Brian Dickson: A Judge's Journey

by Robert J. Sharpe and Kent Roach
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THIS ATTRACTIVE BOOK IS PUBLISHED by the Osgoode Society for Canadian Legal History which has contributed so much to the preservation of our legal heritage. Written by two distinguished scholars, Robert J. Sharpe, now a member of the Ontario Court of Appeal, and Kent Roach, Professor of Law at the University of Toronto, it provides a unique insight into decision-making in the Supreme Court of Canada.

Brian Dickson was appointed to the Supreme Court in 1973 directly from the Manitoba Court of Appeal. In 1984, on the death of Bora Laskin, he was appointed Chief Justice and served until he retired in 1990. He spent some 27 years, the greater part of his professional life, as a judge. As a young lawyer practicing before the Court, I met the Chief Justice on many occasions and after his retirement I worked with him on implementation of the Canadian Bar Association's report on the civil justice system.

While Dickson was a strong and principled leader of the Court, and introduced a number of administrative reforms, it is his Supreme Court opinions, renowned for their clarity and simplicity of expression, including those important decisions which lay down the rules for the interpretation of our individual rights and freedoms, which are his lasting legacy.

Robert Sharpe worked as Executive Legal Officer at the Supreme Court from January 1988 until June 1990 and knew Dickson intimately. In addition, he and Kent Roach interviewed most of Dickson's colleagues and his law clerks and had unlimited access to Dickson's case files.

Brian Dickson: A Judge's Journey[1] covers the whole course of Dickson's life: the early years, his war service, life as a commercial lawyer at Aikins MacAulay in Winnipeg, service on the bench in Manitoba, and his career on the Supreme Court. However, the authors do not attempt to delve too deeply into the personal side. Thus, while the events of his early life in Manitoba are carefully recorded, there is not much in the way of critical analysis or anecdote. The authors' focus is on Dickson's years in the Supreme Court and his contributions to Canadian jurisprudence.

In an interview with Winnipeg lawyer Rees Brock, shortly after his appointment to Ottawa, Dickson was asked to describe what makes a good lawyer. In his response, he defined himself:

1. Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003).

> Apart from the obvious qualities of integrity, loyalty to his client and readiness to bear a substantial burden of work, it seems to me that the lawyers who have attained positions of eminence have, by and large, been those with, firstly, disciplined minds, shrewd, sensitive and imaginative; and, secondly, a marked facility of expression, both oral and written.[2]

Dickson was all of this and more. He was a man of strong values with a deep commitment to individual liberties, meticulous in oral and written expression, formal but courteous, respectful of the call of duty and public service and, to top it off, passionately interested in new ideas. This combination of qualities made him a natural leader during the 1980's when the Court faced its greatest challenge.

Dickson was appointed to the Court in 1973 long before the judges became preoccupied with the heavy burden of constitutional adjudication. At that time, any civil case over $10,000 could be appealed "as of right" and constitutional cases were limited to disputes over the division of powers. The patriation of the Constitution and the enactment of the *Charter*[3] were to come.

Things changed dramatically in 1975 when the *Supreme Court Act*[4] was amended to eliminate civil "as of right" appeals. Thereafter, litigants had to apply for leave to appeal and demonstrate that a case was of public importance. In a 1985 speech, Dickson highlighted the significance of this change:

> The importance of the 1975 amendments cannot be overestimated. The Court was freed of its responsibility as a court of error, that function being left to the various courts of appeal, and was able to get on with the task of supervising the growth and development of Canadian jurisprudence.[5]

After Dickson became Chief Justice, the Court began to reform its procedures to deal more efficiently with a heavy caseload. Oral arguments on leave to appeal applications were virtually eliminated and limits were imposed on oral argument at appeal hearings.[6] Oral argument thus became a forum for vigorous debate over issues and policies, rather than a recitation by counsel of the facts and authorities. Dickson and Bertha Wilson were

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2. Interview of Brian Dickson by Y R. Rees Brock (15-16 November 1973) in DeLloyd J. Guth, ed., *Brian Dickson at the Supreme Court of Canada 1973–1990* (Winnipeg: University of Manitoba, 1998) at 78.
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
4. R.S.C. 1985, c. S-26.
5. Address at a conference on the Supreme Court of Canada, October 4, 1985, in Gerald-A. Beaudoin, ed., *The Supreme Court of Canada: Proceedings of the October 1985 Conference* (Cowansville, Que: Les Editions Yvon Blais Inc., 1986) at 379. See also his opinion in R. v. Gardiner, [1982] 2 S.C.R. 368 at 398, 140 D.L.R. (3d) 612.
6. Sharpe and Roach, *supra* note 1 at 294–296. Today, the appellant and respondent have only one hour each to present oral argument, even in the most complex cases.

active in encouraging young counsel to provide the Court with policy arguments and the latest in comparative research.[7]

The uniqueness of this book is the authors' use of Dickson's personal case files which are on deposit in the National Archives. The files contain conference notes, draft reasons for judgment, memoranda from law clerks and notes to and from colleagues on particular issues. It was Dickson's invariable practice after each judicial conference to dictate a memorandum which recorded the discussion. As the authors explain, these case files are part of the historical record and there are now no compelling reasons for confidentiality: "Simply put, the events we describe have passed from the realm of current events to the realm of history. The need to protect them from public scrutiny has waned and the interest of compiling an accurate historical record prevails."[8] Thus, the reader learns a good deal about the internal deliberations after the appeal hearing when the judges are striving to reach a decision.

The Court, in a recent opinion, described its internal decision-making process as follows:

> The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons, and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.[9]

Regrettably, one important file was not found, apparently withheld by Dickson from the material sent to the Archives. This is the case file on the 1981 *Patriation Reference* where the Court, like the country, was deeply divid-

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7. See Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227 at 242. Some academics, encouraged by the new openness, sent articles or case comments in draft directly to judges or to law clerks. However, this crossed the line and any communications about pending cases were rejected by the Court. See Sharpe and Roach, *supra* note 1 at 214–215.
8. Sharpe and Roach, *supra* note 1 at xiii. The single, and self-imposed, restraint is that the out-of-court deliberations of judges who were still sitting on the bench at the date of publication have not been referred to, a caveat which apparently only applies to Chief Justice McLachlin.
9. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 231 D.L.R. (4th) 1 at para. 92. This was a motion to set aside the Court's judgment on the ground of reasonable apprehension of bias on the part of Binnie J. The earlier reasons for judgment are reported at *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1.

ed. Eventually, the Court issued two opinions, one which affirmed the legal right of the federal government to repatriate the Constitution without provincial approval and the other, signed by a differently constituted majority, which held that there was also a binding political convention that such a change required a significant degree of provincial support.[10] This judicial tour de force brought the governments back to the table. Dickson voted with both majorities and his description of the internal debates would have been of great interest.

Some years later, at a conference honouring the late Chief Justice Laskin, an angry Pierre Trudeau publicly criticized the Court for interfering with the political process. In holding there was a binding convention, Trudeau said that the Court had played a purely political role and had "blatantly manipulated the evidence before them so as to arrive at the desired result."[11] Brian Dickson, then retired, was in the audience but said nothing. In subsequent years, Dickson made it clear that the Court's opinion presented a solution that had salvaged, rather than sabotaged, Trudeau's constitutional project.[12]

Dickson's preoccupation was to draft legal principles or rules simply and clearly. It can be said that he was the architect of the modern legal judgment. His organization of an opinion into sections—the introduction, the facts, statutory provisions, judgment at trial, judgment in the court of appeal, analysis and conclusion—has become the standard template for Supreme Court judgments.[13]

Dickson's clerks helped in the task. They prepared a bench memorandum for each case and were instructed to go beyond the arguments cited by counsel and review academic writings and decisions from other countries. However, the law clerk's role was always to help with research and serve as a sounding board, not to write the reasons.[14]

Although Dickson made major contributions to the criminal law, family law and other areas of law, the authors devote most of their attention to his constitutional judgments from 1983 to 1990. The whole of Part V (over 200 pages) is devoted to this period. Each of the important cases is described and Dickson's contribution carefully documented.

Hunter v. Southam,[15] a search and seizure case argued in November 1983, was the first of his important *Charter* cases. Chief Justice Laskin sat on

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10. *Reference re the Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1.
11. Sharpe and Roach, *supra* note 1 at 279.
12. *Ibid.* at 277–281.
13. See *ibid.*, Chapter 10, "Write and Re-Write" at 202. An analysis of Dickson's judgment writing style can be found in a paper by Katherine Swinton, "Dickson's Style and Sources" in Guth, *supra* note 2 at 185.
14. *Ibid.* at 206–213. Dickson's instructions to his law clerks are reproduced in Guth, *supra* note 2 at xxviii.
15. [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

the appeal but he was in failing health and died before judgment was handed down. Because of its importance as a precedent, the judges convened a number of conferences, with Dickson and Lamer taking the lead. In an internal memorandum Dickson told his colleagues that "this is the first clear-cut *Charter* case before this Court, and therefore it is desirable, I think, to lay sufficient ground work for an orderly and logical development of the jurisprudence under section 8 and under the *Charter* in general".[16] *Hunter v. Southam* declared that *Charter* rights as the basic law of Canada, should always receive a large and liberal interpretation. The purpose of the search and seizure clause was to guarantee the right of individuals to a reasonable expectation of privacy. In order to make this effective, there had to be a system of pre-search approval or authorization by a judge. Dickson's reasons are not merely an exercise in legal analysis but an inspiring call to Canadian judges to apply the *Charter* in a purposive manner so that its human rights guarantees will be recognized and fulfilled.

Other important cases followed, including *Operation Dismantle*[17] where section 7, the fundamental justice clause, was applied to Cabinet decisions. This case brought home to the public, and to the government, the fact that not even Cabinet decisions were beyond the reach of the basic law. The debates between Dickson and Wilson, who had been assigned the task of writing for the majority, could not be reconciled and eventually Dickson took over and wrote an opinion which had the support of the majority.

Another leading case was *Oakes*,[18] a drug prosecution case. There the Court decided that the *Narcotic Control Act*[19] infringed the presumption of innocence guaranteed by section 11(d) of the *Charter* when it provided that the onus of proof was on the accused. The appeal ultimately turned on whether this "reverse onus" provision could be justified under section 1 which provides that *Charter* rights are "subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society". In *Oakes*, Dickson wrote the guidelines to be followed by lower courts in determining reasonable limits under section 1. The guidelines emphasize the value of proportionality, minimal impairment of rights and overall balance, important tests which had to be applied before the government could justify a *Charter* infringement. Dickson was helped by his law clerks, Colleen Sheppard and Joel Bakan, and his Executive Legal Officer, James MacPherson. Bakan had studied European human rights jurisprudence and Sheppard provided the American perspective.

The *Oakes* guidelines on proportionality and minimal impairment placed a heavy burden on government to rely on section 1 and some mem-

16. Sharpe and Roach, *supra* note 1 at 313.
17. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.
18. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.
19. R.S., 1985, c. N-1 as rep. by 1996, c. 19, s. 94.

bers of the Court felt that the *Oakes* tests were too strict. Justice La Forest, for example, argued that a more flexible standard was needed, a debate that continues to this day. Although in subsequent judgments the Court introduced a degree of flexibility, the *Oakes* guidelines remain the accepted framework for a section 1 analysis.

The Sunday shopping appeals, *Big M Drug Mart*[20] and *Edwards Books*,[21] presented a fact situation which affected all Canadians and the Court found itself attempting to balance the right to freedom of religion with the need to have a commonly accepted day of rest which by definition could never accommodate all competing religious interests. In *Edwards Books*, Dickson acknowledged that the *Oakes* tests had to be applied in a pragmatic way, and should not be used to set aside a reasonable legislative solution.

In the "Labour Trilogy", three appeals in which labour argued that the right to strike was constitutionally protected, Dickson took the position that the right to strike was protected under the *Charter* but he was unable to get the support of the other judges. The authors explain how Dickson's philosophy towards this issue had changed over the years.

> The Labour Trilogy was the first significant Charter battle that Dickson lost. The judgments were a bitter disappointment to the unions and fulfilled the worst fears of left-leaning Charter critics. It seemed that the courts were prepared to strike down laws that interfered with corporate interests but held back when legislation affected vital trade-union concerns. The Labour Trilogy proved, if proof were still required, that Charter judging was complex, controversial, and value-laden. The terms of the debate were defined by the constitution, but the results were very much in the hands of the judges. Dickson's powerful dissents represent a remarkable change from his judgment in *Harrison v. Carswell* where he refused the plea of Laskin and striking workers to change the law. More than a decade on, the Court and the enactment of the Charter of Rights had transformed Dickson's attitude.[22]

RWDSU v. Dolphin Delivery Ltd.[23] was another difficult case. Here the trial judge had held that picketing was a common law tort and issued an injunction. The union appealed arguing that the injunction violated the rights of organized labour to freedom of expression under section 2(b). The Court reached a preliminary decision on whether or not the *Charter* applied to non-government entities, such as unions and employers, should be argued before the Court. This issue, which on its face seems quite straightforward and which had been finessed in the lower courts, had vast implications. Was the *Charter* to apply in the private sector and to a ruling based on judge-made common law? The decision took two years and there were many internal

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20. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.
21. *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1.
22. Sharpe and Roach, *supra* note 1 at 364. The Labour Trilogy included *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; *PSAC v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277.
23. [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

arguments. Eventually McIntyre drafted a Solomon-like opinion that while the *Charter* only applied to governments and not to the private sector, nevertheless the judiciary was required to apply the common law in a manner consistent with fundamental *Charter* values. The authors describe this as the "'Charter values' compromise", which originated with an idea suggested by La Forest and Dickson. This was "another halfway house that, for better or worse, effectively bridged the gap between the extremes of constitutionalizing all human relationships, on the one hand, and ignoring the *Charter* when developing the private law, on the other".[24]

Throughout his career, Dickson displayed a great interest in aboriginal rights and he wrote judgments in almost every aboriginal rights case during his 17 years on the Court. His opinions in cases such as *Guerin*,[25] *Simon*[26] and *Sparrow*[27] are recognized as leading authorities in the development of aboriginal law. After his retirement he agreed to assist Prime Minister Mulroney in preparing the terms of reference and in recommending the composition of the Royal Commission on Aboriginal Peoples.

In *Guerin*, a case where federal bureaucrats had negotiated an improvident lease of reserve lands, he held that the Crown had a fiduciary duty towards the Indians that was unique, or *sui generis*, and this mandated a different result than would be produced by agency or property law. In *Simon* Dickson upheld the validity of the 1752 Treaty of Peace and Friendship between the British Crown and the Mi'kmaq and laid down the rule that treaties should "be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices".[28]

In *Sparrow*, a fishing rights case, the case files "reveal Dickson mediating between the strongest poles of his Court—the restrained deference of La Forest and the principled activism of Wilson".[29] Dickson leaned towards Wilson's more robust approach to defining rights, but he was not unsympathetic with the La Forest position. In the end, he bridged the gap and, with the help of both La Forest and Wilson, drafted a judgment for a unanimous court.[30] *Sparrow* declares that section 35 of the Constitution was "the culmination of a long and difficult struggle in both the political forum and the courts for constitutional recognition of aboriginal rights" and must be interpreted to recognize aboriginal rights.[31] However, *Sparrow* also held that the exercise of

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24. Sharpe and Roach, *supra* note 1 at 370.
25. *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321.
26. *Simon v. The Queen*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 [*Simon*].
27. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*].
28. *Simon*, *supra* note 26 at para. 29.
29. Sharpe and Roach, *supra* note 1 at 450.
30. The judgment attributes both Dickson and La Forest as joint authors of the opinion, but Sharpe and Roach conclude, based on the case file, that it is mainly Dickson's work. See Sharpe and Roach, *supra* note 1 at 450–451.
31. *Sparrow*, *supra* note 27 at para. 53.

such rights could be curtailed or infringed by government provided that such infringement could meet a test of justification. Thus, in another balancing act, Dickson held that aboriginal rights were not absolute but were subject to certain limitations imposed by government in the public interest.

In their account of these major cases, the authors have clearly documented how Dickson influenced the eventual outcome. In most cases, he was able to bring the Court together to achieve consensus without sacrificing principle. His qualities of leadership and his passion for clarity did much to keep the Court focussed and on track. Thanks to Dickson's meticulous record keeping and the authors' careful analysis, we have an insider's view of decision-making in our highest court. We come away, I think, with a greater respect for the institution and for the heavy responsibility borne by the judges.

At the end of June 1990, shortly before *Sparrow* was released, Dickson retired. In his final years, he worked on many other important projects including inquiries into the military reserve and the military justice system. He even became involved in the public debate over national unity. When he died of a heart attack in 1998 at the age of 82, he was about to leave on a trip across Canada to conduct yet another inquiry into military justice.

Dickson made a deep impression on a generation of law clerks, lawyers and judges. Sharpe and Roach sum it up well: "[b]y the time he retired, he was revered in the legal community as a judge of exceptional ability. He wrote in a refreshingly lucid style, and he crafted strong and enduring precedents in Canadian law notable for their compassion".[32] Brian Dickson would have been happy and flattered by that measured assessment.

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32. *Ibid.* at 5.