



**Second Session — Thirty-Second Legislature**  
of the  
**Legislative Assembly of Manitoba**

**STANDING COMMITTEE**  
on  
**PRIVILEGES**  
and  
**ELECTIONS**

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**31-32 Elizabeth II**

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*Chairman*  
*Mr. Peter Fox*  
*Constituency of Concordia*



MG-8048

**VOL. XXXI No. 16 - 10:00 a.m., FRIDAY, 9 SEPTEMBER, 1983.**

**MANITOBA LEGISLATIVE ASSEMBLY**  
**Thirty-Second Legislature**

**Members, Constituencies and Political Affiliation**

Name	Constituency	Party
<b>ADAM, Hon. A.R. (Pete)</b>	Ste. Rose	NDP
<b>ANSTETT, Andy</b>	Springfield	NDP
<b>ASHTON, Steve</b>	Thompson	NDP
<b>BANMAN, Robert (Bob)</b>	La Verendrye	PC
<b>BLAKE, David R. (Dave)</b>	Minnedosa	PC
<b>BROWN, Arnold</b>	Rhineland	PC
<b>BUCKLASCHUK, Hon. John M.</b>	Gimli	NDP
<b>CARROLL, Q.C., Henry N.</b>	Brandon West	IND
<b>CORRIN, Brian</b>	Ellice	NDP
<b>COWAN, Hon. Jay</b>	Churchill	NDP
<b>DESJARDINS, Hon. Laurent</b>	St. Boniface	NDP
<b>DODICK, Doreen</b>	Riel	NDP
<b>DOERN, Russell</b>	Elmwood	NDP
<b>DOLIN, Hon. Mary Beth</b>	Kildonan	NDP
<b>DOWNEY, James E.</b>	Arthur	PC
<b>DRIEDGER, Albert</b>	Emerson	PC
<b>ENNS, Harry</b>	Lakeside	PC
<b>EVANS, Hon. Leonard S.</b>	Brandon East	NDP
<b>EYLER, Phil</b>	River East	NDP
<b>FILMON, Gary</b>	Tuxedo	PC
<b>FOX, Peter</b>	Concordia	NDP
<b>GOURLAY, D.M. (Doug)</b>	Swan River	PC
<b>GRAHAM, Harry</b>	Virden	PC
<b>HAMMOND, Gerrie</b>	Kirkfield Park	PC
<b>HARAPIAK, Harry M.</b>	The Pas	NDP
<b>HARPER, Elijah</b>	Rupertsland	NDP
<b>HEMPHILL, Hon. Maureen</b>	Logan	NDP
<b>HYDE, Lloyd</b>	Portage la Prairie	PC
<b>JOHNSTON, J. Frank</b>	Sturgeon Creek	PC
<b>KOSTYRA, Hon. Eugene</b>	Seven Oaks	NDP
<b>KOVNATS, Abe</b>	Niakwa	PC
<b>LECUYER, Gérard</b>	Radisson	NDP
<b>LYON, Q.C., Hon. Sterling</b>	Charleswood	PC
<b>MACKLING, Q.C., Hon. Al</b>	St. James	NDP
<b>MALINOWSKI, Donald M.</b>	St. Johns	NDP
<b>MANNES, Clayton</b>	Morris	PC
<b>McKENZIE, J. Wally</b>	Roblin-Russell	PC
<b>MERCIER, Q.C., G.W.J. (Gerry)</b>	St. Norbert	PC
<b>NORDMAN, Rurik (Ric)</b>	Assiniboia	PC
<b>OLESON, Charlotte</b>	Gladstone	PC
<b>ORCHARD, Donald</b>	Pembina	PC
<b>PAWLEY, Q.C., Hon. Howard R.</b>	Selkirk	NDP
<b>PARASIUK, Hon. Wilson</b>	Transcona	NDP
<b>PENNER, Q.C., Hon. Roland</b>	Fort Rouge	NDP
<b>PHILLIPS, Myrna A.</b>	Wolseley	NDP
<b>PLOHMAN, Hon. John</b>	Dauphin	NDP
<b>RANSOM, A. Brian</b>	Turtle Mountain	PC
<b>SANTOS, Conrad</b>	Burrows	NDP
<b>SCHROEDER, Hon. Vic</b>	Rossmere	NDP
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<b>SHERMAN, L.R. (Bud)</b>	Fort Garry	PC
<b>SMITH, Hon. Muriel</b>	Osborne	NDP
<b>STEEN, Warren</b>	River Heights	PC
<b>STORIE, Hon. Jerry T.</b>	Flin Flon	NDP
<b>URUSKI, Hon. Bill</b>	Interlake	NDP
<b>USKIW, Hon. Samuel</b>	Lac du Bonnet	NDP
<b>WALDING, Hon. D. James</b>	St. Vital	NDP

**LEGISLATIVE ASSEMBLY OF MANITOBA**  
**THE STANDING COMMITTEE ON PRIVILEGES AND ELECTIONS**

**Friday, 9 September, 1983**

**TIME — 10:00 a.m.**

**LOCATION — Winnipeg**

**CHAIRMAN — Mr. Peter Fox (Concordia)**

**ATTENDANCE — QUORUM - 6**

*Members of the Committee present:*

Hon. Mr. Storie

Messrs. Brown, Fox, Graham, Lecuyer,  
Malinowski, Nordman, Santos, Sherman, and  
Mrs. Dodick

**WITNESSES:** Dr. Stephen Scott, Professor of  
Constitutional Law

**MATTERS UNDER DISCUSSION:**

Proposed amendments to amend Section 23  
of The Manitoba Act

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**MR. CHAIRMAN:** There are a number of resignations and replacements. Mr. Mackling, Mr. Eyer and Mr. Santos have resigned. The replacements that are available are Mr. Harper, Mr. Scott and Mr. Lecuyer. Is it agreed that we replace these people? — (Interjection) — Thank you.

I have a further announcement to make, this is for the public and the media as well, that we will be having further hearings after today back here in Winnipeg on September 28th, 29th and 30th. I'll mention that again. Further meetings here in Winnipeg will be held on September 28th, 29th and 30th.

Mr. Graham.

**MR. H. GRAHAM:** Mr. Chairman, on that same point, there are a considerable number that have not had the opportunity of being heard and have indicated their desire. If at the end of those three days, there are still a significant number that have not been heard, surely this committee would extend its . . .

**MR. CHAIRMAN:** Before we speculate, Mr. Graham, the committee will more than likely make its procedural decisions at that time. Let's cross our bridges when we get to them.

**MR. H. GRAHAM:** On the same point of order, there are many people that have been sitting in this room over the last three or four days, I think they would like to know if they have a reasonable chance of being heard.

**MR. CHAIRMAN:** Well, I think this is a reasonable committee. I don't see why not.

Any further discussion on the point of order? Let us proceed. We have agreed - Mr. Brown has a question.

**MR. A. BROWN:** Mr. Chairman, how late will we be sitting tonight?

**MR. CHAIRMAN:** The committee's decision has been until 10:30.

Our first presentation, by agreement of this committee, is Dr. Stephen Scott.

**DR. S. SCOTT:** Mr. Chairman, members of the committee, thank you very much for hearing me this morning. The Clerk will be distributing copies of a memorandum, the signed original to be deposited with you and copies to be distributed to the members, but I will avoid reading that as much as possible and will try to speak briefly.

I come here, of course, in some sense as a representative - not a representative, perhaps I should say, a member of the English-speaking community in Quebec - because the example that is set here will have, I hope, if the resolution is passed as agreed, an important and beneficial effect on the circumstances of our community. But I come here foremost because it seems to me right and just that this resolution be passed from the standpoint of the strength of our Federation and the integrity of our constitutional process.

The hearings, Mr. Chairman, seem to me to be about two things, or perhaps one thing seen from two perspectives. In a narrower perspective it concerns the validation of unilingual Manitoba legislation and the granting of a breathing space to enable the province to bring itself into compliance with the constitutional guarantees of language as interpreted by the Supreme Court. In a wider perspective, however, it seems to me to concern the capacity of our constitutional system to redress historic injustices or failures, whatever term one chooses, and to rebuild and renew the Federation.

Let me speak of these things briefly in order. First of all, the validation of laws and the breathing space, the technical matter which concerns the committee. I would submit, with all respect, that what's remarkable about the Bilodeau case is really not that challenge occurred, but that it didn't occur a great deal sooner. It seemed to me that it was perfectly clear, at latest, on 13th of December, 1979 - the day the Supreme Court rendered its decisions in Blaikie and Forest - that the province was vulnerable to the wholesale challenge of all its legislation.

It seems to me also that the present crisis could have been avoided and a great deal of time and trouble saved, had the then government done two things. Had it first of all moved to secure an Imperial Act, because the Imperial Parliament then had constitutional amendment power for Canada, moved to secure an Imperial Act to validate the Manitoba statutes for the time necessary to bring the province into compliance

with its constitutional obligations; and secondly, moved with deliberate speed to bring the province into compliance. It seems to me neither of these things happened.

Now it may be of some interest to members of the committee, if they'll look at Pages 4 and 5 of my brief, that the night of the Blaikie and Forest decisions, the night of the day on which the Supreme Court had rendered the Blaikie and Forest decision, another historic event occurred and that was the defeat of the Clark Government in Ottawa. A dissolution of parliament was clearly going to take place and did, in fact, take place, but the effect of the dissolution of Parliament would be that there would no longer be a Parliament in Session to pass a joint address to the Parliament at Westminster. So if there were court challenges in the months following December 13th, the Canadian Parliament could not act to approach Westminster for a validating act and it seemed to me that the then government should have appreciated this. I, myself, think that it was a constructive step. It did not have any effect.

I sent a telegram to Mr. Schreyer just after the defeat of the Clark Government, in the terms at the bottom of Page 4, suggesting that he not dissolve Parliament until a joint resolution had been passed, authorizing the government to approach the Imperial Parliament at Westminster for the enactment of a validating act. I print also the responses from Rideau Hall. It's with some irony, I suppose, that a former Premier of this province, Mr. Schreyer was Governor-General and did not appear to appreciate the predicament the province was in. But in a sense, the province was saved by the fact that there were not successful court challenges in those months and the court challenge came later.

But I sight this correspondence really with a view to pointing out that the then government did not respond to the problems created by the Forest and Blaikie decisions in a prompt and alert manner, and it seems to me therefore rather difficult to accept that it is in a position to criticize vociferously, and maintain a strident campaign of attack on a government which has reached a constitutional agreement, this time, of course, on terms and conditions.

It's true that if Mr. Lyon had moved immediately to get an Imperial Act to validate the statutes for the time necessary for compliance there would probably not have been an extension of other language rights and so on. But the crisis was allowed to develop to the point where further litigation was necessary and the present government, it seems to me, in good faith, and with consultation with the interested groups reached a settlement. It seems to me to be a deal; it seems to me to be a progressive deal; it seems to me to be a fair deal. I find myself a little bit concerned that the former government should now feel itself entitled to attack the measure of the present government in quite so strident terms.

Well, having dealt with the technical substance of the matter before you from what I said was the narrower perspective, and we can come back to housekeeping matters, details of the proposal in case committee members are interested, I would like to turn to what I said was the second perspective, and that's the capacity of our constitutional processes to redress historic injustice and renew the federation. The question

here, Mr. Chairman, is what kind of Canada we want. How we can hold together this country which is very difficult to govern, and how we can convince all its peoples that they are wanted, that they are respected, and particularly how we can eliminate this long-standing example cited in Quebec of historic injustices to Franco-Manitobans so that this can no longer be complained of? It seems to me, of course, that this would help to - as an example because of the generosity of the settlement - would help to give a fine example.

I received a letter from a Mr. Dave Miller in Winnipeg and he says:

"Mr. Scott" - I had some exposure in the press here because of my involvement in the Bilodeau litigation, and this was in response to that I imagine. "Mr. Scott, I wish you people in the east would mind your own business and quit telling us in Manitoba what we should do about the French. We don't need it and we don't want it, and, if we have to get rough, we will do that too.

"We have had some 'No More French' paintings on walls, but when I get mad enough there will not be any walls. The sooner Quebec separates, the better. Mr. Lyon is right. We want the right to vote so we can get rid of French, once and for all. We should also have that right clear across Canada.

"Because of gutter politicians, we have been forced to suffer with this bilingual crap long enough. It comes down to two choices. One, vote or two, another Ireland with all the bloodshed and death and all the innocent people getting caught in the middle. We don't care what Quebec wants or likes. If we had our own way we would build a wall on both sides of Quebec and flood the land. If this was the USA, Trudeau would have been shot long ago.

"So, if you want to do something positive, try and get the Federal Government to let Canada vote and quick." Signed, Yours truly, Dave Miller with an address in Winnipeg.

Now, it seems to me that this is the natural outcome of the kind of campaign, which it seems to me from my reading of the press, has been waged against this proposal in this province. I accept there may be some persons who honestly and in good faith object for a variety of reasons to this resolution. But, when the campaign is conducted with a certain stridency and in a certain way, it seems to me that any experienced politician will know what kind of feelings this gives rise to, feelings exemplified in this letter, feelings which of course are paralleled in Quebec by exactly the same sort of thing on the other side. It seems to me, Mr. Chairman, that this is exactly what is not needed in this country and this is exactly why the debate should be conducted on a level which appreciates that the issue is the renewal of our federation, the curing of historic injustices and a positive and constructive attitude of good will to one of the founding peoples, the French-Canadian people.

I have made a few concluding observations in my brief. I think we can remember that The Manitoba Act of 1870 including Section 23 was a measure of a Conservative administration, the administration of Sir John A. MacDonald. I personally don't think I'm a better Conservative, which I happen to be, than Sir John A. MacDonald and I don't think anyone else is entitled to claim to be either.

I say some who accept the reasonableness of a constitutional amendment, I'm reading at Page 10, nevertheless object to the terms of the May 24th agreement, in particular to the creation of a right to certain provincial government services in either the English or French language. The shortest answer to this objection is of course that the constitutional amendment will dispense with the duty to translate an immense volume of legislation covering close to a century and will also give the province a considerable further breathing space. It is surely not unreasonable for something to be offered in return, particularly to those whose rights have been denied for so long a period. There is indeed no reason why they should accept a one-sided settlement which simply gives the province an indulgence and gives them nothing at all.

But much wider interests are at stake and I would hope that Manitobans would accept the May 24th settlement - I choose the date of the ratification by the Société Franco-Manitobaine as May 24th - with a wider perspective. Very simply stated, all Canadians have an interest and respect for constitutional guarantees and processes because we are committed to a free society. In Canada laws are enacted and administered by public authorities chosen in legally-defined ways and exercising legally-defined ways and exercising legally-defined powers. Such a society is not possible if our constitutional laws can be violated with impunity. Everyone must be able to have confidence that the Constitution will be respected; and that, where breaches occur, adequate remedies, sooner or later, will be found. Otherwise the constitution means nothing, and simply breaks down.

Franco-Manitobans are, it is true, relatively few in number. But the Province of Manitoba was created by the Parliament of Canada on the basis of legislative and judicial bilingualism; and the violation of these guarantees for more than 90 years, can be, has been, and is, cited by French-speaking Canadians elsewhere as proving that our Constitution, - our country, - cannot keep faith with its citizens. Surely if we are to have a country founded on respect for the rule of law, - or any country at all, - we must leave no basis for such beliefs.

What part does the May 24th agreement play in the renewal and strengthening of Manitoba and Canada?

Manitoba in effect says this in the agreement. "For nearly a century the constitutional obligation to legislate bilingualism has been violated, and even after that obligation was reaffirmed by the Supreme Court of Canada. We ask these breaches to be excused and our laws to be declared valid, and also a further breathing space for future compliance. In exchange we offer bilingual services from central provincial agencies, and from others where circumstances make it reasonable."

Surely this says, "It is true that we have been in breach of our obligations, but we will now make good and settle in a way which will compensate you fully."

Surely this tells all Canadians that our constitutional system can cure historic injustices and potential legal crises. It invites Canadians to rely in confidence on their constitution and in the good faith of their provinces and country. It renews and strengthens our federation.

These, as I hope most Manitobans will come to see, are the real issues and the real stakes. It would be

tragic to be distracted from them by appeals to ancient fears and jealousies and hostilities. I hope that this committee will make the truth clear to all Manitobans, and recommend to the House the enactment of the text agreed on May 14, 1983.

Thank you very much, Mr. Chairman, and I'll be delighted to address any of the concerns which any committee members may have.

**MR. CHAIRMAN:** Thank you, Mr. Scott.  
Mr. Graham.

**MR. H. GRAHAM:** Thank you, very much, Mr. Chairman.

Mr. Chairman, as a member of this committee I was quite interested yesterday when witnesses before this committee emphasized the fact that you would be coming, and told us that we should listen very carefully to what you had to say, because we expected as a Professor of Constitutional Law that we would be getting some very well-founded logical arguments for the case that is presently before this committee. I suppose, as members who have a great deal of respect for every segment of society, when we have a person travelling from Montreal to present points of constitutional law, we listen with a great deal of interest because there seems to be a general feeling, I think, in society that if a person comes 2,000 miles, he has something pretty important to tell us. Quite frankly, I was somewhat disappointed to find that the main thrust of your presentation so far has been to read a letter that you received from a person in Winnipeg.

Have you left it entirely to the committee just to read your brief? Again in glancing through it, I find that there seems to be a considerable portion of that brief dealing with the attack on one particular person. Quite frankly, sir, are there any other points regarding constitutional law that you would like to bring to the attention of the committee?

**DR. S. SCOTT:** I didn't want to read a long and detailed brief which is deadly dull. I know that you have a great many presentations. This has been attacked primarily on policy grounds, and it seemed to me desirable to affirm the desirability again on policy grounds.

Now I could go through an analysis of the history of the Bilodeau litigation. I would be absolutely delighted to send Mr. Graham my factum prepared for the Supreme Court, and it deals in great detail. The argument if made to the Supreme Court would take a great deal of time, and we could be here all day on that. I didn't want to abuse the indulgence of the committee by addressing that.

I think the proposal as filed is a sound one. We can do a clause-by-clause study. I would be delighted to address any concerns Mr. Graham has on the technical drafting of it. In fact, I could suggest a number of details of improvement and some, as it were, in favour of the government in clarifying one or two little bits. But it seemed to me that insofar as we're to address something in the way of a clause-by-clause study, that should be in response to specific concerns of the committee rather than to have me come and argue as if this were a court or deliver a law seminar or a law lecture.

So I'm certainly delighted to address any of Mr. Graham's concerns in writing or here in front of the

committee. Certainly if he would like my factum on the litigation and history of these matters, he is more than welcome to it.

**MR. H. GRAHAM:** No further question, Mr. Chairman.

**MR. CHAIRMAN:** Mr. Storie.

**HON. J. STORIE:** Thank you, Mr. Chairman, and thank you, Mr. Scott. I could not disagree more with what Mr. Graham has suggested, and I understand his sensitivity to some of the comments that you have made. I would suggest that Mr. Graham is incorrect when he suggests that you have singled out one individual for criticism with respect to some of the problems that are being encountered today because of acts of omission and commission on the part of not a person, but a government. I can understand his sensitivity in that respect.

Mr. Scott, I think it's important that someone of your stature, a professor of constitutional law, can be here today to give us some opinions that, I think, conflict significantly with opinions that have been expressed, particularly by the Leader of the Opposition, and that is, that the Supreme Court, in its wisdom, would never strike down the laws of Manitoba. If I read your brief correctly in what you've said, you're saying, why would the Supreme Court not? Why would it attempt to clean up a mess that was created by The Official Languages Act of 1980?

**DR. S. SCOTT:** Yes. It seems to me that all considerations, that is to say, securing full compliance with the constitutional guarantees as to language; ensuring full respect, secondly, for the rule of law and lawmaking, that is to say, to ensure the law is made according to law and not otherwise, its manner and form of legislation; third, preserving legal continuity in Manitoba, that is to say, to preserve executive legislative and judicial institutions capable of functioning even if all the legislation since 1890 or even earlier, is swept away; and fourth, to work out an internally consistent and plausible disposition of the Bilodeau case itself, a disposition which does not rely on any unilingually enacted legislation.

All these four things can be achieved, but achieved only by striking down all the legislation wholesale and repairing the situation with a constitutional amendment. It is, in my view, the optimal solution from the standpoint of the court. It does the least violence to rules of law and legal principles. You can get almost everything that way, or everything, and you cannot get all these things in any other way.

**HON. J. STORIE:** So, Mr. Scott, not only is it plausible in your estimation that the Supreme Court would have struck down the laws of Manitoba or some portion of those, perhaps even from inception since 1870, it is also your view that the previous government, after 1979, by acts of omission and commission, created additional problems for the resolution of this question?

**DR. S. SCOTT:** The hazards of litigation are such one can't predict and I've given up predicting, but it seems to me, as I've argued, the sound result is the result,

the optimal result is the result of striking down the legislation and repairing the breach because it does violence to no legal principles. In other words, you can get everything by that method and nothing by the others.

As to your second point, my telegram to Mr. Schreyer on the night of the Blaikie decision, which I printed here to show just how things could and should have been done, attempted to approach the matter constructively. In other words, I saw a constitutional crisis coming in Manitoba that day. The legislation was exposed. Parliament was going to be dissolved. There was going to be no Parliament for two months. I did not think the people of Manitoba should be in a position where Bilodeau cases should arise - and I say, the only surprising thing is that it took so long to arise - should be exposed for two months to having chaos in the courts, so I said get an Imperial Act, and it could have been done in a day, to validate this.

Of course, as I say, it's quite ironic that Mr. Schreyer, himself a former Premier, was in office in Ottawa and Parliament was dissolved, and I had the responses which I printed in my brief. But if the government had done two things: (1) move for an Imperial Act immediately; and (2) move at a reasonably deliberate pace, an effective pace, to bring the province into compliance with its obligations, there would have been no Bilodeau case and if a Bilodeau case would have been brought, it would have dismissed. There would have been no Bilodeau case. There would have been no crisis. There would have been no need for a negotiation with the Franco-Manitoban community. There would have been no terms and conditions. The whole thing would have been resolved immediately.

So that with all respect to the previous government, it seems to me that the crisis is of their creation, not to mention 190-odd years of failure to comply with the language guarantees. But at latest, 13 December, 1979 would have been the time to move into action and therefore I find it very difficult to see how a strident campaign of attack can be mounted by a government, against a good faith solution by a new government which is left holding the bag. If a new government is left holding the bag, they have to be left with a reasonable latitude to negotiate with the parties and come to the Assembly, and the Assembly seems to me to have some obligation to support the government, unless it's clearly gone beyond the bounds, and it doesn't seem to me that those who are largely responsible for the crisis should attack the thing in these terms, particularly in terms which invite, and are known to be likely to invite, the kind of response that I read out to you from that Winnipeg citizen. That's an important letter, because this is what we don't need in Canada.

**HON. J. STORIE:** Mr. Scott, on Page 9 of your brief, you made a number of points and I think that they certainly bear repeating. I would just like to read briefly from the text and ask for your comment.

In part you say, "Surely, it is the present Leader of the Manitoba Opposition, the Honourable Sterling Lyon, the text's chief critic, who has done more than any other single person to make this constitutional amendment inevitable. As Premier of Manitoba on

December 13, 1979, when the Supreme Court rendered its decision in the Forest Case, and until after the general election of November 17, 1981, he took no significant steps to bring the province into compliance with the court's ruling that the provincial legislation must be bilingually enacted, printed and published. In fact, his government's act assented to on July 9, 1980 (being Chapter 3 of the Statutes of Manitoba for 1980) sought to give authentic character to translations not enacted by the Legislature - and even prepared after the completion of the legislative process; whereas the Supreme Court had decided that statutes must be duly enacted in both languages. The Honourable Mr. Lyon, in other words, so far from showing that the province would do its best to comply with its constitutional obligation, involved the province in the breach."

**DR. S. SCOTT:** That, I think, speaks for itself. It was suggested by Mr. Graham that I was a bit too hard on one person. Well, I perhaps would say that the role of collective ministerial responsibility applies and the fault is the fault of a government and no one is perfect, and so on, and that one might say, the Lyon Government. But still, the Premier is *premus inter pares* and bears a certain special responsibility and Mr. Lyon has led the attack - the Honourable Mr. Lyon, the Leader of the Opposition - on this, and therefore it seems to me, it's not unfair to place responsibility where it seems to me to lie primarily.

**HON. J. STORIE:** I'd ask you for one final comment, Mr. Scott. In summing up, you would suggest that the present position the government has taken was not only one of necessity, but one that is a practical and plausible solution to the problems that we face, the constitutional problems that we face and that it does in some sense redress the injustices of the past.

**DR. S. SCOTT:** I think the May 24th agreement is sound; it is progressive; it is an example to the rest of the country. I think it is humane; it is generous; and it is constructive; and it is just what this federation needs in terms of attitude and in terms of concrete steps.

**HON. J. STORIE:** Mr. Chairman, I'd like to thank Mr. Scott very much for taking the time to make his views known to this committee and to the people of this province as someone who is non-partisan and unlike members on both sides, I suppose, who have made comments, seen fit to provide his views as an expert and indeed an expert on this very important matter.

**MR. CHAIRMAN:** Mr. Doern.

**MR. R. DOERN:** Mr. Chairman, Professor Scott, I gather from that last burst of enthusiasm that you regard the agreement between the Franco-Manitoban Society and the Federal Government and the Manitoba Government as second only to the Magna Carta.

**DR. S. SCOTT:** I think it is more important than the Magna Carta as addressing the concerns of people in Canada today because, if you were to pull out the Magna Carta, you'd see lots of things about castles

and so on and there are a few major historic statements such as the right to justice but most of Magna Carta is a rather technical document addressing the concerns of medieval barons and this address is the concerns of French-speaking Canadians and it seems to me that this is in many ways more important than Magna Carta.

**MR. R. DOERN:** Who do you see in the role of King John, the Prime Minister or the Premier of Manitoba?

**DR. S. SCOTT:** If we take the person from whom the concessions are in a political sense being wrung then, I suppose, it would have to be the Leader of the Opposition.

**MR. R. DOERN:** Mr. Chairman, Professor Scott has ridiculed - perhaps justly - the opinion of one aroused Manitoban who put some extreme views and some intense frustration down on paper, but it seems to me that there are also some so-called constitutional experts who hold as extreme or silly views. We have heard from some of them and I'm not quite certain whether Professor Scott's position could be summarized as follows, that unless there is such an agreement that we would find ourselves in the incredible position even if for only a moment that all our laws and our courts and our legislature would be ruled out of existence. Is this a serious proposition that you are putting to this committee?

**DR. S. SCOTT:** Yes. What I am saying is, I'm not making a prediction, I made that reservation at the beginning because I've given up making predictions. I don't have a bad track record at making predictions but I don't like to make predictions. What I say is, in my view, that is the law. The law is based on sound and cogent principles. I would be delighted to provide Mr. Doern with my *factum* which goes into great detail on these issues. As soon as the *factum* was filed negotiations opened on a settlement because it seems clear that the government was not certain that it was going to win the litigation, of course, we're not certain either. But that is in my view: (a) a reasonably arguable legal proposition; and (b) in my view, in my respectful submission, a sound legal proposition; and (c) it is in my view a proposition which would be very likely to commend itself to the courts for the reasons given in the *factum* and in the Memorandum of Evidence, the four things which can be achieved by that method, but only by that method.

**MR. R. DOERN:** Professor Scott, you've been quoted a number of times in Winnipeg articles, articles particularly in the Free Press. I don't happen to have a copy of the one that I am particularly thinking of, but some constitutional experts have indicated that there was a "remote possibility" that we would have this chaos in our province. I wonder if you would describe that as your position or whether you would be stronger and say that there is a real possibility or a probability that we would have this state of affairs.

**DR. S. SCOTT:** I think it is at least a real possibility. I think in my view on balance it is a probability but that gets into prediction, both possibility and probability

and I can only say that I think it is right and that if I were in accord ruling on this for the reasons very briefly set out in the memorandum, but set out in great detail in the factum, of which I'll be delighted to send Mr. Doern a copy, I think that is a correct and sound proposition and it is right. I am obliged to say that the court should and could and, I hope, would hold exactly in those terms.

**MR. R. DOERN:** Professor Scott, when somebody tells me that there is a remote possibility, I characterize that as one in a 100 or one in 1,000. Would you care to indicate how you see this in terms of chances before the court or probability in terms of a ruling?

**DR. S. SCOTT:** Okay, I think I have a better than even chance.

**MR. R. DOERN:** I see. So you see it then as a 50/50 proposition.

**DR. S. SCOTT:** I think it's rather better than 50/50.

**MR. R. DOERN:** Better in whose favour?

**DR. S. SCOTT:** Better in favour of the submissions of the positive action commission intervener. That is to say the invalidity of all the legislation.

**MR. R. DOERN:** So then for you it is not a remote possibility but it's a 50/50 situation or 55/45 whatever. We don't have to determine a final set of odds, but you see it as a significant possibility.

**DR. S. SCOTT:** Well, I'm not making odds on this. Fortunately I don't, and lawyers aren't supposed to give warranties to their clients and it's a very foolish thing. But in my view all I can say is that the Supreme Court could and should decide in those terms. If I were therefore predicting probabilities, in terms of the confidence I feel about the right result, I would say it was 100 percent probability. But, of course, I don't venture to hazard predictions of the outcome of litigation. It's a very foolish thing to do and obviously after a little bit of experience you give up doing that, even if you tried, no matter how confident you feel about the outcome.

**MR. R. DOERN:** Professor Scott, do you consider the Supreme Court to be a rational body?

**DR. S. SCOTT:** I think it tries to be rational and very often it is rational, perhaps most of the decisions are rational. Not all decisions are right, but it is certainly doing its best to be rational and more often than not I think it comes out with a sound result. If I may anticipate the next question, would it be a rational result to hold the statutes invalid? It would, I submit for the reasons given in my factum at great length which I would be delighted to give to Mr. Doern. I may even, I think convince Mr. Doern, if he and I sat down for a while on the matter. — (Interjection) — I think that's where I'll stop making any prediction at all.

**MR. R. DOERN:** Professor Scott, it strikes me, as one who has studied history and taught history but never

studied or taught law, that if the Supreme Court made a ruling along the lines that you suggest, this would be considered as an incredible judgment by the people of this province that people would be aroused and incensed and alarmed that the highest court in the land could make what could only be described as a poor judgment and one that would in effect question the whole democratic tradition and the whole history of Manitoba. This would not be a rational judgment, but would be more like the ejaculation of somebody who is losing their mind. I mean, how could a rational body strike down the courts, the Legislature and the laws of a Provincial Government? I mean, on what basis could such a ruling be made and be justified, even for a moment?

**DR. S. SCOTT:** I have never seen anyone ejaculate while losing his mind.

**MR. R. DOERN:** That was a metaphor, in case you didn't realize it.

**DR. S. SCOTT:** Perhaps ejaculate metaphorically while losing his mind metaphorically or actually, and I will leave that to Mr. Doern to elaborate on. I won't address that further point.

Mr. Doern addresses public opinion. He addresses democratic tradition. How would the Supreme Court render such a judgment? Well let's put it the other way. What happens if it doesn't? What happens if it says, every time chaos results, we are going to clear it up and say that everything is valid and nothing can be upset.

That just invites widespread and massive violation of constitutional processes. It would, for example, allow the Commons to pass bills and have them presented for Royal Assent without a valid abolition of the Senate first on the basis that if that went on long enough, there would be 10, 20 or 30 years of federal statutes and if all these bills passed by the Commons and assented to by the Crown were declared valid, there would be no laws. So for the court to excuse this would be for the court to invite violation of constitutional processes.

That, in my view, is the main reason why it would be wrong for the Supreme Court to excuse and overlook these 90 years of invalid legislation. It could not, in my submission, afford to do that. It could afford not to do that and it could strike it all down precisely because constitutional processes are available to cure and validate the invalid legislation. In other words, the problem was created as a political problem by violation of the constitutional processes, and it can be cured by political methods through the constitutional amendment procedure which is what this committee and this House are concerned with now. That is in entire conformity with democratic traditions and with constitutional traditions.

As for public opinion, the court is not supposed to conduct an opinion poll in reaching its decision. It is supposed to make decisions in accordance with our constitutional values which include democratic values, but which include the respect for constitutional processes, its democratic traditions and democratic processes functioning in accordance with constitutional rules. So the court is not simply going to conduct a



public opinion poll, but to look at our entire constitutional system and see how its processes can best be respected.

So I see no violation of democratic traditions. I see respect for constitutional processes. If the Supreme Court rendered such a decision, these constitutional processes would be strengthened and respect for them encouraged by a decision of the court which says, if constitutional guarantees are violated, the consequences must be accepted. Then it is left to the constitutional amendment process to cure the defect.

**MR. R. DOERN:** Professor Scott, I personally hold the Supreme Court in high regard, but I would not expect an Alice in Wonderland decision coming out of them. You suggest that this is a possibility.

**DR. S. SCOTT:** I not only suggest it is a possibility, I think it has sound view. We would be making odds or not making odds, but I think that this is the only way you can get all the results. In other words, you can get enforcement of the language guarantees, because if you say obviously that legislation is not invalid when unilingually enacted, what do you do? You encourage Mr. Levesque to do it. He can turn around tomorrow, you have basically told him, enact all the statutes in French only, and nothing happens. So you've pulled the teeth from it.

By striking down all the unilingually-enacted laws, you do obtain the first result in my list on Page 8, namely, securing full compliance with the language guarantees. You ensure these other objectives also. You can do that and you can repair the matter.

My factum is largely concerned not merely with the issue of striking down the Manitoba laws, but with the method of repairing the consequences of it. That is argued very elaborately and in quite some technical detail.

My concern for constitutional processes in Manitoba, I think, is amply testified to by the fact that I was the one who sent that telegram to try to nip the problem in the bud. I sent a telegram saying, you're going to have challenges in court sooner or later. Get an Imperial Act to nip it in the bud, validate the statutes, give a breathing space. I sent that out the night of the defeat of the Clark Government, which was the same day the Blaikie case was decided, because the dissolution might create problems in Manitoba. It might leave a two-month period in which the Imperial Parliament was inaccessible.

I think that if we are discussing odds and who is predicting results and the like, I think that's not a bad track record either. It seems to me that telegram shouldn't have come from me. That telegram should have come from the then government which should have been sufficiently alert to see that a Bilodeau case would sooner or later come. It would come particularly if the province was slow in moving to legislative bilingualism.

There were two years more or less, from 13th December, 1979 while the former government remained in office and where, as far as I can see from evidence in the statute books at any rate, very little progress was made to move to legislative bilingualism. That in a way is proof positive to the Supreme Court that,

unless the sanction of nullity is used to enforce the obligation of bilingual legislation, there are no effective teeth and that governments in Quebec or in Manitoba, wherever there might be similar guarantees federally, can go off and violate the things with impunity. The two years after 13 December, 1979, are in many ways the best reason for declaring all the Manitoba statutes which are unilingually enacted invalid.

**MR. R. DOERN:** But your telegram or telex was ignored . . .

**DR. S. SCOTT:** By a former Premier of the province.

**MR. R. DOERN:** . . . and the Governor-General of Canada. Was it returned and stamped, "Return to Sender"?

**DR. S. SCOTT:** No, you got the replies which you see on the next two pages. You have the statement from the Administrative Secretary of the Governor-General thanking me for the expression of my views, and a letter on the 19th from the Governor-General asking me for my elaborated views in more detail. On the other hand, Parliament had then been dissolved. Therefore, whatever was going to happen was going to happen. I didn't have the time to write out a long letter of explanation. In other words, Parliament was dissolved. There could be no joint address to Westminster, so I let the thing lie there, but the telegram was duly received otherwise I could not have had the letters in reply.

**MR. R. DOERN:** So you're telling us in effect that the Prime Minister's Office, and the Governor General were not alarmed about this prospect?

**DR. S. SCOTT:** What I say is that it's one thing for an individual citizen, on the night of a defeat of the government, to send in a telex on a constitutional problem, and it's another to have a provincial Attorney-General of an affected province and a provincial government, or a provincial Premier ring up and say, look, we have a problem here. That's a completely different state of affairs, and I'm sure that difference is well understood to all member of the committee.

**MR. R. DOERN:** So what state of affairs would you see in the province if the Supreme Court made this ruling? You say there's a better than 50-50 chance they will strike down our laws, strike down our courts, and strike down our Legislature. What would that make us, a non-province peopled with non-people? Would we be in receivership? If people were driving from Saskatchewan to Ontario would this be referred to as a green belt? Would there be lawlessness, crime, rape, and murder in the streets?

**DR. S. SCOTT:** I think you would have an all-night sitting here, and I think there would not be long committee debates. There would not be a committee hearing. I think it would be a sitting of the House; and the whips would be on; and you would be sitting until an amendment resolution was passed; and you'd be sitting all night and every day; and I think it might be

that the courts of Manitoba would think it necessary to adjourn for a day or two while the amendment was being got through.

Law and order does not necessarily break down because most people don't go out and start committing murder as soon as there are, formally speaking, no laws to prevent it. That has been seen in cases of military occupation, the collapses of government owing to foreign invasion and the like. By and large, a reasonably well-disciplined population does not treat it as science fiction novels describe murder day or whatever, where everyone can go out and have a free for all and get rid of anybody he doesn't like. By and large, the social inhibitions and social reflexes are such that I would expect that the people of Winnipeg would not go out raping, looting, and murdering, but you would probably have an all night sitting.

**MR. R. DOERN:** Mr. Chairman, I agree with Professor Scott. There would be an all night sitting, or there would be a 24-hour Session, but I suspect that legislation proposed might differ from what you would anticipate, and that the Government of the Day might simply, instantly, re-pass all the laws of the Legislature establishing the courts and everything else. So that the effect with minor modifications would be to instantly put back into a position that which was irrationally struck down.

You know, I'm reminded of the American President Roosevelt who said, "We have nothing to fear but fear itself." It seems to me that constitutional experts, who are pretending, not pretending but suggesting that Manitoba faces legal chaos and the extinction of all its institutions, that that, in fact, is not a real fear or a real concern. It is a far out possibility.

The same way, Mr. Chairman, that it's also a possibility that this building may be hit by a nuclear weapon any moment, so we should all run outside and hide. You know, there's all sorts of real possibilities. There could be an instant fire. The podium might catch on fire. These are all possibilities, but they're not real concerns.

**DR. S. SCOTT:** Well, what would the all night sitting do? Well, of course, assuming that simply re-passing all the statutes in both languages would be possible, and there's some technical problems with that arising from the question of the valid existence of the House itself under the invalid statutes and so on, but assuming that were done, you'd need the text to do it, and I don't think you would find that you had the texts of all the statutes since 1890. That being the case, you would have problems as to the validity of all those whose texts you did not have; for example, land titles, contracts, all kinds of things depend on a lot of statutes, which are no longer in force, and which by hypothesis would have to be validated. So I don't think you'd re-enact all the statutes. What you'd probably do is enact a constitutional amendment.

Now the resolution might well differ from the one before us. It might only, I agree with you, address the question of the language of legislation, but then there would be the question as to whether that could get through both Houses at Ottawa. After all, a deal has been reached, I don't think we can ignore that and certain expectations have been created. If the province

then reneged on that and said, well, we're going to have a resolution which just repairs the breach of the validity of the legislation, that might or might not get through Ottawa, and even if it might get through Ottawa, it might not get through Ottawa all that fast. What you'd need, I think, is all night sittings in Ottawa too. You might not have that level of co-operation, particularly if some people in Ottawa wanted to filibuster it. So that if we're going to engage in rather abstruse kinds of prediction of what might or might not happen the day after a Supreme Court judgment declaring the laws invalid. If the Manitoba Government wanted to proceed with a watered-down resolution, I think that's a little difficult to say sitting here. It might not be quite as easy as the honourable member suggests.

**MR. R. DOERN:** But, Professor Scott, the people of Manitoba would regard that passage of legislation to correct an irrational decision as a correct decision, and they would regard everything as business as usual. Are you suggesting that they would be mistaken in that belief?

**DR. S. SCOTT:** By hypothesis the courts would have said they were mistaken, I believe, because they would have said that the statutes were invalid. That's the hypothesis we're working on the day after a Supreme Court decision is precisely saying that business isn't as usual, and the statutes aren't valid. So everyone would gear up and try to solve it, and the Supreme Court would implicitly or explicitly have indicated a constitutional amendment as the solution, and this House would be deliberating on an amendment. Simultaneously, or thereafter, the Houses in Ottawa would be, and the question would be what was the text of that amendment, and that would be a question both of provincial and national political debate by these democratic processes.

It seems to me one factor in that would be the deal ratified by the Société Franco-Manitobaine on the 24th of May. I don't think that can be put out of the picture now. I don't think that can be put out of the picture. I don't think you can go back to Square One. The time has passed to go back to Square One. Square one, for all intents and purposes, if you take the game as the game begun with the Blaikie case, Square One was on 13 December 1979. I don't think you can go back to that and say that you can simply do what the Imperial Parliament would probably have done if it had been asked to on 13 December 1979.

**MR. R. DOERN:** Do you, Professor Scott, envision a uniform bilingualism from coast to coast?

**DR. S. SCOTT:** It's always been said that Quebec is not a province comme les autres. But there are no two provinces which are constitutionally identical, no two provinces.

I think that the responses in the different provinces will result from a variety of factors. It will result from historic considerations, which are very important in Manitoba because Manitoba was created on the basis of a certain understanding, and by an act of a Federal-Conservative Administration, the administration of Sir John A. Macdonald, with Section 23 in it. I think

historical considerations would play a part in how much bilingualism there is; I think numbers of population would; I think the attitudes of governments would; the enlightenment of citizens would; I think there are a lot of situations; and I don't think there'll be a uniform bilingualism from coast to coast, but I think that in varying degrees there will probably be from coast to coast, different kinds of recognition.

Now, for example, as long as you have one French-speaking judge of a superior court of original jurisdiction, you can have all kinds of legal proceedings transferred into that court, and you can have a right to legal proceedings in French. So it isn't all that difficult. Provinces will deal with their respective histories and their respective needs and their respective interests and the enlightenment of their citizens and governments. I don't see uniformity from coast to coast, but I think there will be some response to the concerns of French-speaking citizens of this country in most provinces.

**MR. R. DOERN:** So you do recognize, as you just did, that numbers do play a role.

**DR. S. SCOTT:** Of course, numbers play a role, as does history play a role. I started with history, because I could see exactly what this question was leading to. The question was leading to the point, well, if we're not going to have bilingualism from coast to coast and the numbers aren't enormous in Manitoba, why here? I addressed that in the brief. Why here? Because that is a constitutional guarantee, and we all have a certain interest and respect for constitutional guarantees.

We try to run, and it isn't easy to run, a society based on constitutional processes. It's a very difficult kind of government. Churchill made that point. It's difficult. It is the worst kind of government, except for all the others. It is not easy to run a government by constitutional process, but when you have a guarantee - and everyone has an interest in respect for constitutional processes and constitutional guarantees.

Therefore, in some sense, Manitoba is a product of its history. It has a challenge in a way. The Honourable Mr. Doern may think it has a burden, it has a difficulty. Yes, but it has a challenge also. It has a challenge to show what constitutional guarantees and constitutional processes mean in this country. It isn't just a question of the numbers of citizens of one language or another.

**MR. R. DOERN:** Professor Scott, it seems to me that the general principle is agreed upon. It is the application and the extent and the degree of official bilingualism that is being debated, and the extent of services that is being discussed in this province, not whether or not there should be any.

**DR. S. SCOTT:** At times, it's looked very much, in some quarters, as if the whole thing were an issue in principle, and while there might have been an acknowledgment that certain things had to take place because they couldn't be got rid off, nevertheless nothing should be added. I would be glad to learn that there were no such views represented, if not in the province, at least no such views represented in the House.

Is it really going to be all that difficult to reply to some letters which come into Provincial Government offices in French? Is it really going to be all that difficult to print driving licences in English and French? The forms are not difficult to print up. You don't have to have even a complete range of separate forms. You can have bilingual forms. The Government of Canada has a lot of these.

I think that the cost and the practical impact of right to French Language Services is exaggerated. There is plenty of language in the text which gives a latitude to significant demand and the like, and which says that the ridiculous is not being guaranteed, and that the government is not to be brought to a halt. The services are to be a response to what is reasonable under the circumstances.

**MR. R. DOERN:** My final question is this, Mr. Chairman. Professor Scott is maintaining, has maintained and does maintain that there is this danger of a judgment by the Supreme Court that would result in legal chaos. Has he also offered the same advice to the Province of Alberta and the Province of Saskatchewan, which both came into Confederation in 1905 and apparently have similar provisions to The Manitoba Act of 1870?

**DR. S. SCOTT:** I would not use the term "danger" of a Supreme Court decision holding legislative bilingualism imperative, so I won't use the honourable member's adjective. The prospect - I think Alberta and Saskatchewan are in a different situation because the provisions in question were provisions dealing with the Legislative Assembly in the Northwest Territories not the province, but I have not reached a concluded view on that. Since the question was formally, have I given advice in those provinces, the answer is, I have not had advice asked from me, and I have not given any.

**MR. R. DOERN:** Thank you, Mr. Chairman. Thank you, Professor Scott.

**MR. CHAIRMAN:** Mr. Brown.

**MR. A. BROWN:** Thank you, Mr. Chairman. Professor Scott, you seem to be very critical of the opposition for debating this issue, and you seem to be implying that we have created a very inflammatory situation in Manitoba by doing so. Have you been following the debate in Hansard from the Manitoba Legislature on this topic?

**MR. CHAIRMAN:** Mr. Scott.

**DR. S. SCOTT:** First of all, have I been critical of the opposition for debating it? I wouldn't quite put it in those terms. I haven't been critical of the opposition for debating it. I have had a number of press clippings, quite a volume of press material, sent to me purporting to report speeches being made. It seemed to me that some of this debate, some of this attack was carried on with, what I might call, undue stridency in the sense that when you are dealing with issues of this kind, you are likely to invite the kind of response that I got in that letter which I read out to you from Mr. Miller.

I don't say that this is the position being taken by the critics. I don't say that the opposition members are

really stating in somewhat more polite language the feelings of Mr. Miller, but what I do say it that when a debate of this character is carried on with a certain stridency and without a great deal of care, you are going to stir up feelings of this character. I think these attitudes and feelings are not healthy, whether they are in Quebec or whether they are in Manitoba or whether they are anywhere else. I feel that whilst the opposition was well within its rights to subject it to scrutiny, to debate - and many members might disagree, unfortunate as I might think that. I don't object to the debate. What I say is that it should have been carried on in a statesmanlike manner which, it seemed to me from the Manitoba press, was rather lacking. I would leave it there.

I think that it has been carried on certainly by certain members, not perhaps all, of the House and some outside the House with - let's use the term - undue stridency and insufficient caution.

**MR. A. BROWN:** So, Professor Scott, you are basing your comments on what you have read in the newspaper, who tend to sensationalize somewhat because it sells papers, although I must say that the press has been treating this quite fairly, but you have been basing your comments on what you have read in the press and on the one letter that you received, which expressed itself rather strongly on this particular issue.

**DR. S. SCOTT:** And a lot of reports by telephone and some letters from people here who are close to the situation. Obviously I'm not able to read on a regular basis the Debates of the Legislative Assembly of Manitoba and I don't think many of the citizens of Manitoba do on a daily basis. Most of the citizens inform themselves through the press, through the media, and through communications. If I have misunderstood the tone and temper of the debate if, in fact, it has been carried on throughout, certainly by all responsible persons in a dignified and statesmanlike way - appealing to no sentiments of hostility - then I would be very pleased to hear that that was the case.

**MR. A. BROWN:** From the statements that you made earlier, you would have had us believe that the opposition should not have debated this issue at all, but that we should have gone along with the agreement, *carte blanche*, made by the Provincial Government, the SFM, and the Federal Government, with no debate on this particular topic at all. This is the impression that you left with us earlier, when you were being so highly critical of the way that this debate had been proceeding in Manitoba, which obviously you have not been reading in Hansard. You are just going by newspaper articles and by one letter that you have received.

**DR. S. SCOTT:** I'm not going by newspaper articles and one letter. I've been kept informed by persons here. But I'm not criticizing the opposition for debating it. My criticism was, first of all, that the opposition seemed unwilling to leave a reasonable latitude to the government, having regard to the fact that they, themselves, had two years in office to deal with the situation in their own way. It seems to me, when they,

themselves, had every opportunity - two full years after the Forest decision - to deal with the situation and didn't, that entitles the new government to a little bit of latitude. If you dump a problem in someone else's lap, it seems to me to be somewhat questionable then to launch a violent attack on the manner in which they solve it. So it seems to me that the new government was entitled to a measure of latitude which it was not given.

I think also, on the merits of the debate, the attack has been somewhat strident, as far as I can see, but if the honourable member wishes to correct me and say that it has all been very tempered and so on, then I'd be delighted to hear that. I think it's been somewhat strident and I think simply, and with all respect, the opposition is mistaken in opposing this resolution on principle.

If they had a few constructive suggestions to make, that might have been all very well, but it seems to me that the opposition is mistaken in attacking this settlement on principle, because it is a settlement which is good for Manitoba and good for the country. It is a settlement which isn't nigging and mean and grudging and gives absolutely the least that can be given, as unpleasantly as possible. It shows a bit of magnanimity and it shows a certain attitude and that's what's good for the country, quite apart from the text.

**MR. A. BROWN:** Were you aware, Professor Scott, as Mr. Doern already stated, that we have pretty well agreed to between the two parties - as a matter of fact the previous government already implemented Section 23 of The Manitoba Act and there really is very little disagreement, or possibly no disagreement, as to the amount of French we should have in Manitoba at the present time - but that the disagreement at the present time is on entrenching this particular act, which would mean that the courts would dictate just exactly which positions in Manitoba would be bilingual, which positions would not be. That particular control would be out of the hands of the Provincial Government. Now this is the concern that many Manitobans have, not only the opposition and that is the reason why we are here. Now do you think that we should have this kind of debate where people can come forward and express their opinions?

**DR. S. SCOTT:** I'm not objecting to the debate and I haven't objected to the debate. I say that I think certain things have been unfortunate. The stridency of it, some manner in which the debate has gone forward and I think, with respect, I'm here, I've come forward and I simply say, with all respect, that the position taken by the opposition is, in my view, mistaken.

Now, will entrenchment mean the courts will dictate the degree of language, the use of the French language in Manitoba? Well if you enact a statute, the court dictates the meaning of the statute. If you enact a constitutional amendment, the court, in some sense, dictates the meaning of that. Now if you say, well should it be entrenched or should it not be entrenched and that's the only real issue, well why entrench it? Entrench it, because once it's entrenched it's there, it's permanent, it's enshrined. It's permanent in a way which an ordinary act isn't, and if you want to know why

people want things entrenched, all you have to do is see what would have happened to Section 23 of The Manitoba Act if the Supreme Court had found that it hadn't been entrenched.

Of course, the Legislature of this province purported to repeal it and the Supreme Court would simply have said, it's repealed. The Official Language Act of Manitoba, repeal Section 23 - 23 isn't entrenched and that's the end of language of legislation. Of course, entrenchment is being sought of this text now because that is the only way in which it can be relied on on a long-term basis. Governments change, views change and what's enacted today, by an ordinary act, can be gotten rid of tomorrow. It's perfectly obvious why entrenchment is desired.

Now if the opposition wants to criticize that, of course they're fully entitled to do it, and it's very desirable that people be invited to come forward. I have come forward and I come forward to say that with all respect this proposal is good for the country. The entrenchment is good for the country and it is a constructive proposal and the opposition is, with all respect, mistaken in its opposition. As to that, that's all I say on that point. I don't say that those opposition members who dislike it are wicked. I say, with respect, they are mistaken.

**MR. A. BROWN:** Just one final question, Mr. Chairman. I would just like to ask Professor Scott that if he were a Manitoban, would he have welcomed the opportunity to come forward and speak and express his views before a committee such as this?

**DR. S. SCOTT:** I certainly would have. I think I'm a bit of a parliamentarian manqué. Since I don't often have these opportunities, I enjoy my participation in the process, particularly if others are good enough to think that it can be useful. If I were a Manitoban, I would have come forward and I hope I would - one can't deal with hypothetical situations, my circumstances and background are what they are - but I hope I would believe the things which I do believe and be able to express the views which I have expressed today.

**MR. CHAIRMAN:** Mr. Lecuyer.

**MR. G. LECUYER:** Thank you, Mr. Chairman. During your debate at one point or another, I heard the Attorney-General make reference and I don't recall where this comes from, but make the reference or quote the reference that some - I don't know if it's one of the judges of the Supreme Court or who - referred to the Constitution as a growing tree. Going on from there, I suppose the meaning of that is - and in comparing this with the Constitution of Canada, and particularly with The Manitoba Act, which had very specific wording - but now in terms of its meaning, seeing that in the beginning of this province, the linkage between the Government of the Day and the population was on a very limited basis, do you feel that the Supreme Court today could interpret The Manitoba Act in today's terms, in a parallel with the growing tree, in other words, that it has branched out in so many ways that the original wording intended at the time that this was adopted would contain the provision of services.

**DR. S. SCOTT:** The phrase "living tree" if my recollection serves me right was Lords Sankey and Edwards and the Attorney-General of Canada. Of course trees can grow but they must remain within the limits of genetic possibility. Genetic possibility, if one may use that metaphor in these circumstances, means here: reasonable respect for statutory language. My own view is that Section 23 of The Manitoba Act cannot be extended to give a guarantee as to services. It says what it says and it does what it does. The court, as interpreted in Section 23 and Section 133, the corresponding section for Quebec and the Federal Parliament, Quebec and federal institutions generously, almost every word, it's an extraordinary provision, almost every word in that section has a little bit of case law on it now, a bit of special meaning, person including judges as well as litigants and so on. The Supreme Court interpreted it generously, I think, in accordance with its purpose and objective and did so, for example, in including regulations under the guarantee which it need not have done because they were in some sense not acts of the Legislature. So, if you like, the "living tree" doctrine, the "living tree" approach, the "living tree" attitude has been applied to some extent, but there are limits to how far it can be applied and with respect I don't see 23 of The Manitoba Act as dealing with services.

**MR. G. LECUYER:** Thank you. Another thing that has cropped up or has caused a great deal of verbiage is the wording official languages, English and French are the official languages of Manitoba which in some quarters has created opposition on the grounds that it leaves it open to too wide an application or an interpretation. Are you of that opinion, or that it might create that risk?

**DR. S. SCOTT:** Well, I don't know. Risk, of course, is somewhat loaded. The first thing I would like to say is that I think the package is a reasonable one and a fair one and ought to be left as it stands and that the courts can be relied on, I think, to deal in a fair and reasonable way.

You can read that in two ways. You can say the statement that English and French are the official languages simply is a statement of principle and the actual rights are those which are spelled out. But, on the other hand, it might have a little more effect than that if for example some particularly obnoxious provision were passed interfering with free use of one of the languages, say a statute which said that outside the Legislature and the courts and so on, no one might use the French language, then a statement that English and French are the official languages might have some effect beyond the listed rights which follow.

All in all, I don't think it risky to leave the text as it stands. I think the statement of principle is a good one and a satisfactory one. I don't see anything that I would call risks flowing from that text.

**MR. G. LECUYER:** Mr. Scott, another thing that has been said frequently is that Article 23 of The Manitoba Act could never be extended or its meaning could never be that English and French were the official languages in Manitoba, yet in 1890, the act that was passed was

called The Official Languages Act. In 1980, the statute which was passed to put into operation the re-established Article 23 also referred to and I quote the first article or the first clause of Bill 2, which says, "Definition of Official language. In this act 'official language' means English language or the French language."

In your estimation therefore wouldn't it be the case, that English and French were the official languages of Manitoba as Article 23 was originally adopted?

**DR. S. SCOTT:** Well, the first thing is the effect of Section 23. Section 23 gives certain rights which give certainly undoubtedly a certain official character to both the English and French languages, but there are limits to it. It doesn't contain a statement of general principle and I don't think you can say that it goes much beyond what it says so that it doesn't seem to me that Section 23 itself is to be read as if it began by saying English and French are the official languages of Manitoba.

Now, that leaves us with Bill 2, which I think is probably the act which I referred to in my brief, which I have under the chapter number. Now, of course, Bill 2 is an ordinary act and isn't an entrenched part of the Constitution. It is enacted by the Legislature in exercise of all its various powers and insofar as it contains a provision that English and French are the official languages of Manitoba, that is a statutory statement and it has the weight of all the jurisdictions of the Legislature behind it, but it isn't an entrenched guarantee. So I think we have to draw a clear distinction between Section 23 which is a part of the constitutional text and is entrenched and Bill 2 which is not. Of course, Bill 2 gives some statutory rights and Section 23 gives some constitutional rights and those are two quite different things.

**MR. G. LECUYER:** I realize this difference that you have just made, Mr. Scott, but if this Bilodeau case were to go to the Supreme court, in view of the fact that we have in Manitoba these statutes, even though these are not constitutionally entrenched and in view of the fact that the Legislature of Manitoba adopted these statutes, could the Supreme Court then take that into consideration along with the fact that the violation of the constitutionality of Article 23 over those years and in deciding on the Bilodeau case, they go beyond what Article 23 originally stated?

**DR. S. SCOTT:** I think that Section 23 on its own is quite sufficient to produce a favourable result to the appellant, Bilodeau without any other provincial or other legislation. I think 23 does the trick for reasons which I have given now. Of course the courts look at policy and the fact that there is this statement on the statute books of Manitoba, maybe taken in a general kind of way as indicating a public policy or an acceptance of a public policy, and create a climate - maybe that's the term - more receptive to a favourable decision in the Bilodeau case, particularly because a contrary result would, in effect, get rid of the statement in Bill 2. I think that 23 stands on its own, and that 23 is sufficient. I wouldn't link Bill 2 and Section 23 in quite that way.

**MR. G. LECUYER:** The wording of Clause 2 of Bill 2, which gave prevalence to the interpretation of laws

enacted in English, do you feel that was unconstitutional in terms of what was contained originally in Article 23?

**DR. S. SCOTT:** Yes. The answer is, yes. There is similar provision in the act respecting the act to give effect to the Blaikie judgment in Quebec. I think that is ultra vires, and I think that's so for a variety of reasons. The main practical one is that, if that's valid, the French text ceases to have any meaning at all in Manitoba or the English text in Quebec, because you can put anything you want in the other text, the comics supplement in the weekend newspaper, anything you like, and it doesn't make a bit of difference, because you have the English text. Whatever that says is the law, and anything else is either the same or it's different and, if it's different, it doesn't matter.

So that section would, in effect, make the French text an irrelevancy, and would defeat the purposes and effect of Section 23 and is, in my view, ultra vires.

**MR. G. LECUYER:** Thank you very much, Mr. Scott.

**MR. CHAIRMAN:** Mr. Lyon.

**HON. S. LYON:** Mr. Chairman, through you to Mr. Scott, I regret first of all I wasn't here at the outset to hear if Mr. Scott did explain the reason for his interest, which we respect, in the Constitution of Manitoba and the fact that he is out here giving us the benefit of his advice. I notice that he approved of the fact that we were having hearings and that the debate was, in his view, legitimate to go on. I'm sure that we are all thankful that he has given us that imprimatur, so that we can carry on with a clear conscience.

I would like to find out first of all, because he made reference to a factum and to a group called the Positive Action Committee as an intervener, first of all, what is his relationship to the Positive Action Committee? What are the interveners on, and what is the factum to which he makes reference?

**MR. CHAIRMAN:** Mr. Scott.

**DR. S. SCOTT:** That's a variety of questions. Of course, the committee doesn't require my imprimatur to carry on debate, but I feel the matter is one which should be fully and freely debated insofar as Mr. Lyon might think my imprimatur desirable.

The Positive Action Committee is an English minority language rights organization. It is a minority language rights organization generally in Quebec. It obtained leave to intervene in the Bilodeau case, and I represented it in those proceedings and filed a factum with detailed arguments on all the issues. In fact, I had proposed at a very early stage a constitutional amendment, and had drafted one and included that in the factum. It addressed only language rights and, of course, legislative language rights and other matters came later. But that is the Positive Action Committee, that is who they are, that is how they have intervened, and that's my formal relationship.

As I said at the outset, in a formal sense, I am here as an English-speaking Quebecer because, one might say, English-speaking Quebecers have an interest in the example which is set here. Sooner or later, an

enlightened approach here will do our position materially some good.

I look at it, as I suggested earlier, in a wider sense. I am here, because it seems to me this is right. It is just. It is humane. It is even generous perhaps. Yes, this settlement, it isn't mean and niggardly and grudging and give absolutely the least that can be given. I think it is constructive in the renewal of our federation. I think it sets an example of attitude which is a lesson which can usefully be read to Mr. Levesque and others who want nothing but to see this country not work and see every expression of ungenerosity as a favourable omen. So I am not here simply to squeeze as much as I can out of Manitoba.

Indeed if that were my interest, I think I would not have sent the telegram I did on the 13th of December, 1979. I would probably have wanted as much chaos as possible as soon as possible, so that possibly the best settlement could be squeezed out of a reluctant government. But I did what, it seems to me, the Honourable Leader of the Opposition's government should have done, which was to suggest that what was needed was a breathing space for the province to comply and an Imperial Act to validate the laws in the interim. So I think, my approach in a sense has been a public interest approach, and an approach which is not designed to cause trouble, but to further the public interest in constitutional processes and a general settlement of constitutional issues in this country.

**HON. S. LYON:** Just on the question, Mr. Chairman, of the telegram to the Governor-General. Would Mr. Scott tell us whether or not he sent a copy of that to the Government of Manitoba, or did he contact anybody in the Government of Manitoba to tell them how concerned he was about this position and how Manitoba might be going to hell in a handbasket?

**DR. S. SCOTT:** No, I didn't. When the Clarke Government was defeated, I banged out on my typewriter - I was watching the television - I banged out a copy of this. Parliament was clearly going to be dissolved the next day. I sent the telegram. Parliament was dissolved. Once Parliament was dissolved, the thing was in a sense academic because nothing could be done for another couple of months. If there were challenges in the meantime which were successful, then it might have been that the Imperial Parliament would act on a simple federal executive request. I don't know.

In a sense, the immediately pressing character of the issue which prompted the telegram died with the dissolution of the Parliament. That was that.

**HON. S. LYON:** Could you tell us a bit more, Mr. Scott, about the Positive Action Committee in Quebec? Is this a committee, you've said, of English-speaking citizens of Quebec? Is its main purpose to react, in a legal or in a political sense, to the government of Mr. Levesque? How long has it been in existence? Was it there when Mr. Bourassa was passing unilingual language bills in Quebec, or how long has it existed?

**DR. S. SCOTT:** My recollection is, it was founded after the election of the Levesque Government, and consisted of maybe Montreal lawyers and businessmen and the

like, and was funded by mostly the Anglophone community in Montreal, but with a strong support from those French-speaking people who believed in bilingualism and believed in federalism. What it did was file briefs on educational matters and other legislation as the government progressed. It did not organize actively, politically. It tried to deal in a reasoned manner with legislation, which was often unreasoned and possibly unreasonable.

**HON. S. LYON:** Earlier this week, Mr. Scott, we heard from a group which has been fairly ubiquitous in Manitoba over the last three or four months called Alliance Québec. Mr. Eric Maldoff, another member of his executive and the executive director of the group were out and gave us a brief on Tuesday.

What relationship, if any, is there between the Positive Action Committee on whose behalf you speak and the Alliance Québec, a group on whose behalf Mr. Maldoff spoke, without trying to lead you right to the point of the question, because the remarks that you make about these amendments of the NDP being almost heaven-sent reflect almost word for word the comments that were made to us earlier by Mr. Maldoff?

**DR. S. SCOTT:** I am here on my own behalf and not as representing the Positive Action Committee or anyone else. If I were representing anyone, I would have to have the brief vetted and have meetings and the like. So, I just returned from the United Kingdom, put this brief together and came here on my own behalf.

The Positive Action Committee is now, when I last spoke to the co-chairman of it, who is another Montreal lawyer named Mr. Paterson, the activities of the Positive Action Committee were in process of being merged with Alliance Québec so as to put it under one general umbrella and make the forces more effective in Quebec and not dissipate time, money, energy and the like, because, obviously, in Quebec, we have to fight on many fronts. How far, in fact, that has legally or practically progressed, I'm not sure; I haven't spoken to Mr. Paterson since, I guess, this spring.

In a way, one might say that there are no differences of views that I am aware of. I'm here on my own and I'm not representing anyone, either Alliance Québec, Positive Action Committee, but my original direct involvement, of course, was as representing the intervener in Bilodeau. My telegram on the other hand, of course, took place long before that and I had no connection with Positive Action, Alliance Québec or anyone else. I simply felt concern as an interested citizen and felt that Manitoba was likely to have some problems and no one in government here at that time seemed very concerned about it.

**HON. S. LYON:** Even though no one in government seemed very concerned, you weren't concerned enough to tell people in government here about your concern even though it was probably a concern which was very unique, given the fact that Manitoba, of course, did have access, as it has today, to legal advice, not only from within the province but also from outside of the province.

**DR. S. SCOTT:** I have to teach law also and, while I thank the honourable member for the confidence he

expresses in me, don't have time to act as counsel to a whole series of provincial governments. I saw something which had to be done right away, before the dissolution of Parliament. That's what was my immediate concern, to try to not have a couple of months where there was no Federal Parliament to make requests to Westminster. I tried to do that. It didn't work. Obviously, there was no time afterwards, because the dissolution took place the next day and I just did not have, I suppose, I didn't even think to sit down and start writing letters to the Government of Manitoba.

On the other hand, one might think that the lessons of the Blaikie case should have sunk in as the government's legal advisors debated it in the days and months ahead. I don't know whether it was only when Mr. Bilodeau decided to contest the summons that the possibility first occurred to anyone here. I would be very surprised if that would be the case, but perhaps the Honourable Leader of the Opposition feels that the possibility of a proceeding like the Bilodeau proceeding never entered anyone's mind here, in which case I can only say that was a wont of alertness.

**HON. S. LYON:** Mr. Chairman, through you to Mr. Scott. I'm sure, Mr. Scott, you would not be wanting to leave even the implication that Mr. Kerr Twaddle, Q.C., who has been and remains the chief counsel to the Government of Manitoba on constitutional matters, was negligent or deficient in any way in his responsibilities, either to the former government or to the present Government of Manitoba.

**DR. S. SCOTT:** Perhaps the government didn't ask him what the implications of the Blaikie case were. I'm not privy to the discussions of Manitoba's Government. I'm putting it on the most favourable possible basis. Perhaps Mr. Twaddle gave excellent advice and it was simply ignored, in which case, I would think that would be a whole lot more serious.

The Honourable Leader of the Opposition is in a position to tell us that he was well and effectively advised as to the likelihood of these challenges by Mr. Twaddle. If he'll make that affirmation, I think that will be very interesting to a lot of people, because what that would then say is that the government sat back and being warned that there would be these challenges, then knowing that this would happen did nothing, and it was then wilful negligence or even recklessness instead of simple oversight.

**HON. S. LYON:** Mr. Chairman, I take it that Mr. Scott is familiar with Mr. Twaddle and with the, may I say, pre-eminent record that he has established as counsel in Canada on constitutional matters, being of course in the long fight with Mr. Trudeau, the lead counsel for the eight provinces who went to the Supreme Court and were successful in the Supreme Court in preventing Mr. Trudeau from, as some of us would say in street language, ruining this country. That being the case and making the presumption that as the intervener on the Bilodeau case in which I understand, because Premiers you may be surprised to learn don't involve themselves intimately in all the court cases, they have to be involved in other facets of the running of the province, but are you familiar with Mr. Twaddle in a personal way or by

way of reputation?

**DR. S. SCOTT:** I have never had the privilege of meeting Mr. Twaddle. I have dealt with him a few times over the telephone. Mr. Twaddle has comported himself in the best professional fashion, in a very effective and businesslike way and with great courtesy to me. I have not the slightest reflection to make on Mr. Twaddle, his competence or anything else. I never suggested that at any time.

**HON. S. LYON:** I merely wanted the record to be clear on that, Mr. Chairman.

As intervener, as presumably as counsel for the Positive Action Committee, were you acting in a voluntary capacity for them on the Bilodeau case or were you retained as counsel?

**DR. S. SCOTT:** I was retained as counsel. I suppose that I'm at liberty to say, although I find that question unfortunate, that the basis on which I was retained was that my disbursements would be paid but that I would receive no fee, so that I was not going to obtain any pecuniary advantage to myself out of this and involved myself in it out of belief in its principle and the importance and intricacy of the legal issues involved. How intricate they are and involved they are, the Honourable Leader of the Opposition might be interested in seeing from a copy of my factum which I'd be delighted to provide him with.

**HON. S. LYON:** Mr. Chairman, I would very much like to see a copy of Mr. Scott's factum and may I say it's credible on his part that he would offer his services in the way in which he has described to this committee, because one takes it from what he has said, that it is a committee of voluntary people in the Province of Quebec who do not - unlike the Alliance Québec - enjoy a large subsidy from the federal taxpayers as the Alliance does.

**DR. S. SCOTT:** Whether or not Positive Action has received subsidies from the Federal Government, I do not know. Whether it may in the future, I do not know. Whether I may have anything in the future, I cannot say. All I can say is that the terms of my mandate are the terms which I have stated and so far I've had no pecuniary advantage out of it and indeed had to pay for the copy of the telex message to Mr. Schreyer out of my pocket and have not claimed reimbursement from that. So I'm out of pocket to the extent of the telex message, at any rate.

**HON. S. LYON:** Mr. Chairman, as I've said, I think that's very credible on the part of Mr. Scott. However, if the Positive Action Committee does complete this marriage with Alliance Québec, then of course the Positive Action Committee will be enjoying the benefit of what we were told the other day by Mr. Maldoff was something like 50 or 60 percent of their budget, 60 percent I think, being paid by the taxpayers of Canada, through the office of the Secretary of State. Of course, the office of the Secretary of State has been more than peripherally involved in the negotiations with respect to these amendments, with which some of us find



disfavour in Manitoba. I want you to be clear as to the linkage is.

**DR. S. SCOTT:** Well I mean the linkage - since I made it clear at the outset that I was speaking here on my own, and I made that clear again in response to the honourable members' questions, it seems to me quite aside the point to debate my relations with Positive Action Committee or Positive Action Committee's relations with Alliance Québec, or the relations with either of them with the federal taxpayer. These seem to me to be all beside the point and out of courtesy. To the honourable member, I've responded to these questions without objecting and asking the Chairman to relieve me of the obligation to answer them, but I would emphasize that they seem to me to be beside the point.

**HON. S. LYON:** Mr. Chairman, we're always interested in having a witness's view as to what is in order or what is not in order, but when a witness places himself in front of a committee and presumes to give opinions on a matter and states himself that he prepared a factum on behalf of Positive Action Committee - that was the first time that I knew anything about that - and the Positive Action Committee was an intervener, then I suggest that there is nothing improper, illicit, or otherwise, about pursuing that line of questioning to find out how this peculiar and unique interest that Mr. Scott comes to bear in Manitoba.

**DR. S. SCOTT:** Mr. Chairman, with respect, I didn't say the question was improper, illicit. I said that once I had made it clear that I was speaking on my own, it became irrelevant. Nor did I dispute the fact that this committee could constrain me to answer any proper question. I simply said that I might have asked, had I not thought it desirable simply to respond to the honourable member, the Chairman to relieve me of the obligation to answer that question. I did not say that if asked the question I would not answer it. In fact, I did answer it.

**HON. S. LYON:** Mr. Chairman, I can't then understand the extreme sensitivity of the witness in identifying, as he did himself, at least one of the motivations for his being here; namely, as he told me for the first time this morning, something I never knew of - I've never heard of Mr. Scott before; I've never set eyes on him before - he tells us that he is acting as an intervener in the Bilodeau case and it is because the Attorney-General of Manitoba, in his abject fear of the Bilodeau case, that he has struck the negotiation and the agreement that this Legislative Committee is now considering. So that we're getting down to cases, the cases being that Mr. Scott is one of the counsel before the court in a case which is adjourned at the moment, sine die, in which the Province of Manitoba is being sued by the Plaintiff, Bilodeau, and that Mr. Scott is acting as an intervener, presumably on behalf of Mr. Bilodeau, or sharing the point of view of Mr. Bilodeau.

**DR. S. SCOTT:** With respect, it is the Province of Manitoba which is prosecuting Mr. Bilodeau and not Mr. Bilodeau which is suing Manitoba, but that . . .

**HON. S. LYON:** No, the Province of Manitoba won in both lower courts.

**DR. S. SCOTT:** He's the appellant, but it's a summary conviction prosecution, so he isn't suing anybody, he's appealing from a conviction. The reference to the Positive Action Committee was simply in conjunction with the fact that since questions have been asked about the well-foundedness or otherwise of Mr. Bilodeau's case, and since my arguments are stated in some detail in a public document of record, and the records of the Supreme Court of Canada, I felt it desirable simply to say that, but I am sure that the honourable member will accept the views I express here are my own and not on behalf of anyone else.

**HON. S. LYON:** Mr. Chairman, in the course of his remarks, Mr. Scott made the statement, "We can't go back to Square One." He was referring to the fact that presumably if the Bilodeau case were to proceed on to hearing in the Supreme court, that notice would be taken of the fact that the Manitoba Government had foolishly - some of us would think - entered into and completed negotiations with the Franco-Manitoban Society, Mr. Bilodeau and his counsel, and the Government of Canada, and that the court would be not unaware of that. Would it be your opinion, because I drew this from what you said, but I want you to confirm it or deny it Mr. Scott, that the government may well have prejudiced Manitoba's case before the Supreme Court, by taking this rather uncommon action of attempting to negotiate a settlement in a constitutional case, and that if the Bilodeau case does now go to trial, that Manitoba's position will be weaker than it was, had the case gone to trial in the first instance?

**DR. S. SCOTT:** That's not what I meant to say, nor I am sure that it is right. The point really is that this agreement will be important, not so much for the Supreme Court, because the Supreme Court is able to rely on arguments bearing on the construction of Section 23 of The Manitoba Act and able to come to the conclusion that the proper resolution is in a constitutional amendment of some kind.

So it isn't the question of the terms of this agreement, or the terms of some other agreement as influencing the Supreme Court. But it seems to me, the Federal Houses, when their turn comes to pass a constitutional amendment, may well say that a deal was reached and this deal is now being reneged on, and therefore what kind of terms they would consider appropriate, when the time comes for them to pass the amendment, would be a matter which could not be considered without regard to the settlement which has been reached. So I don't think the Supreme Court is going to say, well, we want to force this settlement on Manitoba; I think the Supreme Court will reach, or should reach the conclusion that a constitutional settlement by enacted amendment is the proper method. I think that it is the Parliament of Canada and the Government of Canada which could well look at this text and say, well, we're not now going to go forward with something which simply reneges on the deal which was made.

**HON. S. LYON:** I take it, from the response that you gave to one of my colleagues around the table with

respect to a matter that I know lawyers never wish to comment upon, but you were being asked to make a decision or a guess, and you gave a guess, and I repeat it only for that reason. You said that you thought, in your opinion, that there was a better than 50 percent chance that Mr. Bilodeau would succeed in his case before the Supreme Court.

My question would be this, and realizing that lawyers never want to venture onto that kind of thin ice, when you first became an intervener in the case, I presume that was when the case had matured to the point where the appeal was on its way to the Supreme Court?

**DR. S. SCOTT:** It had already been filed and factums - I think some factums may or may not have been filed - I can't now remember, but it was already appealed legally, leave to appeal had been granted in the Supreme Court. Oh yes, and indeed other interveners had already joined. We were, I think, the last intervener. So applications for leave to intervene had been granted on behalf of the Government of Canada and the Government of New Brunswick, and the Société Franco-Manitobaine.

**HON. S. LYON:** The question, and I hope it doesn't sound too frivolous, but in view of the fact that Professor Scott was brave enough to put on the record earlier that he thought now the case would have a 60 percent chance of success, did he feel that it had that great a degree of success when he first became counsel and intervener for the PAC on this matter?

**DR. S. SCOTT:** I thought the case was an intricate case, not a difficult case, because a difficult case is a case where there are strong considerations tending both ways. I thought it was an intricate case and that if the intricacies could be put together, it was like a jigsaw puzzle and you could work it out, you could ask for a coherent relief without relying on any invalid legislation. If the authorities could be brought to bear, then I thought that the case would be won if it could be demonstrated that you could have everything by striking down the Manitoba laws, the four points in other words.

So when I thought that, I decided that I would try to make sure that these authorities and these considerations and these reflections were put before the court. I felt that if they were, then the case would probably be won. I still think that. I discussed this with various lawyers in Quebec, and they came to the conclusion that, having regard to the interests of Anglophone Quebecers and the general public interest in language rights and in constitutional process, that the case was a proper one for the Positive Action Committee to intervene in.

Basically, I believed in the case. The case went on, our intervention went on, because I believed in it and because I believed that, if properly presented with all the authorities which could be brought to bear, that we could win.

**HON. S. LYON:** Mr. Chairman, from a purely legal standpoint then - I'm not talking about the standpoint of what you might think good citizenship and the public interest would require, but from a legal standpoint as

a legal practitioner, then you would be not unhappy to see the Bilodeau case mature and be heard in the Supreme Court, because you think your chances are very good.

**DR. S. SCOTT:** It raises immense numbers of sophisticated issues: perspective, judicial law-making and de facto authority as far as the capacity of Assembly. It has more interesting and sophisticated issues than almost any other case I know of. I personally, in other words, would enjoy arguing these issues and so on.

On the other hand, at the end of the day and if we win, this process in which this House is now engaged would still have to be gone through. In other words, a settlement would be necessary. It seems to me that it is desirable for the democratic processes, to which the honourable member's colleagues have referred, the democratic and constitutional processes to be applied immediately and a good and satisfactory negotiated settlement to be reached.

In my view, the package is a good one, a fair one and a just one. It is one that is good for the country in general. That is my first interest; not in arguing cases which I may win; not in having a good time debating abstruse points; not in getting publicity for myself in the law reports, but in seeing a good settlement negotiated and implemented into law.

**HON. S. LYON:** Mr. Chairman, Mr. Scott will appreciate that's why I said from a purely legal standpoint, you wouldn't be adverse to seeing the case go on to trial.

Mr. Scott, you mentioned that even if you were to win the case - to use that perhaps not totally descriptive verb - that this Legislature would still have to sit and go through certain actions that you have described. In the event that Mr. Bilodeau's proposition, far-fetched as it seems to most people who have commented upon it and to the lawyers for the Government of Manitoba whose opinions have been tabled in the House . . .

**DR. S. SCOTT:** That's all parenthetical.

**HON. S. LYON:** That's all parenthetical, but it's part of the evidence. By the way, have you had the opportunity - I'll hold that question to one side - Mr. Scott, to read the opinions that have been tabled in the House that were given to the Attorney-General of Manitoba, opinions from, I believe, Professor Gibson at the University of Manitoba, who may or may not be known to you, and the opinion, of course, of April '82 and any subsequent updates that were given by Mr. Twaddle, who is the counsel for the Government of Manitoba.

**DR. S. SCOTT:** I left my card in the Clerk's Office downstairs with a request for all the proceedings of this committee and the pertinent proceedings of the House. I will be absolutely delighted to read this material when it comes. I haven't yet had this, but I would like to put it into my library.

**HON. S. LYON:** What would your view be with respect to this proposition? Assuming that the amendments as originally drawn were passed; the Society Franco-

Manitoban, the Government of Canada, Mr. Bilodeau were all satisfied that the New Jerusalem had been achieved in Manitoba as a result of this settlement, would the Government of Manitoba in your opinion then be free from any further suits of the nature of Mr. Bilodeau's questioning the validity of the Government of Manitoba or the Legislature of Manitoba to have even entered into this agreement?

**DR. S. SCOTT:** Well, the day the New Jerusalem comes, I suppose, there will be no courts and litigation, so let's take it the day before the New Jerusalem comes.

**HON. S. LYON:** Constitutionally.

**DR. S. SCOTT:** Constitutionally, well you know, the day before.

**HON. S. LYON:** The day we can abolish all lawyers will be when the New Jerusalem comes.

**DR. S. SCOTT:** That, I'm not sure, would be the New Jerusalem.

**HON. S. LYON:** I can say that as a lawyer.

**MR. CHAIRMAN:** Mr. Lyon, please help the procedures by not interrupting.

**HON. S. LYON:** Mr. Chairman, I am helping the procedures, I hope, and Mr. Scott is a very proficient recipient in it, by enlivening the procedures a bit with a bit of humour, so it won't be quite as doggerel and draggy as it was when my honourable friends opposite were asking silly questions.

**MR. CHAIRMAN:** I concur in part of your answer, but the problem is that people have to transcribe this. If two people are speaking at the same time . . .

**HON. S. LYON:** I'll help them out.

**MR. CHAIRMAN:** . . . it's not possible to do this.

**HON. S. LYON:** Over 25 years, we've gotten along pretty well, Mr. Chairman.

**MR. CHAIRMAN:** Mr. Scott.

**DR. S. SCOTT:** Well then to restate, the day before the New Jerusalem comes and in the weeks and months preceding the New Jerusalem, of course no one is ever free from litigation. Litigation can be brought. The courts are open. One can start up law suits any day, every day and every hour of every day against anyone one pleases.

What there will not be is a law suit, it seems to me, of the scope and magnitude of this one when once a proper amendment has been passed validating all the statutes. You will not have a court case which stands a significant or good chance of causing to be held invalid thousands of statutes. You will not have litigation of these massive proportions where a simple inelephant case, a simple highway traffic summons, puts in questions of fundamentals of the legal system. What

you may have, obviously, if someone is entitled to some services and is not given those services, well, he may claim them in court. He's likely to try other means of redress because obviously court cases are expensive and people do not go to court lightly. Most people don't sue over most grievances most of the time. People will go to great lengths not to bring legal proceedings. But, of course, legal proceedings are possible, and if denials of new constitutional rights are sufficiently protracted or sufficiently serious, then there will be more litigation.

**MR. CHAIRMAN:** Mr. Lyon.

**HON. S. LYON:** Mr. Chairman to Mr. Scott.

So you wouldn't be surprised, and if I can find the quotation I'll give it to you, that Mr. Twaddle has already advised the Government of Manitoba that if it pursued the course of action which it is now pursuing, and achieved a constitutional amendment of the nature of what was first introduced in May, in this year, that it would still be open to any person of such a mind to bring an action against the Government of Manitoba questioning the very validity of this Legislature to pass the validating laws or the validating amendment, even though that in turn was passed under Section 43, I think it is, of The Constitution Act by the Parliament of Canada?

**DR. S. SCOTT:** Yes, I anticipated that question. That's why I said if a proper amendment were validly enacted.

Now I addressed that issue in the factum also, and I think that on balance, since it is necessary for the courts to preserve the legal continuity, that the minimum that is required is that at all times there be bodies in existence capable of causing the Part 5 procedures of the Constitution Act (1982) to function. I have attempted in this factum to state the limits of the doctrine of necessity to that extent. In other words, in my factum I address the desirability that the proper solution is a constitutional amendment, and the ability of this House to pass a constitutional amendment.

Now it is true that one could go to the limit and say that what would be required would be for a House to be elected in accordance with the last validly enacted statutes of Manitoba, subject to the amendments made by The Constitution Act (1982) as regards the electorate - such as the right of women to vote and adults to vote, and so on - and that you might have to have, if you pushed it to the extreme, you could make the case consistently with respect for the doctrine of necessity, that necessity only requires that a House be capable of being elected which can participate in Part 5 procedures.

So I leave that question open in my factum. Yes it is a possibility. On the other hand, if that were the only issue in litigation, well, my odds that I've been giving on the success of the litigation might be different from what they were before, but I won't go into that.

**HON. S. LYON:** In fact, you would think that proposition would be almost as far-fetched as most lawyers think Mr. Bilodeau's proposition is in the present case.

**DR. S. SCOTT:** I think I'm going to stay where I did because since we may have a litigation we don't know

what the course of things will be. I don't think I should prejudice my case in that respect.

**HON. S. LYON:** I'll read to you, Mr. Scott, because I've not come across it, the quotation from Mr. Twaddle's opinion given to Mr. Penner, on April 14, 1982. If the Clerk's Office can't do it, I'll be happy to give you a copy of it. I don't want, in any way, to be unfair to Mr. Scott if he feels he shouldn't answer this. I'm merely going to ask him whether or not he agrees with this statement of Mr. Twaddle. If he feels he shouldn't answer it, then, of course, his conscience will be his own guide.

It's under the heading - "Possible amendment to avoid adverse ruling. Amendment before a Supreme Court ruling . . ." - that is amendment of the Constitution before the Supreme Court ruled on Bilodeau - ". . . could presumably be made pursuant to Section 43 of The Constitution Act (1981). Although it would be open to someone to challenge the validity of such an amendment on the grounds that the Legislative Assembly of Manitoba was not properly constituted, this would reintroduce the issue presently before the Supreme Court in Bilodeau versus the AG of Manitoba. If, however, the amendments had the approval of the French-speaking population of Manitoba, perhaps the issue would never be raised. There would remain, however, the right for someone now or at a future date to challenge the authority of the Manitoba Legislature to act at all."

Are you able to venture an opinion?

**DR. S. SCOTT:** Well, that's what we've just been talking about. Carried to its logical conclusions that would mean the ultimate conclusion, the furthest possible conclusion, that would mean that this Assembly can't pass this amendment, even perhaps a newly-elected Assembly in accordance with the last valid laws couldn't, though I think that would not be the case. But carried to its logical conclusion obviously, or carried to a certain conclusion, the Part 5 processes could not function, the Part 5 Constitutional Amendment process couldn't function because there is no Assembly and can never be an Assembly here, and so civilized life in Canada has to come to an end. In a way that problem will always exist. It's like original sin.

**HON. S. LYON:** Always with us.

**DR. S. SCOTT:** This is what I've compared it to. I've discussed this with law students. This is an analogue to original sin in other words that this particular stain, this particular breach of legal continuity cannot on that thesis ever be repaired. Now it will remain with you and someone can litigate it.

As I say, I'm not going to venture on how far the court would go because there are various intermediate positions. I think no court would say that if you elected an assembly under the validly enacted statutes, an assembly of however many constituencies there were at the time - that's all in my factum incidentally - that would be impossible. I don't think anyone would go to those lengths.

I attempt to formulate a test for the Supreme Court to apply, and I do address this in my factum and leave

it open in the end, because it wasn't necessary to my case to say just how far the court could go. But I think it is possible, at any rate, to pass a constitutional amendment under Part 5, of The Constitution Act (1982). The most you could ask for would be another election in Manitoba under the statutes as in force prior to 1890. Now I'm not saying the courts would accept that.

**HON. S. LYON:** So, if the Government of Manitoba is publishing propaganda which says that if these amendments are adopted it would put an end to all of the attacks on the validity of our legislation, that wouldn't be quite correct would it?

**DR. S. SCOTT:** Well for practical purposes. It's like calculating pi to thousands of decimal points. I remember it as 3.14159 if my memory serves me right, but you can go to thousands of decimal points for the purposes of most millions of decimal points. You could never end calculating pi. You could never end debating this constitutional matter.

For practical purposes, I think, it is a fair bet on which ordinary citizens and governments can act that it is unlikely that the attack would be remounted in the extreme form if only because the chances of success would be pretty sharply reduced. I mean as I say, you could say that what is needed is an election under the last bilingually enacted laws to pass the amendment. You could take that to that point or you could stop a little bit short of that.

I think for practical purposes it is not unreasonable for the Manitoba Government to expect and act on the assumption that this would be the end of the matter. Mind you anyone can still raise this, I don't think they might get as far as this has got.

**HON. S. LYON:** You have obviously had experience, Mr. Scott, with constitutional law. Could you tell us, in your opinion, if you are familiar with very many precedents whereby a Provincial or a Federal Government of Canada, have every tried to "settle" a constitutional case?

**DR. S. SCOTT:** Well, I think there have been. Offhand, I don't think of it in those terms. There's lots of litigations involving constitutional issues which don't go up to the final court. A lot stops at different levels and all kinds of things. Yes, a lot of litigation stops and much of this litigation is stopped because for one reason or another the parties don't want to press it further. Settlements in terms of constitutional amendments are perhaps rarer. I suppose in some cases the many constitutional amendments are passed to resolve problems which have given rise to litigation or might otherwise have given rise to litigation. I mean, the provinces have now a greater jurisdiction to deal with natural resources as a result of the recent constitutional reform and that's been a subject of a lot of recent litigation and how far the provinces could go, so the amendment gets rid of some of the problems and anticipates future litigation.

**HON. S. LYON:** Not being, or pretending to be in any way, Mr. Scott, a constitutional lawyer, my only recollection would be the same as yours. I think, in

some of the footnotes to the British North America Act, we find that because of cases in *Rex versus* so and so, this amendment was brought forward. That's my vague recollection, but I can't recall from my limited knowledge of constitutional matters - I'm wondering if you can - any case where a province, or the Federal Government, has entered into a formal agreement of the nature that we have before the House at the present time, and that flowing therefrom is a constitutional amendment which, if passed, will result in a certain appeal presently before the Supreme Court being abandoned.

**DR. S. SCOTT:** I couldn't say offhand whether there was any agreement to make a constitutional amendment with a view to anticipate and end specific pending litigation. Indeed, this agreement is a little unusual in that it isn't quite an agreement amongst the parties to the litigation to end the litigation, because formally speaking I don't think that Mr. Bilodeau is a party to the agreement. I think the Société Franco-Manitobaine and the governments of Canada and Manitoba are the parties and therefore, in a sense, that's an arrangement on the side. It's an arrangement which everyone accepts is going to have an effect on the pending litigation, but which isn't in the most formal terms a settlement to the litigation. In other words, you would not take this agreement and file it in the record of the Supreme Court and say the litigation is at an end by consent to the parties and in accordance with the agreement, it isn't a settlement of the litigation in quite that sense. It's a political arrangement, having as its object the nipping in the bud of a pending case.

**HON. S. LYON:** Well, I find that response interesting, Mr. Chairman, because certainly that is the impression that has been conveyed by Mr. Penner and the Government of Manitoba that they have such an undertaking, either from Mr. Bilodeau or his counsel, that if this legislation proceeds before December 31st of this year, then the case will be dropped. So, one would hope what you're doing, if I may say so, is causing a certain amount of concern amongst some of us, because if the government doesn't have such an agreement, why are we here?

**DR. S. SCOTT:** Well, let me put it to you in these terms. What has been reached is a political settlement. If that political settlement is enacted into a law, the Government of Manitoba has every reason to believe that it will put an end to the case. It will put an end to the case at least in a sense that while a case can go forward and the courts are open, the case would not succeed and you would not get a judgment saying that all the statutes are invalid, and you would not get such a judgment precisely because the constitutional amendment had validated all the statutes.

So what the Government of Manitoba, I think, can fairly say is, they have a political settlement which, if it is enacted into a law, can fairly be expected to end effectively, if not to the litigation in a formal sense at least to the reasonable prospect of success of the litigation. In other words, they expect and have good reason to expect that, effectively, the litigation, if it were proceeded with or if indeed anyone else brought

similar proceedings, would not succeed.

Of course, the courts are open. Of course, anyone can start new cases and even if you settle one case, you can start another case. So, obviously, the question is not whether all litigation will be ended and new litigation stopped, but whether the statutes can fairly be expected to be valid and whether this amendment can stand the reasonable prospect of preventing a Supreme Court decision holding all the statutes invalid.

I think the government expects that it will and I think they have very fair reason to expect that.

**HON. S. LYON:** But their counsel has told them, even if all of that comes about, they will still be subject to attack on the very validity of the Legislature to do what the Legislature has done.

**DR. S. SCOTT:** Of course. But the question is: what chance of success would that stand? Now, I didn't want to predict that . . .

**HON. S. LYON:** About the same as Bilodeau, I would think.

**DR. S. SCOTT:** Well, maybe, in which case, you're saying this latter would stand a good chance of success in my view, a bad chance of success possibly in yours, but it is obviously a more far-out kind of challenge. It is a more extreme kind of challenge and it's a little more difficult to make good. I would argue it with enthusiasm if I were briefed to do it, and of course the Honourable Leader of the Opposition himself could raise it. I mean the legal interest of it is enormous and therefore the next time the honourable member has a parking ticket, if he wants to litigate this issue, of course, he can do so and he can get a decision from the courts.

**HON. S. LYON:** I was interested, Mr. Chairman, in Professor Scott's comments about how he has been kept informed as to the progress of these proceedings in the Legislature of Manitoba and he will be more familiar than I with the concept of the best evidence rule. I'm wondering if he feels that taking newspaper accounts of legislative debate is superior to or inferior to, or should be relied upon or would be relied upon in any court of law when Hansard is available.

**DR. S. SCOTT:** Well, of course, in courts of law, there's a problem with citing Hansard, even to establish facts of proceedings, because there are authorities which suggest that the permission of the House is needed and so forth. But, obviously, for practical purposes, the best record of debates is the official transcript, which on this matter I shall certainly read with interest as soon as I obtain it. It does, however, seem to me that the transcript of debates only report debates in the House, and that a lot happens outside the House, and there are public speeches and there is public discussion and public debate, and that the newspaper accounts obviously must be resorted to for an attempt to find out just what is happening in general in the province and not merely what is said in the House.

**HON. S. LYON:** Mr. Chairman, when the Alliance Québec was here they sent around to all of the members

of the committee a compendium of newspaper editorials that had been printed in such worthy publications as the Montreal Gazette, the Vancouver Sun, the Toronto Globe and Mail, some of which have equated any opposition at all to the constitutional amendment as being racism, bigotry, redneckism and so on. One would have to agree, would one not, that if one could find some basis for that kind of statement in Hansard, then the statement should be made. If one could find the basis for the statement that you made, sir, that the debate in the Legislature had been strident.

**DR. S. SCOTT:** Not necessarily in the Legislature, I think probably more outside. At any rate, the report of the temper of discussion in the province appears from the Press to have been rather more strident than would have been desirable because of the kinds of feelings which can be brought out. Any experienced politician must be aware that if you deal with certain issues without care and caution, you are likely, whether you wish to or not, to bring out or stir up certain kinds of feelings which it is undesirable to stir up. When I read this letter not as reflecting - the letter from Mr. Miller - not as reflecting the opinion of members in this House and not as being something that was said in this House, but of being the kind of thing which results when you do not handle very sensitive issues with sufficient sensitivity. I have the general impression that the debate in this province on this issue has not always been such as to ensure that these feelings are not stirred up.

**HON. S. LYON:** Well, I'm relieved, Mr. Chairman, to know that Mr. Scott is referring to the province-wide debate, rather than the debate in the Legislature. I'm pleased also that he has undertaken, although it will be a formidable task, to read all the transcripts of Hansard, which even I wouldn't even attempt to do - I wish he would withdraw part of that undertaking, because that is too formidable - but at least read the major contributions. I think if he does, he will find that the bulk of the contributions - always with some exceptions - but the bulk of the contributions in the legislative debate have been of a kind that I think even Mr. Scott, with the point of view that he has, would find to be in the public interest and intellectually respectable and not deserving of the kinds of the epithets that even the Montreal Gazette or the Vancouver Sun have applied to all of those, including myself, who happened to be opposed to this matter.

We have in the room today for Mr. Scott's benefit, one of the Vice-Presidents of the Unions of Municipalities. They are opposed to these amendments. I don't think Mr. Scott or anybody else would want to say that they are bigots or racists.

**DR. S. SCOTT:** Well, I don't necessarily support everything the Montreal Gazette says. As a matter of fact I don't give interviews to the Montreal Gazette, because they mangled a letter I wrote and refused to print my repudiation. So I do not give interviews to the Montreal Gazette, so that I can say that I'm not taking as gospel everything that appears in every newspaper

in the country.

**HON. S. LYON:** Mr. Chairman, given the obviously manifested intellect of the witness this morning, I'm not only delighted to hear him say that, I wouldn't have expected anything else.

Mr. Chairman, I apologize again, I wasn't here at the beginning when Mr. Scott was, I'm told, describing his antecedents. Scott is a familiar and honourable name at McGill University. I'm wondering if the famous "F.R." is any relation?

**DR. S. SCOTT:** I have been asked that question very many times and that is usually the first question I am asked. Mr. Diefenbaker asked me it when I met him, but this is the first time I have answered it, been asked it, and had to answer in a form which will be imperishably recorded in the proceedings.

Dean Scott is not a relation, is a very close friend. He is still a member, in retirement, of our faculty. All members here will be, I think, sorry to know that he's been ailing lately, but we watch his progress with close concern and affection and esteem, and look forward to an early recovery. Perhaps honourable members, if they haven't already seen the film of his life, might find it quite interesting. The National Film Board have done a film of Dean Scott's life, which is available now.

**HON. S. LYON:** Mr. Chairman, if I may, on just one personal note, I might ask Mr. Scott to carry my personal felicitations to Dean Scott. We came to know one another, only briefly, when he was the advisor to the Federal Government when Mr. Trudeau, I think, was Minister of Justice and was first starting some of the constitutional meanderings, which later I became involved in. So I do wish to send my best wishes to him.

**DR. S. SCOTT:** It will be my pleasure to do so and indeed I can secure and deliver a certified copy of these proceedings, which will authenticate and give the best evidence of the honourable member's good wishes, because as he said, it is the records of these proceedings which are the best evidence.

**MR. CHAIRMAN:** The hour being 12:30, our adjournment hour has arrived. I have two more questioners of the committee on my list at the present time, Mr. Don Scott and Mr. Sherman. I hope Mr. Scott can be back at 2:00 p.m.?

**DR. S. SCOTT:** I have a plane at 1:15 p.m. Now if members here have not been put off and still want more, then of course, I'll be delighted to come back, but otherwise I would simply catch my plane for Montreal. I was just thinking, is it possible to get to Winnipeg Airport in half-an-hour?

**MR. CHAIRMAN:** Well, in that case, thank you Mr. Scott for your presentation on behalf of the committee. I think you have a volunteer that's coming up to transport you.

The committee is adjourned until 2:00 p.m.