Parties and Participants in Constitutional Litigation: The Minority Language Rights Issue in Quebec and Manitoba

The issue of minority language rights presents an excellent case study which integrates issues of standing and intervention, and permits examination of the role of the courts in a broader institutional and political context. This note reviews the strategies of the litigants and the intervenors, both public and private, in the judicial resolution of minority language controversies in Quebec and Manitoba. It examines the alternative political attempts at resolving these disputes and assesses the judicial disposition of the Manitoba controversy in its larger political context.

Both Quebec and Manitoba enacted laws which constituted French (Quebec) and English (Manitoba) as the only official language. In Quebec this was a recent development. Following election of the Parti Quebecois government in 1976, the Quebec National Assembly passed Bill 101, the *Charter of the French Language*[1], which provided that French was the language of the legislature and the courts of Quebec[2]; that only the French text of statutes and regulations was official[3]; that pleadings by artificial persons before the courts must be in French unless all parties agreed to plead in English[4]; and that only the French version of judgments of Quebec courts was official[5]. In Manitoba the denial of constitutional protection of the French language dated from 1890. In that year the legislature of Manitoba passed an *Official Language Act*[6] providing that English only "shall be used in the records and journals of the House of Assembly...and in any pleadings or process in...any court in ...Manitoba"[7] and that "[t]he Acts of the Legislature...need only be printed and published in the English language"[8].

Both statutes were vulnerable to challenge. Section 133 of the *Constitution Act, 1867*[9] provides that:

> Either the English or the French Language may be used by any Person in the Debates...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

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[1] R.S.Q. 1977, c. C-11 (hereafter referred to as Bill 101).

[2] *Ibid.*, s. 7.

[3] *Ibid.*, s. 9.

[4] *Ibid.*, s. 11.

[5] *Ibid.*, s. 13.

[6] *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, S.M. 1890, c.14; R.S.M. 1970, c. 0-10, rep. by S.M. 1980, c.3, s.7 (hereafter referred to as *Official Lanuage Act*).

[7] *Ibid.*, s. 1.

[8] *Id.*

[9] 30-31 Vict., c.3, as am. by Schedule to the *Constitution Act, 1982* which is Schedule B of the *Canada Act 1982*, 1982 (U.K.) c. 11.

> 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 Legislature of Quebec shall be printed and published in both Languages.

For Manitoba, section 23 of the *Manitoba Act, 1870*,[10] an Act which enjoys constitutional status by virtue of section 52(2)(b) of the *Constitutional Act, 1982*,[11] made identical provision for the use of English and French in the Legislature and the Courts of Manitoba and for the printing and publishing of statutes.

The challenge to Bill 101 was raised by Peter Blaikie (former national president of the Progressive Conservative Party) and two other English-speaking lawyers. They brought an action in Quebec Superior Court against the Attorney-General of Quebec for a declaration that sections 7 to 13 were *ultra vires*. The Attorney-General initially took the position that they lacked standing. However, it was held that as lawyers they had a "sufficient interest" within the meaning of Article 55 of the *Code of Civil Procedure*;[12] accordingly, this defence was abandoned.

The Attorney-General of Canada intervened in support of the challenge and maintained that intervention both in the Quebec Court of Appeal[13] and at the Supreme Court of Canada[14]. Insofar as Bill 101 was in direct conflict with federal government policy on official bilingualism, intervention was to be expected. It is interesting, however, to note the broader political strategy that lay behind this intervention. The federal government had been requested by anglophone groups in Quebec to refer Bill 101 directly to the Supreme Court of Canada. While such action would have expedited the matter, the federal government was concerned about its political impact in Quebec. It was feared that it would be seen as a rather heavy-handed attempt to have the Supreme Court of Canada, a creature of the federal government and whose members are all federally appointed, do its dirty work. Since the Court's creation in 1875, there has always been opposition in Quebec to a federally appointed court with general jurisdiction to interpret the civil law of Quebec and review Quebec legislation. By directly referring Bill 101 to the Supreme Court, there was a risk that the independence of that Court would become compromised in the eyes of Quebecers.

By deciding to intervene in support of a private challenge, the federal government sought to achieve two "political" objectives. First, such action was less dramatic than a reference and less likely to be seen as interfering in a provincial matter. Second, by allowing the issue to be considered first in the Quebec Superior Court and Court of Appeal before going to the Supreme

[10] 33 Vict., c.3, as am. by Schedule to the *Constitution Act, 1982*.

[11] Schedule B of the *Canada Act 1982*, 1982 (U.K.) c. 11.

[12] R.S.Q. 1977, c.C-25.

[13] *Attorney-General of Quebec* v. *Blaikie* (1979), 95 D.L.R. (3d) 42 (Que. C.A.).

[14] *Attorney-General of Quebec* v. *Blaikie* (1980), 101 D.L.R. (3d) 394 (S.C.C.).

Court, it became possible — should the Quebec courts find the *Act ultra vires* — to make the political argument that there was a broad base of judicial opposition to Bill 101. That opposition would be from both civilian judges sensitive to the needs of Quebec and from the more broadly representative judges of the Supreme Court. While it is true that the Quebec judiciary is federally appointed and to that extent might still be seen as unsympathetic to Quebec, the sense in which it would be seen as "biassed" was much less evident. It is also interesting to note the positions taken by other intervenors before the Supreme Court. Manitoba, which had a unilingual English language policy, supported Quebec. New Brunswick, which has always had a significant francophone minority, joined Canada in supporting the challenge. George Forest, who was processing his own challenge to Manitoba's *Official Language Act* at the time of the hearing before the Supreme Court, intervened. These interventions show clearly the way in which competing and parallel interests come together in constitutional cases.

In the end the federal government's hope for a broad base of judicial opposition was achieved. Bill 101 was found to be *ultra vires* by no fewer than 17 judges, without a single dissent. Deschênes C.J. of the Quebec Superior Court[15], seven judges of the Court of Appeal[16], and a full bench of the Supreme Court[17] all found the *Act* to contravene section 133 of the *Constitution Act, 1867*. In a subsequent proceeding an application was brought to clarify the application of section 133 to delegated legislation.[18]

At the same time George Forest initiated his challenge to Manitoba's *Official Language Act*. The problems he encountered in getting his claim before the Supreme Court indicate some of the peculiar difficulties of constitutional litigation. He was initially charged with a parking violation and sought acquittal on the basis that the ticket which was in English should have been in English and French. Upon rejection of that argument, Forest was convicted. He appealed. However, as he filed his notice of appeal in French, the Crown opposed the setting down of the appeal on the basis that the notice did not comply with the *Official Language Act* (requiring English to be used in pleadings). Forest argued that the *Act* was *ultra vires*. Dureault Co.Ct.J. agreed and set the appeal down for hearing.[19] The Crown declared that while it did not accept this ruling, it did not intend to appeal "at this time".[20] It waived its objection to the appeal documents and indicated that it was prepared to proceed with the merits of the appeal. Forest requested the Queen's Printer to supply him with official French versions of certain provincial statutes in order to permit him to conduct his appeal. The Attorney-General replied that, although these statues were not available, they could be supplied if Forest were

[15] *Blaikie* v. *Attorney-General of Quebec* (1978), 85 D.L.R. (3d) 252 (Que. S.C.).

[16] *Supra*, footnote 13.

[17] *Supra*, footnote 14.

[18] *Attorney-General of Quebec* v. *Blaikie* (1981), 123 D.L.R. (3d) 15 (S.C.C.).

[19] *R.* v. *Forest* (1976), 74 D.L.R. (3d) 704 (Man. Co.Ct.).

[20] *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 at 449 (Man. C.A.).

prepared to pay $17,000 for translation.[21] Forest then brought an application in French — to the office of the Prothonotary of the Court of Queen's Bench[22] for both a declaration that the statutes of Manitoba be published in both languages and an order requiring the Attorney-General to do whatever was necessary for printing and publishing the official French version of the statutes. His documents were rejected as being in French and therefore contrary to the *Official Language Act*. He then made a similar application to the Registrar of the Court of Appeal[23] and was again rejected on the grounds that the ruling of Dureault Co.Ct.J. was not binding on the Court of Appeal and that until the Court of Appeal had disposed of the issue of the language of pleading, pleadings had to be exchanged in English.

Forest next brought an application in English before the Court of Appeal for an order directing the Registrar to accept registration of the French documents previously rejected. At this stage he was met by an argument from the Attorney-General that the Court of Appeal was not the appropriate forum for such an application and that he should have proceeded in the Court of Queen's Bench. The Court of Appeal accepted that position and dismissed his application for the reason that while the issue was important, it had potentially serious consequences in terms of costs of translation and training of judges — consequences concerning which evidence may have to be called — all of which suggested that the better forum was the Court of Queen's Bench rather than a court of appellate jurisdiction.[24] In due course Forest returned to the Court of Queen's Bench and brought an application — in English — for a declaration that the *Official Language Act* was *ultra vires*. Here the Attorney-General of Manitoba took the position that Forest had no standing. The Court ruled he lacked standing on the basis that he already had obtained the relief he wanted in the proceedings before Dureault Co.Ct.J. and declined to pursue his appeal in the County Court.[25] On appeal, the Court of Appeal held that he did have standing.[26] The Court stated that it was no answer to direct the applicant to pursue his appeal in the County Court.[27] His objective was to get the language issue into a higher court; since he had been successful on the constitutional issue in that court, he could not appeal that issue to a higher court. Moreover, the Attorney-General had chosen not to appeal the adverse finding on this issue. Therefore, the only way that Forest could have a justiciable issue litigated in a higher court was to proceed afresh in the Court of Queen's Bench. Thus, it was held that it would be unfair to deny him standing there since it would in effect penalize him for having been successful in the County Court.[28]

[21] Apparently, Forest had asked for a number of statutes, many parts of which had little application to the parking controversy.

[22] *Supra*, footnote 20 at 451.

[23] *Id.*

[24] *Ibid.*, at 453-54.

[25] *Forest* v. *Attorney-General of Manitoba* (1979), 90 D.L.R. (3d) 230 (Man. Q.B.) at 237-38.

[26] *Forest* v. *Attorney-General of Manitoba* (1980), 98 D.L.R. (3d) 405 (Man. C.A.).

[27] *Ibid.*, at 413.

[28] *Id.*

On the merits the Court of Appeal found the *Official Language Act ultra vires* as in conflict with section 23 of the *Manitoba Act, 1870.*[29] On appeal by the Attorney-General to the Supreme Court of Canada, that conclusion was sustained.[30] The Court essentially found the case to be indistinguishable from *Blaikie* v. *A.G. Quebec.*[31] Again, before the Supreme Court of Canada, the Attorney-Generals of Canada and New Brunswick intervened in support of Forest. However, the Attorney-General of Quebec did not intervene in support of Manitoba. Apparently the political cost of supporting a unilingual English language policy was felt to be great. In any event, Quebec had already lost the fight insofar as its own legislation was concerned.

The success of George Forest was by no means the end of litigation over the Manitoba language question. It now became necessary to assess the impact of the Forest decision. Did it mean that all Manitoba statutes passed since 1890 in the English language were invalid? If so, there would be legal chaos in Manitoba. The initiative for testing this question was taken up by Roger Bilodeau, President of the Franco-Manitoba Society. Charged with speeding contrary to the *Highway Traffic Act*[32] he argued that this Act as well as the *Summary Convictions Act*[33] under which the summons was issued, were *ultra vires* because they were printed only in English. He was convicted in Provincial Court[34] and appealed to the Court of Appeal[35].

The main issue addressed was whether section 23 of the *Manitoba Act, 1870* was mandatory or directory. Courts presume that the legislature could not have intended widespread chaos to be the consequence of non-compliance with a particular statute. Where such chaos would occur courts will find that the statute was intended only to be directory. The Court of Appeal held that chaos would result if it were held that non-compliance with section 23 of the *Manitoba Act, 1870* meant that all statutes (some 4500 in number) passed since 1890 were invalid. Consequently, it was held to be directory only; the appeal was dismissed.[36]

Bilodeau appealed to the Supreme Court of Canada. The Attorney-General of Canada intervened against him in order to avoid the legal chaos that would flow from his success. This position is an interesting contrast with that taken by the Attorney-General of Canada before the Court of Apeal where it was argued that section 23 was mandatory, but that the Court was justified because of "the compelling logic of reality"[37] in declining to hold in-

[29] *Ibid.*, at 424.

[30] *Attorney-General of Manitoba* v. *Forest* (1980), 101 D.L.R. (3d) 385 (S.C.C.).

[31] *Ibid.*, at 390.

[32] C.C.S.M., c. H-60.

[33] C.C.S.M., c. S-230.

[34] *R.* v. *Bilodeau*, [1981] 1 W.W.R. 474 (Man. Prov. Ct.).

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

[36] *Ibid.*, at 402.

[37] *Id.*

valid acts of the Legislature passed prior to the Forest decision. The internal inconsistency in that position was recognized by the Court of Appeal and rejected. However, the process of resolving the issue now moved from the judicial to the legislative and political arenas. A compromise was negotiated by the federal and Manitoba governments, Bilodeau and the Franco-Manitoba Society. In exchange for confirmation of entrenched bilingualism and extension of French language services, Bilodeau and the Franco-Manitoba Society were prepared to agree to a formula under which the province would have been able to validate cheaply and quickly approximately 90 per cent of its "English only" laws.

The Government of Manitoba introduced a resolution which, when passed by the Manitoba Legislature and the Federal Parliament pursuant to section 43 of the *Constitution Act, 1892*, would amend the *Manitoba Act, 1870*. That resolution confirmed that English and French would be the official languages of Manitoba. It further stated that any Act passed after December 31, 1985 would be of no force if not printed in both languages. As for those Acts passed prior to January 1, 1980, the following scheme was adopted: Any public general statute included in the Revised Statutes of Manitoba 1970 and any statute enacted after January 1, 1970 which would normally be included in a revision, would be of no force if not printed and published in both languages by December 1, 1983. A similar target date was set for a certain private acts or public municipal acts listed in a schedule. However, until that date, none of these statutes would be invalid by reason of its having been printed in only one official language. The resolution also guaranteed the right of members of the public to communicate in English or French and to receive available services in each language from various listed agencies of government. The language of this section was roughly parallel to that found in section 20 of the *Canadian Charter of Rights and Freedoms*[38] respecting access to services from the governments of Canada and New Brunswick. It was this latter provision which met substantial opposition from the provincial Progressive Conservative party. In an attempt to ease passage of the resolution, the Federal Parliament, with the support of the federal Progressive Conservatives, passed a resolution endorsing the Manitoba resolution. However, in the end the opposition to the measure succeeded; the resolution could not be passed in Manitoba.

At this stage the Attorney-General of Canada decided to return to the judicial route. It may be recalled that Bilodeau had been given leave to appeal to the Supreme Court. The hearing of that appeal was adjourned pending the outcome of the political settlement. However, if the Bilodeau case alone were to go forward and if he were successful, the result would only be that the *Highway Traffic Act* and *Summary Convictions Act*, the two statutes whose validity was put in issue by his appeal, were *ultra vires*. That appeal would not necessarily dispose of the wider question as to the effect of the Forest decision on all other Manitoba statutes. To obtain a formal declaration with respect to these, it would be necessary to have each one separately litigated, an exercise that would benefit lawyers but few others. It was therefore decided to combine the hearing of the Bilodeau appeal with a constitutional reference whose terms

[38]Part I, *Constitution Act, 1982* which is Schedule B of the *Canada Act 1982*, 1982 (U.K.) c.11.

would be broad enough to provide an answer to the general question.[39] The Attorney-General of Canada announced that he intended to argue that section 23 of the *Manitoba Act, 1870* was mandatory and that all laws not published in both languages were invalid. Moreover, the federal government also indicated that it would reverse its position in the *Bilodeau* case and intervene in support of his claim.

The issue before the Court was a difficult one. On the one hand the Court had to be seen as enforcing compliance with the constitution. The conduct of Manitoba had been in open defiance of the constitution. Even after the decision in the *Forest* case, only nine of 115 bills passed in the 1980 session of the Manitoba legislature were passed in both languages. At the same time the Court had to be conscious of the consequences of its ruling. A finding that section 23 were mandatory would produce chaos and would threaten, in a different way, the rule of law. Whether the court was free to find a compromise position which would find section 23 mandatory but delay the natural consequences of that finding until Manitoba had a reasonable time to comply was unclear.[40] While the Supreme Court of the United States had engaged in a practice of setting a timetable for compliance with its constitutional rulings,[41] that kind of disposition had not, to date, been a part of the Canadian judicial tradition.

At the hearing before the Supreme Court of Canada, participation by interested persons widened considerably. Naturally, the Attorney-Generals of Manitoba and Quebec, the Franco-Manitoba Society and Bilodeau were permitted to intervene. However, leave to intervene was also granted to Alliance Quebec (an English language interest group in Quebec), a number of English speaking residents of Manitoba, the Fédération des Francophones hors Québec and the Freedom of Choice Movement, all of whom were represented

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[39]*Manitoba Language Rights Reference* (1985), 59 N.R. 321 (S.C.C.) at 326 (hereafter referred to as *Manitoba Language Reference*).

The Order of Reference asked the following questions:

1. Are the requirements of section 133 of the *Constitution Act, 1867* and of section 23 of the *Manitoba Act, 1870* respecting the use of both the English and French languages in
   a) the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and
   b) the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba
   mandatory?
2. Are those statutes and regulations of the Province of Manitoba that were not printed and published in both the English and French languages invalid by reason of section 23 of the *Manitoba Act, 1870*?
3. If the answer to question 2 is affirmative, do those enactments that were not printed and published in English and French have any legal force and effect, and, if so, to what extent and under what conditions?
4. Are any of the provisions of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, enacted by S.M. 1980, c. 3, inconsistent with the provisions of section 23 of the *Manitoba Act, 1870*, and, if so, are such provisions, to the extent of such inconsistency, invalid and of no legal force and effect?

The Act referred to in question 4 had provided that where an act was passed in only one of the official languages before a translation was available, a translation of that act would for all purposes be valid and of the same effect as the act originally passed if subsequently a translation was deposited with the Clerk of the House. No time limit was established for any translation.

[40]It was estimated by counsel for the Franco-Manitoba Society that the costs of translation of acts alone, leaving aside the sessional papers, would exceed $30 million.

[41]See, *e.g.*, *Brown* v. *The Board of Education*, 347 U.S. 483 (1954).

by counsel at the hearing.[42] On June 13, 1985 (one year to the day from the date of the hearing before the Court) the Supreme Court of Canada announced its opinion on the *Reference*. On the first question the Court held that section 23 of the *Manitoba Act, 1870* and section 133 of the *Constitution Act, 1867* were mandatory and that, while Anglo-Canadian law recognized the distinction between mandatory and directory statutory provisions, there was no basis for applying it when the constitutionality of legislation was put in issue.[43] The Court stated that the principle of the supremacy of the constitution would be harmed if it were 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.[44]

The more difficult question before the Court concerned the effect of this finding. What was the status of all the Manitoba statutes and regulations since 1890 that were not printed and published in both the English and French language? Consistent with its earlier conclusion, the Court held that all the unilingual acts were, ***and always had been***, invalid and of no force.[45] However, the Court recognized that such a consequence would, without more, create legal chaos: the positive legal order of Manitoba would be destroyed and rights and obligations arising under these laws would be invalid and unenforceable until such time as the Legislature was able to translate, re-enact, print and publish its current laws in both official languages.[46] For example, the courts, administrative tribunals and municipal corporations, to the extent that they derived their existence from or purported to exercise powers conferred by unilingual laws, would be acting without legal authority.[47] Indeed, the composition of the Manitoba Legislature might also be vulnerable to challenge.[48] In the face of these consequences the Court ruled that a declaration of invalidity of all of the unilingual acts of the province would undermine the principle of the rule of law,[49] the constitutional status of which is affirmed explicitly in the Preamble to the *Constitution Act, 1892* and implicitly in the very nature of a constitution as a "purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence".[50] As the Court stated, "the Rule of Law simply cannot be fulfilled in a province that has no positive law".[51]

[42] *Supra*, footnote 39 at 327.

[43] *Ibid.*, at 342-43.

[44] *Ibid.*, at 343.

[45] *Ibid.*, at 348.

[46] *Id.*

[47] *Ibid.*, at 349.

[48] *Id.*

[49] *Ibid.*, at 350.

[50] *Ibid.*, at 352.

[51] *Ibid.*, at 351.

The dilemma before the Court was clear. How could it at the same time affirm the supremacy of the constitution and give effect to a mandatory requirement of the constitution without compromising the equally important constitutional principle of the rule of law? The strategy adopted by the Court was to deem temporarily valid those acts which would be currently in force were it not for their constitutional defect until the expiry of the period necessary for the Manitoba Legislature to comply with its constitutional duty to translate, re-enact, print and publish *all* of its acts in both languages.[52] The Court stated that it was unable at the date of judgment to determine the period of time which should be allowed.[53] It announced that it would convene a special hearing to make that determination if a request were made by either the Attorney-General of Canada or the Attorney-General of Manitoba within 120 days of the date of judgment.[54]

The immediate impact of this ruling was to raise again the prospect of a political resolution of the issue. While the Franco-Manitoba Society wanted to secure the constitutional status of French language rights in the province, it had little immediate practical interest in having laws long since repealed or spent re-enacted in the French language. It was concerned more with current laws and, more importantly, the availability of government services in the French language. The latter, however, was not guaranteed by section 23 of the *Manitoba Act, 1870*. Although the Court decision said nothing about that shortcoming, its decision may well have contributed indirectly to securing those services. The cost of implementing the decision will be staggering to the taxpayers of Manitoba (and to all Canadians should the federal government assist in defraying these costs). It would be far less expensive for Manitoba to translate and re-enact only its current laws and make provision for the availability of certain government services in the French language. Thus, the effect of the *Manitoba Language Reference* is to arm the Franco-Manitoba Society with a valuable bargaining chip. In exchange for an undertaking to re-enact current laws and provide francophone government services, it could undertake not to seek full enforcement of the Court's decision. This kind of compromise would appear to do two things: It would give French language interests in Manitoba an effective remedy for their grievance while at the same time protecting Manitoba taxpayers in general from the crippling costs of implementation of the decision.

The initial reaction of the Government of Manitoba was to announce that it intended to comply fully with the decision of the Court. It appeared reluctant to propose a compromise and risk the same kind of political opposition which it faced when that kind of solution was first proposed in 1983. However, there have been some efforts by Franco-Manitobans to question the wisdom of full compliance with the decision and some suggestion that the matter be resolved through constitutional amendment.

[52] *Ibid.*, at 372-73.

[53] *Ibid.*, at 375.

[54] *Id.*

It is of interest to compare the approach taken by the Supreme Court to the cases under review with that taken by the same Court in the *Constitutional Amendment Reference*[55]. It may be recalled that in the latter case the Court, while finding that there existed a constitutional convention requiring a substantial consent of the provinces to constitutional amendments affecting their interests, was reluctant to specify precisely the number of provinces whose consent would be necessary to satisfy the constitutional threshold. That disposition put considerable pressure on both the federal government and the provincial premiers to agree to changes both in the *Charter* and in the amending formula, which could command the support of a "substantial number" of provincial governments.[56] In both cases the Supreme Court of Canada appears to have been sensitive to the political dimension of the legal issues brought before it and to have arrived at a result which establishes a foundation on the basis of which political negotiations could proceed. Given the essentially political nature of many constitutional disputes, the approach taken by the Supreme Court of Canada in the *Manitoba Language Reference* is to be commended.

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[55] *Reference Re Amendment of the Constitution of Canada, Nos. 1, 2 and 3* (1982), 125 D.L.R. (3d) 1.

[56] See in this connection, G.J. Brandt, "Judicial Mediation of Political Disputes: The Patriation Reference" (1982), 20 *U.W.O.L.R.* 101.

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