

CHAPTER 3
**THE LEGISLATIVE PROCESS
AND JUDICIAL REVIEW:
ROYAL FUNCTIONS AND THEIR
JUSTICIABILITY**

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The executive as personified by the Queen has a distinctive role in the enactment of Acts of Parliament. This paper looks at three “royal” functions in this role, largely from the federal perspective in Canada:

- Royal recommendation;
- Royal consent;
- Royal assent.

The object of the paper is to consider how these functions fit with the roles of the other branches of the State in the larger constitutional picture, particularly the role of the courts to review legislative action. This judicial role is sometimes seen to intrude on the world of parliamentary procedure and legislative institutions have generally resisted judicial review of their processes. This is somewhat ironic since the principal function of these institutions is to make law, which is what the courts are mandated to enforce. Why would a law-making institution not welcome the views of a law-enforcing institution?

The short answer is that the law is not the exclusive preserve of either the legislative or the judicial branches, not to mention the executive. And indeed, the courts themselves have come to recognize this through a variety of methods and doctrines about showing deference to the legislative and executive branches when conducting judicial review.

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This paper begins by describing in general terms the three procedural functions noted above. This description is based on constitutional provisions and accounts of these functions from historical and parliamentary practice perspectives.

The focus then turns to how these functions have been considered by the courts, both in terms of their review of legislative action as well as their application of legislation itself. The paper gives a general account of judicial review and its limits in relation to legislative action, notably the concept of justiciability and the standard of review analysis. It then considers whether the courts have a role to play in reviewing the three functions and argues that they have no role in relation to the royal recommendation and royal consent and have only a very limited role in terms of satisfying themselves that the parliamentary record shows that royal assent has been given.

ROYAL FUNCTIONS IN THE LEGISLATIVE PROCESS

The three royal functions described here are not by any means the only way the executive plays a role in the legislative process. Party politics and constitutional conventions provide a host of levers for its intervention. However, the functions considered here are based on more than political dynamics or convention. They are firmly rooted in the law, and for that reason are arguably capable of attracting the attention of the courts.

Royal Recommendation

In Canada, the royal recommendation is granted by the Governor General on the request of the Government. Historically, it has only been granted for Government bills, but more recently with changes to the Standing Orders,¹ it has also been granted for private members bills that the Government supports.²

1. *House of Commons Procedure and Practice*, 2nd ed. (House of Commons: Ottawa, 2009) at ch 18 (Royal Recommendation).

2. See e.g. Bill C-383, *An Act to amend the International Boundary Waters Treaty Act and the International River Improvements Act*, 1st Sess, 41st Parl, 2013, (first reading 13 December 2011) (which received the royal recommendation before 3rd Reading and was subsequently enacted as SC 2013 c 12).

The requirement originated in British parliamentary practice and recognizes the primary role of the executive branch in the spending of public money. It is the product of historical developments that gradually shifted legislative power, including the power to levy taxation and spend public money, from the Sovereign to democratically-elected legislative assemblies.³ These developments also involved the relationship between upper and lower legislative assemblies and crystalized into two modern procedural requirements: the initiation of financial legislation in a democratically elected chamber and the royal recommendation.

Although much has been written on the development of the origination requirement and the relationship between the Senate and the House of Commons, the development of the royal recommendation and the relationship between the executive and legislative branches is somewhat less well-known. Like the origination requirement, it is derived from ancient constitutional usage, but it was also shaped by the separation of taxation from appropriations at the beginning of the 18th century. An account of its development is provided in the UK House of Commons *Debates* of March 26, 1866 dealing with an amendment to the standing orders.

Speaking first, Ayrton began by acknowledging that “one of the fundamental principles of the Constitution was that the House of Commons should never take the initiative in granting or voting away public money” and that it was “the duty of the House of Commons to sit in judgment upon the measures introduced by the Crown”. He then said:

At the beginning of the last century, however, an entirely new system was introduced, and the Exchequer was constituted to act as a trustee between the Crown on the one hand, and the House of Commons and the people on the other. The consequence of this new arrangement was, that the plan was adopted of separating the levying of taxes from their appropriation by Votes of the House. The result was that there was always a balance of public money lying in the Exchequer, which in the course of time Members began to regard as very much at their own disposal. To prevent the mischief likely to arise from the growing disposition of private Members to establish a claim upon such balances

3. See J.M. Keyes, “When Bills and Amendments Require the Royal Recommendation” (1998) 20 Can. Parl. Rev. at 15; J.E. Magnet and D. Palumbo, “Taxation, Democracy and the Constitution” in J.E. Magnet, ed, *Modern Constitutionalism*, (Lexis-Nexis: 2004) at 247 [Magnet].

remaining in the Exchequer, a Standing Order was made in 1813 [sic] to the effect –

That this House will receive no petition for any sum of money relating to the public service but what is recommended by the Crown.⁴

This standing order was given a broad interpretation and applied not only to petitions, but also to any other steps that would tend to impose a burden on the public purse. In 1852, the standing order was amended to reflect this enlarged application to say

That this House will receive no petition for any sum of money relating to the public services or proceed upon any Motion for granting any money but what is recommended by the Crown.⁵

And, as noted above, the standing order was amended yet again in 1866 to deflect a drafting practice that had developed of including clauses to say that any expenses necessary to implement a bill were to be paid out of money “to be provided by Parliament.” Thus, the standing order came to read:

That this House will receive no petition for any sum of money relating to the public services or proceed upon any Motion for granting any money, whether payable out of the Consolidated Revenue Fund or out of monies to be provided by Parliament, unless recommended by the Crown.⁶

The 1866 debate on this amendment also links its adoption to provisions in colonial legislation dealing with the royal recommendation. The Chancellor of the Exchequer said:

...I believe that in all cases of legislation – certainly in the great cases of legislation we have had in this House in the last thirty years for Colonial Constitutions – we have been most careful to introduce this provision. In Canada, before the present Constitution was established, the proposals by private Members to make grants of public money became so numerous and glaring that a remedy was necessary. The remedy was to introduce this provision. I believe it has been successful, and that the practice is now becoming a recognized principle of the British Government at home and in the colonies.⁷

4. UK, HC, *Commons Debates* (1865-67) at 592 (March 26 1866) (note, the reference to “1813” should be “1713”; see Erskine May, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed, (Lexis Nexis: London, 2011) at 717 [May].

5. *Ibid.* at 592-593.

6. *Ibid.* at 603.

7. *Ibid.* at 598.

Thus, developments in Canada in the first half of the 19th century paralleled those in the British Parliament, spurred on by the concerns of colonial governors to keep a tight control on spending in the face of the emerging democratic assemblies.⁸ This resulted in section 57 of the *Union Act*, 1840⁹, which said:

... It shall not be lawful for the said Legislative Assembly to originate or pass any Vote, Resolution or Bill for the Appropriation of any Part of the Surplus of the said Consolidated Revenue Fund, or of any other Tax or Impost, to any Purpose which shall not have been first recommended by a Message of the Governor to the said Legislative Assembly during the Session in which such Vote, Resolution or Bill shall be passed;

This provision was subsequently incorporated almost verbatim into the *Constitution Act 1867* as section 54 and in *Standing Order 79* of the House of Commons. Section 54 says:

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Some commentators have argued that these provisions are narrower in scope than the UK standing orders in that they apply only to bills that expressly appropriate public money, and not to those that would do so indirectly by creating institutions or requirements that entail public expenditures.¹⁰ These arguments are based on the differing historical circumstances in the UK as well as differences in wording. However, it is difficult to see how concerns about the propensity of legislators to spend public money were substantially different in Canada. If anything, the concerns were even greater in Canada¹¹

8. See Keyes, *supra* note 3, at 16, citing JG Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed (Toronto: Canada Law Book Company, 1916) at 405 and J Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle?" (1995) 27 *Ottawa L Rev* 33 at fn 68 and the accompanying text.

9. (UK), 3 & 4 Vict, c 35, s 57, reprinted RSC 1985, App II, No 5.

10. Magnet, *supra* note 3 at 257ff; Small, *supra*, note 8.

11. Note the following passage from the journals of Lord Sydenham, which Small, *ibid* at fn.69:

You can have no idea of the manner in which a Colonial Parliament transacts its business. I got them into comparative order and decency by having measures

and should have accordingly led to controls that were as strict, if not stricter, than those in the UK. As concerns the differences in wording, it appears that greater detail was introduced into the UK standing orders to counteract specific practices. This detail was evidently not considered necessary to reinforce the application of more generally worded colonial provisions, which the Chancellor of the Exchequer acknowledged as having the same effect as that sought in the 1866 amendment.

Thus, it is hardly surprising that in Canada the requirement was applied broadly, as the first edition of Bourinot in 1884 noted:

The constitutional provision which regulates the procedure of the Canadian House of Commons in this respect applies not only to motions directly proposing a grant of public money, but also to those which involve a grant.¹²

The application of the royal recommendation in Canada both to direct and indirect appropriations has continued to the present day, albeit with some adjustments as concerns indirect appropriations.¹³ Many aspects of its application are fairly clear. First of all, it applies only to provisions that entail the spending of money from the Consolidated Revenue Fund.¹⁴ Thus, it does not apply to provisions that would reduce spending; it also does not apply to provisions to reduce or eliminate taxes since these prevent money from coming into the CRF; they do not entail the expenditure of funds that are ever in the CRF.¹⁵

brought forward by the Government, and well and steadily worked through. But when they came to their own affairs, and, above all, to the money matters, there was a scene of confusion and riot of which no one in England can have any idea. Every man proposes a vote for his own job; and bills are introduced without notice, and carried through all their stages in a quarter of an hour! One of the greatest advantages of the Union will be, that it will be possible to introduce a new system of legislating, and, above all, a restriction upon the initiation of money-votes. Without the last I would not give a farthing for my bill: and the change will be decidedly popular; for the members all complain that, under the present system, they cannot refuse to move a job for any constituent who desires it.

12. J G Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (Rothman Reprints: South Hackensack, 1971) at 464.
13. For a summary of recent practice, see M Lukyniuk, "Spending Proposals: When is a Royal Recommendation Needed?" (2010) 33-1 Can Parl Rev 29.
14. Senate Speaker's Ruling on Bill S-223 (11 March 2010); HC Speaker's Ruling on Bill C-285, *House of Commons Debates*, 39th Parl, 1st Sess, No 79 (8 November 2006).
15. Senate Speaker's Ruling on Bill S-212 (24 February 2009); HC Speaker's Ruling on Bill C-253, *House of Commons Debates*, 39th Parl, 1st Sess, No 74 (1 November 2006).

The application of the royal recommendation to indirect appropriations is most often framed in terms of whether a provision would extend the “objects, purposes, conditions and qualifications” of an existing appropriation of public revenue. This aspect of the requirement has engendered considerable debate and there are innumerable speaker’s rulings on this issue. However, some aspects of its application in this regard are quite clear. For example, provisions that would extend the coverage or amount of employment insurance benefits have consistently been ruled to require the royal recommendation.¹⁶

Where things become less clear is when provisions would modify the functions of an existing body. The test for applying the royal recommendation is to determine whether the modification would entail a “new and distinct” charge. The many recent rulings on this point are split fairly evenly, despite a suggestion in a ruling from 1998 that no recommendation is needed for these provisions because any increased funds could be sought in an appropriation bill.¹⁷ For example, in 2012 the Speaker of the House of Commons ruled that Bill C-377, which would have instituted new filing requirements for labour organizations, did not require a recommendation:

In carefully reviewing this matter, it seems to the Chair that the provisions of the bill, namely the requirements for the agency to administer new filing requirements for labour organizations and making information available to the public, may result in an increased workload or operating costs but do not require spending for a new function per se. In other words, the agency, as part of its ongoing mandate, already administers filing requirements and makes information available to the public. The requirements contained in Bill C-377 can thus be said to fall within the existing spending authorization of the agency.¹⁸

In contrast, in 2010, the Speaker ruled that Bill C-501, providing for the appointment of adjudicators for claims against corporate directors under the *Canada Business Corporations Act*, required a recommendation since there was no existing legislative authority for the appointment of adjudicators under that Act.¹⁹

16. HC Speaker’s Ruling on Bill C-243, *House of Commons Debates*, 40th Parl, 3rd Sess, No 32 (23 April 2010).

17. HC Speaker’s Ruling on Bill S-3, 36:1 *House of Commons Debates*, 40th Parl, 3rd Sess, No 56 (10 February 1998); (see also J M Keyes, “The Royal Recommendation: An Update” (1999) 22:2 *Can Parl Rev* 19).

18. See e.g. HC Speaker’s Ruling on Bill C-377, *House of Commons Debates*, 41st Parl, 1st Sess, No 193 (6 December 2012).

19. See e.g. HC Speaker’s Ruling on Bill C-501, 40:3 *House of Commons Debates*, 40th Parl, 3rd Sess, No 49 (26 May 2010).

One further area remains somewhat controversial in relation to indirect appropriations. It involves bills that would require the Government to take some action, but leave it considerable discretion to decide what to do. A pair of rulings in 2006 exemplify these sorts of bills: C-292 (*An Act to implement the Kelowna Accord*) and C-288 (*Kyoto Protocol Implementation Act*).

The ruling on Bill C-292 focused on clause 2:

2. The Government of Canada shall immediately take all measures necessary to implement the terms of the accord, known as the “Kelowna Accord”, that was concluded on November 25, 2005 at Kelowna, British Columbia, by the Prime Minister of Canada, the first ministers of each of the provinces and territories of Canada and the leaders of the Assembly of First Nations, the Inuit Tapiriit Kanatami, the Metis National Council, the Native Womens’ Association of Canada and the Congress of Aboriginal Peoples.

The House of Commons Speaker ruled:

Bill C-292 in clause 2 does state that the government shall “take all measures necessary to implement the terms of the accord”, but it does not provide specific details on those measures. The measures simply are not described. In the absence of such a description, it is impossible for the Chair to say that the bill requires a royal recommendation.

...

As I read it, the Kelowna accord tabled in the House sheds light on the plan of action, but it is not clear whether the accord could be implemented through an appropriation act, through amendments to existing acts, or through the establishment of new acts. From my reading, implementation would appear to require various legislative proposals.

In any event though, this is more of a legal question than a procedural one. The government House leader’s legal advisors are best placed to reply to that question. As my predecessors and I have said on many occasions, the Speaker does not rule on matters of law. When, or perhaps if, enabling legislation comes forward, the Chair will, as usual, be vigilant in assessing the need for a royal recommendation.²⁰

Two days later, the Speaker ruled on Bill C-288. After prefacing his remarks with a reference to his ruling on Bill C-292, the Speaker said:

So too in the case before us, the adoption of a bill calling on the government to implement the Kyoto protocol might place an obligation on the

20. HC Speaker’s Ruling on Bill C-292, *House of Commons Debates*, 39th Parl, 1st Sess, No 52 (25 September 2006).

government to take measures necessary to meet the goals set out in the protocol but the Chair cannot speculate on what those measures may be. If spending is required, as the government House leader contends, then a specific request for public monies would need to be brought forward by means of an appropriation bill, as was the case in 2005, or through another legislative initiative containing an authorization for the spending of public money for a specific purpose.

As it stands, Bill C-288 does not contain provisions which specifically authorize any spending for a distinct purpose relating to the Kyoto protocol. Rather, the bill seeks the approval of Parliament for the government to implement the protocol. If such approval is given, then the government would decide on the measures it wished to take. This might involve an appropriation bill or another bill proposing specific spending, either of which would require a royal recommendation.²¹

More recently, this approach has also been taken to the provisions of Bill C-471 for implementing the recommendations of the Pay Equity Task Force.²²

How does one explain these bills given the application of the royal recommendation to indirect appropriations, particularly those characterized by changes to the scope of existing programs that entail public spending? Arguably, the striking feature of these bills is not that they require the Government to take implementing action. Rather, they involve entirely new measures. Bills involving the expansion of existing programs also require Government implementation; the difference is that the existing programs provide enough details of those implementation measures to attract the royal recommendation. This reflects the basis of speaker's rulings on legislative texts. Speakers generally do not speculate on what will be required to accomplish some legislative objective; they look to the provisions of the bill and other related legislation to answer these questions.²³ It is also worth noting that the Speaker's views about the lack of detail in these bills resonates with a court case brought to enforce the *Kyoto Protocol Implementation Act*.²⁴ In *Friends of the Earth v Canada*, federal courts concluded that many of the provisions of the Act were not clear enough to be "justiciable" and susceptible of judicial enforcement.²⁵

21. HC Speaker's Ruling on Bill C-288, *House of Commons Debates*, 39th Parl, 1st Sess, No 54 (27 September 2006).

22. HC Speaker's Ruling on Bill C-471, *House of Commons Debates*, 40th Parl, 3rd Sess, No 39 (2010/05/04).

23. J Keyes & A Mekunel, "Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law" (2001) 46 McGill LJ 6 at 28.

24. SC 2007, c 30.

25. 2008 FC 1183, 299 SLR (4th) aff'd 2009 FCA 297, [2009] FCJ No 1307 (QL). See the discussion below of justiciability at p. 12ff.

Royal Consent

The royal consent is one of the more obscure aspects of the legislative process. It is required “when the property rights of the Crown are postponed, compromised or abandoned, or for any waiver of a prerogative of the Crown” and it has been granted for legislation dealing with Crown land or allowing litigation against the executive (*Crown Liability Act*).²⁶ Given that Crown prerogatives have been much diminished over the course of history, it is not surprising that it has been seldom invoked in recent times.²⁷ However, a Senate Speaker’s ruling in 2011 demonstrates that it still has some vitality.²⁸

The requirement is derived from British parliamentary practice and “is among the unwritten rules and customs of the House of Commons of Canada.”²⁹ Unlike the royal recommendation and royal assent, it has not been expressed in legislative form, either in the Constitution or in the Standing Orders.

The purpose of the requirement is to afford the executive protection from legislative encroachments on its prerogatives and property. However, this protection has more recently been cast by the Senate Speaker in terms of providing notice of possible encroachments, as opposed to a veto over them:

However, with the recognition of parliamentary supremacy and the subsequent development of responsible government, the use of Royal Consent became not so much a veto as an acknowledgement that a prerogative power was involved in proposed legislation. While the lack of Royal Consent can ultimately block the passage of a bill, it should not be used to override the right of Parliament to free debate, the absolute right of Parliament to discuss any topic, to exercise its fundamental right to free speech guaranteed in the *Bill of Rights* of 1689.³⁰

26. Audrey O’Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2nd ed. (House of Commons: Ottawa, 2009), at ch 16 [O’Brien & Bosc](Stages of the Legislative Process, 2nd Reading and Reference to a Committee). See also May, *supra* note 4 at 165-167 and 661-664.

27. In 2011, the Speaker of the Senate noted that it had been invoked only about two dozen times since confederation: see *Senate Debates*, 40th Parl, 3rd Sess, No 95 (March 21, 2011) (relating to Bill C-232 (*An Act to Amend the Supreme Court Act (Understanding the Official Languages)*)) [Senate Debates 40th Parl, 3rd Sess No 95].

28. *Ibid.*

29. O’Brien & Bosc, *supra* note 26.

30. *Senate Debates* 40th Parl, 3rd Sess No 95, *supra* note 27.

Royal Assent

Royal assent is perhaps the best known of the three procedural functions considered in this paper. It is the final stage of enactment and is required for every Act of Parliament. Once it has been given, a bill becomes law, even though its dispositive provisions may not yet be in force. This marks a significant juridical point at which an Act enters the legal domain, being both subject to judicial notice and enforceable according to its terms.

Royal assent has historically been given in a ceremony that takes place in the Senate Chamber with members of the House of Commons present as well as the Sovereign, the Governor General or a deputy appointed under section 14 of the *Constitution Act, 1867* (including judges of the Supreme Court of Canada).³¹ However, since 2002, the *Royal Assent Act* has provided an alternative method for signifying assent by a written declaration.³²

While it is clear that decisions about giving the royal recommendation or the royal consent are discretionary, this is questionable with royal assent. On the one hand, section 55 of the *Constitution Act, 1867* by its terms suggests that there is considerable discretion to refuse assent:

Royal Assent to Bills, etc.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

On the other hand, Hogg says "There is no circumstance that would justify a refusal to assent, or a reservation ...".³³ He bases this assertion on a resolution of the Imperial Conference of 1930 that the powers of reservation and disallowance must never be exercised.³⁴ However, it is difficult to see why a resolution dealing with relations between the United Kingdom and its former possessions should affect

31. O'Brien & Bosc, *supra* note 26 (see Stages of the Legislative Process, Royal Assent).

32. SC 2002, c 15.

33. P W Hogg, *Constitutional Law of Canada* (Carswell: Toronto, 2012) at 9-20.

34. M Ollivier, ed, *The Colonial and Imperial Conferences from 1887 to 1937* (Queen's Printer: Ottawa, 1954).

the operation of legislative functions within those possessions. Constitutional provisions for reservation and disallowance pertain to the role of the British Sovereign, as opposed to the vice-regal representative. Thus, it is not clear why such a resolution should affect the giving of royal assent by the Governor General other than to eliminate any role for the Sovereign in this function. Arguably, the assent function continued to exist as it did in the UK in relation to UK legislation.

The question of discretion to refuse royal assent was briefly considered by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*:

As a matter of law, the Queen, or the Governor General or the Lieutenant Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill.³⁵

The view that there is discretion to refuse royal assent has currency outside Canada in both the UK and Australia. In the UK, it is a matter of historical record that two of the most prominent constitutional scholars of the day, Sir William Anson and A.V. Dicey, advised King George V that he had discretionary power to refuse assent to the Irish Home Rule Bill in 1912.³⁶

In Australia, Twomey has argued that there are two ways to characterize royal assent in modern times.³⁷ The first focuses on the wording of enactment clauses such as that used in Canada:

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows

The Governor General thus act on the “advice and consent” of the legislative chambers in deciding whether to give royal assent.

35. [1981] 1 SCR 753 at 881, 11 Man R (2d) 1 [*Resolution to Amend the Constitution*].

36. R Blackburn, “The Royal Assent to legislation and a monarch’s fundamental human rights” (2003) Public Law at 205-210.

37. A Twomey, “The Refusal or Deferral of Royal Assent” (2006) Public Law at 580-602.

Once a bill has been passed by both chambers, the Governor General is bound to give the assent. The competing view is that the Governor General makes decisions about royal assent in the same way as on matters other than those of their personal prerogatives: on the advice of the Government. After reviewing the practice in Australia and the UK, Twomey concludes:

There is much to be said for the view that the Queen or her vice-regal representative, when giving Royal Assent to a Bill, acts upon the advice of the House(s) of Parliament. It is a view that is consistent with the definition of Parliament and the enacting words of legislation, as well as with the principles of representative government. It also has the advantage of providing certainty and avoiding all the problems that arise from the existence of discretion.

However, the history of the exercise of the power to grant Royal Assent, both in its colonial context in Australia, and as part of the royal prerogative in the United Kingdom, suggests that an underlying discretion may continue to exist, albeit one that is heavily circumscribed by constitutional convention.³⁸

JUDICIAL REVIEW AND LEGISLATIVE PROCESSES

The starting point for understanding how the courts have limited judicial review is a statement of what it is. In *Dunsmuir v New Brunswick*, the Supreme Court, with Bastarache and Lebel, JJ writing for the majority, characterized judicial review as follows:

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.³⁹

This passage conveys a great deal about judicial review in relatively few words. First of all, it tells us that judicial review is about ensuring that public power is exercised in accordance with the law. It also acknowledges the variety of sources of law, ranging from statute law through the common and civil law to the Constitution. Thus *law*

38. *Ibid* at 601.

39. 2008 SCC 9 at para 28, 1 SCR 190 [*Dunsmuir*].

provides the basis for judicial review, which is essentially an inquiry into what the law requires and whether the exercise of public power conforms to these requirements.

Although the focus of this passage narrows from “all exercises of public authority” to “the administrative process and its outcomes”, it is clear that prerogative⁴⁰ and legislative powers are also to some extent subject to judicial review, notably to ensure the legality of their exercise. The extent of judicial review is, generally speaking, more limited than it is in relation to other powers. The basis for this rests on notions of a constitutional separation of powers and judicial deference towards the executive and legislative branches.

Separation of Powers

Montesquieu is generally credited with the definitive formulation of the separation of powers as a principle of government. His thinking inspired republican models of government, such as that of the United States. It was also influenced by the English constitutional system, although Montesquieu’s understanding of that system was somewhat faulty.⁴¹ Thus, it is perhaps not surprising that today in Canada the doctrine of the separation of powers is regarded as having some relevance to our system of government, but it does not enjoy the status of an inflexible constitutional principle.

The decision of the Supreme Court of Canada in *Doucet-Boudreau v Nova Scotia* demonstrates how the Canadian courts view the separation of powers:

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also

40. See e.g. *Operation Dismantle Inc et al v The Queen et al*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC).

41. Iain Stewart, “Men of Class: Aristotle, Montesquieu and Dicey on ‘Separation of Powers’ and ‘the Rule of Law’” (2004) 4 MacQuarrie LJ at 187-223.

be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers ..., the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. ... In *New Brunswick Broadcasting Co. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.⁴²

As this passage suggests, concerns about the separation of powers arise when one of the three branches of government does something that interferes with what another branch wants to do. The approach of the courts has been to concentrate on what each branch has authority to do and to reconcile this authority when conflict arises.

Article 9 of the *Bill of Rights, 1689* also recognizes that Parliament and the courts are to operate in separate spheres, stating “[t]hat the freedom of speech and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament”.⁴³ The Supreme Court of Canada in the *Reference Re Resolution to Amend the Constitution*⁴⁴ has accepted that this provision is “undoubtedly in force as part of the law of Canada”.⁴⁵ That decision also carved out a large sphere of activity into which the courts should not venture:

How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the “court” aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion

42. [1993] 1 SCR319 at paras 32-33, 100 DLR (4th) 212.

43. 1688 (UK), 1 Will and Mar, Sess 2, c 2.

44. [1981] 1 SCR 753, 1981 CanLII 25 (SCC) (*sub nom. Reference Re Amendment of Constitution of Canada*).

45. *Ibid* at 785.

on a bill or a proposed enactment). It would be incompatible with the self-regulating – “inherent” is as apt a word – authority of Houses of Parliament to deny their capacity to pass any kind of resolution.⁴⁶

Views about the appropriate spheres of courts and parliament were greatly influenced by the political events and constitutional changes of the 17th and 18th centuries. The law of Parliament was seen as a separate law, distinct from the common law. For that reason it was the common belief that “judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti* [according to the laws and customs of parliament]”.⁴⁷ By the same token, the *sub judice* doctrine prevents parliamentary debate on matters that are before the courts.⁴⁸

The concept of parliamentary privilege also demarcates the courts and Parliament. Through parliamentary privilege, the legislature maintains its formal internal autonomy from external forces such as the public, the executive, and the courts. The privileges of Parliament include those rights necessary for free action within its jurisdiction and the necessary authority to enforce those rights if challenged. Among the most important privileges of the members of a legislature is the enjoyment of freedom of speech in debate. Although originally intended as protection against the power of the Crown, it was later extended to protect members against attack from all sources. This freedom of speech may not be impeached or questioned in the courts, and statements made in parliamentary proceedings cannot be the subject of an action for defamation or contempt.⁴⁹ Members are liable to censure and punishment only by the House itself for a breach of its rules.

The separation of powers has also been recognized as between the executive and legislative branches. However, in *Wells v Newfoundland-*

46. *Ibid.*

47. Sir E Coke, *Fourth Part of the Institutes of the Laws of England* (London: E and R Brooke, Bell-Yard, 1797) at 14; cited in May, *supra* note 4 at 283.

48. See O’Brien & Bosc, *supra* note 26 at ch. 11 (Questions, Oral Questions) (but note the critique of this doctrine in); L Sossin & V Crystal, “A Comment on ‘No Comment’: The Sub Judice Rule and the Accountability of Public Officials in the 21st Century” (2013) 26 Dal LJ 535.

49. See *Roman Corp v Hudson’s Bay Oil and Gas Co*, [1972] 1 OR 444, 23 D.L.R. (3d) 292 (CA), aff’d [1973] SCR 820, 36 DLR (3d) 413; see also O’Brien & Bosc, *supra* note 26 at ch 3, Rights and Immunities of Individual Members, Freedom of Speech.

land, the Supreme Court noted that it is tempered by the realities of party politics:

The government cannot, however, rely on this formal separation to avoid the consequences of its own actions. While the legislature retains the power to expressly terminate a contract without compensation, it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control. ... On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government.⁵⁰

Limits on Judicial Review – Judicial Deference and Justiciability

During the past 30 years or so, Canadian courts have wrestled with the scope of judicial review and the potential it holds for interfering with the exercise of power by the bodies and officials under review. The concept of “deference” has come to the fore in a variety of forms to limit judicial review, most notably in the “standard of review analysis” for calibrating the degree of scrutiny courts should bring to bear on the decisions of bodies and officials under review.

In *Dunsmuir v New Brunswick* the Supreme Court articulated two standards for review: correctness and reasonableness.⁵¹ Correctness, as the name implies, requires the decision under review to conform to the reviewing court’s view of what should have been decided (the “correct” decision).⁵² In contrast, reasonableness recognizes that there is a range of differing “reasonable” decisions and that the decision under review need only conform to one of them. The central concern in determining reasonableness is “the existence of justification, transparency and intelligibility within the decision-making process”.⁵³

50. [1999] 3 SCR 199 at 220-221[Wells].

51. *Supra* note 39.

52. *Ibid* at para 50:

When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

53. *Ibid* at para 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

The Court in *Dunsmuir* also recognized a series of factors for determining the appropriate standard, saying that it reflects a contextual analysis that is:

... dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.⁵⁴

Although this formulation of the factors refers to “the tribunal”, this reference reflects only the particular tribunal context in the *Dunsmuir* decision since the standard of review analysis has been applied more broadly to prerogative⁵⁵ and delegated legislative powers.⁵⁶ It does not yet appear to have been applied to questions about the enactment process for primary legislation. Instead, the related concept of “justiciability” has been applied to limit judicial review. Sossin describes it as

A set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable.⁵⁷

themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

54. *Ibid* at para 64.

55. For e.g., *Kamel v Canada*, 2008 FC 338 at para 57 ff, 1 FCR 59 (rev'd on other grounds 2009 FCA 21); *Turp v Canada*, 2012 FC 893 at para 15, (available on CanLII).

56. See, for e.g., *Giant Grosmont Petroleum Ltd v Gulf Canada Resources Ltd* [2001] ABCA 174 at para 16, 286 AR 146; *Sunshine Village Corp v Canada (Parks)* 2004 FCA 166 at para 10, [2004] 3 FCR 600 *Canadian Council for Refugees v Canada* 2008 FCA 229 (CanLII) at para 51ff; *Canada v Canadian Wheat Board* 2009 FCA 214 at para 36, [2009] FCJ No 695; *Enbridge Gas Distribution v Ontario (Energy Board)*, 74 OR (3d) 147 at para 23, 2005 CanLII 250 (ON CA).

57. L Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Thomson Reuters Canada Ltd: Toronto, 2012) at 7 [Sossin]; see also *Kelly v Canada*, 2013 ONSC 1220 at para 148, 226 ACWS (3d) 654.

He goes on to suggest that although the determination of justiciability “cannot be reduced to purely objective assessments” and its content is “open-ended”, it nevertheless depends on context and the suitability of the subject-matter of a dispute to be judicially determined. It also appears that “the criteria used to make this determination relate to three factors: (1) the capacities and legitimacy of the judicial process; (2) the constitutional separation of powers and (3) the nature of the dispute before the court”.⁵⁸ Interestingly, these factors are not altogether different from those that form the basis for the standard of review analysis. This is hardly surprising since that analysis originated about the same time as justiciability was being developed.⁵⁹

One of the foundational Canadian cases on justiciability is *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)* where Dickson, CJC said:

... As I noted in *Operation Dismantle Inc v The Queen*, [1985] 1 S.C.R. 441, at p. 459, justiciability is a “doctrine ... founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes”, endorsing for the majority the discussion of Wilson J. beginning at p. 460. Wilson J. took the view that an issue is non-justiciable if it involves “moral and political considerations which it is not within the province of the courts to assess” (p. 465). An 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.⁶⁰

The Supreme Court also situated the notion of justiciability within the judicial review of Acts of Parliament and acknowledged how it had been qualified in Canada by the constitutional context:

The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin*, *supra*, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various Constitution

58. *Ibid.*

59. Sossin, *ibid* at 252 (also notes the connection between justiciability and the “pragmatic and functional approach” (the precursor to the standard of review analysis).

60. [1989] 2 SCR 49 at para 49, 61 DLR (4th) 604.

Acts, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.⁶¹

The reference to the *Pickin* case⁶² demonstrates the scope for applying the concept of justiciability to issues of parliamentary process. It involved a challenge to legislation based on parliamentarians being misled or acting for improper motives. The House of Lords dismissed the challenge as non-justiciable on the basis that such challenges would lead the courts into conflict with Parliament.⁶³ Lord Simon said:

It is well known that in the past there have been dangerous strains between the law courts and Parliament-dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other-Parliament, for example, by its *sub judice* rule, the courts by taking care to exclude evidence which might amount to infringement of parliamentary privilege (for a recent example, see *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405)... A further practical consideration is that if there is evidence that Parliament may have been misled into an enactment, Parliament might well-indeed, would be likely to-wish to conduct its own enquiry. It would be unthinkable that two enquiries-one parliamentary and the other forensic-should proceed concurrently, conceivably arriving at different conclusions; and a parliamentary examination of parliamentary procedures and of the actions and understandings of officers of Parliament would seem to be clearly more satisfactory than one conducted in a court of law quite apart from considerations of parliamentary privilege.⁶⁴

However, when one turns to the procedural aspects of the enactment of legislation, the application of the justiciability doctrine is not so absolute. On the one hand, the courts have repeatedly held that the common law requirements of natural justice (including fairness and legitimate expectations) do not apply to the process of enacting

61. *Ibid.*, at para 50.

62. *Pickin v British Railways Board*, [1974] UKHL 1, [1974] AC 765, [1974] 1 All ER 609.

63. *Turner v Canada* [1992] 3 FC 458 (CA), (1992) 149 NR 218 (relying on *Pickin*, *ibid.*).

64. *Ibid.*

bills,⁶⁵ (including the role of the executive in this process).⁶⁶ On the other hand, they have been prepared to enforce legislated “manner and form” requirements, giving effect to constitutional requirements for the publication of laws in both official languages⁶⁷ as well as for the amendment of the Constitution.⁶⁸ They have also differentiated the legislative process from “policy development”, holding that the latter does not enjoy the protection from review accorded the former.⁶⁹ And they have found that the origination requirement of section 53 of the *Constitution Act, 1867* expresses the “fundamental principle of no taxation without representation” and applied this principle to the interpretation of enabling legislation.⁷⁰

The courts have also been prepared to enforce requirements enacted by ordinary statute,⁷¹ although because these requirements are not constitutionally entrenched, they are more susceptible to avoidance through amendment.⁷² They are also subject to the interpretive framework of parliamentary intention, as the Supreme Court noted in the *Auditor General* case in deciding not to provide a judicial remedy to enforce statutory requirements on the Government to disclose information to the Auditor General. The touchstone for deciding the justiciability of this question was the parliamentary intention underlying the statutory requirements:

It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. If, then, the courts interpret a particular provision as

65. See e.g., *Wells*, *supra* note 50 at 222.

66. See *Reference re Canada Assistance Plan* [1991] 2 SCR 525 at 558, 1991 CanLII 74 (SCC), (but note *Wells*, *ibid*, recognizing that the Executive does not enjoy the immunity from its contractual obligations).

67. *Re Manitoba Language Rights* [1985] 1 SCR 721, 1985 CanLII 33 (SCC) [*Manitoba Language Rights*].

68. *Reference re Senate Reform*, [2014] 1 SCR 707, 2014 SCC 32.

69. See *Native Women’s Association of Canada v. Canada*, [1992] 3 FC 192 (CA), [1992] FCJ No 715; *rev’d on other grounds* [1994] 3 SCR 627. See also Sossin, *supra* note 57 at 197ff.

70. *Re Eurig Estate*, [1998] 2 SCR 565 at para 30, 165 DLR (4th) 1; *Ontario English Catholic Teachers’ Association v Ontario*, [2001] 1 SCR 470 at para 71, 196 DLR (4th) 577.

71. *Canada v Friends of the Canadian Wheat Board* 2012 FCA 183, 352 DLR (4th) 163.

72. See e.g. *Canadian Taxpayers Foundation v Ontario*, 73 OR (3d) 621, [2004] OJ No 5239; Hogg, *supra* note 33 at 12-13.

having the effect of ousting judicial remedies for entitlements 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.⁷³

One significant aspect of parliamentary intention emerges in the notion of mandatory and directory enactments. This notion recognizes that the breach of a statutory requirement relating to the performance of public functions does not always invalidate the performance of that function.⁷⁴ Invalidity will not result from a failure to follow a statutory requirement if it "would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and would not promote the main object of the Legislature..."⁷⁵ However, it should be noted that the Supreme Court of Canada rejected the characterization of constitutional provisions as directory in the *Manitoba Language Rights Reference*.⁷⁶

This interpretive orientation of parliamentary intention has most recently played a role in a case involving statutory requirements on the introduction of legislation. In *Friends of the Canadian Wheat Board*, Mainville, J. said

In my view, the democratic principle favours an interpretation of section 47.1 of the *CWB Act* that preserves to the greatest extent possible the ability of the elected members of the House of Commons, the Minister, to change that legislation as best they see fit. This is, moreover, what subsection 42(1) of the *Interpretation Act*, reproduced above, specifically requires.⁷⁷

This general description of judicial deference and justiciability suggests that the courts are generally receptive to arguments that questions of legislative process are not justiciable. This receptivity is based on their understanding of the distinctive role of legislative bodies and their ability to manage their own affairs. With this background in mind, I now turn to consider how, if at all, the three royal functions in the legislative process may be judicially reviewed.

73. *Ibid.*, at para 51.

74. *Montreal Street Railway v. Normandin* [1917] AC 170 at 174-175, 33 DLR 195 (PC) (this case has been applied repeatedly by the Supreme Court of Canada, most recently in notably in).

75. *Ibid.*

76. *Supra* note 67 at 741.

77. *Supra* note 71 at para 68.

I will also consider Hogg's assertion that "There is of course no doubt as to the binding character of the rules in the Constitution that define the composition of the legislative bodies and the steps required in the legislative process".⁷⁸ If by "binding" he means here that the courts necessarily have a role in reviewing the application of these constitutional rules, I would argue that his assertion is an overstatement. Although the courts clearly will enforce some of these rules, notably those relating to language rights,⁷⁹ there is reason to doubt this in relation to the three royal functions that this paper considers.

Royal Recommendation

The royal recommendation and section 54 of the *Constitution Act, 1867* have been considered in a handful of Canadian decisions, most of which are from the Supreme Court of Canada.

The earliest of these is *Canada v. Belleau* involving a question of liability to repay debentures to secure a loan to fund road construction.⁸⁰ The question turned on the meaning of the legislation authorizing the loan. Taschereau, J noted that the royal recommendation had been granted for the bill authorizing the loan and accordingly held that it was liable to be repaid by the Government.⁸¹ However, this decision was overturned on appeal,⁸² the Judicial Committee of the Privy Council affirming the minority decisions of Ritchie and Gwynne, JJ in the Supreme Court. Their decisions turned exclusively on the text of the authorizing legislation:

It passes my ability to comprehend and appreciate the propositions here put forward ... In other words, to give to the language of the act a meaning the exact opposite of what the language used conveys, and while the legislature says in plain unambiguous language that the loan shall be made on the credit and security of one fund and payable thereout, and that such loan shall not be payable out of or chargeable on another fund, we are asked to say that the legislature intended thereby to say that it was to be chargeable on and payable out of both funds – failing one, then out of the other.⁸³

78. *Supra* note 33 at 12-11.

79. *Manitoba Language Rights*, *supra* note 67.

80. (1881), 7 SCR 53, Carswell Nat 4.

81. *Ibid* at 131

82. (1882), LR 7 App Cases 473.

83. *Supra* note 80 at 104 per Ritchie, J.

And, although they did not address the grant of the royal recommendation for the authorizing legislation, Ritchie, J did note and reject another argument based on the provision requiring it:

From these enactments [requiring the royal recommendation] they claim to fix on the crown a liability to pay these debentures under the 16 Vic., ch 235, and so it has been strongly urged that because the government paid the first loan under the 4 Vic, and the home district bonds, ergo, they became liable to pay this loan under the 16 Vic. This, to my mind, is a pure fallacy. The legislature in its wisdom or its liberality continually grants money in aid of institutions and undertakings, public, local, or individual, but I know of no principle by which a simple grant of money to one object can be construed into a binding contract to pay other monies, because the parties seeking to set up such a contract are in a position similar to that of those who, by the grants made, benefited by the bounty of the legislature.⁸⁴

Thus in *Belleau*, we see the Court taking some notice of the royal recommendation in the context of interpreting legislation, but not giving it much significance.

The next Canadian case is *R v Irwin* where the Exchequer Court dismissed a challenge to the validity of legislation based on section 54.⁸⁵ Although the challenge was misconceived as an attack on a taxation measure rather than an appropriation,⁸⁶ Audet, J nevertheless dealt with section 54 more broadly on a basis akin to justiciability:

6 Now there is not a tittle of evidence showing whether or not such recommendation was made before the passing of the Act. But that is of no importance in disposing of this case, because it is no part of the business of the Court in construing a statute to enquire as to whether the legislature in passing it did or did not proceed according to the *lex parliamenti*.

7 It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act as a matter of fact. It is a case where the maxim *Omnia praesumuntur rite esse acta* applies with great force and rigour. It is for Parliament, to decide how they will proceed to legislate and it is only the concrete embodiment of such legislation – the statute itself – that the Court is called upon to construe.

84. *Ibid* at 106.

85. [1926] Ex CR 127 at 129.

86. See W Conklin, “Pickin and Its Applicability to Canada” (1975) 25 UTLJ 193 at 203.

Conklin has argued that this reasoning is inconsistent in so far as it first states that the court had no business examining whether the *lex parliamenti* had been followed, and then invokes an evidentiary rule that depends on a statute that “appears on its face to have been *duly passed*”.⁸⁷ However, a court must have some basis for determining whether a bill has been enacted. Audet, J’s point is simply that a court should be satisfied with a document that attests to its enactment as a statute and go no further in examining the basis for the attestation. This is essentially the enrollment doctrine that, as Katherine Swinton demonstrated some years ago, serves to protect at least some “irregularities in statutes”.⁸⁸

A little more than 50 years later in *Reference re Agricultural Products Marketing* the Supreme Court of Canada considered both sections 53 and 54.⁸⁹ Pigeon, J for the majority dismissed a challenge on the basis that these provisions were not constitutionally entrenched and could be amended “indirectly”:

Furthermore, ss. 53 and 54 are not entrenched provisions of the constitution, they are clearly within those parts which the Parliament of Canada is empowered to amend by s. 91(1). Absent a special requirement such as in s. 2 of the *Canadian Bill of Rights*, nothing prevents Parliament from indirectly amending ss. 53 and 54 by providing for the levy and appropriation of taxes in such manner as it sees fit, by delegation or otherwise.⁹⁰

This notion of indirect amendment of constitutional provisions has since been qualified by the Supreme Court in *R v Mercure* where it rejected the argument that an unentrenched constitutional requirement to enact laws in both English and French could be impliedly repealed.⁹¹ However, the decision was largely rooted in the fundamental language rights at stake in that case and it is arguable whether the same result would hold for all manner and form requirements.

The next Supreme Court case to discuss section 54 was *Reference re Canada Assistance Plan* where Sopinka, J said:

The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely

87. *Ibid* at 204.

88. K. Swinton, “Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege” (1976), 14 Osgoode HLJ 345 at 404.

89. [1978] 2 SCR 1198, 84 DLR (3d) 257.

90. *Ibid* at 1291.

91. [1988] 1 SCR 234, 48 DLR (4th) 1.

procedural requirement in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.⁹²

This comment was made in the context of the Court's rejection of arguments based on natural justice and legitimate expectations. It firmly shuts the door on these arguments and more broadly affirms the proposition in the *Irwin* case that the courts should not "meddle" with section 54. It leaves open the possibility of review only on the basis of the *Charter*.

The most recent Supreme Court decision to comment on section 54 is *Ontario English Catholic Teachers' Association v. Ontario*.⁹³ Although Iacobucci, J acknowledged that this section was not pertinent to the case, he nevertheless agreed with the Court's earlier decision in the *Agricultural Products Marketing Reference* that it (as well as section 53) was an "unentrenched" provision of the Constitution, capable of being amended by Parliament and each Legislature with respect to its application to them.⁹⁴ With the recent Supreme Court decisions on the application of the constitutional amending formulae in Part V of the *Constitution Act, 1982*, this view warrants re-examination.⁹⁵

Baker has suggested that the unanimity amending formula in section 41 of the *Constitution Act, 1982* would apply to changes to section 54 because they would affect the "office of the Governor General".⁹⁶ However, in the *Reference re Senate Reform*, the Supreme

92. [1991] 2 SCR 525 at 559, 83 DLR (4th) 297.

93. *Supra* note 70.

94. *Ibid* at 518 (he also noted that British Columbia had in fact amended its constitution to remove the origination requirement (s. 53) with the enactment of the *Constitution Act*, R.S.B.C. 1979, c. 62, but he did not comment on the suggestion that section 54 could be indirectly amended); D Baker, "The Real Protection of the People: The Royal Recommendation and Responsible Government" (2010) 4 *Journal of Parliamentary and Political Law* 197 at 211 (argues that Iacobucci, J also disavowed a judicial role in the enforcement of section 54, noting his citation of Joan Small's comment that "Section 54 is directed to the House of Commons alone". However, this comment simply reflects the text of section 54; neither she nor Iacobucci, J argued that it has any relevance to judicial review).

95. *Reference re Supreme Court Act, ss. 5 and 6* 2014 SCC 21 and *Reference re Senate Reform* 2014 SCC 32.

96. Baker, *supra* note 94 at 210.

Court commented as follows on the scope of the unilateral amending formula of section 44:

When discussing the scope of the unilateral federal procedure in the federal government's 1980 proposal for an amending formula, the then-Minister of Justice Jean Chrétien made statements to the effect that it would allow Parliament to make constitutional amendments for the Senate's continued maintenance and proper functioning, such as for example a modification of the Senate's quorum requirement at s. 35 of the *Constitution Act, 1867: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No 53 (February 4 1981) at 50. He made clear, however, that significant Senate reform which engages the interests of the provinces could only be achieved with their consent: *ibid*, at 67-68.

In our view, this understanding of the unilateral federal procedure applies to Part V. The Senate is a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design — i.e. the federal government and the provinces — and cannot be achieved by Parliament acting alone.⁹⁷

Transposing these comments to the royal recommendation, it is difficult to see how even the repeal of section 54 could be said to “affect [the Governor General's] fundamental nature and role and engage the interests of stakeholders in our constitutional design — i.e., the federal government and the provinces”. The royal recommendation involves one aspect of the relationship between the executive and the House of Commons in managing public spending at the federal level alone, having little if anything to do with the provinces.

The case law discussed above suggests that the courts are unlikely to take much notice of the royal recommendation, either as an interpretive matter or as a basis for challenging the validity of legislation. This is a sensible result. The basic question here is whether the House of Commons and the provincial legislative assemblies should have complete control over this matter, as they generally have over their proceedings.

As I have argued before,⁹⁸ section 54 should not be a basis for judicial review. The factors indicating non-justiciability are all here.

97. *Ibid* at paras 76-77.

98. *Supra* note 23 at 31.

The courts have no particular competence to determine what should be considered an appropriation for the purposes of the requirement; this is a matter for determination exclusively by the speaker according to the practices they have themselves developed.

In terms of the separation of powers and the nature of the question, the royal recommendation is directed to the relationship between the House of Commons and the executive; it does not confer rights or benefits on anyone else. Its unentrenched status in the Constitution underscores this. It protects the right of the Crown to initiate spending legislation, and alerts members of Parliament to the spending implications of bills. Although based on fundamental constitutional principles about the role of the Crown, the royal recommendation originated as a standing order of the UK House of Commons and, as such, is a matter of internal House procedure. Its inclusion in Canada's constitution reflects the preoccupations of a colonial period and, like those underlying the provisions for the disallowance and reservation of bills.⁹⁹ These provisions are now generally considered to be defunct with Canada's accession to full nationhood.¹⁰⁰

The executive and the House of Commons are quite capable of sorting out their relationship on spending matters without the intervention of the courts. The continuing speaker's rulings on the royal recommendation through periods of minority government demonstrate that there is little prospect of any weakening of the rights of the Crown in this regard, as Baker has suggested.¹⁰¹ As with the information disclosure requirements in the *Auditor General* case, the courts should leave the application of the royal recommendation to Parliament alone.

There is no need to resort to arguments about indirect amendment to deflect challenges based on section 54. Arguments about royal assent "curing" the absence of a recommendation are equally unnecessary, if not misconceived.¹⁰² The principles of non-justiciability are enough.

And if there is any doubt that the royal recommendation is non-justiciable, consideration should also be given to re-evaluating the wholesale rejection of the mandatory / directory distinction in rela-

99. *Constitution Act, 1867*, ss 56, 57.

100. See Hogg, *supra* note 33 at 3-2.

101. *Supra* note 70 at 211.

102. See Baker, *ibid* at 209.

tion to constitutional provisions. While it is clear that provisions that protect fundamental rights should never be characterized as directory, the argument is much less compelling for matters of internal parliamentary procedure such as the royal recommendation, quorum, voting and the election of a speaker.¹⁰³

Royal Consent

I have found no cases dealing with the royal consent.¹⁰⁴ This is hardly surprising given its obscurity and its absence from the *Constitution Act, 1867*. However, it is also difficult to see how questions about it could be considered justiciable for much the same reasons expressed above about the royal recommendation. If anything, the arguments against justiciability are even more compelling since the royal consent is still a prerogative matter, not overtaken in any way by legislative enactment.¹⁰⁵

Royal Assent

Canadian courts have on at least one occasion considered whether royal assent had been effectively given to a bill. In *Gallant v The King*, a bill of the Prince Edward Island Legislative Assembly was presented to the Lieutenant Governor for assent, which he then withheld.¹⁰⁶ Over six months later, after the Lieutenant Governor had been replaced and the session prorogued, the new Lieutenant Governor purported to assent to the bill. The Supreme Court of Prince Edward Island held that royal assent had not been effectively given to the bill and that, accordingly, it had never become law. The decision first noted that sections 56 and 57 of the *Constitution Act, 1867*, (dealing with royal assent) did not indicate what was to happen when assent was withheld. In the absence of any express direction, the Court reasoned that assent could not be given unless the bill were re-presented to the Lieutenant Governor for assent.¹⁰⁷ The Court did not comment on the fact that prorogation puts an end to all the business of a session and would, accordingly, have constituted an even more convincing reason for the decision.

103. See *Constitution Act, 1867*, ss 35, 36, 44, 45, 48, 49.

104. Searches on CanLii and QuickLaw have yielded none.

105. See Charles Robert's contribution to this volume, p. 95-131.

106. [1948] PEIJ No. 1, [1949] 2 DLR 425 (PEISC).

107. *Ibid*, at para.17.

The *Gallant* case represents a remarkable judicial intervention in the legislative process, suggesting that the courts can scrutinize the validity of a royal assent that has been given. But, while there is no doubt that, as noted above, the courts must have a role in satisfying themselves that this ultimate step in the legislative process has been taken, their role should be limited, as the *Irwin* decision holds¹⁰⁸, to examining the parliamentary record.

Gallant was discussed by the Supreme Court of Canada in relation to constitutional conventions in the *Re Resolution to Amend the Constitution*. After stating that there was legal, but not conventional, discretion to refuse assent, the Court said:

This is what happened in *Gallant v The King*, a case in keeping with the classic case of *Stockdale v. Hansard* where the English Court of Queen's Bench held that only the Queen and both Houses of Parliament could make or unmake laws. The Lieutenant Governor who had withheld assent in *Gallant* apparently did so towards the end of his term of office. Had it been otherwise, it is not inconceivable that his withholding of assent might have produced a political crisis leading to his removal from office which shows that if the remedy for a breach of a convention does not lie with the courts, still the breach is not necessarily without a remedy. The remedy lies with some other institutions of government; furthermore it is not a formal remedy and it may be administered with less certainty or regularity than it would be by a court.¹⁰⁹

Although this passage at first appears to cite *Gallant* with approval, it in fact turns it on its head. Rather than affirming the jurisdiction of courts to inquire into whether royal assent has been validly given, it says that they will not intervene when it is withheld because the remedy lies elsewhere. But if that is true for withholding assent, why is it not equally true for giving assent? Why is it not enough to take an attestation of assent on the parliamentary record at face value and leave it to Parliament to resolve any problems with the way it was given?

One further potential obstacle to judicial review of royal assent, at least in relation to the Federal Parliament, is the role that judges of the Supreme Court of Canada play as delegates of the Governor General. They are regularly called on to give royal assent in the absence of the Governor General. How then could they, or indeed any judge whose decision could be appealed to the Supreme Court, sit in judgment on legality of a royal assent in which they had been involved?

108. *Supra* note 85.

109. *Resolution to Amend the Constitution*, *supra* note 35 at 881-2.

Before leaving royal assent, it may be useful to note the related function of bringing statutes into force. Many statutes are enacted with commencement provisions that say their provisions come into force on a day or days to be fixed by proclamation or order in council.¹¹⁰ Although these days are generally fixed within a year or two of royal assent, there are instances of several years, if not decades, elapsing without a commencement day being set.¹¹¹ As a consequence, legislation such as the *Statutes Repeal Act*¹¹² has now been enacted in several jurisdictions to deal with statutes that have not been brought into force within a certain period of time.¹¹³

The courts have declined to order governments to bring statutes into force. The most notable case in the UK is *R v Secretary of State for the Home Department ex p. Fire Brigades Union* involving criminal injuries compensation legislation that had not been brought into force. Although a majority of the House of Lords concluded the Government had a “clear duty to keep under consideration from time to time the question whether or not to bring the section ...into force”, it declined to make an order requiring the Secretary of State to do so. Lord Browne-Wilkinson said

In my judgment it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment the court should hesitate long before holding that such a provision as section 171(1) imposes a legally enforceable statutory duty on the Secretary of State.¹¹⁴

He also went on to decide that, even though the statute was not in force, it nevertheless limited the Government’s prerogative powers relating to the same subject matter.¹¹⁵

110. See, e.g. *Canada Customs and Revenue Agency Act*, SC 1999, c 17, s 188 (this Act or any of its provisions comes into force on a day or days to be fixed by order of the Governor in Council).

111. See A Samuels, “Is it in Force? Must it be Brought into Force?” (1996) 17 Stat L Rev at 62-65.

112. SC 2008, c 20.

113. See also *Legislation Act 2006*, SO 2006, c 21, Sched F, s 10.1; *Interpretation Act*, RSNS 1989, c 235, s 22A (enacted by SNS 2001, c 5, s 5, but not in force).

114. [1995] UKHL 3 at para 22, [1995] 2 AC 513.

115. *Ibid* at paras. 31 and 33.

The same wariness of treading into the legislative process is also evident in Canadian cases where courts have declined to order governments to bring statutes into force on the basis of the *Canadian Charter of Rights and Freedoms*.¹¹⁶ In the most recent of these cases, *Beauchamp v Canada*, Barnes, J dismissed the application on the basis of a failure to exhaust alternative rights of recourse.¹¹⁷ However, the following comments on the justiciability of the claim leave little doubt as to his reluctance to review decisions about when to bring legislation into force:

Once such a delegation of authority has been made by Parliament, the decision to proclaim is dependant upon the pleasure of the GIC unless and until Parliament reclaims to itself that authority. What the Applicants' are therefore seeking from the Court is an order which would defeat the intent of Parliament not advance it. That this would be an inappropriate intrusion into the legislative realm is well reflected in the following passage from the decision of Justice Bora Laskin in *Reference re Criminal Law Amendment Act (Canada)*, 1968-69, [1970] S.C.R. 777, 10 D.L.R. (3d) 699 at para. 82:

82 It is beside the point that the result of the proclamation in this case may not be congenial to this Court. We miss a step in the legislative process if we purport to read the consequences of the proclamation back into the severable power to promulgate the legislation. To look at the proclaimed legislation in the light of a supposed parliamentary intention, gleaned from looking at the legislation as if it had been made effective without the conditional terms of s. 120, is to truncate that section and plunge into an abyss of speculation. Moreover, it is to make an assumption that there was a limited trust reposed by Parliament in the executive, and, further, that it lay with the Courts to enforce that trust. If there has been a failure to live up to Parliament's expectations on the manner in which the proclamation power should be exercised, the remedy does not lie with the judges.¹¹⁸

These arguments are now even stronger with the enactment of legislation like the *Statutes Repeal Act* that demonstrates Parliament's ability to deal itself with legislation that has been enacted but not brought into force.

116. See *R v Cornell* [1988] 1 SCR 461; *R. v Paquette* [1988] 2 WWR 44 (AltaCA); *R v Bussière* [1990] 2 WWR 577 (SaskCA); *R v Van Vliet* (1988), 38 CRR 133 (BCCA); *R v Alton* (1989), 36 OAC 252 (CA); *R v Langille* [1992] NSJ No 500 (CA); *R v Lunn* 1997 PEIJ No 45 (CA) (leave to appeal to SCC dismissed November 7, 1997).

117. [2009] FCJ No 437.

118. *Ibid* at para 18.

CONCLUSION

It is supposedly trite law that courts should review governmental functions to ensure conformity with the law. But if the development of judicial review in the past 30 years has demonstrated anything, it is that the courts do not resolve all questions involving law. The Supreme Court of Canada has devoted considerable energy to providing guidance on when the courts should defer to other government actors. And while it is clear that some aspects of parliamentary procedure merit considerable judicial scrutiny when they engage individual rights, not all of them do. Procedural requirements relating to the internal functioning of parliamentary institutions are quite different from those such as language requirements that are integral to public participation in parliamentary proceedings and the application of legislation. The concept of justiciability, like the related standard of review analysis, responds to these differences and arguably removes from judicial scrutiny questions related to the three “royal” functions considered in this paper. This is not to say that there is no accountability for these functions; rather, the accountability lies with parliamentary institutions rather than the courts.