Brian Dickson, the Supreme Court of Canada, and the *Charter of Rights*:

A Biographical Sketch

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This paper, originally presented at the University of Windsor Faculty of Law as the Access to Justice Lecture – 2002-3, and published in (2002), 21 Windsor Y.B. Access Just., is drawn from *Brian Dickson: A Judge's Journey* (Osgoode Society and University of Toronto Press) by Robert Sharpe and Kent Roach. I have also drawn freely on Robert J. Sharpe, "The Constitutional Legacy of Brian Dickson" (2000), 38 Osgoode Hall L. J. 189. See also Robert J. Sharpe, "Brian Dickson: Portrait of a Judge" (1998), 17 (3) Advocates' Society Journal 3. Many of the references are to the Dickson papers in the National Archives of Canada, MG 31, E 85, referred to here as "NAC". The interviews referred to were conducted by Robert Sharpe and Kent Roach.

Abstract

Brian Dickson grew up in Saskatchewan during the Great Depression, was severely wounded in World War II, and had a highly successful corporate law career in Winnipeg. His appointment to the bench in 1963 shocked his partners, but he quickly established a solid reputation as a judge and ten years later, he was appointed to the Supreme Court of Canada. Brian Dickson played a leading role in the transformation of Canadian law from the formalism of the 1960's and 1970's to the *Charter* era of the 1980s and 1990s. As a Supreme Court judge, Dickson was strongly influenced by his earlier experiences as a soldier, a corporate lawyer and a trial judge. Dickson was attracted to "half-way house" solutions to legal problems that balanced or reconciled apparently competing rules of principles. Drawing extensively on Dickson's extra-judicial writing and speeches, this paper examines Dickson's reconciliation of the Supreme Court's constitutional role under the *Charter* with Canada's democratic tradition.

I. INTRODUCTION

Brian Dickson's judicial career spanned a period of twenty-seven years, from his appointment as a trial judge in Manitoba in 1963 to his retirement as Chief Justice of Canada in 1990. Dickson spent seventeen years as a member of the Supreme Court of Canada, six as the nation's Chief Justice, and emerged as one of the most important judicial figures in Canadian history. The Dickson era was a period of intense change in Canadian society and even more dramatic change in the Canadian legal system. The Supreme Court of Canada emerged from relative obscurity to become a powerful national institution with the final say on some of the most controversial issues of the day.

The role assumed by the Supreme Court under the *Charter of Rights and Freedoms* is without doubt the most important feature of this remarkable transformation. Brian Dickson's judgments on the *Charter or Rights of Rights and Freedoms* are perhaps his best-know judicial legacy.

The details of these judgments are well known, and I do not intend to review them here. Rather, my purpose is to provide a biographical sketch of Brian Dickson and to reflect upon some of the personal characteristics and experiences that influenced him as a judge. Then, drawing extensively on Dickson's extra-judicial writing and speeches, I will consider his conception of the Supreme Court's constitutional role under the *Charter* in relation to Canada's legal and democratic tradition.

II. A BIOGRAPHICAL SKETCH

Brian Dickson, the child of Irish immigrants, grew up in small town Saskatchewan. Dickson's father was a bank manager and mother was a university-educated woman who taught her son the importance of reading and education. The Dicksons lived in relative prosperity during the dark days of the depression and drought in the 1930s. Thanks to the security of Thomas Dickson's position with the bank, the family escaped the destitution that surrounded them. However, it was not an easy time to be a bank manager. Once prosperous farmers could not keep up the loan payments that Thomas Dickson was expected to collect and were driven from their farms. Thomas Dickson had to face many heartbreaking situations. On occasion, he took young Brian along with him to make his discouraging calls. Years later Dickson recalled seeing "nothing but tumble weed and sand blowing and abandoned houses and fences down. Women were committing suicide, Incomes were rock bottom".[1] These visits to wasted prairie farms had a lasting impact on Canada's future Chief Justice. He never forgot the humiliation and despair of the hard working farmers who had lost everything through no fault of their own. Dickson grew up in a climate of grave economic uncertainty and was keenly aware that his future prospects could be very limited.

By the time Brian Dickson was ready for University, the family had moved to Winnipeg. After a rocky start in arts where he demonstrated more interest in his fraternity than his grades, Dickson switched to law. By the end of his four years going to law school in the morning and working at a law office in the afternoons, Dickson graduated at the top of his class in law school in 1938. Economic times, however, were still tough and Canada's future chief justice could not

find a legal job. Dickson worked as a clerk for an insurance company until World War II broke out when he enlisted in the Royal Canadian Artillery.

Dickson spent the first few years of the War in England and was then sent home for officer training. He spent several months at Royal Military College in Kingston where he received what he later described as his best education. He also returned to Winnipeg during this time to marry Barbara Sellers, the daughter of wealthy and prominent Winnipeg businessman. After a short stint in Prince George, British Columbia, Dickson volunteered for overseas service and in the spring of 1944, joined the Allied assault in Normandy. Dickson arrived in France shortly after D-Day. He narrowly escaped death when he was severely wounded near Falaise. He lost his leg and returned to Canada after the war had ended and after a lengthy convalescence in England.

In 1945, seven years after he his law school graduation, Brian Dickson finally started his legal career with Aikens, MacAulay, a leading Winnipeg firm. He was bright, exceptionally hard working and he enjoyed the blue chip connections provided by his father-in-law, a prominent Winnipeg entrepreneur. Dickson's success as a corporate lawyer was matched with active service to the community. In 1950, as President of the Red Cross, he took a leading role coordinating with military precision the relief of victims of the Winnipeg Flood. By the mid-1950s, Brian Dickson had established his reputation as one of the city's leading commercial lawyers and as one of the pillars of the Winnipeg community. Dickson held senior positions in the Law Society of Manitoba and the Canadian Bar Association. He served on many volunteer boards of community organizations and was the Chancellor to the Bishop of the Anglican Church. He served on many corporate boards, including that of the Imperial Bank, later the

Canadian Imperial Bank of Commerce. The Dicksons raised a family of four children and enjoyed a very prosperous life that included a farm outside Winnipeg where he could engage in his passion for horseback riding, a summer home in Minaki and a winter home in Mexico.

In 1963, at the age of 47, Brian Dickson abruptly changed his direction. Seemingly out of the blue, and to the bewilderment of his law partners, he accepted an appointment as a trial judge on the Manitoba Court of Queen's Bench. Dickson, who had rarely seen the inside of a courtroom, now had to deal with murders, rapes, divorces, personal injury actions, disputed estates and a myriad of other disputes that bore little resemblance to the problems he had confronted as a corporate lawyer. Dickson relished the change and loved his new job. As he traveled from town to town on circuit, he was moved by the plight of his fellow citizens who come before him and he gained an enormous respect for the common sense of Manitoba juries.

Dickson was appointed to the Manitoba Court of Appeal in 1967. He missed the human drama of trial work, but he welcomed the intellectual challenge of appellate work. Both as a trial judge and as an appellate judge, Dickson took great pains with his judgments and developed a clear and direct writing style. Dickson's carefully researched judgments for the most part followed established legal doctrine closely. There were occasional flashes of the liberal judge he would later become, but it still would have been difficult to predict that he would one day emerge as one of Canada's greatest judges.

When Dickson arrived at the Supreme Court of Canada in 1973, he joined an institution that was poorly understood by the Canadian public and held in low regard by the legal community. For the most part, the Supreme Court spent its time dealing with technical legal questions and resolving run-of-the-mill disputes. Most judges were imbued in the tradition of

legal positivism and formalism. Judgments were written for a strictly legal audience. There was little or no scope for the consideration of the relevant historical, social and political context. Broader issues of theory and policy were not confronted openly in judicial decision-making and the judges rarely strayed from traditional legal sources. The Court heard many constitutional and public law cases, but as a rule, the judges were unwilling or unable to escape the confines of traditional formal legal reasoning.[2] After a brief flurry in the *Drybones* case,[3] the Court had refused to breathe any life into the lofty language of the *Canadian Bill of Rights* and most observers regarded as tepid and uninspired the Court's interpretation of the fundamental rights and freedoms secured by that document.

By the time Dickson retired as Chief Justice of Canada in 1990, the Court had become a major national institution, very much in the public eye and at the centre of political life in Canada. Scarcely a week seemed to pass without a front-page story on the Court. Supreme Court judgments became familiar fodder for editorial page writers. Under the *Canadian Charter of Rights and Freedoms*, the Court was confronted with extraordinarily difficult issues of human rights and social policy. Abortion,[4] mandatory retirement,[5] the legitimacy of laws restricting hate speech,[6] and the reconciliation the individual's right to privacy with the need for effective police investigatory powers[7] had replaced routine personal injury and property disputes on the Court's docket. The Court's audience had expanded beyond lawyers and legal academics to the Canadian public at large. The Court's decisions had implications for all Canadians and were the subject of intense public interest and concern. No longer was the Court criticized for being too cautious, narrow and legalistic. In 1990, when Dickson left the Court, some observers were asking whether the Court had become too willing to play an active role in Canadian political life.

Brian Dickson emerged as a leading figure in this transformation of Canadian law. By the time he retired, he was revered in the legal community as a judge of exceptional ability. He wrote in a refreshingly clear and lucid style. He paid close attention to established legal doctrine and precedent. But he was also a judicial innovator with a strong commitment to idea that the law had to be shaped and molded and kept in tune with changes in society and social values. As a judge, Dickson had the capacity to place himself in the shoes of those much less advantaged than himself. He crafted strong and enduring precedents in Canadian law.[8]

The transformation in Canadian law he led was matched by his own personal transformation. One could hardly have predicted in 1963 that Brian Dickson, the successful and wealthy corporate lawyer who shocked his partners by accepting an appointment as a trial judge, would emerge as a Canadian judicial giant 27 years later. Those who start their legal careers drafting complex commercial agreements rarely finish by crafting judicial opinions advancing with the rights of women, aboriginal people, religious minorities, and minority language groups.

III. WARTIME EXPERIENCE

The first important aspect of Dickson's experience before he became a judge was his wartime experience. Dickson rarely spoke of his war injury. He lost his leg, and nearly lost his life, on August 14, 1944 during an allied assault near Falaise in Normandy. Dickson's near encounter with death was the result of a tragic accident. He was the victim of "friendly fire". Allied aircraft supporting the ground attack dropped their bombs short of the enemy lines with devastating effect on their own troops.[9] Dickson refused to make anything of the fact that he lost his leg and nearly lost his life because of a military error. He simply did not want blame anyone.

He knew of the risks that bomber crews faced and that their casualty figures were staggering. He believed that all involved in the fighting were doing their best in very unfamiliar and difficult circumstances and he accepted that accidents were inevitable.

Dickson suffered pain from his war injury for the rest of his life. There can be no question that his war injury had a profound affect upon his life and his outlook. However, Brian Dickson was a very proud and determined man who simply refused to allow his life limited or defined by his significant physical disability. As he said in an interview in 1985: "It wasn't a question of 'will I or won't I', the decision wasn't mine. It was done and that was it. From then on it was if I was born with blue eyes or brown eyes. You accept it with no cavil."[10] He did not like any notice to be taken of his of his physical disability and he pushed himself to the limit and sometimes beyond to get about on his own and do things unaided. At his law firm, articling students and secretaries were warned on "fear of their lives" not to assist Dickson should he fall, as he frequently did in these early days as he was still adjusting to his artificial leg. Dickson was "fiercely independent and proud" and wanted no special favours because of his wartime injury.[11] At times he suffered severe pain from his leg that could not be relieved by medication. He had the ability to endure pain and never complained, even to his family.

Dickson's wartime experience left a life-long impression that shaped and influenced both his rigorous analytical side and his fundamentally compassionate nature. He claimed that the best education he ever had was an intensive officer staff-training course. Years later, he would approach his professional work as a lawyer and a judge with an almost frightening military-like organization. Every task or project was meticulously planned and plotted from beginning to end in a logical fashion. His team of

juniors, or law clerks, was carefully assigned specific tasks and their progress was rigorously monitored. He was even more demanding upon himself, adhering relentlessly to his demanding self-imposed schedule. Objectives and issues were identified and scrutinized from every possible angle until a rational and principled solution emerged. His judicial colleagues were struck by Dickson's military-like approach. As Chief Justice Beverley McLachlin recalls:

> He was very organized and he was very correct…very military… In my own mind I always wondered if the military had not been a big important part of instilling that sense of correctness. Decorum, I always felt, it was terribly important for him. You had to behave properly and somehow, without ever saying it, he instilled in the judges' who worked with him a sense that you were expected to maintain certain standard of correctness.[12]

But Dickson's military experience also made a lasting impression on his compassionate side. Fate had dealt him "an unfortunate, unexpected blow early in his life", an experience that made him sensitive to the misfortunes of others.[13] Fighting along side people from a wide diversity of backgrounds in a life and death struggle for fundamental values influenced is vision of Canada as an inclusive society.[14] His near-death experience and the injury he suffered gave depth to his understanding of human suffering. He knew what it was to risk one's life for a cause. He showed remarkable courage, grit and determination in making the most of his life despite the limitations imposed by his own injury. The commitment to the great cause of the war years imbued him with a dedication to public service, a hatred of tyranny and cruelty, as well as a profound love for Canada and its ideals of fairness, tolerance and opportunity for all.

The combined effect of his Prairie upbringing in the depths of the Depression and his shattering wartime experience and injury contributed to making Dickson a deeply compassionate

man. Dickson saw the law as a means to protect rights and advance the interests of the most vulnerable members of our society. As a judge, he wrote ground-breaking judgments advancing the rights of minorities and the disadvantaged. In his early years on the Supreme Court of Canada, his attention was focussed on the rights of prisoners.[15] Later he turned to the rights of women,[16] the rights of workers,[17] the rights of religious[18] and linguistic minorities,[19] and the advancement Canada's aboriginal peoples.[20] In all of these endeavours, Dickson was rigourously faithful to what he conceived to be the applicable legal principles and governing constitutional imperatives. However, there can be little doubt that his attitude towards the law and an instrument to advance the interests of the disadvantaged was shaped and influenced by his life's experience.

IV. CORPORATE LAWYER

The second important aspect of Dickson's experience before he became a judge was his time in practice.[21] After the war, he joined a leading Winnipeg law firm. His practice was that of a corporate solicitor. His astute legal mind and exceptionally hard-driving work habits quickly brought him to the top ranks of both the legal and business communities. His legal acumen and good business judgment brought memberships on many Boards of Directors, including the Board of a major Chartered Bank.

Dickson's law partners and business associates were astounded in 1963 when, after 18 highly successful years, he abandoned his business law career to become a trial judge. Dickson's junior described it as "it was the most frightening day in my life …It absolutely stunned me …It was a shock".[22] Another Aikins, MacAulay colleague described Dickson's departure for the

bench as not only very surprising, but as a "devastating blow to the firm".[23] The firm was loosing a lawyer who was at the top of the legal profession as the President of the Law Society of Manitoba and the next President of the Canadian Bar Association. Dickson also was at the apex of corporate Canada with his multiple directorships and business and social connections from coast to coast and a person with a track record of tireless service to the Winnipeg community.

By the early 1960's, Brian Dickson's career could have gone in any one of several directions. Dickson's corporate experience and shrewd business acumen could easily have led to a leadership position with a major corporation.[24] Another possibility was politics. Although Dickson was not politically active, the year before his appointment to the bench, Liberal party officials tried to recruit him to run in the forthcoming federal election.[25] Despite these rich choices, Dickson decided it was time to get back to the law. He had a strong commitment to public service and he had achieved financial security for himself and his family and could afford the significant cut in salary that would follow accepting a judicial appointment.

I believe that Dickson drew on his experience as a corporate solicitor and business advisor throughout his judicial career. Again, there are several sides to the story. The first is that he brought the prudence, care and rigor of a commercial lawyer to his judicial work. His judgments were as meticulously prepared as any commercial agreement, with a view to covering all angles and all contingencies. Every point was carefully researched and considered. Every judgment went through several drafts and painstaking line-by-line review. Nothing was left to chance.

The other side is that he always had the commercial lawyer's eye for the practical, real world dimensions of any problem. He was faithful to the law, but not slavishly so – the law was

a means to an end, not an end in itself. As a commercial lawyer, he saw his task as using the law to fulfill the real world business needs and objectives of his clients. As a judge, he used the law to fulfill the legitimate real world needs and expectations of the litigants who came before him.

The third important aspect of Dickson's time in practice was his remarkable commitment to public service. Dickson came to the bench with high-minded professional ideals. He thought that "dedication to pubic service is the mark of the professional" and he described a legal career as "a life public service" with multifaceted responsibilities "to the state, to the court, to the client, to his fellow lawyers and to himself".[26] He rejected the view that lawyers were "value-neutral technicians" and he argued that "technically competent lawyers who fail to recognize the moral quality of their work misunderstand the nature of their calling and ignore their larger responsibilities to society." [27] He consistently promoted the "vision of a lawyer as a wise counsellor, skilled advocate, contributor to the improvement of the legal system, an unselfish and courageous leader of public opinion and a professional willing to answer the call for public service."[28] In a call to the bar ceremony shortly after his appointment to the bench, Dickson urged the young lawyers to dedicate "your lives to the service of the public, in the cause of truth and justice…a life of unselfish service to others" [29] He was troubled by "disturbing signs" of declining public confidence and respect in the profession and by the attitude that "lawyers are more interested in making money than in living up to the best standards of their calling." [30]

Unlikely as it may have seemed at the time, Dickson would show in the years to come that his wide experience as a soldier, trusted business advisor, tough-minded corporate lawyer and community-minded volunteer were ideal qualifications for the bench. In 1963, Dickson had the makings of what Dean Anthony Kronman has described as the "lawyer-statesman ideal".[31]

Dickson went to the bench with a strong sense of citizenship and public duty and a remarkable grasp of how best to blend principle with the possible. As he demonstrated in his practice, he had an acute legal mind. But in practice, Dickson was never a legal technocrat. As he said years later: "I don't think I entered the library in our firm very often. It was more business savy and knowing what were the business consequences, plus or minor, nothing much in the way of legal principle".[32] In his law practice as in his judicial work, Dickson displayed mature legal judgment, not raw legal expertise. From the early days of his practice, Dickson acted "without professional veneer".[33] In his law practice, he kept his clients out of trouble by steering them towards practically achievable solutions that balanced expediency with principle. As a judge, he would be faithful to the law and demonstrate remarkable intellectual rigor in his legal analysis, but he never lost the corporate lawyer's perception of the law as a means to an end rather than as an end in itself. He revered the law but he always saw it in terms of the human problem that was posed. Dickson the corporate lawyer used the law to help his clients achieve their goals. Dickson the judge did his best to use the law to improve the lot of his fellow citizens. Again, to borrow from Kronman, Dickson was "possessed of great practical wisdom and exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements".[34] He had the "lawyer-statesman's" prudential wisdom to assess problems from a broad perspective, and judiciously to reconcile competing rules and values in a principled fashion.

V. MANITOBA JUDGE

The third aspect of Dickson's pre-Supreme Court of Canada experience that I would like to discuss is his time as a judge in Manitoba. Despite his lack of trial experience, Dickson relished the life of a trial judge. Even after his appointment as Chief Justice of Canada he described being a trial judge as "the best job in the world".[35] He loved the opportunity to work, hands on, with juries and lawyers, litigants and witnesses, especially in criminal cases. As he traveled from town to town on circuit, he was moved by the plight of his fellow citizens who come before him and he gained an enormous respect for the common sense of Manitoba juries.

The experience of having to explain technical points of law to juries had a lasting effect on Dickson. He was a strong believer in plain language. He thought that it was "imperative that our judgments be understandable to people who have not had legal training. We are not writing simply for legal academics or other judges. The cases we deal with…affect every man, woman and child in the country."[36] Even the legal community needed accessible and clearly written judgments. Reflecting on his own experience as a trial judge, Dickson thought of the judge "reading these judgments of the Supreme Court of Canada late at night preparing for a jury charge….It is very much easier for them to read something which is written in everyday language."[37]

Dickson never lost the trial judge's perspective that the law does not belong to lawyers, judges or law professors - it belongs to the people who come before the courts to have their disputes resolved. Dickson's later judgments as a Supreme Court judge, reflecting impatience with technicalities and arcane rules that obscure rather that clarify underlying principles,[38] owe their origin to his work as a trial judge where he had to explain and decide in a manner

comprehensible to the ordinary people who served as jurors and who came before him as litigants.

Dickson thought that sentencing was the most difficult task a trial judge performs.[39] Within a week of being sworn in as a trial judge, Dickson took pleas of guilty in two cases of what was then called rape. He knew that sentencing was going to be an important aspect of his work as a Queen's Bench judge and he had little or no background in criminal law. As always, he saw the problem in concrete human terms. He decided that before he sentenced anyone, he had to find out more about the prisons and the correctional facilities he would be sending people to. Few judges have undertaken this sort of investigation, reasonable though it may seem. Before passing sentence, he spent a day at Stoney Mountain Penitentiary and then proceeded to visit the Selkirk Mental Hospital.[40] I suggest that the way he equipped himself to face the difficult task of sentencing speaks volumes about his approach to judging.

Dickson was appointed to the Manitoba Court of Appeal in 1967. He missed the human drama of trial work, but he welcomed the intellectual challenge of appellate work. Several of his appellate decisions show flashes of what was later to come. Traditional public moral values were subjected to severe challenge in the late 1960s and early 1970s and Dickson was aware of the temper of his times. In a call to the bar ceremony in 1970, he recognized a "growing tendency…to challenge tradition and traditions, to challenge constituted authority whether it be religious, governmental, judicial or parental, and to challenge those representative of authority." Despite his conservative corporate law background, Dickson welcomed re-examining basic concepts "to separate wheat from chaff, to separate those features of a system which are archaic

and outmoded, having outlived their usefulness, from those features which are of continuing validity and worth and utility."[41]

Dickson's liberal instincts are revealed in three important decisions he wrote as a member of the Manitoba Court of Appeal. The Canadian *Criminal Code*, drafted in the Victorian era, still punished certain sexual acts on purely moral grounds. In a decision, he foreshadowed Justice Minister Pierre Trudeau's famous pronouncement that "the state has no business in the bedrooms of the nation,"[42] by reversing a gross indecency conviction. Dickson reviewed an unusually public academic debate between H.L.A. Hart,[43] a prominent English legal philosopher and Lord Devlin,[44] a prominent English judge, and concluded that the state had no business criminalizing behaviour solely on the ground that it was morally unacceptable to the majority. Dickson wrote a short but compelling judgment based upon the principle that it was not for the courts to sit in judgment on what passes in private between consenting adults.

Two other decisions involved clashes between the law and the "hippie subculture." The first case[45] the *Criminal Code's* notoriously vague vagrancy law[46] that allowed the police to arrest anyone who had no "apparent means of support" and who was "found wandering abroad or trespassing" and could not "when required, justify his presence in the place where he is found". Dickson reversed a conviction for vagrancy of a young man who had hitch-hiked to Winnipeg with four dollars in his pocket, a decision that was applauded in the press as striking "a blow for the rights of the individual".[47] The police, said Dickson, had no basis to lay the charge. "There is nothing untoward about resting on the steps of a public building."[48] The vague language of the *Criminal Code* gave the police a powerful and conveniently ill-defined weapon

that did not sit well with Dickson who, despite his establishment lawyer background, empathized with the youthful urge to roam. As he recalled years later:

> I had spent quite a bit of time in Europe and seen a lot of hostels and young men and young women who regularly traveled with very little in the way of money and yet were welcomed across the country. I thought this was barbarous, this idea of arresting the young man without any crime except for the fact that he only had four dollars in his pocket.[49]

When explaining the judgment to a group of Manitoba law students, Dickson related the decision to his boyhood experience on the Prairies. "During the years of the depression…the charge of vagrancy was used to rid the community of those who seemed to be footloose and unemployed and, therefore, undesirable". This offended him: "Poverty is not a crime. To be unemployed is not a crime."[50]

Another case[51] dealt with another technique employed by the police and the magistrates courts to rid the city of Winnipeg of "undesirable" youth. An usually heavy sentence was imposed for possession of marijuana, but the magistrate directed that the warrant directing committal to prison be withheld for seven days, to allow the offender to leave Winnipeg before it could be enforced. This was known as issuing a "floater" and had become common practice in Western Canada. Dickson had little hesitation in finding that the practice was illegal and that it offended both individual rights and community values. From the perspective of the rights of the individual Dickson found that the practice "finds no justification in the statute; it is likely to induce an accused, in the hope of escaping imprisonment, to plead guilty to a charge to which he might otherwise plead not guilty."[52] From the communitarian perspective, issuing "floaters" amounted to one community passing off its problems to another. This Dickson could not accept:

> In Canada communities are interdependent and relations between them should be marked by mutual respect and understanding. A practice whereby one community seeks to rid

> itself of undesirable by foisting them off on other communities violates this basic concept of consideration for the rights of others and should not be tolerated.[53]

Dickson's decisions in the cases dealing with gross indecency, vagrancy and "floaters" were rightly hailed as reflecting a liberal and progressive view of the law. However, as would become increasingly apparent from his work on the Supreme Court of Canada, Dickson was always prepared to limit individual rights where he thought it necessary to protect fundamental communitarian values. In an appeal from an obscenity conviction,[54] Dickson adopted a passage from Lord Devlin's book defending the use of law to enforce morality, the same argument based on the same authority he had rejected in the gross indecency case. When it came to obscenity, Dickson accepted the proposition that more was at stake than the moral outrage some citizens had about the conduct of others. Dickson recognized that the area as "treacherously subjective" yet he accepted the communitarian principle that "all organized societies have sought in one manner or another to suppress obscenity" and that "the right of the state to legislate to protect its moral fibre and well-being has long been recognized."[55] The community standard was to be determined, according to Lord Devlin, not "by the opinion of the majority" of by "the counting of heads" but by the standard "of the reasonable man …not to be confused with the rational man". The law simply applied "principles which every right-minded person would accept as valid" – what another English writer called "'practical morality,' which is based not on theological or philosophical foundations but 'in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense.'"[56]

This thinking is difficult to reconcile with the gross indecency judgment. It shows that Dickson did not approach judging as an exercise in logic or legal theory. He saw the regulation of

human affairs by law was an extraordinarily complex and varied exercise where one could not hope to find a simple single formula to decide all cases. Some legal principles are rooted in liberal individualism while others derive from communitarian values. Dickson thought that it would be wrong for a judge to have a pre-determined agenda and always prefer one theory to the other. To the extent that he had a developed personal philosophy, it fell on the side of individual rights, but individual rights are meaningless without a community and, even under the *Charter of Rights and Freedoms*, Dickson frequently preferred community values.[57]

As a member of the Manitoba Court of Appeal, Dickson rarely confronted the broad issues of equality and human rights that would become a preoccupation years latter as Chief Justice of Canada. However, he did author a significant judgment in *Canard v. Attorney General of Canada,*[58] striking down a discriminatory provision of the Indian Act that denied an aboriginal woman the right to administer her deceased husband's estate. But for passing references in other cases, this was the first time he came to grips with the *Canadian Bill of Rights.* Early decisions had given limited effect to the *Bill of Rights* and had balked at the legitimacy of striking down legislation that offended its guarantees. The Supreme Court's 1970 decision in the *Drybones* case[59] had taken the legal community by surprise. Supreme Court of Canada had found the *Bill of Rights* promise of equality was paramount and precluded Parliament from making it an offence for members of a specified racial group to do something (being drunk off a reserve) which all other Canadians could do with impunity. Fortified by *Drybones*, Dickson found that the statutory provisions depriving Flora Canard of the right to administer her husband's estate were contrary to the guarantee of equality and therefore inoperative. Dickson had little trouble in concluding that Mrs. Canard's right to equality was being denied. "The *Bill of* Rights", he wrote, "proclaims an egalitarian doctrine" and Flora

Canard was being denied a civil right. That denial was "a negation of the principle of equality" that "stems from the fact that she is an Indian" and it followed that the provision had to be declared inoperative.[60] However obvious this result might appear today, it was too much for the Supreme Court of Canada in the mid-1970s and Dickson's judgment was reversed on appeal

After four years as a trial judge and six years on the Court of Appeal, Dickson had earned a reputation as one of Canada's finest judges. He wrote his judgments in a refreshingly clear and lucid style. He had made an important mark in the area of law and morality by excluding the application of the criminal law to private sexual conduct between consenting adults. Dickson's refusal to countenance unlimited police or judicial power with respect to wandering youth, and his equality rights judgment in *Canard* revealed an essentially progressive view that saw the law in terms of the broader social, political and economic context. In a 1970 address to students at the University of Winnipeg, Dickson spoke of the need to recognize the legal system "as an integral part of the social process" and argued that "as increasing recognition is given to the social problems of the nation – poverty law, the rights of the dispossessed, the poor, the mentally ill, illegitimate children – it is increasingly apparent that we must seek to develop a legal system that provides both 'equality before the law', and justice to the particularities of individual cases."[61]

On the other hand, Dickson was also careful and cautious judge. His approach to judging was lawyerly and pragmatic, not theoretical or philosophic. He could not be accused of having any particular agenda. To the extent he had taken essentially liberal positions in the morality and equality cases, he was probably displaying an his essentially open minded attitude and willingness to listen to new ideas, rather than revealing any pre-determined or fixed philosophy. His willingness to narrowly interpret the *Criminal Code* to protect individual rights in the gross indecency and

vagrancy cases and to strike down a discriminatory law in *Canard* was balanced by his cautious approach to statutory interpretation in other settings[62] by his acceptance of obscenity laws as necessary to protect the community's moral fibre.

VI. SUPREME COURT JUDGE

When Dickson became a judge in 1963 - even in 1973 when he was appointed to the Supreme Court of Canada - judgments were for the most part written for lawyers and judges, not for the litigants and certainly not for the ordinary citizen. Results were justified solely by reference to abstract legal rules with little or no discussion of social, political or economic context or of the policies underlying or motivating those legal rules. The Court was still suffering from its prolonged attachment to legal formalism, a school of thought Dickson described in an 1986 convocation address in the following terms: "The law was venerated as a scientific, objective and formal body of rules. Judges, as masters of logic and reason could resolve legal disputes with a formula-like certainty which transcended the particularized complexity of social life."[63] There was a pronounced preference for legalistic judgments that were based upon an arid recitation of the relevant statutes and case law. Reference to scholarly writing was exceptional and most judges considered it to be neither necessary nor appropriate to discuss underlying policy considerations or to locate the legal issues in their broader social, economic or political context. It was assumed that only lawyers and other judges would read the judgments. The Court spoke in an obscure and technical legal voice. Little or no effort was made to make judgments accessible to the ordinary Canadian.

Within a short time his appointment to the Supreme Court of Canada, Dickson earned a reputation as a writer of remarkably lucid and clear judgments. In both style and content, Dickson's

judgments played an important role in taking Canadian law out from the shadow of formalism and there can be little doubt that he set a new standard for the Canadian judiciary. Dickson wrote his judgments in clear and straightforward language. He followed the legal rules followed, but with careful attention to their underlying purposes, to the social problem they addressed, and to the most sensible way to solve that problem. Clarity of expression especially important in the *Charter* era as the Court emerged as the county's moral conscience.

In July, 1981, Dickson was asked to explain the art of judgment writing at an annual judgment writing seminar for judges, sponsored by the Canadian Institute for the Administration of Justice.[64] The paper he gave reflects in some detail his philosophy of judgment writing. Despite his well-deserved reputation as a master of the art, he began modestly. The subject of judgment writing, he said, is "part and parcel of the daily life of a judge" but one "to which I make no particular claim to expertise." He said that he had no formula to offer for like all writing, the writing of judgments was something of an art. "Each of us, as a judge, is a professional writer and each of us …is practicing an art." Dickson suggested one way to improve is to analyze and emulate the best work of the best writers, within and without the profession, but repeated Oliver Wendell Holmes caution: "The best style that a man can hope for is a free, unconscious expression of his own spontaneity, not the echo of someone else."

He was blunt about the shortcomings of some of the judgments he read. Many "show a strong tendency to be wordy, unclear and dull." Often this was simply the product of sloppy thinking. "Thoughts straggle across the printed page like a gaggle of geese, without form, without beginning or end, lacking in coherence, conciseness, convincingness." Another prevalent problem

was what Dickson described as "a love for resounding words and phrases, 'half-tones', opaque language, obscure conceptualization" that tend "to leave the reader in a state of obfuscation."

The starting point, he explained, is the "intense thought" that should precede the writing. The very purpose of a judgment, he suggested, was to assure the litigants and the public that there had been "intensive and thoughtful study of the record, the briefs and the law." Judgment writing, Dickson suggested, is a discipline that "minimizes snap judgments and casual theorizing" and "compels thinking at its hardest."

Dickson's judgment writing style was a model of clarity. He worked very hard to make his judgments as readable and accessible as possible. Legal jargon and technical language, he told his audience, should be avoided. Judges should be mindful that their writing will be read by all Canadians. "We are speaking to a broad audience and we want to be understood." He cautioned against the tendency to justify obscurity by the complexity of the law. Simple language should be used "whatever difficulties this may entail in expressing the subtleties which constitute some of the pivotal considerations of law."

"What is needed" stated Dickson, "is clear, succinct, forceful writing". He warned his audience that good writing was not easy and that it took time. But to "sweat blood for a month" writing a judgment is worth it, he suggested, "if we can expunge the clumsy legalese, tedious, obscure prose, overblown phrases, the vagueness and verbosity which are neither good law nor good literature."

Dickson cautioned against unduly formal judgments that "overemphasize precedents and case law." He suggested that the "identifying badge of a superior judgment is a focus on principle and reason." Good judgment involves more that a digest of the cases that are "important only to the

extent that they enunciate principles or rules." A good legal argument "is essentially an attempt to justify a certain conclusion through an appeal to reason and principle."

One of the most striking features of Dickson's work was his ability to find a way to reconcile competing rules or values in a principled fashion. One of his most notable achievements was his 1978 decision in *R. v. Sault Ste. Marie*[65] where he created standard of reasonable diligence standard of fault for public welfare offences. Dickson described this as a "half-way house" to avoid on the one hand the unfairness of no-fault liability and on the other the difficulty of enforcement inherent in a strict *mens rea* approach. This bridged the gap between a rigid and rule of no-fault absolute liability on the one hand, and the other extreme of full *mens rea* liability on the other. Dickson thought that to punish without fault was unjust, but that the require *mens rea* could make public welfare offences practically unenforceable. By allowing the accused the defence of due diligence, he avoided the injustice of no fault liability without unduly impairing the public interest in enforcement.

This is but one example of a Dickson "half way house". Time does not permit full exploration of each of these, but let me mention a few. In the personal injury damages,[66] Dickson imposed a limit on intangible and unmeasurable pain and suffering damages, but also insisted upon full compensation and proper care for those who had suffered devastating injuries. In administrative law, he championed the fairness doctrine to ensure that those affected by decisions could know and meet the case against them, but at the same time to avoid the cost and delay of unnecessarily complex court-like proceedings.[67] In private law, recognized the injustice that could result from the strict application of statutory and common law rights and made available the flexible remedies of constructive trust and unjust enrichment.[68] To Dickson, this was not an abstract proposition but a

matter of simple justice, in this instance, for a farm wife who was being told after years of hard work that she had no propriety claim to the farm because her husband held the legal title. Dickson brilliantly adapted the private law fiduciary principle to answer the just claims of aboriginal peoples in *Guerin*[69] and *Sparrow*.[70] By imposing upon the Crown a trust like duty with respect to native land rights and the to regulation of constitutionally protected aboriginal rights, Dickson managed to bridge the gap between the strict letter of the law and the spirit of the Crown's duty to respect the rights of First Nations.

In constitutional law, Dickson steered a very steady middle course between federal and provincial claims, perhaps best exemplified by his position in the *Patriation Reference*,[71] the case he later described as the most important ever decided by the Supreme Court.[72] Dickson was one of the four judges who formed the majority on both issues, holding that the letter of the law allowed the federal government to make a unilateral request to amend the constitution, but that constitutional convention required a substantial measure of provincial agreement

VII DICKSON AND THE *CHARTER*

This brings me finally to the area where Dickson perhaps made his most significant and enduring contribution, the *Charter of Rights and Freedoms.* Here again, he tried to find a "half way house" that would accommodate both robust judicial review under the *Charter* and respect for Canada's tradition of Parliamentary democracy.

Let us recall that when the *Charter* was enacted, it was by no means clear what the judiciary would make of it. Dickson seems to have welcomed the *Charter*, but he also worried that the Canadian judiciary was ill prepared for the challenges it presented. He recognized that many

judges would regard the *Charter* as a "heavy" and "perhaps to some, an uncomfortable" duty.[73] He told judges that the decade following the enactment of the *Charter* could be "one of the most important in the history of the Canadian judiciary…We face a great challenge; we have been given a weighty responsibility. And the eyes of individual Canadians will be on us as never before."[74] He accepted many invitations to speak about the *Charter* and encouraged judges not to shirk their duty. He urged Canada's judges to "exercise reasonable sense, restraint and self-control" but at the same time argued that "constitutionally protected rights and freedoms must not be cut down by any narrow or technical construction" and that the *Charter* was "capable of growth and expansion within its constitutional limits."[75] As he explained in a 1982 address to provincial court judges, "the Canadian judiciary, and in particular the Supreme Court of Canada, will either breathe life into the *Charter* or reduce it to a hollow promise of things that may have been."[76]

Dickson was also concerned about the capacity of the Bar and the adversary system to cope with the demands of the *Charter*. He urged the Bar's to behave responsibly and mused aloud about whether the courts would have to loosen traditional rules limiting the role of public interest intevenors and the admissibility of "statistical, economic and sociological data" to provide the background of "social context and legislative effect which are necessary for policy making."[77] He worried that the cost of litigation might make the *Charter's* lofty promises hollow and appealed to the legal profession to ensure that disadvantaged Canadians had access to justice. In 1985, the day after the *Charter*'s equality rights provision came into force, Dickson told a large audience of young lawyers just called to the bar: "It is profoundly to be hoped that those whose skills have commonly been available only to private and paying clients increasingly will devote some of their skills and talents to extending the blessings of freedom and equality to the legal and social difficulties of the

disadvantaged."[78] He told law professors that the Supreme Court needed their assistance for "the orderly development of a coherent body of national law" under the *Charter*.[79]

Despite these reservations about the capacity of Canada's legal establishment to cope with the demands of the *Charter*, Dickson made no secret of his own determination to breathe life into its vague and general language. He saw the *Charter* it grand terms: it entrenched "the foundations of Canadian society: democracy, social justice, freedom and human dignity" and he urged judges, lawyers and legal academics "to meet [the] challenge head-on" of "advancing the role of law in upholding these principles."[80] Using language that would soon find its way into his judgments, Dickson told a Calgary audience "a constitution is a document designed to grow and develop over time to meet new social, political and historic realities unimagined by its framers". He warned that the courts would "have to take a philosophic approach in our interpretive endeavours" and that *Charter* rights would have to be interpreted in light of "the purpose of protecting" the right at issue.[81] The meanings of the terms of *Charter*, he told students at Dalhousie, "are not to be found by consulting a dictionary" and *Charter* interpretation "requires a philosophic and possibly political theory as context."[82] The courts, he warned, "will have to go beyond abstract logic and disembodied precedent" and he urged Canada's judges to rise to the challenge: "When the occasion cries out for new law, let us dare to make it. Let us recognize that the law is a living organism, its purpose is to serve life, its vitality is dependent upon renewal."[83]

These bold thoughts soon became the law of the land and, for the most part, the legal community welcomed the way the Court dealt with the *Charter* cases and applauded the bold steps taken by Dickson and his colleagues in *Hunter v. Southam*,[84] *Big M Drug Mart*,[85] and *R. v. Oakes*.[86] Public confidence in the Supreme Court as the final arbiter of fundamental rights and freedoms was

high. However, it soon became apparent that *Charter* litigation put the Court at the center of public debate and that the Court could not expect an easy ride. Its decisions were bound to be controversial and to attract some criticism. Some critics thought that the Court was far too eager to strike down laws and feared that the Court's liberal approach to the *Charter* could undermine laws designed to limit corporate power and protect vulnerable interests. Left wing critics pointed out that the big *Charter* "winners" were corporations.[87] How could it be, asked the *Charter* skeptics, that Big M, a corporation, could assert a claim based on freedom or religion? Should the Court be so eager to strike down Sunday closing legislation that had the effect of guaranteeing workers a common day of rest with their families? Would the *Charter* allow corporations to immunize themselves from regulatory scrutiny? Conservative critics worried about the erosion of Parliamentary sovereignty and feared that special interest groups would use *Charter* litigation to achieve a judicially imposed culture of liberal rights.[88]

The most contentious issue Dickson and his colleagues faced under the *Charter* was the claim that the Supreme Court was usurping the role of Parliament. Dickson had no doubt that permitting un-elected judges to strike down laws duly passed by the elected representatives of the people is consistent with Canada's democratic values. He saw the rule of law and an independent judiciary as its guardian as essential elements of an ordered democracy. The ideal of the rule of law was fundamental to Dickson's conception of Canada's constitution. Dickson had a profound belief that a liberal structure defining the "framework for relations among individuals as well as between the individual and the state" and protecting "individuals from arbitrary and capricious treatment at the hands of government" was essential for social order in a democratic society.[89] In Dickson's

mind, the role of the courts as guardian of the constitutional order was an essential element of the rule of law. In *Beauregard v. Canada* he described the courts as:

> …protector of the constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.[90]

Dickson saw an independent judiciary with the power of judicial review as implicit in the rule of law, and as a necessary element to the realization of the values of federalism, to the protection of individual rights and freedoms, to the protection of minorities, and to the realization of democracy itself. In written answers he prepared for an interview with Radio-Canada's Le Point, Dickson recorded his "great pride in the *Charter*" as it put "Canada in the mainstream of the post Word War II movement towards conscious recognition of, and protection for, fundamental human rights". He saw the *Charter* as "the logical culmination of Canadian developments in the field of human rights" building upon the anti-discrimination human rights codes and the Canadian Bill of Rights and protecting "those basic values which most Canadians share and cherish." Dickson added: "I am pleased that, in my professional capacity as a judge, I can play a role in protecting and promoting those values."[91] When speaking about judicial review under the *Charter*, Dickson would invariably remind his audience that Parliamentary sovereignty had never been absolute in Canada because of the division of powers between Parliament and the provinces. He would also mention the long common law history of judicial review of legislative action as "a well established unquestionably proper function of courts in all jurisdictions with a long and honourable tradition as a buffer against incursions by the state on the rights of the individual."[92]

However, Dickson was also conscious of the dangers of excessive enthusiasm for *Charter*. As early as 1983, he noted the tendency of governments "to pass recalcitrant problems to the courts"[93] and of social activists and to resort to litigation rather than political action. "It is presumably easier and cheaper to look to the courts for social changes than to go through the laborious and time-consuming process of persuading legislators." He worried that "litigation is being substituted for politics; the judicial process for the political process"[94] and sometimes wondered "if we are expecting too much of the judicial system"[95] and hoped that "we are not pushing too many problems that are too complex into the courts."[96] He cautioned lawyers to "resist the temptation for overkill" as the "*Charter* was not intended to provide a full employment program for lawyers or to protect every minor right which people might think themselves ideally to possess."[97] He urged Osgoode Hall's graduating class in 1985 to "consider the merit of legislative as opposed to judicial solutions so that an appropriate balance between the two forums is maintained." He reminded the fledgling lawyers of the limitations inherent in the judicial process and the advantages of legislation as a way to achieve social justice. "The courts", he said, "are basically reactive; they respond, usually after the event, to remedy situations between two parties." The legislator had the advantage of "access to information and material often denied the judge", the legislator could "assess the desirability and wisdom of policies in a way the judge may not" and the legislative process allowed for "consultation, negotiation, mediation, amendment and improvement in a way judicial decisions do not."[98] Despite his growing enthusiasm for the *Charter* as the years went by, he remained conscious of the dangers of placing to much emphasis on rights. Towards the end of his career on the bench, Dickson worried that Canadians were "prone to lay greater emphasis upon claims to rights

and to pay less heed to the responsibilities which must be shared by all for those rights to become meaningful."[99]

Dickson was also very sensitive to the charge that the *Charter* would "Americanize" Canadian law. In a 1983 speech, he pointed out that the *Charter* represented "a fulfillment of Canada's international obligations respecting human rights"[100] rather than a copying of the American Bill of Rights, and detailed the significant differences between the Canadian and American constitutions. Among these he listed the absence in Canada of the separation of church and state, the right to bear arms, the protection of property rights and the right to jury trial in civil matters. Canada's *Charter*, he pointed out, explicitly contemplated affirmative action programs and protected freedom of association, mobility and equal rights for women. The *Charter's* minority language and education guarantees had no parallel in the United States, nor did the protection of aboriginal rights and the recognition of Canada's multicultural heritage. These features of the *Charter*, he said in a 1985 speech, "manifest a distinctively Canadian social experience, one marked by a recognition of cultural identity, as well as an awareness of the importance of equality in a multicultural confederation."[101] Dickson also highlighted important structural differences: the "reasonable limits" clause with its "explicit…political limits to the rights that are guaranteed and…the stringent standard for assessing the legitimacy of any such attempted limitations"; the supremacy clause ensuring the power of the courts to strike down laws; and the notwithstanding clause allowing for "a time-limited legislative override" by a legislature prepared to face "the electoral consequences of legislating directly in the face of the supreme law of the land".[102] Dickson also spoke of significant differences between the Canadian and American political cultures. He recognized that "the tension between the individual and the state has never been quite as developed in Canada as in the United States", that

Canadians had "less discomfort with an active state" and that "distrust of authority is also a less prevalent theme in Canada."[103]

Dickson recognized that the *Charter* brought before the Court "some of the most difficult social, economic, religious and ultimately moral issues of our time" [104] and that the Court was "compelled to shoulder and resolve questions that evoke strong and potentially divisive sentiment, which present no right answer and no easy solution."[105] But at the same time he assured Canadians "that any fears about the emergence of a judicial oligarchy – government by a few judges – are entirely without foundation."[106] Canada's judges, he often observed, had no "license to rely on personal, political or philosophical preferences as the basis for interpretation" of the *Charter* and that "intuitive feelings for justice are a poor substitute for a known rule of law, particularly when we do not all have the same intuition."[107]

Dickson categorically rejected the contention that *Charter* adjudication was anti-democratic. As he and some of his colleagues frequently observed,[108] the *Charter* was a product of democratic choice. The judges of Canada, he pointed out "did not ask for the enactment of the *Charter*. It was thrust upon us."[109] To Dickson's mind, the language of the *Constitution Act, 1982* left no room for doubt that the political actors consciously imposed upon the judiciary the duty to strike down laws that did not meet constitutional muster and to grant appropriate and just remedies to vindicate *Charter* rights. He told a meeting of Toronto lawyers in May 1985: "The question of the desirability of constitutional review of government and legislative action has been answered by this country's elected representatives and the judiciary must fulfill the great responsibility they have been given."[110]

In *Canard*,[111] Dickson had supported a robust interpretation of the *Canadian Bill of Rights.* As late as 1982, Dickson described the rights it guaranteed as going "to the very root of the democratic system" and spoke of the "duty to declare inoperative offending legislation" that had been vested in the courts." This, he emphasized, was not judicial usurpation of the supremacy of Parliamentary but judicial "obedience" to "an expression of democratic will" by "the elected representatives".[112] Dickson was keenly aware of the disappointing record of the Supreme Court under the *Canadian Bill of Rights* which he attributed in large measure to the fact that it lacked constitutional pedigree.[113] He saw the entrenchment of the *Charter*, the explicit language of supremacy and the remedies clauses as conscious and deliberate choices by the political actors of the day. The generous and liberal interpretation he accorded the *Charter* was, in Dickson's view, not an unwarranted assertion of judicial power, but a direct response to the invitation of the political actors and a fulfillment of the widely held, and deeply felt expectations of the Canadian public.[114] "As a society, we have chosen to look to the courts for the elucidation and resolution of some of the values most fundamental to the Canadian way of life."[115] As he explained in a 1984 speech: "Our nation accepted on April 17, 1982, the political proposition that there are some phases of life in Canada that should be beyond the reach of any majority, save by constitutional amendment or by the exercise of the *non obstante* power."[116]

Dickson attributed the apparent public wish for the courts to take an active role under the *Charter* to the erosion or breakdown of other more traditional institutions. In a 1985 speech, he observed that in an era of drastic social change and eroding established customs, where there seem to be few institutions the ordinary citizen could count on, "people in increasing numbers are coming to the courts for the assertion of rights to political, economic and social equality."[117] He saw the

"energetic national debate about social and moral values" engendered by the *Charter* as a sign of "the vigour or our democratic institutions and our confidence in their strength and durability."[118] When Geoffrey Palmer, New Zealand's Minister of Justice and Deputy Prime Minister, visited Canada while considering a bill of rights for his country, Dickson told him: "My personal opinion is that our experience under the *Charter* has been a good one….We respect the values of liberty, equality and diversity…[T]he *Charter* is an important bulwark of these values."[119]

Dickson saw the *Charter* as enhancing rather than detracting from the values of democracy. In a speech to the Canadian Bar Association in 1983, just after the adoption of the *Charter*, he said "I believe that the *Charter* is in line with our democratic traditions and has the potential to enhance and strengthen them".[120] In the years to follow, Dickson frequently adverted to the needs of a mature democracy when interpreting *Charter* rights and freedoms. The Dicksonian vision integrated and harmonized the constitutional protection of minorities and individual rights with the democratic process and gave democracy a richer meaning than raw majority rule in which the power of numbers prevails over all other values. In *Oakes*,[121] he wrote that "the court must be guided by the values and principles essential to a free and democratic society". These included "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." He saw the "underlying values and principles of a free and democratic society" as "the genesis" of the *Charter* and argued that *Charter* rights had to be interpreted and limited by reference to democratic values.[122]

To those who asserted judicial supremacy had replaced Parliamentary sovereignty, Dickson pointed to section 33: "Since Parliament can circumvent the *Charter* by no greater effort than an ordinary statutory declaration, it seems necessary to observe that the Canadian judiciary is simply not superior to the legislature, at least not in the tradition of the American constitution."[123] Just as before the *Charter*, he pointed out, Parliament had the power to abrogate fundamental rights and the ultimate safeguard against such action was political, not judicial. Dickson recognized that the courts were not alone in the struggle to protect fundamental rights and freedoms. While he saw the courts as the last resort and ultimate protector of constitutional values, he saw Parliament and the legislatures as vital partners. He recognized that the legislators had to be accorded reasonable scope when mediating between competing claims, especially to protect vulnerable groups.

Dickson frequently adverted to the needs of a mature democracy when interpreting the *Charter*. In *Keegstra*, he described freedom of expression as "a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons".[124] To him, respect for individual rights and dignity was the underpinning of a healthy democracy. In this conception, rights are accorded not to put the individual at odds with the collectivity, but rather to confer upon the individual the dignity and respect essential for full participation in democratic and community life. When giving freedom of religion generous scope in the *Big M* case, Dickson made a direct link to the nature and demands of a democratic society: "[A]n emphasis on individual conscience and individual judgment lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of

self-government".[125] In a later decision dealing with the presumption of innocence he described the "overarching principle of judicial review under the *Charter*" as the need to ensure that legislatures do not infringe upon certain fundamental rights in the name of the broader common good.[126] He recognized that this could be viewed as a challenge to "the nature of democratic institutions in Canada" as they represented the collective voice of the community, but he rejected that analysis in favour of one supportive of democracy:

> The infusion of the spirit of individual and collective democratic aspirations into the process of defining the contours of constitutional guarantees …ensures that the courts are and will remain allies of Canadian democracy, strengthening any weaknesses of democracy by providing a voice and a remedy for those excluded from equal and effective democratic participation in our society. [127]

Dickson's determination to protect religious and linguistic minorities, as well as his effort to enhance the rights of Canada's indigenous peoples may be seen a rejection of the view that democracy is defined by majority rule and nothing more. In *Big M*, he made explicit reference to the need to protect minorities from the tyranny of the majority: "What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of 'the tyranny of the majority'."[128]

Dickson's approach to s.1 and the justification of limits on protected rights and freedoms was also strongly influenced by the need to integrate democratic choice in relation to protected rights. In the first place, he recognized that the courts were not alone in the struggle to protect fundamental rights and freedoms. While he saw the courts as the last resort and ultimate protector of constitutional values, he saw Parliament and the legislatures as vital partners. He recognized that the legislative arm had to be accorded reasonable scope when mediating between competing claims,

especially to protect vulnerable groups. This line of analysis was expressed in *Edwards Books*, a case[129] dealing with Sunday closing laws, where the legislature was attempting to reconcile the claims of religious freedom, on the one hand, and the claims of vulnerable retail workers to a day of rest on the other. Dickson was prepared to accord the legislature some latitude as it was difficult to identify an ideal solution, noting that care had to be taken to ensure that the *Charter* "does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons". [130] He applied a similar analysis in *Slaight Communications* to uphold legislation impinging upon a former employer's freedom of expression by authorizing an arbitrator to require an appropriate letter of reference.[131] Dickson assessed this as "a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee"[132] and concluded that "constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship".[133]

In *Keegstra*,[134] the last *Charter* judgment he wrote, Dickson found that the *Criminal Code* prohibition of hate propaganda infringed freedom of expression. He also held that this legislative measure could be justified under s. 1. I suggest that the significant feature of Dickson's *Keegstra* judgment was his determinative assessment of the democratic values at issue. In a collision between the right of freedom of expression and fundamental democratic values, the values of democracy prevailed, not on the ground that the law was the result of democratic choice, but rather because he thought the law protected democratic values better than the asserted right to freedom of expression. Dickson saw the anti-hate law as a legislative initiative to enhance the very values underpinning the *Charter* including the universal right to equal dignity and respect, the right

of minority groups to be free from discrimination and the right of all citizens to full participation in the social and political life of the community without vilification. He found that the harms caused by the hatemonger's message ran "directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons".[135] Dickson refused to place expression above other *Charter* values in the pursuit of democracy: "expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values."[136] As hate propaganda subverts the democratic process, he found it to be a "brand of expressive activity… wholly inimical to the democratic aspirations of the free expression guarantee".[137]

Finally in relation to democracy and majority rule, it should be noted that Dickson did hesitate to respect fully the *Charter*'s majority rule safety valve enshrined in s. 33, the override or notwithstanding clause. Despite his own serious personal misgivings as to the propriety of allowing the majority to override fundamental rights and freedoms,[138] Dickson accepted its inclusion in the constitution as an essential term of the political bargain that broke the 1982 impasse,[139] and he joined the opinion of the Court in *Ford v. Quebec* establishing that the legitimacy of a legislative decision to invoke the clause is not open to review except on purely formal grounds.[140]

VIII CONCLUSION

Brian Dickson was a remarkable judge who played an important role in the transformation of Canadian law from the formalism of the 1960s and 70s to the *Charter* era of the 1980s and 90s. He brought to the bench a wealth of personal and professional experience that

included his Prairie upbringing during the Depression, his horrific and shattering wartime experience in the defence of Canada, and his remarkably successful business law career in Winnipeg. Dickson was idealistic and optimistic about the capacity of lawyers and judges to serve the public and to improve Canadian society. In his own career, he was faithful to those ideals. As a judge he exhibited a steady determination to improve the law and to improve the lot of the disadvantaged. Dickson had an appreciation of the limits of the judicial function and of what could be achieved through constitutional litigation, but he also believed that judicial review as an essential element of Canada's constitutional democracy.

[1] R. Yalden, "Before the Bench: Brian Dickson as Corporate Lawyer" in D. Guth (ed.), *Brian Dickson at the Supreme Court of Canada* 1973-1990, (Winnipeg: Canadian Legal History Project, 1988) at 18.

[2] Paul Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974).

[3] *R. v. Drybones*, [1970] S.C.R. 282.

[4] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

[5] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

[6] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 764.

[7] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145

[8] For surveys of Dickson's jurisprudential contribution see: D. Guth (ed.), *Brian Dickson at the Supreme Court of Canada* 1973-1990, *supra* ;"The Dickson Legacy Symposium", (1991), 20 Man.L.J. 263- 561.

[9] The August 14, 1944 "friendly fire" incident is fully documented in C.P. Stacey, *Official History of the Canadian Army in the Second World War – Volume III: The Victory Campaign The Operations in North-West Europe, 1944-1945*, (Ottawa: Queen's Printer, 1960) at 243-45; Denis and Shelagh Whittaker, *Victory at Falaise: The Soldiers' Story* (Toronto: Harper Collins, 2000) at 169-81.

[10] Toronto *Globe and Mail*, Nov. 9, 1985, quoted in Lee Gibson, *A Proud Heritage. The First Hundred Years of Aikens, MacAulay and Thorvaldson* (Winnipeg: Aikens, MacAulay and Thorvaldson, 1993) at p. 131.

[11] Peter Morse Interview, Winnipeg, Manitoba, 27 December 2002.

[12] Beverley McLachlin Interview, Ottawa, Ontario, 16 October 2000.

[13] Joel Bakan Interview, Vancouver, British Columbia, 16 November 2000.

[14] Stephen Toope Interview, Toronto, Ontario, 24 January 2002.

[15] See e.g. *Howarth v. National Parole Board,* [1976] 1 S.C.R. 453 (dissent), *Martineau v, Matsqui Disciplinary Board,* [1980] 1 S.C.R. 602.

[16] See e.g. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114; *Brooks v. Canadian Safeway Ltd.* [1989] 1 S.C.R. 1219; *Jansen v. Platy Enterprises* Ltd., [1989] 1 1252.

[17] See e.g. *Reference Re Public Service Employee Relations Act*, [1987] 1 SCR 313 (dissent).

[18] See e.g. *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295.

[19] See e.g. *Mahé v. Alberta* [1990] 1 S.C.R. 342.

[20] See e.g. *Guerin v. The Queen,* [1984] 2 S.C.R. 335; *Sparrow v. The Queen,* [1990] 1 S.C.R. 1075.

[21] See Yalden, "Before the Bench: Brian Dickson as Corporate Lawyer" *supra*

[22] Blair MacAulay Interview, Toronto, Ontario, 30 November 2001.

[23] Peter Morse Interview, *supra*

[24] Yalden, "Before the Bench: Brian Dickson as Corporate Lawyer" *supra* at 30; Blair MacAulay Interview, supra.

[25] Brian Dickson Interviews, Ottawa, Ontario, Osgoode Society Oral History Project, 1992-93.

[26] Brian Dickson, "The Public Responsibility of Lawyers" (1983) 13 Man. L. J. 174.

[27] Brian Dickson "Counsel's Duty to the Court and to His Client" Continuing Legal Education Society, Halifax, Nova Scotia, 17 November 1984, NAC vol. 139 file 6.

[28] *Ibid.*

[29] Brain Dickson, "Call to the Bar Ceremony" Winnipeg, Manitoba , December 1963, NAC vol.138 file 4.

[30] Brian Dickson, "Call to the Bar Ceremony" Winnipeg, Manitoba, 1968, NAC vol.138 file 9.

[31] Anthony Kronman, *The Lost Lawyer*, (Cambridge: Harvard University Press, 1995) at 12. William Rehnquist, "The Lawyer-Statesman in American History" (1986), 3 Harvard Journal of Law and Public Policy 537; Robert Gordon, "Corporate Law Practice as a Public Calling" (1990), 49 Maryland Law Rev. 255.

[32] Brain Dickson Interviews, supra

[33] Gibson, *A Proud Heritage. The First Hundred Years of Aikens, MacAulay and Thorvaldson,* supra at 131.

[34] Kronman *The Lost Lawyer*, supra at 12.

[35] Katherine Swinton Interview, 11 December 2000.

[36] Brian Dickson Interviews, supra

[37] Ibid.

[38] See e.g. Vetrovec v. The Queen, [1982] 1 S.C.R. 811.

[39] Brian Dickson, 'The Role and Function of Judges" (1980) L.S.U.C.Gaz. 138 at 144

[40] Brian Dickson Interviews, supra.

[41] Brian Dickson, "Call to the Bar Ceremony" Winnipeg, Manitoba, 1970, NAC vol. 138 file 11.

[42] J.R. Colombo ed, *New Canadian Quotations* (Hurtig, Edmonton: 1987) at 311.

[43] H.L.A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963).

[44] Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1968).

[45] *R. v. Heffer* (1969), 71 W.W.R. 615.

[46] 164 (1) Every one commits vagrancy who
(a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found.

[47] "Courts blow for civil rights" Winnipeg *Tribune,* 29 November 1969.

[48] At p. 619.

[49] Brian Dickson Interviews, supra.

[50] Brian Dickson, "Address at the University of Winnipeg" 30 January 1970, NAC vol. 138 file 12.

[51] *R. v. Fuller* (1968), 67 W.W.R. 78.

[52] At p. 81.

[53] *Ibid.*

[54] *R. v. Great West News Ltd.,* (1970), 72 W.W.R. 354.

[55] At p. 355.

[56] *The Enforcement of Morals*, supra at p. 15

[57] See for example, *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713 and *R. v. Keegstra*, [1990] 3 S.C.R. 697, both discussed *infra.*

[58] [1972] 5 W.W.R. 678.

[59] *R. v. Drybones*, [1970] S.C.R. 282.

[60] *Canard v. Attorney General of Canada*, supra, at 688-9.

[61] Brian Dickson, "Address at the University of Winnipeg" 30 January 1970, NAC vol. 138 file 12.

[62] See e.g. Dickson's dissenting opinion in *Genovese v. York Lambton Corporation Ltd.* (1969), 67 W.W.R. 355 (Man. C.A.).

[63] Brian Dickson, "The Law and Compassion", Convocation Address, University of Toronto, 20 June 1986, NAC vol. 139 file 51.

[64] Brian Dickson, "Address to the Canadian Institute for the Administration of Justice Seminar on Judgment Writing" 2 July 1981, NAC vol. 138 file 28.

[65] *R. v. Sault Ste Marie,* [1978] 2 S.C.R. 1299.

[66] *Andrews v. Grand and Toy Ltd.,* [1978] 2 S.C.R. 229.

[67] *Howarth v. National Parole Board, supra.*

[68] *Rathwell v. Rathwell,* [1978] 2 S.C.R. 436; *Pettkus v. Becker,* [1980] 2 S.C.R. 834

[69] Supra

[70] Supra

[71] *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2, and 3),* [1981] 1 S.C.R. 753.

[72] Brian Dickson Interviews, supra.

[73] Brian Dickson, "The Opening of the Cambridge Lectures" Cambridge England, 15 July 1985, NAC vol. 139 file 25.

[74] Brian Dickson, "Judging in the 1980's", Canadian Association of Provincial Court Judges, Saskatoon Saskatchewan 15 September 1980, NAC vol. 138 file 36.

[75] Brian Dickson, "On the Supreme Court of Canada", Regina Bar Association, Regina

Saskatchewan, 15 October 1982, NAC vol. 138 file 37; "The Public Responsibility of Lawyers" supra at 186.

[76] Brian Dickson, "Judging in the 1980's", supra.

[77] Brian Dickson, "The Public Responsibility of Lawyers" supra at 187.

[78] Brian Dickson, "Remarks at the Call to the Bar Ceremony, Osgoode Hall Law School, Toronto, Canada 18 April, 1985. vol. 139 file 15.

[79] Brian Dickson, "The Opening of the Cambridge Lectures" Cambridge England, 15 July 1985, vol. 139 file 25.

[80] "The Opening of the Cambridge Lectures" supra.

[81] Brian Dickson, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" Calgary Alberta, September 1983, NAC vol. 138 file 46.

[82] Brian Dickson, "The Development of a Distinctively Canadian Jurisprudence", Faculty of Law, Dalhousie University, Halifax Nova Scotia, 29 October 1983, NAC vol. 138 file 48.

[83] Ibid.

[84] Supra,

[85] Supra

[86] *R .v Oakes*, [1986] 1 S.C.R. 103.

[87] See A.J. Petter, "The Politics of the Charter" (1986), 8 Supreme Court L.R. 473.

[88] R. Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

[89] Brian Dickson, "The Rule of Law: Judicial Independence and the Separation of Powers" Canadian Bar Association, August 21, 1985, NAC vol 139 file 26 xx

[90] [1986] 2 S.C.R. 56 at 70.

[91] "Questions and Answers Le Point" n.d., NAC vol. 156 file 13.

[92] Brian Dickson, Remarks at Luncheon, Lawyer's Inn, Vancouver, British Columbia, 17 June 1985, vol 139 file 22.

[93] Brian Dickson, "Recent Developments in the Supreme Court of Canada and Some of the Problems Facing the Court", Address to the Council of the Canadian Bar Association, Quebec City, Quebec, 30 August 1983, NAC vol. 138 file 41.

[94] "The Public Responsibility of Lawyers" supra at 187.

[95] "Recent Developments in the Supreme Court of Canada and Some of the Problems Facing the Court" supra.

[96] "The Public Responsibility of Lawyers" supra at 187.

[97] Ibid. at 186.

[98] Brian Dickson, "Lawyers and Law-Makers – The Challenge of Change", Convocation, Osgoode Hall Law School, Toronto, Ontario, 21 June 1985, NAC vol. 139 file 23.

[99] Brain Dickson, "Rights and Responsibilities" Ashbury College, Ottawa Ontario, 10 June 1989, NAC vol. 140 file 6.

[100] Brian Dickson, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" Calgary Alberta, September 1983, NAC vol. 138 file 46.

[101] "The Opening of the Cambridge Lectures" supra.

[102] "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" supra.

[103] Brain Dickson, "Role of the Judiciary Under the American and Canadian Constitutions: What Can We Learn from Each Other?" The Frank Kenison Lecture, Concord New Hampshire, 1 April 1992, NAC vol. 140 file 32.

[104] "Questions and Answers Le Point" supra.

[105] Brain Dickson, "Remarks at Dinner in Honour of Governor General Jeanne Sauvé" 1984, NAC vol. 139 file 9.

[106] Brain Dickson, "Address to the Montreal and Quebec Law Associations" 29 November 1984, NAC vol. 139 file 8.

[107] "Remarks at Luncheon, Lawyer's Inn, Vancouver, British Columbia" supra.

[108] See, eg. *Reference Re s. 94(2) of the Motor Vehicle Act (B.C.),* [1985] 2 S.C.R. 486 at 497, per Lamer J.

[109] "Remarks at the Luncheon with the Judges of the British Columbia Court of Appeal", 8 may 1986, vol 139, file 46.

[110] Brian Dickson, "Supreme Court of Canada as a General Court of Appeal", County of York Law Association, May 30, 1985, NAC vol. 139 file 19.

[111] Supra

[112] Brian Dickson, "The Supreme Court of Canada as a Functioning Institution" 1982, NAC vol. 138 file 32.

[113] Brian Dickson Interviews, supra.

[114] Ibid.

[115] Brian Dickson, "Address to the Mid-Winter Meeting of the Canadian Bar Association" 2 February 1985, NAC vol. 139 file 10.

[116] Brian Dickson, "Remarks at Dinner in Honour of Governor General Jeanne Sauvé" NAC 1984, vol. 139 file 9.

[117] Brian Dickson, "Canada's Charter and the Supreme Court of Canada", 1985 NAC vol. 139 file 12.

[118] Brian Dickson, "The Canadian Charter of Rights and Freedoms and Its Interpretation by the Courts" Princeton Alumni Association, Princeton, April 25, 1985, NAC vol. 139 file 16.

[119] Brain Dickson, "Remarks at Dinner in Honour of Mr. Geoffrey Palmer Deputy Prime Minister and Minister of Justice, Government of New Zealand" 16 September 1985, NAC vol. 139 file 32.

[120] "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" supra.

[121] Supra at 136.

[122] *Oakes, supra* note 65 at 136.

[123] Brian Dickson, "Judging in the 1980's", Canadian Association of Provincial Court Judges, Saskatoon Saskatchewan 15 September 1982, NAC vo. 138 file 36.

[124] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 764

[125] *Big M*, supra at 346.

[126] *R. v. Holmes*, [1988] 1 S.C.R. 914 at 931.

[127] *Ibid.* at 932.

[128] *Big M.*, supra at 337.

[129] *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713.

[130] *Ibid*. at 779.

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

[132] *Ibid*. at 1051.

[133] *Ibid*. at 1052.

[134] *Supra*

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[135] *Ibid*. at 756.

[136] *Ibid.* at 764.

[137] *Ibid*.

[138] Brain Dickson Interviews, supra

[139] "The Canadian Charter of Rights and Freedoms and Its Interpretation by the Courts" supra.

[140] *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.