COMMENTS

CHRONIQUES DE JURISPRUDENCE ET DE LÉGISLATION

Beyond "Manner and Form": Reading Between the Lines in *Operation Dismantle Inc.* v. *R.*

J.R. Mallory*

The author discusses *Operation Dismantle Inc.* v. *R.* and its implications for judicial review of legislative and executive acts. The problem is examined from the perspective of "manner and form", an issue which has seldom been litigated in Canada, but which may now, in light of the *Constitution Act, 1982*, be of greater significance in Canadian law.

L'auteur commente *Operation Dismantle Inc.* c. *R.* et les implications de cette décision au niveau de contrôle judiciaire des actes législatifs et exécutifs. Le problème est étudié sous l'angle de la "manière et forme", une question rarement décidée par les tribunaux mais qui, à la lumière de la *Loi constitutionnelle de 1982*, pourrait se voir attribuer une importance grandissante en droit canadien.

Operation Dismantle Inc. v. *R.*[1] raises a number of questions relating to the reach of the *Canadian Charter of Rights and Freedoms*,[2] including whether it covers only laws enacted by the legislature and not those enacted under the prerogative, and the degree to which judicial review extends to the executive. Broader questions were also raised, such as the extent to which the *Constitution Act, 1982*[3] may increase the scope of judicial inquiry into the internal procedures of the executive. One of the fundamental precepts

*R.B. Angus Professor Emeritus of Political Science, McGill University.

[1](1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.].

[2]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

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

of the Westminster system has been the doctrine of parliamentary supremacy, a doctrine that stemmed — as Bora Laskin put it — from "the revolution of 1688 and the ultimate triumph of Parliament over both the Crown and the courts."[4]

Judicial review in the United Kingdom generally stopped short of an inquiry into the internal procedures of Parliament and, on the whole, the executive. The existence of a federal system has led, in Canada, to judicial scrutiny of the jurisdictional limits of the several legislatures under the Constitution. However the courts have never shown self-restraint in dealing with subordinate agencies created by the legislature. In these matters the courts have been unabashed in reviewing actions in both jurisdictional and procedural terms, although in the past they were reluctant to look too closely at ministers, even when they appeared to be acting judicially. Judicial review of statutory bodies is, as Laskin said, "a core part of administrative law". In his view, "[j]udicial review in this area represents an adaptation of familiar judicial modes of supervising inferior courts to the new regulatory and adjudicative agencies which now dot the legal landscape."[5]

In dealing with ministers and legislatures, the courts — once the question of jurisdiction has been settled — have shown great reluctance to intervene. Not only are they sensitive to the feeling that they should not substitute their own policy views for those of the other two branches of government (at least overtly), but they have shown no disposition to examine the formal structure of the executive or of the legislature by going behind a certificate of the Clerk of the Privy Council that states that an order in council has been duly passed, or one from the Clerk of the Parliaments, to discover some flaw in the legislative process. Is it possible that the *Charter*, or to put it more broadly, the *Constitution Act, 1982*, may tempt the courts to make a bolder intrusion into the inner processes of the executive and the legislature? *Operation Dismantle* gives some clues as to the answer, but some of the other issues have yet to arise in the new constitutional context.

I. What was decided in *Operation Dismantle*?

The issues in *Operation Dismantle* were whether the decision to test the cruise missile posed a threat, contrary to the *Charter* guarantees of life, liberty and security of the person, whether the courts had jurisdiction to hear the case, and what remedies should apply. In essence the appellants sought a remedy by way of declaratory judgment, injunction, and damages, which are more commonly thought of as part of the law of tort or delict.

[4]B. Laskin, "The Judge as Legislator and Administrator" (1973) 11 Proc. & Trans. Royal Soc'y of Canada (4th) 183 at 185.

[5]*Ibid.* at 186-87.

In other words, they sought, through the *Charter*, to bring the actions of governments and legislatures more squarely into the area of law where the subject is protected from injurious actions by another against whom he has no rights arising from contractual relations.

In particular the case hinged on reconciling section 1 ("reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society") with section 7 ("the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). While the decision disposes of some of the most obvious questions about the capacity of the courts to review legislative and executive acts in the light of the *Charter*, it does not throw much light on an important secondary question: how far will the courts go in reviewing the processes by which these acts are carried out? This question is bound to arise, since the Court, in *Operation Dismantle*, has staked out a fairly wide territory within which it will review the actions of both the executive and the legislature.

In summary, a majority of the Court reached two basic conclusions.[6] "Cabinet decisions are reviewable by the Courts under s.32(1)(a) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*."[7] However, the decision to test the cruise missile was not contrary to this duty since its possible effects "are a matter of mere speculation."[8] Wilson J., who delivered a separate opinion, would have added that even acts under the prerogative are reviewable, and even if the issue could be considered a "political question" the Court nevertheless had a duty to review an executive act which threatened the rights of the citizen.[9] And, she added that,

> [t]here is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed to any member of the immediate political community, was never intended to be caught by s.7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.[10]

Dickson C.J. concluded that the causal link between the action of the government and the violation of the appellants' rights under the *Charter* was "simply too uncertain, speculative and hypothetical to sustain a cause of action."[11] Nevertheless he "had no doubt that the executive branch ... is

---

[6]The majority decision was delivered by Dickson C.J. and concurred in by Estey, McIntyre, Chouinard and Lamer JJ.

[7]*Supra*, note 1 at 443 [headnote].

[8]*Ibid.*

[9]*Ibid.* at 444.

[10]*Ibid.*

[11]*Ibid.* at 447.

duty bound to act ... in a manner consistent with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[12] Is it possible that a subsequent court may be asked to take this decision a stage further and to review the process by which the executive action was arrived at to see if the procedure accorded with the principles of fundamental justice? This issue seems not to have been addressed directly in *Operation Dismantle.*

Wilson J., while agreeing with the results of the majority decision, embarked on a fuller and more detailed discussion of the issues, which she saw to be:

> 1) Is a decision made by the Government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:
>
> (a) it is an exercise of the royal prerogative;
>
> (b) it is, because of the nature of the factual questions involved, inherently non-justiciable;
>
> (c) it involves a "political question" of a kind that a court should not decide?
>
> 2) Under what circumstances can a statement of claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?
>
> 3) Do the facts as alleged in the statement of claim, which must be taken as proven, constitute a violation of section 7 of the *Charter*? and
>
> 4) Do the plaintiffs have a right to amend the statement of claim before the filing of a statement of defence?[13]

For present purposes, I intend to deal mainly with the first question, important as the others are in relation to future actions under the *Charter.*

First of all, Wilson J. had no difficulty in disposing of the respondents' claim to exemption because they were acting under the royal prerogative. It was argued that the limitation in paragraph 32(1)(a), that the *Charter* applies "in respect of all matters within the authority of Parliament", was restricted to powers exercised under the authority of statute law, and therefore, could not be applied to the exercise of the royal prerogative which was a source of power existing independently of Parliament. But Wilson J. pointed out that the limitation applies to the *jurisdiction* of Parliament according to the division of powers under sections 91 and 92 of the *Constitution Act, 1867*,[14] in other words to those areas in which Parliament may legislate and

---

[12]*Ibid.* at 455.

[13]*Ibid.* at 463-92.

[14](U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

the government may take executive action.[15] She agreed with Le Dain J., who had pointed out in his judgment in the Federal Court, that the royal prerogative is "within the authority of Parliament" because Parliament can legislate if it chooses to do so in areas that have hitherto been left in the realm of the prerogative.[16] Therefore the prerogative falls under the *Charter*.

Was this a "political question" and thus an area in which American courts would have refrained from acting; or should the Court have found that the question could not be resolved because the evidence was so insubstantial and speculative that it could not be evaluated? The first proposition is dubious because at the basis of American judicial restraint in such matters is really the separation of powers, explicit in the American Constitution. On the second point it seems clear that both Dickson C.J. and Wilson J. felt that the Court had to deal with the issue and evaluate the evidence. She said:

> It seems to me ... that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.[17]

Thus, if the only question before the Court was "the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given in the Constitution."[18] But it is not open to the court "to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called 'political question'."[19]

> I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second-guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.[20]

---

[15] *Supra*, note 1 at 463-64.
[16] *Ibid.* at 464.
[17] *Ibid.* at 471.
[18] *Ibid.* at 472.
[19] *Ibid.*
[20] *Ibid.*

By pushing the issue towards its ultimate limits, Wilson J. posed a hypothetical situation. Does, she asked, the imposition of conscription for overseas service in wartime violate the rights of the citizen under section 7 of the *Charter*? Clearly it constrains his liberty and puts his life in jeopardy. However, it is likely that a court would conclude that the challenge would necessarily fail because it is subject to the limitation in section 1 of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[21] On the other hand, a government decision to "force a particular group to participate in experimental testing of a deadly nerve gas" would hardly survive judicial review.[22] Similarly the seizure of people for military service without appropriate enabling legislation would fail the *Charter* test in the courts even if the government adduced the argument of necessity.[23]

All of this leads her to conclude that the present case is one where it is "not only appropriate that we decide the matter; it is our constitutional duty to do so".[24] After a full review of the argument she arrived at an even more awkward question:

> [T]here nonetheless remains the question of whether fundamental justice is entirely procedural or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation under the *Charter* but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.[25]

Operation Dismantle does not raise that kind of issue, but clearly Wilson J. is warning us that such an issue is bound to arise in the future. Meanwhile the Court could dispose of the case by an acceptable, but easier, route. No right is absolute; it is limited by taking account of the rights of others. Furthermore, the concept of right must take account of "political reality in the modern state".[26] Action by the state, or for that matter, inaction, may have the effect of increasing or decreasing the risk to lives and security of citizens, but this does not, she says, "fall within the scope of the right protected by s.7 of the *Charter*".[27] Nor can the need for the state to take steps to protect itself from external threats in ways that incidentally increase risks to the lives or personal security of citizens violate the *Charter*: "There

---

[21] *Ibid.* at 473.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.* at 474.
[25] *Ibid.* at 488.
[26] *Ibid.*
[27] *Ibid.* at 489.

is no liberty without law and there is no law without some restriction of liberty ... ."[28] Accordingly,

> [a]t the very least, it seems, to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s.7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals have to face.[29]

Even though the motion made by the appellants in *Operation Dismantle* failed, the Court has come some way towards clarifying the reach of section 7 and its relationship to section 1. That section, in Wilson J.'s words,

> is the uniquely Canadian mechanism through which the Courts are to determine the justiciability of particular issues that come before it [*sic*]. It embodics through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.[30]

This last quotation, it is submitted, raises issues which the Court may have to face in the future, not only in connection with the *Charter* but also in connection with Part V of the *Constitution Act, 1982* which deals with procedures for amending the Constitution. The Court has told us that it will review executive decisions, and while on the whole it will not deal with merit and attempt to substitute its judgment for that of the executive, Wilson J. did foresee situations where the action taken by one of the other branches of government could be so repellent as to justify the Court in overturning it under the *Charter*. So the Court has a policy role after all.

II. A Wider Role for "Manner and Form"?

What about "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"? Can judicial review of "prescribed by law" extend to "manner and form"? Implicit in the process of judicial review of Parliament and the executive is the problem that the guiding principles for judicial review arose out of judicial supervision of subordinate bodies in both Britain and Canada. This kind of review is generally considered to be the province of administrative law. While the courts have generally accepted a self-denying ordinance not to substitute their own view of the merits of decisions (as Wilson J. emphasized), they

---

[28] *Ibid.*
[29] *Ibid.* at 490.
[30] *Ibid.* at 491.

have firmly resisted privative clauses which exclude them from considering both *vires* and the rules of procedural fairness. Generally speaking, up to now they have shown great deference to the principal branches — both Parliament and the Cabinet — and have been chiefly active in reviewing the delegated powers of subordinate bodies. In the future this may not be the case.

One particular instance of this problem is the issue which is usually called "manner and form". As applied to parliamentary action this kind of judicial review stems from the landmark South African case of *Harris* v. *Minister of the Interior*[31] in which the Appellate Division of the Supreme Court of South Africa directly addressed the meaning of manner and form. The South African Parliament had abolished the Cape Colony's coloured franchise by an ordinary act of Parliament, although that right had been entrenched in the South African Constitution by the provision of a special procedure for its amendment. As Sir Kenneth Wheare stated,

> the prior and fundamental question was: "What is the Union parliament?" Granted that an act of the Union parliament is always valid, when is the Union parliament to be deemed to have passed an act of parliament? And the answer to this question, says the court, is that whereas in relation to most matters the Union parliament consists of the Governor-General and the two houses sitting separately and it is deemed to have passed an act when the consent of all three of these elements is obtained, in relation to matters contained in the entrenched sections the Union parliament consists of the Governor-General and the two houses sitting together and it is deemed to have passed an act when the consent of the Governor-General and of two-thirds of the two houses sitting together is obtained. If the proper procedure is not followed no act of parliament has been passed ... .[32]

A more recent Canadian commentary has put the matter even more succinctly:

> The *Harris* case is the first to elaborate the idea that manner and form provisions do not *bind* a sovereign Parliament in the sense of preventing legislation, but rather *define* it. Although section 2(2) of the *Statute of Westminster* conferred upon the South African Parliament the power to amend any Imperial statute, according to the Appeal Division of the South African Supreme Court, "Parliament" is to be read subject to the definition thereof in South Africa's constitution.[33]

This question of manner and form in relation to the Constitution has, with one or two exceptions of which I am aware, never been litigated in

---

[31](1952), [1952] 2 S. Afr. L.R. 428, (*sub nom. Harris* v. *Daanges*) [1952] 1 T.L.R. 1245.

[32]K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960) at 78-79.

[33]K. Swinton, "Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege" (1976) 14 Osgoode Hall L.J. 345 at 383.

Canada even though there are several places in the Constitution where it might arise. One of these is the now-repealed provision in section 80 of the *Constitution Act, 1867*, which was within the power of the Quebec legislature to be dealt with as part of the Constitution of the province. Under this section, which was repealed in 1970, no redistribution of certain named seats (mainly in the Eastern Townships) could be effected without the concurrence of the majority of members representing those seats as expressed in their vote on second reading of the bill and by a special resolution affirming that this had been done. In fact there were a number of redistributions affecting these seats over the years, but the procedure was never followed.

Nevertheless, the existence of the provision was a serious obstacle to Premier Jean Lesage's attempt to rectify the imbalance between rural and urban seats, although the original reason for the provision — to protect seats which represented predominantly English-speaking populations at Confederation — had been largely vitiated by population shifts. Premier Daniel Johnson, with a strong base in rural constituencies in the Lower House and a secure majority in the Legislative Council, had no difficulty in removing the constitutional safeguard by repealing section 80. Nevertheless, it remains a puzzle why an ingenious lawyer did not try to litigate the matter, and thus seek to undo a redistribution measure on the ground that it had not been effected in the proper form prescribed in the Constitution. Had such an attempt been made, it is likely that the courts would have followed the "enrolled bill" rule, refusing to consider matters of legislative procedure, and simply looking to the face of the act. However, there seem to have been some cases in which the courts in England would have been willing to rule an act invalid had there been an error on its face. Katherine Swinton, after reviewing the cases, concluded that

> it is clear that there exists a rule which treats statutes as conclusive to some extent. There is weighty precedent for the assertion that errors of law on the face of the enrolled Act can cause invalidity, as can those on the original Act to which royal assent was given. Whether a court can look further than the face of the Act is not settled conclusively, yet *Harris* seems to alter the presumption of validity where special procedures exist.[34]

One possible opportunity for testing the limits of the "enrolled bill" rule might have been a case which arose in the late 1940s in Prince Edward Island. On 19 April 1945, the Lieutenant-Governor prorogued the Legislature and withheld assent to a bill amending *The Prohibition Act*, presumably for reasons of conscience. Shortly thereafter the government presented the Bill to his successor, who gave it royal assent. In subsequent litigation

[34]*Ibid.* at 359.

the Supreme Court of Prince Edward Island ruled that the amending act was invalid and that *The Prohibition Act* continued in force.[35]

Swinton summarizes the matter:

> In that case, the Supreme Court of Prince Edward Island declared an Act invalid because the Lieutenant-Governor assented thereto several months after his predecessor withheld assent. In determining that his actions contravened sections 55 and 90 of the *B.N.A. Act*, the Court made reference to the extrinsic evidence of the *Royal Gazette* and made no mention of the enrolment principle whatsoever. In adhering to that principle, the Court would have held the Act valid, since the face of the Act showed the requisite consent of Crown and legislature.[36]

Indeed, the position of the Lieutenant-Governor is one of the areas of the Canadian Constitution which might have given rise to constitutional challenges on procedural grounds. The office is exempted from provincial power to amend its own constitution, and the imposition of such democratic procedures as initiatives and referenda might have created situations in which the courts could have found themselves looking closely at legislative procedures. However, that matter was disposed of in a reference case in which the Judicial Committee of the Privy Council found that such provisions had the effect of altering the position of the Lieutenant-Governor.[37]

Two other constitutional provisions may be of more importance. The first is subsection 4(2) of the *Constitution Act, 1982* (originally contained in the *British North America (No. 2) Act, 1949*) which provides that the life of Parliament may not be extended except "in time of real or apprehended war, invasion or insurrection" and then only "if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons". This is clearly a case where a court might have to inquire what Parliament actually was for this purpose.

The part of the *Constitution Act, 1982* which has the greatest potential for review is Part V, dealing with the amending procedure. There are a number of conditions to be met which include the procedure for provincial acquiescence, the type of amendment involved, and the delay provided for provincial acquiescence, all of which might be subject to litigation by a province or an interest group seeking to challenge the amendment. These are issues of manner and form. The question of manner and form fell outside the terms of *Operation Dismantle*, and therefore was not considered by the Court except in the sense that it affirmed that the actions of governments

---

[35]*Gallant* v. *R.* (1948), [1949] 2 D.L.R. 425, 23 M.P.R. 48. An account of the episode can be found in F. MacKinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto Press, 1951) at 157-60.

[36]*Supra*, note 33 at 366.

[37]*Re The Initiative and Referendum Act* (1919), [1919] A.C. 935.

and legislatures are justiciable. Thus, the way is open for a more direct challenge which will force future courts to question legislative procedure as to manner and form.

III. Comparison with Australian Experience

Even though Australia does not have any constitutional provisions of the *Charter* type, there are several Australian cases where the courts have already ventured into this unfamiliar territory. As far back as 1930, the Supreme Court of New South Wales issued an injunction to prevent a bill from being presented to the Governor for royal assent on the ground that the Constitution of New South Wales provided that there should be a referendum before the bill could be assented to.[38] This case should perhaps be distinguished, as Swinton points out, "on the basis that although the procedure was statutory, its applicability to the New South Wales legislature was compelled by the *Colonial Laws Validity Act*, an Imperial statute which the legislature of New South Wales was powerless to alter."[39] More recently there have been cases focusing on the meaning of section 57 of the Australian Constitution which deals with double dissolutions to break a deadlock between the two houses of the Australian Parliament.

Early in 1974 the Labour government of Prime Minister Gough Whitlam, having found a number of its major bills obstructed in the Senate, and no doubt hoping to strengthen its representation in both Houses, asked the Governor-General for a double dissolution to resolve the matter. On 11 April 1974, a proclamation was issued asserting that the conditions of section 57 had been met in respect of the named bills, and dissolving both Houses. The resulting election returned the government with a reduced majority in the Lower House and left the two main parties with equal representation in the Senate, with the balance of power being held by two independents. When Parliament reconvened, the bills in question were again passed by the House but rejected by the Senate. A proclamation was then issued which, under the terms of section 57, convened a joint session of the two Houses to deal with the bills.

Two senators then sought injunctions and declarations to restrain the holding of the joint session on a variety of grounds, the principal one being that a joint session could only be held in respect of a single bill and that

---

[38]*Trethowan* v. *Peden* (1930), 31 S.R.(N.S.W.) 183 (S.C.), aff'd (*sub nom. A.G. New South Wales* v. *Trethowan*) (1931), 44 C.L.R. 394 (H.C. Aust.), aff'd (1932), [1932] A.C. 526, 47 C.L.R. 97 (P.C.) [hereinafter *Trethowan*].

[39]*Supra*, note 33 at 383.

one of the bills in question had not been passed by the House within the time limits prescribed and that accordingly the whole process was invalid.[40]

Double dissolutions in Australia have been rare, and as it turned out, a host of questions could have been raised. Did they constitute a justiciable matter? If so, did the senators have standing to institute proceedings? In a related action the question arose as to whether the States were entitled to institute proceedings.[41] Who were the proper parties to the action? Furthermore, did the action lie against the Governor-General? This question was immediately disposed of by the High Court, the Chief Justice declaring without explanation that the Governor-General was not a proper party to the proceedings and that his name should be struck out. Nevertheless, the issue was not clearly resolved, although it would appear from *Trethowan* that judicial remedies were available to prevent unconstitutional action by a Governor and his ministers in the States. Why the Governor-General was not part of the action was never explained.

The other important questions were, at least in part, resolved. Five of the six members of the Court agreed that the validity of a joint session was a justiciable issue. The Court further found that there was nothing in section 57 that prevented more than one bill from being brought before a joint sitting, and that the specification of bills in the proclamation had no force in itself. The members of the Court did not find that an injunction or a declaration in advance of the joint sitting was appropriate in the circumstances, but their reasons varied. One felt that the issue was non-justiciable. Two felt that an injunction was not possible because the High Court in 1911 had already ruled that it did not have jurisdiction to enjoin parliamentary proceedings.[42] On the other hand Barwick C.J. and one other judge held that the Court did not have jurisdiction to interfere with internal parliamentary matters while a session was actually in progress, but that they could assert jurisdiction if there were no other way to prevent unconstitutional action.

The Court was again faced with the double dissolution issue after the joint session had taken place.[43] This case concerned the validity of one of the pieces of legislation that had been passed (the *Petroleum and Minerals Act*) and the Court went further into the terms of section 57 "even though this requires the Court (contrary to the assumptions of Westminster) to undertake a consideration of steps taken within parliament in the handling

[40]*Cormack* v. *Cope* (1974), 131 C.L.R. 432 (H.C. Aust.).
[41]*State of Queensland* v. *Whitlam* (1974), 131 C.L.R. 432 and 475.
[42]See *Osborne* v. *Commonwealth* (1911), 12 C.L.R. 321 (H.C. Aust.).
[43]*Victoria* v. *Australia* (1975), 7 A.L.R. 1 (H.C.).

of proposed laws ... ."[44] Not only did they find that the act in question had not complied with the three-month interval which must elapse between the passage of the bill by the House and its re-enactment, but the Court (while noting the general undesirability of judicially determining the validity of parliamentary proceedings) went on — because of the exceptional nature of section 57 — to deal with the meaning of the phrase "fails to pass". The problem with this, as Geoffrey Sawer points out, "is rather that any realistic assessment of the Senate's conduct under this head must involve a detailed consideration of the course of political events in the Senate."[45] Should the Court take account of Senate debates, or the procedural steps there as recorded in the Senate *Journals*? The latter would have been possible under the *Evidence Act*, but the first would have been far less likely under the Westminster system. In any event, the majority of the Court did neither. In order to deal with the question in another way the Chief Justice and Gibbs J. sought refuge in the concept of "reasonable time" for the Senate to consider the measure. This, however, is no better. As Sawer observes, "this is an excellent example of something Barwick C.J. has elsewhere criticized — the judicial tendency to replace the words of the Constitution by completely different words. S. 57 makes no mention of giving the Senate any 'reasonable time'".[46] Had the Court gone a little further, it might even have concluded that when a double dissolution under section 57 failed to satisfy the judicially determined conditions then the parliament so elected was illegal. This was avoided by the Chief Justice's unsupported statement that "[t]he dissolution itself is a fact which can neither be void nor be undone."[47] No doubt a court can always find a way of upholding the legitimacy of institutions in order to avoid a breakdown of the state, possibly by invoking the maxim *salus populi suprema lex.*

These are dangerous waters. Courts are not well-equipped to deal with the nuances of internal legislative procedures, and are on even less firm ground when it comes to conventions of the constitution. In Australia, where Chief Justice Barwick imported a novel convention into the Australian Constitution in his memorandum of advice to Sir John Kerr at the time of the dismissal of Prime Minister Gough Whitlam, the needless confusion is exemplified. He was in effect asserting that the nature of Australian federalism made a government responsible not only to the Lower House, but also to the Senate. Similarly, in Canada, the confused jurisprudence of the

[44]G. Sawer, *Federation under Strain: Australia 1972-1975* (Carleton, Aust.: Melbourne University Press, 1977) at 45-46.

[45]*Ibid.* at 49-50.

[46]*Ibid.* at 50.

[47]*Victoria* v. *Australia*, *supra*, note 43 at 12.

Supreme Court in *Reference Re Resolution to Amend the Constitution*[48] is a further illustration of the difficulty, even if the outcome in that instance created the conditions for a political solution.

The trouble is that eminent judges do not seem at their best when dealing with conventions of a constitution, which tend to be modified from time to time and from place to place. Lawyers, who are the product of an elaborate discipline whose object is to discern the precise meaning of the law as expressed by the legislature, have difficulty applying the rules of construction to such insubstantial stuff. When they move outside the realm of the law properly so called they are no more able to deal with it than anyone else, and their normal habits of thought tend to force them to assert precise meanings where no such precision exists.

IV. Possible Implications of Wider Judicial Review

What will happen if the Canadian courts are impelled by the *Constitution Act, 1982* to open up a wider range of issues? For one thing, they are likely to look more closely at the way in which ministers exercise statutory powers by applying the same rules of procedural fairness which in the past have been applied chiefly to subordinate bodies. This the Federal Court of Appeal did as far as back as 1973 in *Lazarov* v. *Secretary of State of Canada.*[49] *Singh* v. *Minister of Employment and Immigration* shows that the Supreme Court will not be easily satisfied with appellate procedures which seem to deny the procedural fairness made explicit in section 7 of the *Charter*. Neither section 1 nor the existence of grave administrative inconvenience and high cost justified the activity of the Minister of Employment and Immigration in a procedure which lacked the basic requirements of a fair hearing.[50]

When ministers act collectively problems of a different order will arise. The cabinet itself has no legal existence. Its powers are generally given legal effect through the Governor-General in Council. But what is the Governor-General in Council? According to one former Cabinet minister: "The governor in council is a committee of the cabinet and not a full cabinet, as some hon. members seem to think."[51] Robert Winters was describing what is called the Special Committee of Council, a quorum of four ministers (not, one imagines, the brightest or the busiest) who meet as required to approve

[48](1981), [1981] 1 S.C.R. 753, (*sub nom. Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 D.L.R. (3d) 1.

[49](1973), [1973] F.C. 927, 39 D.L.R. (3d) 738.

[50](1985), [1985] 1 S.C.R. 177, (*sub nom. Re Singh and Minister of Employment and Immigration*) 17 D.L.R. (4th) 422.

[51]Canada, *House of Commons Debates* at 5126 (18 June 1956, R.H. Winters).

the orders in council necessary to give legal effect to decisions taken elsewhere in the cabinet or one of its committees. Furthermore, the Governor-General in Council, in its proper form presided over by the Governor-General with ministers present and engaged in the actual transaction of business, has not met for over a hundred years, although in recent years it has been summoned for ceremonial or symbolic purposes. It is unlikely that a court will some day find that the procedure is flawed because the Governor-General (described on the "face" of a batch of orders in council as present) is never present but only "deemed to be present". But such a possibility is a disquieting thought.

If it is perhaps a trifle fanciful to think that the courts might not accept arrangements, many of which pre-date Confederation, to cloak political decisions in the archaic clothing of colonial constitutional practices, it might be otherwise with more modern practices of cabinet government. What about the complex rationalized structure of actual Cabinet decision making, which does not always conform to constitutional rituals? What, for example, is the validity of a Cabinet directive? Under the practice of the present government the Priorities and Planning Committee may upon occasion take decisions on behalf of the whole Cabinet;[52] but do these decisions have legal effect unless backed by an order in council? These questions seem not to have been raised in *Operation Dismantle*, and are nowhere discussed in Wilson J.'s judgment. No one seems to have bothered to ask how exactly the decision to test the missile was reached, or by what body. Does this mean that the Court will not consider them, or will the question be raised some day in a form in which the Court will have to look at how the executive branch of the government actually conducts its business?

Already the various language cases have turned on a sort of manner and form issue: whether, for example, section 133 overrides general provisions of the Constitution such as subsection 92(1).[53] In fact such a decision could be justified by ordinary rules of statutory construction, but nevertheless the courts are having to look more closely at actual procedures under the Constitution.

An even more intriguing possibility may be raised in Manitoba. Does compliance with the 1985 Supreme Court ruling on the language of legislation in Manitoba require that the Order Paper be in both languages in

[52]I.D. Clark, "Recent Changes in the Cabinet Decision-Making System in Ottawa" (1985) 28 Can. Pub. Admin. 185 at 199.

[53]See, *e.g.*, *A.G. Quebec* v. *Blaikie* (1979), [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394.

order for a bill (in this case the re-enactment of the *Highway Traffic Act* and the *Summary Convictions Act*) to be validly introduced in the legislature?[54]

The question which remains unresolved is how far the Court will go in following Wilson J. when she says: "However, if what we are being asked to do is decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so."[55]

---

[54]See "Manitoba Law Invalid Even in French: Lawyer" *The [Montreal] Gazette* (16 September 1985) A-12 discussing *Reference Re Manitoba Language Rights* (1985), [1985] 1 S.C.R. 721, (*sub nom. Reference Re Language Rights under the Manitoba Act, 1870*) 19 D.L.R. (4th) 1.

[55]*Supra*, note 1 at 472.