The Dickson Court, The Courts, and the Constitutional Balance of Powers In the Canadian System of Government

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I. INTRODUCTION

CHIEF JUSTICE DICKSON AND THE DICKSON COURT have undoubtedly had a profound influence over the evolution of Canadian federalism. This influence can be felt in the "traditional" constitutional issue of the distribution of powers, among other areas. The Court's most significant decisions in this respect are probably those dealing with the general trade and commerce power[1] and the theory of the national dimensions within the peace, order and good government clause.[2] Add to these issues the administration of justice cases[3] and the *Alberta Government Telephones*[4] case dealing with the question of intergovernmental immunities and one has what can be considered the essence of Chief Justice Dickson's legacy and that of his Court in terms of the distribution of powers.

In this paper, the theme "The Dickson Court and Canadian Federalism" will be interpreted more broadly than in strict terms and will cover the judicial power in Canada and the constitutional balance of powers within the Canadian system of government over the years 1985 to 1990. In other words, it will examine what can be described as a new relationship developed under the leadership of the Dickson Court between the courts and other institutions of the Canadian political system, mainly the legislative and the executive branches of government.

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[1] *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641.

[2] *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

[3] *Di Iorio* v. *Warden of the Common Jail of Montreal*, [1978] 1 S.C.R. 152; *R.* v. *Hauser*, [1979] 1 S.C.R. 984; *Starr* v. *Houlden*, [1990] 1 S.C.R. 1366.

[4] *Alberta Government Telephones* v. *C.R.T.C.*, [1989] 2 S.C.R. 225.

Of course, to speak of a new relationship in the context of the recent adoption of the *Canadian Charter of Rights and Freedoms*[5] will appear a truism. Indeed, the importance of the judiciary within the Canadian system of government was bound to shift substantially with the adoption of the *Charter*. It was foreseeable and it has effectively occurred. This paper will urge that under the Dickson Court such a shift has been more profound than usually thought. In fact it would appear that the *Charter* has had a unique levering effect and that the courts have developed for themselves, over and above the *Charter* and its application, a new role, place and standing within the Canadian constitutional system of government. The traditional "balance of powers" between the executive, legislative and judicial branches has thus been substantially modified on a more important scale in the last five years than at any time since the early days of the Canadian federation.

This paper will first discuss the way in which the Dickson Court has positioned the judiciary and defined its place, attributes and responsibilities within the Canadian constitutional framework. This will in turn lead me to examine the recent evolution of the constitutional relationship between the courts on the one hand, and the legislative and executive branches of government, on the other. Finally, what can be perceived as a new attitude or perception of the Court with respect to its relationship to the constitution of Canada itself, and particularly to the principle of legality, or the rule of law, will be discussed.

It should be pointed out from the outset that this paper will present essentially an impressionistic point of view. Years of detailed examination of the Court's decisions would probably be needed to confirm or deny that point of view. Of course, all the judgments discussed here have not necessarily been written by Chief Justice Dickson himself. Most of them have, however, and this fact is telling about the intellectual stature of this man and his influence over the Court.

Finally, this paper is concerned exclusively with the decisions released by the Supreme Court under the leadership of the Chief Justice: *i.e.*, from 1984 to mid-1990.

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[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

II. THE JUDICIARY ON THE JUDICIARY

IN THE LAST FIVE YEARS, the Supreme Court has had a chance, perhaps for the first time, to discuss extensively the question of the role and place of the judiciary within the Canadian constitutional framework. It did so mostly in two respects, that of the principle of the independence of the judiciary and that of the relationship between the judiciary and the *Canadian Charter of Rights and Freedoms*.

A. The Independence of the Judiciary or "The Lifeblood of Constitutionalism in Democratic Societies"

There is no need to present in detail the well-known case of *Valente* v. *R.*,[6] where the parameters of the principle of the independence of the judiciary have been extensively discussed by Mr. Justice LeDain for a unanimous Court in the particular context of section 11(d) of the *Charter*. A few months later, in the lesser known case of *Beauregard* v. *Canada*[7], Chief Justice Dickson had the opportunity of discussing the same question, but outside the context of the *Charter*. In both cases the Court has taken ample opportunity of defining more precisely the contents of the well-known but so far ill-defined basic constitutional principle of the independence of the judiciary.

Many of the elements of the discussion by the Supreme Court in *Beauregard* and *Valente* about the independence of the judiciary were not especially surprising or new. It would appear that the core of the principle is "the complete liberty of individual judges to hear and decide the cases that come before them."[8] The principle involves in its application both a subjective and an objective approach: judges need to have complete liberty and independence of mind in deciding individual cases, but must also be objectively and institutionally independent from the other branches of the state, especially the executive and the legislative branches.[9] Finally, it is obvious that the principle originates from the British constitutional system, and that it has a particularly important *raison d'être* in Canada, because of the federal principle incorporated within our constitutional structure and because

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[6] [1985] 2 S.C.R. 673.

[7] [1986] 2 S.C.R. 56.

[8] *Ibid.* at 69.

[9] *Beauregard, ibid.*; *Valente, supra*, note 6 at 685.

of the existence of the *Charter* which confers an important role on the judiciary.[10]

Some aspects of the Dickson Court's decisions deserve special mention. First and foremost is the Court's acknowledgment of a dual role for the judiciary, that of solving individual cases, which has always been its traditional role, as well as that of policy-making, particularly with regard to the constitution of Canada. As Chief Justice Dickson wrote in *Beauregard*:

> [T]he courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.[11]

In his discussion in *Beauregard*, Mr. Justice Dickson also quotes Professor Shetreet about the fact that "[t]he Judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role with participates along with other institutions in shaping the life of its communities."[12]

It is submitted that such an explicit definition of the courts as "a significant social institution with an important constitutional role" would have been more difficult to pronounce in the pre-*Charter* era. The principle of judicial independence is thus perceived by the Court as being the one essential and necessary condition, indeed the cornerstone of the protection of the constitutional system of democracies. In so situating the principle, the Court also states most clearly its conception of the role of the judiciary, as the "first and ultimate" protector of the constitution. As will be appreciated, the Supreme Court has taken this role quite seriously.

A second important element deserves a special mention. It is the discussion of the individual/institutional dimensions of judicial independence. While the distinction was not in itself new, the depth of the Supreme Court's study of these aspects is rather remarkable. For the essentials of judicial independence, Mr. Justice Dickson in

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[10] *Beauregard, ibid.* at 71-72.

[11] *Ibid.* at 70.

[12] *Ibid.* at 69, quoting S. Shetreet, "The Emerging Transnational Jurisprudence on Judicial Independence: the IBA Standards and Montreal Declaration" in S. Shetreet & J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985) at 393.

Beauregard refers to what Mr. Justice LeDain had to say on that question in *Valente*. Security of tenure, the institutional independence of the court "as reflected in its institutional or administrative relationships to the executive and legislative branches of government," are seen as necessary attributes.[13]

But when the time comes to define more precisely this institutional independence, Mr. Justice LeDain points out that the questions of the assignment of judges, sittings of the court, court lists, as well as the related matters of "allocation of court rooms and direction of administrative staff engaged in carrying out these functions" must be regarded as essential or minimal.[14] He takes great care to indicate that the list does not stop there. In citing Howland C.J.O. and the Deschênes Report, a stronger role in the financial aspects of court administration (including budgetary preparation and presentation as well as allocation of expenditures), and in the personnel aspects of administration (including the recruitment, classification, promotion, remuneration, and supervision of necessary support staff) is proposed as a further guarantee of institutional independence.[15] However, according to Mr. Justice LeDain and the Court, such greater measure of autonomy, although desirable, would not be required under section 11(d) of the *Charter*, providing that the "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function" is preserved.[16] This list certainly proposes a blueprint for a greater autonomy of the courts within our constitutional system, although the Supreme Court hesitated to go so far as to call for, as a matter of constitutional requirement, substantial administrative autonomy for the judiciary.

The Supreme Court has also insisted that institutional independence should be guaranteed from all quarters and that the judiciary be protected from both the executive and Parliament (among other institutions). This attitude is nowhere more obvious than in *Beauregard*, where Chief Justice Dickson strongly emphasized in a non-*Charter* context the principle of the complete autonomy of the courts from "*all* other participants in the justice system."[17] It therefore

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[13] *Supra*, note 6 at 687.

[14] *Ibid.* at 709.

[15] *Ibid.* at 709 and 710.

[16] *Ibid.* at 712.

[17] *Supra*, note 7 at 73 (emphasis in original).

seems that, according to the Court, what might be referred to as the "geographical" dimension of the principle must be as wide as possible.

One of the first illustrations of this approach is that of the Supreme Court's reasons in *Mackeigan* v. *Hickman*.[18] Chief Justice Dickson did not sit on this case. The question to be determined was whether judges enjoyed absolute immunity from having to testify before a commission of inquiry set up by a province to look into various aspects of a wrongful conviction. Although the issue could have been dealt with as a strict matter of privilege originating from the common law, Madam Justice McLachlin, for some judges of the Court, took great care to review extensively the case law relating to the principle of the independence of the judiciary. She specified that independence does not involve total absence of relations between the judiciary and the executive or legislative powers. It implies instead that the authority and function of the courts should be kept separate. She warned:

> Actions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution. As protectors of our Constitution, the Courts will not consider such intrusions lightly.[19]

In her view, any attempt to force a judge to testify to explain and account for a judgment "would strike at the most sacrosanct core of judicial independence."[20] In *Mackeigan*, a unanimous Court found, in the end, that the judiciary enjoyed absolute immunity as far as the exercise of judicial functions were involved; by a narrow margin (4 to 3), the Court also ruled that the same absolute immunity existed even with regard to the exercise of administrative functions (like decisions relating to the names and numbers of judges sitting in any given case) by the courts.

At the end of the day, one thing seems clear and it is that it can be argued that the principle of judicial independence has grown under the Dickson Court from a vague constitutional principle with some legal consequences to a firmly entrenched constitutional rule.

The conclusion at this point is impressive insofar as the Dickson Court has seized the occasion to clearly define the requirements of the principle while politely suggesting further reforms aiming at improving the autonomy of the judiciary. The judiciary is now probably deliberately more administratively isolated than ever from the other

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[18] [1989] 2 S.C.R. 796.

[19] *Ibid.* at 828.

[20] *Ibid.* at 831.

branches of our system of government. The next section will demonstrate that the judiciary also insulated itself from the application of the *Charter* to itself.

B. The Judiciary and the Charter

Generally speaking, the Court's role in *Charter* matters is inescapable and obvious. In 1982, Canadians inherited a constitutional instrument deeply rooted in a judicial culture. It is a truism to say that the role of the courts has, since 1982, greatly changed in being associated more than ever with some very basic and important social and political choices. The message coming from the Supreme Court in *Charter* matters has been consistent from the beginning: this instrument should be given a liberal and purposive approach in order to ensure that its full effect is felt. One knows very few areas of public life which have escaped the influence of the *Charter* and the Dickson Court has been careful not to unduly restrict the scope of its application.

Remarkably, however, there is one area of our constitutional system of government which has, in fact, been declared exempt from the application of the *Charter*, and it is the judiciary itself. The question to be determined, namely if the courts were themselves subject to the application of the *Charter*, was obviously not an easy one for the Dickson Court. In the well-known case of *Dolphin Delivery*,[21] the Supreme Court of Canada was faced with the question whether the *Charter* applied in litigation between private parties. Mr. Justice McIntyre, for the majority of the Court, had to decide whether court decisions did constitute governmental action under the meaning of s.32 of the *Charter*. The answer of the Court was unequivocal in that court judgments cannot be assimilated to state action subject to the application of the *Charter*.[22] The rationale justifying this conclusion provides further indications as to the conception the Court has of the role and function of the judiciary within our constitutional system.

Considering the courts as neutral arbiters between private parties and not as an extension of the state in one of its three traditional functions, Mr. Justice McIntyre concluded that:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of government, that is, legislative, executive, and judicial,

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[21] *R.W.D.S.U. Local 580* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573.

[22] *Ibid.*

I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action.[23]

The reasons invoked by the majority of the Court seem to have more to do with the eventual effect of such finding than with the essence of the problem. For the Court, any other conclusion would lead to the unavoidable consequence that all private litigation would be subject to the *Charter*:

To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question. A more direct and more precisely-defined connection between the element of governmental action and the claim advanced must be present before the *Charter* applies.[24]

Of course, this conclusion is somehow attenuated by the subsequent passage of Mr. Justice McIntyre's reasons where he mentions that, even in the context of private litigation, the judiciary has the duty to interpret and develop the common law in a way compatible with the values embodied in the *Charter*.[25]

In *B.C.G.E.U.* v. *A.G. B.C.*,[26] Chief Justice Dickson gave an example and nuanced the meaning of this position. In this case, the Chief Justice of British Columbia, on his own and *ex parte*, issued an order restraining picketing and other activities calculated to interfere with the operations of any court in the province. In his reasons Chief Justice Dickson inquired whether the *Charter* applied to such facts where the validity of a common law breach of criminal law was involved. He concluded in the affirmative since the court was acting on its own motion, "and not at the instance of a private party," explaining that "the motivation for the court's action is entirely "public" in nature, rather than "private."[27]

Can we say then that in some cases, depending on the "public" or the "private" nature of a case, courts' orders will or will not be

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[23] *Ibid.* at 600.

[24] *Ibid.* at 600-01.

[25] *Ibid.* at 603.

[26] [1988] 2 S.C.R. 214.

[27] *Ibid.* at 244.

submitted to *Charter* scrutiny? The importance which should be attached to this nuance is unique, especially in light of what seems a proper understanding of *Dolphin*. One thing is certain, however, and it is that in some respects at least, decisions of courts of law are not subject to the *Charter*. This conclusion in itself seems unique since no other elements of "state action" (taken in the largest sense) escape *Charter* scrutiny.

Indeed, in *Slaight Communications*[28] the Supreme Court ruled that administrative tribunal orders are themselves subject to the application of the *Charter*. Such orders cannot violate any of the provisions of the *Charter* and any such violation constitutes an abuse of power and results in a loss of jurisdiction.[29] In what could appear as a "Do-what-I-say-not-what-I-do" attitude, the Court remained perfectly coherent with the traditional separation of powers with respect to administrative tribunals. It is, however, difficult to explain why Parliament as well as the Crown in general and governments and their creatures, administrative tribunals (whether they do or do not resolve litigation between *private parties*, as was the case in *Slaight*) are all subject to the *Charter* (and, it seems, in some cases, even court orders), but not, in general, the courts when they are resolving litigation between private parties.

It must be concluded from this discussion that the Supreme Court has, under the leadership of Chief Justice Dickson, reinforced the position of the judiciary within the constitutional system of government by accentuating the integrity of the judicial realm, whether by defining more precisely the parameters of its independence or by insulating itself from the application of the *Charter*. That, in itself, is a remarkable achievement.

III. The Courts and their Constitutional Relationship to the Executive and Legislative Branches of Government

One of the traditional functions of the courts has undoubtedly been to control the actions taken by organs of the legislative or executive branches of government, whether this control related to the exercise of administrative or statutory powers, or was justified by constitutional provisions relating to the distribution of powers. This familiar concept of judicial control of the other elements of the state,

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[28] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

[29] *Ibid.* at 1078, *per* Lamer J., dissenting in part, but not on this point otherwise agreed to by Dickson C.J.C., *ibid.* at 1048.

however, has been substantially enlarged by the adoption of the *Charter* in 1982. This constitutional instrument explicitly called for a much greater say by the judiciary over the conduct of the legislating and administrative functions of the state and it would have been very surprising for the courts to resist and to refrain from exercising an increased power of intervention.

Over and above the enactment of the *Charter* it is submitted that the judiciary in general and the Dickson Court in particular while maintaining in some cases a traditionally restrained approach towards the legislative and executive functions of the government, seem to have in other respects more or less abandoned the same approach, thus creating a different constitutional culture where very few elements of state action are left beyond judicial reach.

A. Non-Charter Cases and Justiciability: Respecting Parliamentary Sovereignty

In *Operation Dismantle* v. *R.*,[30] the appellants were trying to demonstrate that the testing of the cruise missile in Canada could violate some of their constitutional rights guaranteed by the *Charter*. At stake in this case, was the exercise of the royal prerogative in matters relating to the authority of entering into international agreements as well as in matters of defense. Madam Justice Wilson, for the whole court on this point, ruled that decisions made pursuant to the royal prerogative fell within the ambit of the *Charter*.[31] That is to say that all actions of the government which fall within what could traditionally be referred to as the prerogative of the Crown are henceforth subject to the *Charter* and, by way of consequence, open to judicial control.

In the interesting case of *A.G. Canada* v. *Minister of Energy, Mines & Resources*,[32] the Supreme Court has had an occasion to discuss the role of the courts with regard to their power of intervention in legal relations between the executive and the legislative arms of the government. In this case the Auditor General sought access to documents relevant to the evaluation of the transaction by which the federal government acquired Petrofina in 1981. Access to these documents was denied successively by the Department of Energy, Mines and Resources, by senior officials of Petro-Canada and by the

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[30] [1985] 1 S.C.R. 441.

[31] *Ibid.* at 464.

[32] [1989] 2 S.C.R. 49.

Governor in Council. The Auditor General, a creature of the Parliament whose mandate is precisely to verify public accounts, then applied to the Federal Court for the same purpose and was finally denied any right of access to the documents. This case was considered by the Supreme Court as essentially a dispute between the legislative and executive branches of the federal government.[33]

It was pointed out that nowhere was the *Charter* invoked in this case.[34] For Chief Justice Dickson, writing for a unanimous Court, "what was really at issue in this case, is the appropriateness of the Court, assuming the role of arbiter in solving a dispute between Parliament and a parliamentary servant, albeit of high rank."[35] For him, in this context, the resolution of the question revolved around issues of justiciability and of the availability of alternative remedies. It is therefore clear that whether the *Charter* is invoked or not in any given case will make a difference and that this conclusion is not abnormal since *Charter* cases are constitutional cases.

While Chief Justice Dickson had previously defined justiciability in *Operation Dismantle* as being a doctrine "founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes,"[36] he directly explained in *A.G. Canada* v. *Minister of Energy, Mines and Resources* that "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity."[37] This appropriateness has, of course, ultimately to be decided by the courts themselves and will depend "on the appreciation of the judiciary of its own position in the constitutional scheme."[38] This being stated, for the Chief Justice it becomes the responsibility of the Parliament and the legislatures to determine the "ultimate constitutional authority to draw the boundaries" of justiciability in non-*Charter* cases:

> It is the prerogative of a sovereign Parliament to make its intentions known as to the role the courts are to play in interpreting, applying and enforcing its statutes. [...] If,

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[33] *Ibid.* at 103.

[34] As mentioned by the Court, *ibid.* at 56.

[35] *Ibid.* at 55.

[36] *Supra*, note 30 at 459.

[37] *Supra*, note 32 at 90-91.

[38] *Ibid.* at 91.

then, the courts interpret a particular provision as having the effect of ousting judicial remedies for entitlement contained in that statute, they are, in principle, giving effect to Parliament's view of the justiciability of those rights. *The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be nonjusticiable.* ... As a constitutional matter, it is not appropriate for the court to intervene by virtue of the simple fact that Parliament has directed that they must not.[39]

In a *Charter* age but not in a *Charter* case, this statement by the highest court of the land pays remarkable respect to the principle of Parliamentary sovereignty. Of course, one of the difficulties with this approach is that it maintains the fiction that the courts, in interpreting statutes and determining justiciability, somehow "find" the law. In so doing, this approach ignores the more realistic view that the courts in such cases are called to define for themselves what the intention of the Parliament is, on the one hand, and whether it is appropriate, on the other, to intervene.

In the case discussed, Mr. Justice Dickson did not ignore this more "realistic view" and mentioned that the decision of the Court to determine the existence of alternative remedies entails, in reality "a decision by the courts on the appropriateness of their intervention, and a less clear statement of intention by Parliament. By not unambiguously highlighting the exclusivity of the statutory remedy, Parliament leaves it to the judiciary to define its role in relation to that remedy."[40]

In other words, the power to determine questions of justiciability in non-*Charter* cases would belong to Parliament, and courts should pay respect to such determination while, at the same time, the Supreme Court acknowledges that, ultimately, courts will keep the power to determine if a matter is justiciable and, therefore, whether or not they

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[39] *Ibid.* at 91-92 (emphasis added).

[40] *Ibid.* at 95. The Court, in order to determine whether it will intervene, will be guided by the criteria developed by Chief Justice Dickson in *A.G. Canada* v. *Minister of Energy, Mines & Resources*. Those revolve around the question of the adequacy of the alternative remedies proposed by the Act. The Courts, in that respect, will have to balance the relevant factors and, among other things, examine the degree "to which a statutory remedy is clearly linked to a right in the same Act" as well as the comprehensiveness of the remedies provided by the scheme or the code (at 96). In this case, the Court judged that the purely political nature of the remedies provided for by the Act constituted an adequate alternative remedy, which "must not be underestimated" (at 103-04). Any conclusion to the contrary would amount, according to the Chief Justice, to a "*de facto* shift in the constitutional balance of powers in the expenditure auditing process," a responsibility not appropriate for the courts to assume (at 109).

will intervene. What appears strange is the seeming need for the Court, at least on a rhetorical plane, to seek to establish the extent of the "permission" given or not given by Parliament to the judiciary to intervene. The "official" reasons provided by the Chief Justice have to do with the principle of Parliamentary sovereignty:[41]

> The *grundnorm* with which the courts must work in this context is that of the sovereignty of Parliament. The ministers of the Crown hold office with the grace of the House of Commons and any position taken by the majority must be taken to reflect the sovereign will of Parliament. . . [I]t would not be appropriate for this Court to consider granting remedies for such denials, if they, in fact, exist.[42]

One may ask, not unreasonably, about the effective impact of such grand declarations respecting Parliamentary sovereignty.

B. Justiciability When Ordinary Citizens Knock on the Door

It is in fact not surprising that the Chief Justice in *A.G. Canada* v. *Minister of Energy, Mines and Resources* conditions the statement previously referred to, by specifying that, indeed, "the courts should not bow before inadequate relief for citizens' statutory and common law rights."[43] He subsequently observed that the Auditor General did not bring suit as an ordinary citizen, but as his capacity of servant of Parliament and sought a political remedy against other political actors.[44]

If nuances are taken quite literally they would seem to indicate that courts could indeed pay substantially less respect to the principle of Parliamentary sovereignty and be strongly tempted to intervene using the concept of justiciability when ordinary citizens seek to use the courts to pursue otherwise dubiously litigable issues. In other words, as long as a debate remains strictly of a political nature and between political actors and where political remedies exist, courts should refrain from intervening in what is considered a non-justiciable issue; however, as soon as a debate — be it legally identical — involves "ordinary citizens," the issue may well become "justiciable," in that it

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[41] See, on this question, the reference to and extensive quotation from *British Railway Board* v. *Pickin*, [1974] A.C. 765 (H.L.) in *A.G. Canada* v. *Minister of Energy, Mines & Resources*, *supra*, note 31 at 88.

[42] *Supra*, note 32 at 103-04.

[43] *Ibid.* at 96.

[44] *Ibid.* at 97.

could be, to borrow the words of Chief Justice Dickson, appropriate as a matter of constitutional policy for the courts to decide.

The best illustration of this profound sensitivity of the Supreme Court to litigation brought by "ordinary citizens" in otherwise non-traditional constitutional fields is that of one of the most puzzling judgments rendered by the Dickson Court, *Finlay* v. *Canada*.[45] This case deals essentially with problems of standing, as opposed to the issues of justiciability just discussed.

The exact scope of this decision appears difficult to establish. Was it a "freak" case unlikely to occur again otherwise than in very similar circumstances, or did it constitute a revolution in the law of standing in public law cases? A Manitoban, Robert James Finlay, sought to challenge the validity of the payments made by the Government of Canada to the Government of Manitoba in order to subsidize the Manitoba *Social Allowances Act*,[46] since that Act appeared to violate the provisions of a federal-Manitoban agreement. The obvious particularity of the litigation is that there was no direct causal relationship between the declaration Finlay sought to obtain and the effects such a declaration would have on the benefits paid to him. This lack of direct relationship, according to Mr. Justice LeDain, writing for the Court, meant that there was a lack of standing under the general common rules.[47]

The Court, however, decided to enlarge the rules of standing developed in constitutional cases in the *Thorson*, *McNeil* and *Borowski* trilogy[48] to recognize a judicial discretion to grant standing, providing that this judicial discretion be exercised in taking into account various concerns such as: the proper role of the courts; the allocation of scarce resources; and whether there is no other reasonable and effective manner in which a matter can be brought before a court of law.[49] Indeed, in *Finlay*, the Court ruled that the matter was certainly as justiciable as it was in *Dismantle*, the test seemingly being whether questions of law are involved:

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[45] [1986] 2 S.C.R. 607.

[46] R.S.M. 1987, c. S160.

[47] *Supra*, note 45 at 623-24.

[48] *Thorson* v. *A.G. Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors* v. *McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice* v. *Borowski*, [1981] 2 S.C.R. 575.

[49] *Supra*, note 45 at 632-33.

> There will no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing will raise issues that are not appropriate for judicial determination, but the particular issues of non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable.[50]

Furthermore, it specified that the issues of law raised in this case are "far from frivolous" and "merit the consideration of a court";[51] it finally concluded that "there could be no one with a more direct interest than the plaintiff in the circumstances."[52]

The effective result of this case is that fields of contractual, public or constitutional law which concern intergovernmental relationships and which have traditionally been considered as "private" intergovernmental affairs become suddenly justiciable, despite the fact that they may have no direct bearing on any "ordinary" citizens' rights. One must admit that the domain of judicial intervention, even in non-*Charter* cases, has thus been greatly extended.

In the end, it would appear that despite what I would refer to as the "official discourse" relating to Parliamentary sovereignty in *Auditor General*, the Dickson Court has been extremely forceful in enlarging judicial activity to new fields of public and constitutional litigation. In so doing, the Court has chosen to impose a new equilibrium in terms of the traditional balance of powers, an equilibrium where the judiciary will, from now on, have the means of intervening in areas of the functioning of the Canadian State that were formerly ignored. The mere possibility of such judicial intervention obviously sends clear signals to litigants and governments; it may very well enhance and deepen the role of the judiciary in the political life of this country and that possibility will constitute, I would submit, for good or for ill, one of the very major contributions of the Chief Justice and of the Dickson Court.

IV. The Judiciary as Protector of the Constitution and the Rule of Law

One of the most significant judgments rendered by the Dickson Court in constitutional matters was that of *In Re Manitoba Language Rights*,[53] not so much for the language rights dimension of that

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[50] *Ibid.* at 632.

[51] *Ibid.* at 633.

[52] *Ibid.* at 633-34.

[53] [1985] 1 S.C.R. 721.

decision, but because of the very fundamental position the Court adopted concerning its attitude towards the constitution and the upholding of the rule of law. A few years later, the Dickson Court had another occasion to further develop the issue of the courts' relationship with the constitution and the principle of legality in *B.C.E.U.* v. *British Columbia*.[54] These two judgments are important in understanding the concept the Supreme Court has of the role of the judiciary within the Canadian political and governmental systems. They will be discussed with a special attention brought to the attitude of the Court which preempted difficulties, the notion of rule of law it advanced, and the effect of these rulings on the rights of "ordinary citizens."

A. A Dynamic Vision of the Role of the Courts With Regard to the Constitution

In the events leading up to the Reference, Roger Bilodeau was given a speeding ticket written exclusively in English; he was summoned to appear in court according to the *Summary Convictions Act*.[55] He sought to oppose the validity of the ticket and that of the summons because the Acts under which they were issued had been adopted and published exclusively in English, contrary, he argued, to the requirements of section 23 of the *Manitoba Act*.[56] While Bilodeau was pursuing his case before the courts, a reference was brought by the Governor General in Council before the Supreme Court. Over and above the question of the effect of section 23, the Reference raised the question of the consequences of an eventual declaration, by the Court, that all the Acts adopted by the Manitoba Legislature in English only were invalid and of no force or effect.

In summary, after having concluded that the language of section 23 was indeed imperative and that all the Acts of the Manitoba Legislature should have been adopted in both languages, the Court examined the effect of an eventual judicial declaration of inconsistency and concluded that all statutes adopted since 1890 would have to be declared invalid and would, therefore, be of no force or effect. It concluded that Manitoba would find itself in a situation of chaos and anarchy and that such situation would "deprive Manitoba of its legal order and cause a transgression of the rule of law":

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[54] *Supra*, note 26; see also *A.G. Newfoundland* v. *N.A.P.E.* [1988] 2 S.C.R. 204.

[55] S.M. 1985-86, c.4, C.C.S.M. c. S230.

[56] S.C. 1870, 33 Vict. c.3.

> For the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution.[57]

The Court therefore had to find a means of avoiding the creation of such legal chaos without at the same time giving in on the principle of the imperative character of constitutional norms. For the Court, the "only appropriate resolution" to the *Reference* was, on the one hand, to declare all the unilingual Acts of the Manitoba Legislature invalid and of no force or effect, while, on the other hand, taking "such steps as will ensure the rule of law in the Province of Manitoba."[58] The Court therefore declared that all rights, obligations and other effects which have in the past arisen under invalid Acts are deemed valid, as well as all the Acts of the Legislature currently in force. This validity was deemed to exist "for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty."[59]

It is absolutely striking to note that the Court seems to have refused to even consider the possibility of simply declaring the statutes invalid and letting the Manitoba Legislature and government (or, eventually, the federal Parliament and government) deal with the problems they had created. In fact, the Court has chosen to impose a solution which avoided a foreseeable and profound constitutional crisis. The aim of that choice was obvious and the sigh of relief audible when the decision was released. The constitutional argument invoked to sustain and explain that decision had to do with the protection of the principle of the rule of law. The Dickson Court has chosen to rely on that same principle in another recent case.

In *B.C.G.E.U.*, the Chief Justice of British Columbia, on his own motion and *ex parte*, decided to issue an injunction restraining picketing and other activities calculated to interfere with the operations of any court. The validity of that order was challenged by the union and the case submitted to the Supreme Court. In a context where it is acknowledged that the strike was lawful, that the picketing was peaceful and where there were no threats of violence or destruction of property, Chief Justice Dickson nevertheless considered that the rule of law was threatened,[60] that public access to justice

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[57] *Supra*, note 53 at 753; see *Order: Manitoba Language Rights*, [1985] 2 S.C.R. 347.

[58] *Ibid.* at 754.

[59] *Ibid.* at 758.

[60] *Supra*, note 26 at 229.

was *ipso facto* impeded[61] and that not only could the Chief Justice of British Columbia issue on his own such an order, but that it was his *duty* to do so.[62]

One of the striking features of Chief Justice Dickson's reasons in this case is the rhetorical tone used, from the very first lines ("This case involves the fundamental right of every Canadian citizen to have unimpaired access to the courts and the authority of the courts to protect and defend that constitutional right"[63]) to the very last ("The injunction, it is important to recall at this stage, was not intended to vindicate the dignity of the court or the judges but rather to maintain access to the institution in our society directly charged with responsibility of ensuring respect for the *Charter*. A significant element therefore of the objective of the injunction order was to protect *Charter* rights. The *Charter* surely does not self-destruct in a dynamic of conflicting rights."[64]). Even the structure of the judgment is unusual, since the Chief Justice states the conclusion of the case without having first discussed the points of law argued.[65] This is one further instance where the Supreme Court has preempted the eventual consequences, not of one of its own judgments this time, but of somebody else's conduit. There again the preemption was authorized by the Court in the name of the constitutional concept of the Rule of Law.

B. The "Positivisation" of the Principle of the Rule of Law

It would therefore appear in the light of these cases that, under the Dickson Court, the rule of law has become an effective constitutional norm which can be invoked before Canadian courts. We are indeed far from any "Diceyenian" approach in that respect. The choices made by the Supreme Court are most interesting in that, whether in the *Manitoba Language Reference* or in *B.C.G.E.U.*, it could have acted otherwise.

In *B.C.G.E.U.*, the Chief Justice of British Columbia decided to issue the order before any "real problems" had time to occur. In the *Manitoba Reference* case, the reasons of the Court indicate clearly that

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[61] *Ibid.* at 231.

[62] *Ibid.* at 239.

[63] *Ibid.* at 219.

[64] *Ibid.* at 249.

[65] See *ibid.* at 228-30, section III of the judgment, on the relationship between the *Charter*, the rule of law, and access to the courts.

other avenues were open to ensure the existence of the principle of legality despite the effect of an eventual ruling. It is striking that, in discussing the doctrine of necessity in this case, the Court indicated clearly, with Commonwealth case law in support, that the concept of rule of law fully justified the judiciary to maintain the validity of otherwise unconstitutional statutes in exceptional circumstances where the principle of the rule of law is threatened. The most interesting case discussed is that of *Attorney General of the Republic* v. *Mustafa Ibrahim*[66] where Parliament had taken upon itself the task of remedying an emergency by using an ordinary statute to modify a provision of the constitution. That measure was approved by the Court of Appeal under the doctrine of necessity. In *In Re Manitoba Language Rights* the Court took great pains to distinguish *Ibrahim* from the instant case but it is very difficult to actually do so.

Can it be said, however, that the situation would have been similar if the Court had simply invalidated the Manitoba statutes and if the Manitoba Legislature or the Federal Parliament had intervened legislatively or otherwise to protect public order and the rule of law in the province? Although alternatives existed it is significant that the Court refused to play a passive role. The crucial conclusion to draw in the light of these two cases is that the Court considered the judiciary to be the guardian, protector and, in some cases, the saviour of the constitution and of the constitutional order. This attitude is nowhere as clear than in *B.C.G.E.U.*:

> Of what values are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undetermined.[67]

The Supreme Court, in modifying the scope and effect of the principle of the rule of law, and in applying this newly-positive norm in "real-world" cases, has effectively shifted the traditional balance of powers doctrine and situated the judiciary somewhere, in a somewhat hierarchical sequence, between the rule of law and the constitution on one level and the other traditional legislative and executive arms of the state, on another. One must admit that the positioning of the judiciary has considerably changed from the traditional Montesquian

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[66] [1964] Cyprus L.R. 195.

[67] *Supra*, note 26 at 229.

approach. However, one wonders where it leaves the "ordinary citizen."

C. In Defence of the "Ordinary Citizen"?

In both *B.C.G.E.U.* and the *Manitoba Language Rights Reference*, the obvious preoccupation of the Dickson Court seemed to be the effective functioning of the constitution itself and of the institutions governed by its application, all that, of course, for the greater benefit of all citizens. One wonders though what treatment the particular citizens behind those cases got. An examination of these cases from that angle reveals a certain uneasiness about some aspects of the rulings.

In the *Manitoba Language Rights Reference*, for instance, what happened to our colleague Roger Bilodeau? A year after this decision, the judgment of the Court was released in his case. In short: Bilodeau was right in raising the defence he proposed as the Acts under which he was convicted were invalid and of no force or effect but Chief Justice Dickson, writing for the majority of the Court, decided that the conviction was "saved [sic] by the principle of rule of law."[68] This decision is perfectly coherent with the previous decision of the Court in the *Manitoba Language Rights Reference*. However, one wonders how Roger Bilodeau felt still having to pay his fine after the constitutional arguments he had raised were found valid by the Court. Did not the Court write in the *Reference* that "We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation"?[69]

As for the *B.C.G.E.U.* case, one thing was clear and that was that a few years earlier by the same Dickson Court in *Dolphin Delivery*,[70] picketing had been declared to contain an element of expression, otherwise protected by the *Charter*. For the Chief Justice such an element was also present in this case and an examination of section 1 of the *Charter* became necessary.[71] This task must be accomplished, according to the Chief Justice, in a context where "public or societal" values must dominate individual values:

> In the instant case, the task of striking a balance is not difficult because without the public right to have absolute, free and unrestricted access to the courts the individual

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[68] *Bilodeau* v. *A.G. Manitoba*, [1986] 1 S.C.R. 449 at 456.

[69] *Supra*, note 53 at 745.

[70] *Supra*, note 21 at 586 and 588.

[71] *Supra*, note 26 at 245.

and private right to freedom of expression would be lost. The greater public interest must be considered when determining the degree of protection to be accorded to individual interests.[72]

In this context, it becomes clear for the Court that individual rights have to give way to the superior interests of society and that, to repeat Mr. Justice Dickson's words, the *Charter* cannot "self-destruct in a dynamic of conflicting rights."[73] The concrete result of that approach is that from now on in Canada, whatever the circumstances, individuals cannot necessarily exercise a right such as picketing before courthouses that is otherwise constitutionally protected by the *Charter*. This conclusion might explain why in *N.A.P.E.*, a decision released the same day by the Court and essentially bearing on the same point of law, the Chief Justice adopted a rather defensive tone in specifying that:

[T]he power to punish for criminal contempt is not intended to insulate the courts from life's vicissitudes; it is not intended to place the courts in Elysium, a blessed abode free from slings and arrows which afflict all others; it is not intended to vindicate the dignity of the courts or of the judges... The rule of law, enshrined in our Constitution, can only be maintained if persons have impeded, uninhibited access to the courts in this country.[74]

It now appears that in such cases the imperatives of the rule of law and the courts' ability to exercise their proper constitutional role must predominate over the otherwise constitutional rights of "ordinary citizens."

V. CONCLUSION

IN THE VARIOUS JUDGMENTS examined in this paper, the judiciary has been the central preoccupation of the Dickson Court. One characteristic of these judgments is undoubtedly their tone of judicial activism. It is striking to note that the judiciary is, within the Canadian system of government, in the position to define its role and to more or less impose its characterization on all the other constitutional actors.

A few tendencies can be identified as to the trends developed in that respect under the leadership of the Dickson Court in these fields. The first raises the question as to whether the Court proposes a

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[72] *Ibid.* at 248.

[73] *Ibid.* at 249.

[74] *A.G. Newfoundland* v. *N.A.P.E.*, *supra*, note 54 at 212-13.

bicephalous conception of the institutional framework of the constitution with the legislative and executive powers on one side, and the judiciary on the other. One could also wonder if the judiciary has not imposed a certain hierarchical vision of the place of these institutions within our constitutional framework. Of course, a certain type of hierarchy has probably always officially existed with the courts having the last say at least on constitutional matters. But this trend now seems completely adapted by the Supreme Court, which has sent clear messages as to its role *vis-à-vis* the constitution and the constitutional order: it will not tolerate any impairment from any quarters (whether legislative, executive or public) of the exercise of these functions.

In fact, these two trends, hierarchical and bicephalous, could even be said to have been integrated over the last few years, thus substantially shifting the traditional balance of powers between the three major constitutional actors. One can ask whether such trends could not eventually lead to a certain "deresponsibilization" of the other institutions of the Canadian system of government and of the political actors towards the constitution in general and the respect of constitutional order in particular. We see obvious manifestations of that trend in the Senate these days.

Finally, the contribution of the Dickson Court on these issues can be qualified as unique and very important. From now on basic constitutional principles, such as the independence of the judiciary or the rule of law, have taken on new and vigorous meanings in Canadian constitutional terms. One striking point, in that context, is the obvious sensitivity of the Court towards the "ordinary citizen". This sensitivity predominates and is a cardinal consideration for the Court whenever legislative, executive or administrative actions are questioned. It is, however, less salient when the examination of judicial functions are involved.

These findings are not trite: they are remarkable and undoubtedly demonstrate the highly significant contribution of Chief Justice Dickson and his Court towards the evolution of constitutional law in this country.