislature by posing the question: Does the legislature intend every breach of this provision to result automatically in the invalidity *ab initio* of the act in question irrespective of the consequences, or does it rather intend that there be some flexibility to tailor the remedy to fit the particular breach?

The fact is, the Supreme Court of Canada did accept the power of this rationale because it lies at the root of the Court's determination that the rule of law, which the *Constitution Acts, 1867-1982*, intend to prevail, can prevail in Manitoba only if the Court deems valid those same laws which it holds invalid *ab initio*, the fictional validity being allowed to continue so long as need be to give Manitoba's Government and Legislature time to translate into French the entire legislative output, including regulations, of nearly a century and to re-enact it all in English and French in compliance with s. 23 of the *Manitoba Act, 1870*. Thus, having asserted that the doctrinal basis for the mandatory and directory distinction was uncertain, the Court went on and in its disposition of the *Reference* expressed and, to support its fiction, gave effect to that doctrinal basis, which is to avoid the consequence of automatic invalidity of proceedings *ab initio* where the legislature did not intend such consequences to flow from the breach of the obligatory provision.

The only explanation advanced by the Supreme Court of Canada for its difficulty in ascertaining the doctrinal basis for the mandatory and directory distinction was a quotation from *R. ex rel. Anderson v. Buchanan*<sup>25</sup> in which the court confessed inability to draw the distinction and the temptation to strain a point to call a provision directory merely because the court felt the consequences in the case at hand would be inconvenient if the provision were directory. But that explanation is tantamount to saying: somebody else has trouble understanding this, therefore I am having trouble. It also concentrates on inconvenience or injustice to a particular litigant, whereas the doctrine places the emphasis inconvenience on injustice to the public generally. Further, it assumes that avoidance of inconvenience or injustice is itself the objective, whereas the doctrine has one look to the inconvenience only as one factor among many in determining the intention of the legislature.

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23. *Supra*, note 19.

24. *Supra*, note 18.

25. (1909), 44 N.S.R. 112 (C.A.).

A second reason given by the Court for not applying the doctrine seems to emerge from its reiteration that the fundamental guarantees in s. 23 are entrenched in the Constitution and beyond the power of the province to amend unilaterally, a result established in *Blaikie No. 1*<sup>26</sup> and in *Forest*.<sup>27</sup> In that connection the Court observed: “Those guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory.” Note here the word “obligatory”. The Court later quoted<sup>28</sup> in the same connection and with approval the following passage from Monnin, J. A., of the Manitoba Court of Appeal in his dissent in *Bilodeau*:<sup>29</sup>

The legislation [section 23] is clear, and speaks of “shall be used” and “shall be printed”. There is nothing directory in that language. Furthermore, entrenched linguistic rights are by nature mandatory and never directory. If they were directory only, the risk is that they would never be enjoyed or be of any use to those to whom they were addressed. If they were merely directory it would fly in the face of entrenchment. The authorities . . . on the mandatory or directory nature of legislation have no application to entrenched rights.

In these passages, “entrenchment” seems to convey only that provision is in the legislated constitution, as opposed to ordinary legislation, and is not amendable by either the ordinary legislature process or by unilateral action of a single, in this case provincial, legislature. The Court and Monnin, J. A., also likely used the word further to emphasize why they felt the provision to be obligatory, or mandatory in the normal grammatical sense of the word.

These passages show that the Court felt that an “entrenched” provision was inherently not subject to placement in the mandatory and directory classification. In a predominantly written constitution such as Canada’s the constitutionality of legislation is nearly always, if not always, contingent upon such “entrenched” provisions. From these premises it follows that the constitutionality of legislation can never be contingent upon the mandatory and directory classification. Thus the classification is not to be applied. That is the Court’s reasoning, but is the first premise well founded?

The foundation offered<sup>30</sup> is that in many American authorities, none of which are cited, in *Blaikie No. 1*,<sup>31</sup> in *Forest*,<sup>32</sup> and in *Bribery*

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26. *Supra*, note 8.

27. *Supra*, note 4.

28. *Supra*, note 1 at 23.

29. *Supra*, note 7 at 407.

30. *Supra*, note 1 at 23.

31. *Supra*, note 8.

32. *Supra*, note 4.



*Commissioners v. Ranasinghe*,<sup>33</sup> the courts did not mention the mandatory and directory distinction when ruling that legislation which had not been enacted in compliance with constitutional manner and form requirements was invalid. To that list one could add: *Harris v. Donges*;<sup>34</sup> *Immigration and Naturalization Service v. Chadha*;<sup>35</sup> *McDonald v. Cain*;<sup>36</sup> *Attorney-General for New South Wales v. Trethowan*;<sup>37</sup> and *Akar v. Attorney-General of Sierra Leone*.<sup>38</sup>

The Court's reasoning here seems specious. In all of those cases the ground of invalidity affected only one Act, not the entire body of statutory law enacted by a provincial legislature over the course of some 96 years. More importantly, from the fact that the mandatory and directory distinction was on many occasions not mentioned one ought at least as readily to infer that the provision was without argument thought or conceded to be mandatory as to infer that the mandatory and directory distinction was thought not to be applicable to provisions of a constitution. Silence does not speak unequivocally.

These passages about "entrenched" provisions are also noteworthy because through them the Supreme Court of Canada seems to assume that a directory provision is not obligatory and that a failure to observe it does not give rise to a remedy, a view that is different from that expressed by the weight of authority.

A third reason given by the Court for rejecting the doctrine is:

... the harm that would be done to the supremacy of Canada's Constitution if such a vague and expedient principle were used to interpret it. It would do great violence to our Constitution to hold that a provision on its face mandatory, should be labelled directory on the ground that to hold otherwise would lead to inconvenience or even chaos. Where there is no textual indication that a constitutional provision is directory and where the words clearly indicate that the provision is mandatory, there is no room for interpreting the provision as directory.<sup>39</sup>

But the doctrine about mandatory and directory provisions does not suggest that "a provision mandatory on its face" should in some cases be labelled directory. The Court's assertion here is logical only if the Court understands the distinction between mandatory and directory provisions to be a distinction between provisions that are obligatory and provisions that are not obligatory. The passage is another indication that the

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33. [1965] A.C. 172.

34. [1952] T.L.R. 1245 (S.C. of S.A., App. Div.)

35. 103 S.C. 2764 (U.S.S.C.)

36. [1953] V.L.R. 411 (S.C. of V., Full Crt)

37. [1932] A.C. 526 (P.C.).

38. [1970] A.C. 853 (P.C.).

39. *Supra*, note 1 at 24.

reasoning of the Court is indeed based on the assumption that a directory provision is not obligatory. If that was the Court's assumption, then its reasoning stands to reject only a doctrine under which mandatory is obligatory and directory is not obligatory; it does not stand to reject the doctrine that the weight of authority describes under which both mandatory and directory are obligatory in the sense that they must be obeyed.

As for the alleged vagueness and expediency of the principle, *Clayton v. Heffron*,<sup>40</sup> *Simpson*,<sup>41</sup> and *Namoi Shire Council v. Attorney-General for New South Wales*<sup>42</sup> illustrate that there are concrete criteria by which to apply the doctrine in a principled judicial way where constitutional validity of legislation is in issue and that rather than expediency, in the sense of politic rather than just, the principle allows flexibility to help assure that the constitution will be construed and applied so as to achieve its object.

*Clayton v. Heffron*<sup>43</sup> is one of those exciting gems that inspires re-examination of fundamental precepts of constitutional jurisprudence. The purpose of the suit was to obtain an injunction to prevent the holding of a referendum under the *Constitution Act, 1912-1956* of New South Wales on the question of whether a Bill for the abolition of the Legislative Council (the upper House in a bi-cameral Parliament) should be adopted. The alleged illegality was that procedures required by the Constitution Act preliminary to the referendum had not been followed. By virtue of a concession made by counsel for the defendant, the case was argued and decided as though it were one where, instead of an injunction being sought to prevent a step that might lead to enactment, the Act was assumed to have been enacted and a declaration of its invalidity was being sought. Section 7A of the *Constitution Act* protected the Legislative Council from abolition except on approval of the majority of electors voting in a referendum. Section 5B established a procedure to resolve conflict or deadlock between the Legislative Assembly and the Legislative Council. In pursuance of that procedure and the procedure for constitutional amendment, the Assembly set about to abolish the Council. The Council refused to consider the Bill for its abolition. Through the Council's refusal to participate, a meeting of the managers of the Houses, required by section 5B as a condition precedent to subsequent steps, did not occur and a subsequent joint meeting of members of both Houses was convened by the Governor and occurred in

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40. *Supra*, note 19.

41. *Supra*, note 18.

42. [1980] 2 N.S.W. L.R. 112 (S. C.)

43. *Supra*, note 19.

fact but in defiance of a resolution of the Council. Despite those departures from the procedure required by the *Constitution Act*, the Assembly took the next step in the stipulated procedure and resolved that the Bill for abolition be sent to referendum. Some members of the Council attempted by court action to thwart the Assembly, but the High Court of Australia determined that the departures from the procedure would not affect the validity of the Act enacted by such irregular procedures.

The judgment of the Court was given by Dixon, C. J., and although the passage relevant here is long it merits reproduction rather than paraphrase:

[Is] it in accordance with principle to treat the omission of such a step in the legislative process [the conference of managers] as invalidating the statute once it is approved by the electors and assented to by the Crown. . .

There is no doubt that the words 'after a free conference between managers' contain an implied direction that such a conference shall take place. In the same way the words relating to the joint sitting of members of the Houses import an intention that the Governor shall exercise the authority to convene a joint sitting of members. But it is an entirely different thing to find in the direction an intention that a departure from the procedure shall spell invalidity in the statute when it is passed. In this case there are two matters with which we are dealing: the legislative power and the procedure for its exercise. The principles of the common law distinguish sharply between invalid attempts to exercise a legislative power and departures from the prescribed course for its exercise which may or may not bring invalidity as a necessary consequence. In the end the distinction must be governed by the intention expressed by the legislature conferring the power and prescribing the steps to be taken in its exercise. But commonly no express declaration is to be found in a statutory power as to the effect on validity [of a departure] from the procedure laid down. The question is then determined by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed. The power here is to enact a public general statute and the power to do this extends to a statute altering the constitution of the Legislature so that if the statute is to be void every future piece of legislation passed by the Legislature of the State so constituted will have no force or effect. The matter of procedure prescribed is a matter affecting the process in Parliament. . . The point of procedure concerns a step preliminary to the calling by the Governor of a joint sitting of the members of the two Houses. Such a meeting was convened. . . and a meeting of certain members the two Houses took place. . . The preliminary step of appointing managers freely to confer rested on the co-operation of both Houses in conflict. It would rest with either House to neglect the duty and so bring the proceedings to nought. . . before one reaches the conclusion that the failure to fulfil the requirement of holding a free conference will result in invalidity of the law

if adopted, it is natural to treat the fact that the Legislative Council may decline a conference of managers as a reason to be added to the other considerations for holding that it is not a matter going to validity. Lawyers speak of statutory provisions as imperative [mandatory] when any want of strict compliance with them means that the resulting act, be it a statute, a contract, or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act is wholly ineffective, is null and void. . .the decided cases illustrating the distinction relate to much humbler matters than the validity or invalidity of the constitution of the Legislature of a State. But in them all the performance of a public duty or the fulfilment of a public function by a body of persons to whom the task is confided is regarded as something to be contrasted with the acquisition or existence of private rights or privileges and the fact that to treat a deviation in the former case from the conditions or directions laid down as meaning complete invalidity would work inconvenience or worse on a section of the public is treated as a powerful consideration against doing so. Is it possible to imagine a stronger case of inconvenience than the invalidation, perhaps at some future time, of a constitutional provision possessing all the outward appearances of a valid law on the ground that when it was made managers of the Council had not met with managers of the Assembly before the members of the two Houses were required by the Governor to meet.<sup>44</sup>

The procedural requirement that was not observed in *Clayton v. Heffron* is obviously not of the same importance as the fundamental language right expressed in s. 23 of the *Manitoba Act, 1870*. But I do not use *Clayton v. Heffron* to suggest that the obligatory provisions of s. 23 ought to be classified as directory. Rather, I use the reasoning of the case to suggest that the doctrine distinguishing between mandatory and directory provisions, both of which are obligatory, ought not to be rejected as inapplicable in cases where the constitutionality of legislation is in issue. *Clayton v. Heffron* stands as a clear exposition of the doctrine and as eloquent witness to the doctrine's utility when construing and applying provisions of a constitution.

That utility is further illustrated by *Simpson*.<sup>45</sup> In that case the constitutional validity of the legislative output of several Parliaments was challenged on the ground that the Governor General had not made the writs of election of members returnable within the time prescribed by the constitution, it being alleged that he was one day late. Through interpretation to establish how to count the days correctly the court narrowly escaped having "to deal with the appellant's sweeping contention that, if his main submission succeeded, the effect would be to

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44. *Id.* at 245-47.

45. *Supra*, note 18.

invalidate all subsequent proceedings of Parliament".<sup>46</sup> However, for one Parliament, that sweeping contention had to be faced because there was for it the further indisputably true fact that the Governor General had not issued his warrant for a general election within the time required by a constitutional provisions, it being accepted by all that neither he nor his advisors could fairly be criticized for the delay. Having noted that the royal prerogative was the source of the power to call the election, the court said of the provision in question:

This provision does not purport to impose any limitations, restrictions, or conditions upon the exercise of the prerogative. What it does purport to do is to place a duty upon the Governor-General in aid of the summoning of Parliament. . .the main object [of the provision] is to sustain, and not to destroy the House of Representatives.<sup>47</sup>

It could not have been the intention of the Legislature that [some accidental or unavoidable delay] should affect the prerogative right to call Parliament.<sup>48</sup>

The court went on to hold<sup>49</sup> that although the provision here was obligatory, not permissive, it was directory and not mandatory because the Legislature did not intend invalidity of all subsequent proceedings to be the consequence of non-compliance with the provision; on the contrary, such invalidity would frustrate the fundamental intention of the Legislature, which was that Parliament should be summoned after an election.

The doctrine was also applied in *Namoi Shire Council*<sup>50</sup> where the validity of an Act was challenged on the ground it was enacted in contravention of the Standing Orders of the Legislative Assembly, those Orders having statutory force by virtue of the *Constitution Act, 1902* although made by the Assembly rather than by the whole Parliament. That the Standing Orders in question were obligatory was not doubted. The Court thought the heart of the matter to be "whether on the true construction of the *Constitution Act*, compliance with Standing Orders made under s. 15 [of the *Constitution Act*] is a condition of the validity of a law otherwise validly enacted thereunder."<sup>51</sup> The Court inferred from the following factors that compliance with them was not a condition of validity and therefore the Standing Orders in question were directory:

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46. *Id.* at 278.

47. *Id.* at 279.

48. *Id.* at 280.

49. *Id.* at 281.

50. *Supra*, note 42.

51. *Id.* at 644.

- (1) the Constitution Act vested plenary law making power in Parliament comprising Queen, Legislative Council, and Legislative Assembly;
- (2) there was no express stipulation that compliance with the Standing Orders was a condition of the validity of the Acts of Parliament;
- (3) each House made its own Standing Orders, subject to the approval of the Governor;
- (4) the Standing Orders embraced only procedural matters, and many of those procedural matters were relatively insignificant;
- (5) if the Standing Orders were mandatory, the consequences would indeed be inconvenient especially if a challenge to an Act's validity did not come until a long time after its enactment;
- (6) the nature and function of the Standing Orders was to facilitate the plenary power to legislate.

The reasoning of the Courts in *Clayton v. Heffron, Simpson*, and *Namoi* shows that the mandatory and directory provision doctrine, far from harming the supremacy of the constitution, can be applied so as to respect the constitution and further its objects; it further suggests that the rigidity created by the Supreme Court of Canada's rejection of the doctrine is at least as likely to harm the supremacy of the constitution as is the application of the doctrine.

By rejecting the mandatory and directory provision, the Court put itself in the same position it would have been in had it accepted the doctrine and classified the relevant provisions of s. 23 as mandatory. Having climbed to the precipice and boldly chosen to leap lively forth, the Court cast about for the rule of law and a doctrine of state necessity to assure a safe landing in the troubled waters below. It fashioned the fiction of invalid laws being deemed valid for an indefinite time. The Court could have preserved the mandatory and directory provision doctrine for its utility in future case and come to the same final disposition. The Court could even have classified s. 23 as directory and still chosen the same final disposition.

The classification as directory would have created the opportunity for the Court to have been more flexible in fashioning a remedy. For example, it could have declared that all laws already enacted in contravention of s. 23 were valid notwithstanding the contravention, declared that all laws enacted and published in the future without compliance with s. 23 would be subject to being declared invalid, and ordered that the Government of Manitoba as soon as practical translate and publish in French the statutes and regulations currently in force, and in default of compliance with the order, risk a declaration of invalidity in relation to those laws. The United States Supreme Court has already shown the way in its approach toward desegregation of schools so as to

end violation of the equal protection of the law guarantee. That court's approach was to require the school authorities to dismantle the unconstitutional segregated school systems with all deliberate speed. This meant a prompt and reasonable start toward full compliance. If the authorities needed more time to comply it could be permitted if necessary in the public interest and consistent with good faith compliance at the earliest possible date.<sup>52</sup> That approach seems especially well suited for adaptation to enforce language rights. We have no idea whether or why the Supreme Court of Canada thought this approach to a remedy was deficient. The Court's reasoning moved it inexorably to automatic invalidity and, therefore, no choice about remedy — the remedy had to be total compliance to avoid invalidity; flexibility came only through the time for total compliance which was purchased at the cost of a fiction deeming valid what was declared invalid, thereby letting nullities in the law live on, a leap that Freedman, C. J. in *Bilodeau*<sup>53</sup> found difficult and the Courts in *Clayton v. Heffron*, *Simpson* and *Namoi Shire Council* found unnecessary.

The implications of the inflexibility flowing from the Courts rejection of the mandatory and directory distinction are highlighted when that rejection is coupled with the Court's readiness to review whether manner and form requirements fixed by the constitution for the legislative process have been complied with.

The Court's process of review starts with the proposition that:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.<sup>54</sup>

The Court reaffirms its earlier statement in *Amax Potash Ltd. v. Government of Saskatchewan*, a case involving division of powers between federal and provincial governments:

A state. . .is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. . .but the general principle must yield to the high requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. . .it is the high duty of this Court to insure that the legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.<sup>55</sup>

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52. *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Griffin v. Prince Edward County Board of Education*, 377 U.S. 218 (1968); *Green v. County School Board*, 391 U.S. 430 (1968)

53. *Supra*, note 7 at 402.

54. *Supra*, note 1 at 28.

55. [1977] 2 S.C.R. 576 at 590.

The Court's decision in the *Patriation Reference*<sup>56</sup> asserted the same. Even more to the point is s. 52 of the *Constitution Act, 1872*:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.

That s. merely restates in the context of Canada's "patriated" constitution what had in any event been the law through joint operation of the *Statute of Westminster, 1931*<sup>57</sup> and s. 2 of the *Colonial Laws Validity Act, 1865*<sup>58</sup> under which Canada has a tradition of judicial review of validity of legislation. Such a tradition is important because it influences receptiveness of bench and bar to extension of the scope of review, even if most of the tradition is in cases concerned with distribution of power between federal and provincial governments; this point has been elaborated on in articles by Owen Dixon and W. Friedmann.<sup>59</sup>

Finally, the Court referred to *Ranasinghe*<sup>60</sup> in support of its conclusion that "in a case where constitutional manner and form requirements have not been complied with, the consequence of such non-compliance continues to be invalidity."<sup>61</sup>

In *Ranasinghe* the Privy Council was concerned with an Act to amend the constitution of Ceylon that the constitution required bear the Speaker's certification that the Act had passed by a 2/3 majority. The Act did not bear that certification. The constitution stipulated that the certification was conclusive as to whether the required 2/3 majority existed. Relying on *Edinburgh Railway Co. v. Wauchope*,<sup>62</sup> counsel sought to sustain the Act by invoking the enrolled bill rule by which:

All that a Court of Justice can do is look to the parliamentary roll: if from that it should appear that a bill has passed both Houses and received Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, not into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

The Privy Council disposed of that with the following:

The English authorities have taken a narrow view of the Court's power to look behind an authentic copy of the Act. But in the constitution of the

56. *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 841, 848, 877.

57. 22 Geo. V, c. 4 (U.K.).

58. 28 and 29 Vict., c. 63 (U.K.).

59. O. Dixon, *The Law and the Constitution* (1935), 51 A.L.J. 590; W. Friedmann, *Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Changes* (1950), 24 A.L.J. 103.

60. *Supra*, note 33.

61. *Supra*, note 1 at 30.

62. (1842), 8 C1. and F. 710; 8 E. R. 279.



United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the Court to take any close cognizance of the process of law-making. . .

When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any Court of law. . .The Courts. . .have a duty to look for the certificate in order to ascertain whether the constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

[When the certificate is lacking] is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner?

[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of whether the legislature is sovereign.

The proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

This cut by the Privy Council through the Gordian Knot tied by the enrolled bill rule is all the more magnificent because in *Hoani Te Heuheu Tukino*,<sup>63</sup> a case from New Zealand, and in *Labrador Company*,<sup>64</sup> a case from Canada, the Privy Council had invoked the enrolled bill rule in aid of its refusal to inquire into the validity of Acts whose enactment was alleged to have been procedured by misrepresentation or to be premised on demonstrable misunderstanding. For that limited purpose the rule is certainly still alive in England, as *Pickin*<sup>65</sup> shows, and likely still alive in Canada, although s. 1 of the *Canadian Charter of Rights and Freedoms*, inviting as it does examination of the premises upon which the legislature acted, might further restrict the potential operation of the rule.<sup>66</sup>

The Supreme Court of Canada's acceptance of *Ranasighe* not only reduces the role of the enrolled bill rule but also lays to rest the conflict between *Gallant*,<sup>67</sup> where the Prince Edward Island Supreme Court declared an Act invalid for want of compliance with the *Constitution Act*,

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63. *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308 (P.C.).

64. *Labrador Company v. The Queen*, [1893] A.C. 104 (P.C.).

65. *British Railways Board v. Pickin*, [1974] A.C. 765 (H.L.).

66. E. Conklin, *Pickin and its Applicability to Canada*.

67. *Gallant v. The King*, [1949] 2 D.L.R. 425 (S.C. of P.E.I.)

1867 requirements about Royal assent, and *Irwin*<sup>68</sup> where the Exchequer Court of Canada invoked the rule to reject the suggestion it should declare an Act invalid on the ground it imposed a tax and was not shown to have been presented by message of the Governor General as required by s. 54 of the *Constitution Act, 1967*. Dicta of Laskin, C. J., in *In re Agricultural Marketing Act* had suggested that the reasoning of *Irwin* would not be adopted by the Supreme Court of Canada.<sup>69</sup>

In *Ranasinghe* the constitutional requirement related to the form of an Act; the thing was not an Act unless in the required form. That is a helpful analogue to the requirement of s. 23 of the *Manitoba Act, 1870* that an Act be enacted, printed, and published in English and French. But s. 23, particularly the implied requirement that the Bill be in both languages as it passes through the legislative process, can also be viewed as a stipulation as to the manner in which the power to legislate is to be exercised. For this aspect the reasoning of the Privy Council in *Trethowan*<sup>70</sup> is more germane. There, by virtue of an amendment under one government, the constitution of New South Wales contained a provision prohibiting a Bill to abolish the Legislative Council from being presented for Royal Assent unless it had been approved by a majority of electors in a referendum; that provision also expressly said it could be repealed or amended only by the same procedure. Under a succeeding government both Houses of the Legislature passed Bills to remove that provision from the constitution and seemed intent on presenting them for Royal Assent. Opponents of that move brought a suit to obtain an order enjoining officers of the Legislature presenting the Bills for Assent. In response to the argument that the members were masters in their own Houses and could in whatever manner they chose exercise the Legislature's power to amend the constitution the Privy Council said, after determining that, despite argument to the contrary, power to make the amendment did exist:

The question then arises, could *that* Bill, a repealing Bill, after its passage through both chambers be lawfully presented for the Royal assent without having first received the approval of the electors in the prescribed manner? . . . the Bill could not lawfully be so presented. The proviso. . . states a condition that must be fulfilled before the legislature can validly exercise its power to make the kind of laws that are referred to in that sentence. . . In order that s. 7A may be repealed. . . the law for that purpose must have been passed in the manner required by s. 7A. . .<sup>71</sup>

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68. *The King v. Irwin*, [1926] Ex. C.R. 127.

69. [1978] 2 S.C.R. 1198 at 1227.

70. *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526 (P.C.).

71. *Id.* at 540.

*Harris v. Donges*,<sup>72</sup> a South African case, and *McDonald v. Cain*,<sup>73</sup> an Australian case, are further examples of the reasoning of *Trethowan* being applied in cases where the prescribed manner of legislative action was not followed. In the former, the Court declared invalid a constitutional amendment that was not passed in conformity with the required manner, namely, a 2/3 majority of a joint sitting of the two Houses of Parliament. In the latter the Court declared invalid a constitutional amendment not passed by an absolute majority of members of each House as the constitution required.

Implicit in cases like *Ranasinghe* and *Trethowan* is an overriding of not only the enrolled bill rule but also another bastion of parliamentary privilege, namely, the rule that the courts have no jurisdiction over the management of the internal proceedings of the legislature, internal proceedings being those which do not affect the rights of persons exercisable outside the legislature,<sup>74</sup> the legislature itself being sole judge of whether the requirements for its proceedings have been complied with. The Privy Council decision in *Kielly v. Carson*<sup>75</sup> and the Supreme Court of Canada's in *Landers v. Woodworth*<sup>76</sup> restrict the operation of the rule to the extent, that for a legislature like Manitoba's created by statute, the privileges and immunities of the legislature and the members are limited to those either expressly conferred by or pursuant to statute, or necessarily incidental to the existence and status of the body or the reasonable exercise of its functions.<sup>77</sup> The issue is relevant here because the implied requirement in s. 23 of the *Manitoba Act, 1870* for bilingual enactment relates to a matter of internal proceedings within the legislature. The Supreme Court of Canada did not speak to the issue. But the rule has been expressly overridden in and for the purposes of at least three cases dealing with manner and form requirements, namely, *Clayton v. Heffron*,<sup>78</sup> *Namoi Shire Council*,<sup>79</sup> and *McDonald v. Cain*,<sup>80</sup> and such overriding is necessarily implicit in the reasoning of the other manner and form cases. *Clayton v. Heffron* puts it most bluntly: if the constitution makes validity dependent on a proceeding within Parliament, the courts must take cognizance of it.<sup>81</sup> However, the rule was overridden only for

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72. [1952] 1 T.L.R. 1245 (S.C. of S.A., App. Div.)

73. [1953] V.L.R. 411 (S.C. of V., Full Ct.)

74. *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271.

75. (1842), 13 E.R. 225.

76. (1878), 2 S.C.R. 158.

77. *Namoi Shire Council*, *supra*, note 42.

78. *Supra*, note 19.

79. *Supra*, note 42.

80. *Supra*, note 73.

81. *Supra*, note 19 at 234.

the purposes of those cases concerned with constitutional validity of legislation, it was not overruled for all purposes.

This rule about internal proceedings and, more especially, the enrolled Bill rule both tend to sustain a conception of the supremacy of Parliament under which Parliament cannot bind a succeeding Parliament to observance of obligatory manner and form rules for the legislative process in Parliament.

The reasoning of *Trethowan* and *Ranasinghe* has been the occasion for re-examination and reformulation of the conceptions of the supremacy of the law and the supremacy of Parliament. The reformulation was well expressed by Sir Ivor Jennings<sup>82</sup> and Owen Dixon<sup>83</sup> long before *Ranasinghe*, but more recent comments on it came from Geoffrey Marshall<sup>84</sup> and Catherine Swinton.<sup>85</sup>

In the words of Owen Dixon:

It is of the essence of Parliamentary sovereignty that the Courts of law, once there is before them an authentic expression of the legislative will, shall give unquestioned effect to it according to what appears its true scope and intent. But it is of the essence of the supremacy of the law that the Courts shall disregard as unauthorized and void the acts of an organ of government, whether legislative or administrative, which exceed the limits of the power that the organ derives from the law.<sup>86</sup>

A wide distinction in any case exists between the powers of legislation and the mode and procedure for their exercise.<sup>87</sup>

[Trethowan established that the] very power of constitutional alteration cannot be exercised except in the form and manner which the laws for the time being prescribe.<sup>88</sup>

It is at this point that the conception of the supremacy of the law is allowed to prevail over the conception of the supremacy of the Legislature. If a requirement of the existing law is one which goes to manner and form of legislation, then that requirement cannot be disregarded and any attempt to legislate, which does not comply with it is void. . . [the rule in *Trethowan* is] a modern reconciliation of the supremacy of Parliament. For it is the demarcation of the limits of operation of the two principles. The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law. But on the

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82. Sir Ivor Jennings, *The Law and The Constitution*, (5th ed. London: University of London Press) at 149-156.

83. *Supra*, note 59.

84. G. Marshal, *Parliamentary Sovereignty: A Recent Development* (1966-67), 12 *McG. L. J.* 523.

85. C. Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege* (1976), 14 *Osgoode Hall Law Journal* 345.

86. *Supra*, note 59 at 596.

87. *Id.* at 603.

88. *Id.* at 601.

question what may be done by the law so made, Parliament is supreme over the law.<sup>89</sup>

Dixon's proposition has practical significance which might be all the greater in Canada given the Supreme Court of Canada's rejection of the relevance of the mandatory and directory doctrine when the constitutional validity of legislation is in question. Under ss. 44 and 45 of the *Constitution Act, 1982*, Parliament and the provincial legislatures each have a restricted power of unilateral amendment of the Constitution of Canada and of the province respectively; the manner and form of proceedings within Parliament or the legislature is one field for unilateral constitutional amendment. Further, even without looking to the Constitution, manner and form requirements for legislative proceedings can and do exist by ordinary statute and by Standing Orders. For the purposes of Dixon's proposition, the distinction between a requirement that is in the constitution and one that is not, seems irrelevant. In this proposition, the key element is that the "requirement" is indeed a requirement and that it is prescribed by law. When Dixon's proposition is combined with the Supreme Court of Canada's assertion that the mandatory and directory doctrine is irrelevant, what will the Court do when it has before it a challenge to the validity of an Act that on the face of it is not in conformity with the *Interpretation Act* requirement that the fact and date of Royal Assent be endorsed on it, or an Act that was not enacted in conformity with the Standing Orders, or an Act that was passed by a House of Commons sitting one member short of the quorum required by s. 48 of the *Constitution Act, 1867*?

When using *Ranasinghe* to support its rejection of the mandatory and directory doctrine, the Supreme Court of Canada seemed to infer that the reasoning of *Ranasinghe* was inconsistent with applying the doctrine where constitutional validity of legislation was in issue.<sup>90</sup> But there is no inconsistency. The reasoning of *Ranasinghe*, like that of *Trethowan* and the other cases similar to them, assumes that the Court has before it an obligatory provision breach of which is intended by the legislator to result in automatic invalidity of the proceedings. That is the premise from which their reasoning proceeds. When the mandatory and directory doctrine is applied, it is used to determine whether that premise is established for the case at hand. This is the synthesis between cases like *Ranasinghe*, where the mandatory and directory doctrine were not mentioned, and cases like *Clayton v. Heffron*, where the doctrine was applied. That this is so is evident from the fact that cases in the *Clayton v. Heffron* group recognize *Ranasinghe*, and before it *Trethowan*, as

89. *Id.* at 603-604.

90. *Supra*, note 1 at 23.

authority to carry out the review of validity and from the belief common to both groups that:

Of course the framers of a constitution may make the validity of a law depend upon any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding in Parliament the Courts must take it under their cognizance in order to determine whether the supposed law is a valid law.<sup>91</sup>

The principle expressed in that passage shows the wisdom of the mandatory and directory doctrine. Further, it is the principle that Owen Dixon described as the reconciliation of the supremacy of the law and the supremacy of Parliament. In this host of authorities, the Supreme Court of Canada stands alone in its rejection of a mandatory and directory provision doctrine whose purpose is to determine whether the framers of the Constitution intend the validity of a statute or other proceeding to depend upon compliance with the rule.

And we are left with the irony that the court, using principles of necessity drawn from the crucible of war, revolution, and civil war, unwittingly provides legal justification for the continued violation of the right the court obviously intended to enforce. For if Manitoba does not do as the court requires, what do we have in Manitoba? Chaos. And if we have chaos we have, on the authority of the Supreme Court of Canada itself, occasion for the invocation of necessity to clothe with legitimacy that which, in the absence of the necessity, is illegitimate.

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91. *Supra*, note 19 at 234.

