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### The Constitutional Legacy of Chief Justice Brian Dickson

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## The Constitutional Legacy of Chief Justice Brian Dickson

### Abstract

Chief Justice Brian Dickson played a central role in the elaboration of the fundamental values of the Canadian Constitution. He took a balanced approach to federalism, favouring neither federal nor provincial claims and inviting cooperation through overlapping jurisdiction. Dickson transformed the rule of law from a background value to an operative constitutional principle. His judgments on the rights of minorities reflect a remarkable empathy for the plight of the disadvantaged. Democracy informed all aspects of his constitutional thinking. Dickson rejected the contention that judicial review is anti-democratic, and his constitutional legacy reflects a sustained effort to harmonize all four fundamental constitutional values.

### Keywords

Dickson, R. G. Brian; Canada. Supreme Court; Constitutional law; Canada

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# PIERRE GENEST MEMORIAL LECTURE

## THE CONSTITUTIONAL LEGACY OF CHIEF JUSTICE BRIAN DICKSON<sup>©</sup>

BY ROBERT J. SHARPE\*

Chief Justice Brian Dickson played a central role in the elaboration of the fundamental values of the Canadian Constitution. He took a balanced approach to federalism, favouring neither federal nor provincial claims and inviting cooperation through overlapping jurisdiction. Dickson transformed the rule of law from a background value to an operative constitutional principle. His judgments on the rights of minorities reflect a remarkable empathy for the plight of the disadvantaged. Democracy informed all aspects of his constitutional thinking. Dickson rejected the contention that judicial review is anti-democratic, and his constitutional legacy reflects a sustained effort to harmonize all four fundamental constitutional values.

Le juge en chef Brian Dickson a joué un rôle central dans l'élaboration des valeurs fondamentales de la constitution canadienne. En adoptant une approche équilibrée vis-à-vis le fédéralisme, il n'a pas privilégié les énoncés fédéraux ou provinciaux, et il a encouragé la coopération à l'aide d'un chevauchement de compétences. Grâce à Dickson, la primauté du droit, un principe à l'arrière-plan, a été transformé en principe constitutionnel opérationnel. Ses jugements en matière de droits des minorités reflètent une remarquable faculté de s'identifier au sort des défavorisés. La démocratie a influencé tous les aspects de son raisonnement d'ordre constitutionnel. Dickson a rejeté les propos supposant que la révision judiciaire était anti-démocratique, et son patrimoine constitutionnel reflète un effort soutenu dans le but d'harmoniser les quatre valeurs constitutionnelles fondamentales.

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## I. INTRODUCTION

The judicial career of Brian Dickson spanned a period of twenty-seven years, from his appointment as a trial judge to the Manitoba Court of Queen's Bench in 1963 to his retirement as Chief Justice of Canada in 1990.<sup>1</sup> Those twenty-seven years, seventeen of which Dickson spent as a member of our highest court, and six as Chief Justice of Canada, were a period of significant, perhaps unprecedented, constitutional controversy. We were confronted with a seemingly endless constitutional debate and repeated calls for both renewal and reform. Canadians from all corners presented each other with competing visions of their nation, the very existence of which was put into question.

The debate was intensely political, but the courts could not, and did not, escape involvement. Indeed, at critical points in our history we witnessed judicial resolution of political impasses. In the *Patriation Reference*<sup>2</sup> in 1981, the Supreme Court determined that while the federal government had the legal right to request the Parliament of Westminster to amend the Constitution of Canada, convention required a substantial consensus of the provinces. The political process responded to the Court's direction. With patriation came the *Canadian Charter of Rights and Freedoms*<sup>3</sup> and its enhancement of the role of the judiciary in the governance of Canada.

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<sup>1</sup> For a biographical sketch, see R. J. Sharpe, "Brian Dickson: Portrait of a Judge" (1998) 17:3 *Advocates' Soc. J.* 13 [hereinafter "Portrait"].

<sup>2</sup> *Reference Re Resolution to Amend the Constitution of Canada*, [1981] 1 S.C.R. 753 [hereinafter *Patriation Reference*].

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

During these tumultuous times, Brian Dickson played a central role in the elaboration of our most fundamental constitutional values. The product of his judicial work now constitutes an essential element of the Canadian Constitution. In this lecture, I will consider the essential features of his constitutional legacy.

To accomplish my task in the space of a single lecture, I will, necessarily, take a broad-brush approach. To identify the essential elements of Dickson's constitutional vision, I will organize my remarks around the four basic principles of our Constitution that are immanent in his work and that were specifically identified by the Supreme Court of Canada in its monumental 1998 *Secession Reference* decision.<sup>4</sup> As in the *Patriation Reference* almost twenty years earlier, the Court was asked to bring its judicial wisdom to bear on an apparently intractable constitutional debate. To respond in a principled judicial fashion, the Court probed the most fundamental principles of our Constitution to identify what it described as "the vital unstated assumptions upon which the text is based," its "internal architecture," and its "defining principles."<sup>5</sup> In elaborating these fundamental constitutional principles, the Court drew heavily on the judicial work of Brian Dickson, and so, I suggest, it is appropriate for me to take those values as the organizing principles for this assessment of his legacy.

The first basic principle of our Constitution is federalism—the division of legislative power between the Parliament of Canada and the provincial legislatures. The division of powers represents an attempt to identify those aspects of our political life that unite us while preserving appropriate scope to accommodate and to enhance the heterogeneous social, cultural, and economic realities of our diverse and distinctive provincial communities. Dickson's federalism jurisprudence, I will suggest, demonstrates a remarkable balance between the competing claims of federal and provincial authorities, perhaps unequalled by any of his contemporaries.

The second basic principle, constitutionalism and the rule of law, is an important abstract notion fundamental to the legal order of all Western societies. During the Dickson era, the rule of law was transformed from a vague abstraction to an operative constitutional principle. As the pioneering architect of *Charter* jurisprudence, Dickson made a unique contribution to a whole new era for Canadian

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<sup>4</sup> *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Secession Reference*].

<sup>5</sup> *Ibid.* at 247-48.

constitutionalism. His judgments established an enduring basic framework for the elaboration of *Charter* rights and freedoms.

The third basic principle, the protection of minorities, is implicit in the very nature of Canadian society, and an explicit feature of our written Constitution. Dickson's elaboration of anti-discrimination legislation, his commitment to the enhancement of minority language rights, and his determination to see respected the rights and values of our First Nations, made him a leading judicial exponent of this aspect of our Constitution.

The fourth basic principle, democracy, is the bedrock value of the Canadian Constitution. As the Supreme Court said in the *Secession Reference*, democracy is "a fundamental value in our constitutional law and political culture" and a "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."<sup>6</sup> To some, the power of judicial review that flows from the first three values—federalism, constitutionalism and the rule of law, and the protection of minorities—conflicts with the values of democracy.<sup>7</sup> I will suggest that a significant element of Dickson's constitutional legacy is the synthesis he achieved of all four fundamental values. In Dickson's constitutional vision, the values protected by judicial review were themselves informed and defined by the principle of democracy. His work demonstrates that all four constitutional principles, democracy included, work in harmony.

## II. THE FOUR BASIC CONSTITUTIONAL PRINCIPLES

### A. *Federalism*

A striking feature of Dickson's federalism jurisprudence<sup>8</sup> is the extent to which he tended to uphold legislation challenged on federalism grounds. To accomplish this end, he made use of a number of interpretive principles.

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<sup>6</sup> *Ibid.* at 252-53.

<sup>7</sup> See, for example, M. Mandel, *The Charter of Rights and Freedoms and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson, 1994); and R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992).

<sup>8</sup> See generally K.E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990); and K.E. Swinton, "Dickson and Federalism: In Search of the Right Balance" (1991) 20 Man. L.J. 483.

## 1. Deference and overlapping powers

Permeating Dickson's federalism judgments is a tendency to show appropriate deference to the aims of the legislature. "We should not," he said in a 1978 decision, "lightly decide that enabling legislation is beyond the constitutional competence of the enacting body."<sup>9</sup> In another 1978 judgment, the majority of the Court held that a Saskatchewan well-head tax on oil was a constitutionally impermissible interference with interprovincial trade. Dickson dissented, suggesting that the Court should allow the legislatures freedom of action to "safeguard their legitimate interests as in their wisdom they see fit."<sup>10</sup> A law benefits from the presumption of constitutionality and the party attacking its validity bears the onus of proof. Dickson insisted that to discharge that onus and displace the presumption, "the evidence must be clear and unmistakable; more than conjecture or speculation is needed to underpin a finding of constitutional incompetence."<sup>11</sup>

Given this posture of deference in federalism cases and his inclination to interpret all elements of the Constitution generously, Dickson was strongly attracted to what might be described as mediating devices. The pith and substance doctrine stipulates that for federalism purposes, a law is to be classified in terms of its core purpose. Provided that core purpose falls within the legislative competence of the enacting body, the law will not be rendered invalid by virtue of other incidental features of the legislation that fall outside the powers of the enacting body. In a 1989 decision,<sup>12</sup> Dickson adopted Peter Hogg's crisp statement of the principle, and observed that "a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation ..."<sup>13</sup>

Dickson also made frequent reference to the so-called double aspect doctrine, adopting the analysis of his former high school

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<sup>9</sup> See, for example, *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 at 200 [hereinafter *Di Iorio*].

<sup>10</sup> *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1978] 2 S.C.R. 545 at 573.

<sup>11</sup> *Ibid.* at 573-74.

<sup>12</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 [hereinafter *General Motors*].

<sup>13</sup> *Ibid.* at 670, citing P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 334.

classmate, the eminent constitutional scholar, William Lederman.<sup>14</sup> The double aspect doctrine acknowledges that some legislative subjects fall within both federal and provincial competence. Lederman explained that where one aspect of a matter fell within a head of federal legislative competence, but another aspect of the matter was within the provincial sphere, and where “the contrast between the relative importance of the two features is not so sharp,” both laws could stand.<sup>15</sup> Finding the federal and provincial characteristics of a matter to be more or less equal in importance, Dickson concluded that there was little reason “to kill one and let the other live.”<sup>16</sup>

The application of these doctrines yielded many situations of overlapping federal and provincial laws. Dickson welcomed this as a natural result in a federal state, one that encouraged cooperation between the two levels of government. He frequently observed in his judgments that “overlap of legislation is to be expected and accommodated in a federal state.”<sup>17</sup> On this point as well, the seminal thinking of Lederman was cited with approval: “[O]ur community life—social, economic, political, and cultural—is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring. There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution.”<sup>18</sup> In a 1987 judgment,<sup>19</sup> Dickson went so far as to overrule an earlier Supreme Court decision that had “read down” an otherwise valid municipal by-law on posting signs so that it would not interfere with lawn signs posted in a federal election.<sup>20</sup> This form of interjurisdictional immunity was inconsistent with Dickson’s model of federalism:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. [But it must be

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<sup>14</sup> See, for example, *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 181-82 [hereinafter *Multiple Access*], adopting from W.R. Lederman, “Classification of Laws and the British North America Act” in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964) 177 at 193.

<sup>15</sup> *Multiple Access*, *supra* note 14 at 182, adopting from W.R. Lederman, *supra* note 14 at 193.

<sup>16</sup> *Multiple Access*, *supra* note 14 at 182.

<sup>17</sup> See, for example, *General Motors*, *supra* note 12 at 669.

<sup>18</sup> *Multiple Access*, *supra* note 14 at 180-81, quoting W.R. Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada” (1963) 9 McGill L.J. 185 at 185.

<sup>19</sup> *O.P.S.E.U. v. Ontario (A.G.)*, [1987] 2 S.C.R. 2 [hereinafter *OPSEU*].

<sup>20</sup> See *MacKay v. R.*, [1965] S.C.R. 798.



recognized] that doctrines like interjurisdictional and Crown immunity and concepts like “watertight compartments” ... have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.<sup>21</sup>

Acceptance of overlapping federal and provincial legislation was further enhanced by Dickson’s narrow definition of paramountcy. This judge-made rule provides that in the event of conflict between validly enacted federal and provincial legislation, federal legislation prevails and the provincial law is rendered inoperative to the extent of the conflict. In a 1982 decision, Dickson was confronted with virtually identical provincial and federal securities legislation regulating insider trading.<sup>22</sup> Both were held to be valid by application of the double aspect doctrine. Describing duplication as “the ultimate in harmony,” Dickson held that “[m]ere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.”<sup>23</sup> He found that double recovery of damages could be readily dealt with by the courts. He elaborated the narrowest possible definition of paramountcy, limiting its application to situations “where there is actual conflict in operation as where one enactment says ‘yes’ and the other says ‘no’; ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other.”<sup>24</sup>

## 2. Administration of justice

In the *Constitution Act, 1867*,<sup>25</sup> section 91(27) allocates to Parliament responsibility for the “Criminal law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters” while section 92(14) gives the provinces responsibility for “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil

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<sup>21</sup> *OPSEU*, *supra* note 19 at 18.

<sup>22</sup> See *Multiple Access*, *supra* note 14.

<sup>23</sup> *Ibid.* at 190. Dickson acknowledges borrowing the phrase “the ultimate in harmony” from Lederman.

<sup>24</sup> *Ibid.* at 191.

<sup>25</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

Matters in those Courts.” There is an obvious tension to resolve between federal authority over the “criminal law” and “procedure in criminal matters,” and provincial competence in relation to “the administration of justice in the province.” Dickson saw these provisions as an attempt to “effect a careful and delicate division of power between the two levels of government in the field of criminal justice.”<sup>26</sup>

In a series of cases that came before the Supreme Court in the late 1970s and in the early 1980s, Dickson fought valiantly to define for the provinces a core constitutional mandate with respect to the administration of criminal justice. Although Dickson carried the majority upholding the constitutional validity of a provincial inquiry into organized crime over a strong dissenting opinion from Laskin C.J.,<sup>27</sup> on the whole, Dickson’s views did not prevail and the arguments favouring exclusive federal authority held sway with the majority. For example, Dickson failed to persuade his colleagues that the provincial authority extended to the investigation of the activities of the Royal Canadian Mounted Police within the province<sup>28</sup> or, most significantly, to the prosecution of criminal offences.<sup>29</sup> Although he wrote in dissent in *Putnam, Hauser, and Wetmore*, Dickson’s reasons bear scrutiny today as they illustrate two significant elements of his approach to constitutional interpretation, namely, the use of history and the appeal to a functional analysis.

While not an adherent to the “original intent” school of constitutional interpretation, which holds that the Constitution should be given the same meaning today its drafters intended over a century ago,<sup>30</sup> Dickson did refer to “the bargain struck at the time of Confederation”<sup>31</sup> and often drew upon history as an interpretive aid. As he said in one decision, “[a] page of history may illuminate more than a book of logic.”<sup>32</sup> His judgments in this area contain references to the

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<sup>26</sup> *R. v. Wetmore*, [1983] 2 S.C.R. 284 at 305 [hereinafter *Wetmore*].

<sup>27</sup> See *Di Iorio*, *supra* note 9.

<sup>28</sup> See *Alberta (A.G.) v. Putnam*, [1981] 2 S.C.R. 267 [hereinafter *Putnam*].

<sup>29</sup> See *R. v. Hauser*, [1979] 1 S.C.R. 984 [hereinafter *Hauser*]; and *Wetmore*, *supra* note 26.

<sup>30</sup> See, for example, *British Columbia (A.G.) v. Canada Trust*, [1980] 2 S.C.R. 466 at 479: “If the Canadian Constitution is to be regarded as a ‘living tree’ and legislative competence as ‘essentially dynamic’ (per Beetz J. in *Martin Service Station Ltd. v. M.N.R.*, [1977] 2 S.C.R. 996 at 1006), then the determination of categories existing in 1867 becomes of little, other than historic, concern.”

<sup>31</sup> *Hauser*, *supra* note 29 at 1032.

<sup>32</sup> *Wetmore*, *supra* note 26 at 299.

speeches of Sir John A. Macdonald, to legislative history, and to practices prevalent at the time of Confederation.<sup>33</sup>

Dickson fortified the historical approach with a functional analysis to consider which level of government could best deal with the matter at hand. He did not hesitate to conclude that, from a functional perspective, it made sense to locate criminal prosecutorial authority at the provincial level so that prosecution policies would be sensitive to local needs and concerns.

Although Dickson was unable to persuade his colleagues with these arguments, I think it fair to say that most commentators have pronounced favourably upon the position he took.<sup>34</sup> Moreover, since the federal Crown has delegated prosecutorial authority over most offences to the provincial attorneys general, the overlapping cooperative scheme envisioned by Dickson has largely been achieved in practice.

### 3. Trade and commerce

It is ironic that the same case<sup>35</sup> that dealt the death blow to Dickson's plea for provincial control over the administration of justice served as the starting point for his significant achievement in elaborating a workable theory to embrace general federal economic regulatory authority under the trade and commerce power. An early Privy Council decision<sup>36</sup> held that there were two branches to the trade and commerce power; first, the regulation of interprovincial and international trade;

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<sup>33</sup> See, for example, *Putnam*, *supra* note 28 at 293-94, quoting Sir John A. Macdonald on local policing; and *Wetmore*, *supra* note 26 at 281:

If constitutional history teaches us anything it teaches that the Fathers of Confederation wished the substantive criminal law to be enacted at the federal level (s. 91(27) of the *BNA Act*) but the administration of justice within the provinces (s. 92(14)) both criminal and civil justice, to be at the local level. And for very good reasons of policy. The maintenance of law and order is inherently of local concern. It is best managed by local officials, sensitive to the needs and idiosyncracies of the community. The Fathers of Confederation recognized that it simply would not do for officials in Ottawa to be enforcing laws throughout the Dominion. The federal Parliament had the power to define the content of the general rules. But the enforcement of the rules requires, at the

<sup>34</sup> See, for example, P.W. Hogg, *Constitutional Law*, looseleaf edition (Toronto: Carswell, 1997), at 19.6(b); A. Petter, "Constitutional Law: Rearranging the Administration of Criminal Justice" (1985) 63 *Can. Bar Rev.* 162; and J.D. Whyte, "The Administration of Criminal Justice and the Provinces" (1984) 38 *C.R.* (3d) 184.

<sup>35</sup> *Canada (A.G.) v. Canadian National Transportation Ltd.*, [1983] 2 *S.C.R.* 206 [hereinafter *Canadian National*].

<sup>36</sup> See *Citizens Insurance Company of Canada v. Parsons* (1881), 7 *App. Cas.* 96 (P.C.).

and second, the "general regulation of trade affecting the whole Dominion."<sup>37</sup> While there was a relatively well-developed body of jurisprudence elaborating the extent of federal power under the first branch, the courts had failed to articulate a workable test for the second branch.

Dickson was keenly interested in economic issues. Before he became a judge, he had carried on a sophisticated commercial and corporate law practice and he had served as a director on the board of a chartered bank. As a member of the Manitoba Court of Appeal, he decided no fewer than four cases involving the trade and commerce power,<sup>38</sup> and in one case, he discerned a trend towards its broadening.<sup>39</sup> His combined business and legal experience led him to believe that there were economic issues, national in scope, affecting the "economy as a single integrated national unit"<sup>40</sup> transcending provincial interests and provincial competence. At the same time, he saw the issue as being one of balance, due to his strong belief in the need to protect provincial jurisdiction over the regulation of businesses, trades, and local economic activity. The challenge was to unlock the constitutional barrier to federal regulatory power, but to do so in a way that would not imperil "the local autonomy in economic regulation contemplated by the Constitution."<sup>41</sup> A balance had to be struck between, on the one hand, an all-pervasive interpretation of the federal power that would overwhelm the regulatory powers of the provinces in relation to their own local economic activities, and, on the other hand, "an interpretation that renders the general trade and commerce power to all intents vapid and meaningless."<sup>42</sup>

In achieving that balance, Dickson built upon the efforts of a 1977 Laskin C.J. decision,<sup>43</sup> which identified the elements for a valid exercise of the general branch of the federal trade and commerce power: a general regulatory scheme monitored by the continuing oversight of a

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<sup>37</sup> *Ibid.* at 113.

<sup>38</sup> See *R. v. Loblaw's Groceries Co.* (1969), 6 D.L.R. (3d) 225 (Man. C.A.); *Reference Re Interprovincial Trade Restrictions on Agricultural Commodities* (1971), 18 D.L.R. (3d) 326 (Man. C.A.) [hereinafter *Interprovincial Trade Restrictions*]; *Gershman Produce Co. v. Manitoba Marketing Board* (1971), 22 D.L.R. (3d) 320 (Man. C.A.); and *Manitoba (A.G.) v. Burns Foods Ltd.* (1973), 35 D.L.R. (3d) 581 (Man. C.A.).

<sup>39</sup> *Interprovincial Trade Restrictions*, *supra* note 38 at 333.

<sup>40</sup> *Canadian National*, *supra* note 35 at 267.

<sup>41</sup> *Ibid.* at 277.

<sup>42</sup> *General Motors*, *supra* note 12 at 660.

<sup>43</sup> See *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134.

regulatory agency and concerned with trade as a whole rather than with a particular industry. To “ensure that federal legislation does not upset the balance of power between federal and provincial governments,” Dickson added two further crucial elements directly focusing on the dimensions of the problem being addressed in relation to provincial capacity: “(i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.”<sup>44</sup> The reference to provincial incapacity, a device later employed to allow for a contained expansion of the federal residual peace, order, and good government power,<sup>45</sup> maintained the balance Dickson sought, protecting provincial regulatory authority while affording scope for federal initiatives aimed at the national economy as a whole.

#### 4. Federalism: Conclusion

Dickson adopted a balanced approach to the challenges of federalism. He was generally unwilling to read any provision of the Constitution narrowly, and leaned decidedly in favour of a judicially deferential approach, upholding legislation if at all possible. He accomplished this by accepting—indeed encouraging—overlapping legislative authority, and he made liberal use of the mediating devices of pith and substance analysis, the double aspect doctrine, and a very narrow scope for federal paramountcy. From a doctrinal perspective, the two most significant aspects of Dickson’s federalism jurisprudence are his valiant effort to define a broad role for the provinces in relation to the administration of criminal justice, and his great achievement in the elaboration of the federal power in relation to trade and commerce. Dickson’s functional approach to federalism, seeking if possible to locate authority at the level he perceived to be most adept at dealing with the problem, avoided any apparent inclination or predisposition to favour either the federal or provincial authorities. He differed from the two other dominant judicial thinkers on federalism with whom he served, Chief Justice Bora Laskin, who leaned distinctly towards the federal side, and Justice Jean Beetz, who took a decidedly more provincial

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<sup>44</sup> *General Motors*, *supra* note 12 at 662.

<sup>45</sup> See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

approach and insisted upon a sharper demarcation of jurisdictional limits.

## B. *Constitutionalism and the Rule of Law*

### 1. The rule of law

The ideal of the rule of law was fundamental to Dickson's conception of Canada's Constitution. In a speech given in 1985, Dickson described his understanding of the rule of law in the following terms:

The meaning of the Rule of Law is very simple and well known to us all: the law must stand supreme as the source and fabric of all social organization. It is the law which provides the framework for relations among individuals as well as between the individual and the state: the law delineates the scope of each person's liberties and responsibilities and defines the powers and duties of government. All obligations imposed on the individual and all restrictions upon his or her liberty must be justified by law. This is the most fundamental guarantee of equality and freedom we have achieved as a society. The Rule of Law protects individuals from arbitrary and capricious treatment at the hands of government and fosters confidence in each of us that the power of government to interfere with our lives is finite and ascertainable. It allows us to live together in freedom and harmony and provides the common ground for social progress and prosperity.<sup>46</sup>

Dickson had a profound belief that this liberal structure was essential for social order in a democratic society.

While always an implicit element of the legal and judicial order,<sup>47</sup> the rule of law took concrete form in Dickson's era.<sup>48</sup> In a series

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<sup>46</sup> "The Rule of Law: Judicial Independence and the Separation of Powers" (Canadian Bar Association, 21 August 1985) [unpublished, archived: National Archives of Canada, MG31 E85 vol. 137 file 27] [hereinafter "Rule of Law"].

<sup>47</sup> For an example of the use of the rule of law as a background interpretive principle, see Dickson's dissent in *Dedman v. R.*, [1985] 2 S.C.R. 2, on the validity of random stops to investigate for drinking and driving. Dickson writes, at 10, that it is a "fundamental tenet of the rule of law in this country that the police ... have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law." He continues, at 15:

A police officer is not permitted to execute his or her duty by unlawful means. The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfillment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.

<sup>48</sup> See J. Frémont, "The Dickson Court, the Courts, and the Constitutional Balance of Powers in the Canadian System of Government" (1991) 20 Man. L.J. 451 at 465-71.

of cases, commencing with the *Manitoba Language Reference*,<sup>49</sup> the rule of law was transformed from a rather vague background concept to an operative and, in the event of conflict, overriding and governing constitutional principle. The Court found that the Manitoba legislature had failed to respect the French language guarantees entrenched at the time the province joined Confederation by enacting laws in English only. As a result, the Court found the province's entire statute book invalid and of no effect. This consequence of upholding the guaranteed language right was alarming: would the entire legal regime of the province collapse in order to vindicate this constitutionally protected right? The Court could not countenance such a result, as it would "deprive Manitoba of its legal order and cause a transgression of the rule of law."<sup>50</sup> The Court held that "[f]or the Court to allow such a situation to arise and fail to resolve it would be an abdication of its responsibility as protector and preserver of the Constitution."<sup>51</sup> The Court determined that rather than undermine the entire legal order, it would have to sanction the violation of rights for a period sufficient to allow Manitoba to translate its laws and to bring itself into compliance with the demands of the Constitution. Thus, in the event of a conflict between a specific constitutional right and a threat to the entire legal order, the rule of law prevails as the Constitution's dominant and governing principle.

A similar line of thinking motivated Dickson's judgment in a 1988 decision<sup>52</sup> upholding the validity of an injunction to prevent picketing of a courthouse over the picketers' claim of a violation of *Charter* rights. In Dickson's view, to the extent that they existed, the individual *Charter* rights of the picketers could not trump the general public's right to have access to the courts, a right he saw as essential to the rule of law and as "one of the foundational pillars protecting the rights and freedoms of our citizens."<sup>53</sup> The rule of law and the rights of all had to prevail over the exercise of individual rights by a few: "The *Charter* surely does not self-destruct in a dynamic of conflicting rights."<sup>54</sup>

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<sup>49</sup> *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*].

<sup>50</sup> *Ibid.* at 753.

<sup>51</sup> *Ibid.*

<sup>52</sup> *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214.

<sup>53</sup> *Ibid.* at 230, quoting the judgment of the British Columbia Court of Appeal, below: *B.C.G.E.U. v. British Columbia (A.G.)*, 20 D.L.R. (4th) 399 (B.C. C.A.).

<sup>54</sup> *Ibid.* at 249.

Another example of the prevalence of the rule of law over individual rights is provided by Dickson's elaboration in *R. v. Big M Drug Mart Ltd.*<sup>55</sup> of the broad rule for standing to raise a *Charter* claim. The Crown argued that since the accused was a corporation, it could not demonstrate a sufficient interest to invoke the guarantee of freedom of religion. Dickson did not suggest that corporations could have a religion, but he did insist that the Court could not countenance a conviction under an unconstitutional statute: "[N]o one can be convicted of an offence under an unconstitutional law."<sup>56</sup> *Big M Drug Mart*, he observed, was not a busybody that invoked the process of the Court to challenge the law, but rather found itself charged with an offence:

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. ... A law which itself infringes religious freedom is, by that reason alone, inconsistent with section 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.<sup>57</sup>

Dickson viewed the rule of law as a fundamental aspect of our legal and political order. He found an abstract principle, and he left, as part of his legacy, an operative rule capable of trumping more specific constitutional values where necessary to preserve the legal order.

## 2. Independence of the judiciary and judicial review

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.<sup>58</sup>

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

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<sup>55</sup> [1985] 1 S.C.R. 295 [hereinafter *Big M*].

<sup>56</sup> *Ibid.* at 313.

<sup>57</sup> *Ibid.* at 313-14.

<sup>58</sup> [1986] 2 S.C.R. 56 at 70.



rights and freedoms, to the protection of minorities and, as I suggest later in this lecture, to the realization of democracy itself.<sup>59</sup>

Although he tended to be deferential in federalism cases, he did not hesitate to assert the fundamental importance of judicial review when faced with a provincial attempt to immunize legislation from scrutiny in *Amax Potash Ltd. v. Saskatchewan*.<sup>60</sup> Dickson wrote that while the courts would not question the wisdom of legislation, “it is the high duty of this Court to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.”<sup>61</sup> A statute immunizing the province from suit for the return of money paid under an unconstitutional tax presented a direct challenge to the division of powers under Canada’s federal constitution: “To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens.”<sup>62</sup>

Dickson read the section 52 supremacy clause, included in the *Constitution Act, 1982*,<sup>63</sup> as charging the courts with a positive obligation to vindicate protected rights and freedoms. He frequently referred to the duty of the court to uphold the Constitution.<sup>64</sup> While he concurred with the Court’s judgment in *Dolphin Delivery*<sup>65</sup> limiting the application of the *Charter* to government activity, he did not hesitate to ensure that the *Charter* reached all aspects of governmental decisionmaking. In *Operation Dismantle v. R.*,<sup>66</sup> Dickson insisted that the *Charter* must apply to all decisions of government, even those of the Cabinet in highly sensitive and highly political areas. The case involved a challenge to the federal Cabinet’s decision to permit the United States to test cruise missiles in Canadian territory, a decision alleged to violate the right to life and personal security guaranteed by section 7 of the *Charter*. While that claim was dismissed on the ground that the facts alleged to support

<sup>59</sup> See Part II(D), below.

<sup>60</sup> [1977] 2 S.C.R. 576.

<sup>61</sup> *Ibid.* at 590.

<sup>62</sup> *Ibid.*

<sup>63</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

<sup>64</sup> See, for example, “Rule of Law,” *supra* note 46: “When a law is inconsistent with the *Charter* the courts must not hesitate to strike it down. The fulfillment of the grand objectives which inspired the *Charter* is dependent in large measure on the strength and fortitude of the judiciary.”

<sup>65</sup> *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

<sup>66</sup> [1985] 1 S.C.R. 441.

the claim were matters of speculation and conjecture incapable of proof, Dickson rejected the contention that Cabinet decisions should be immunized from review: "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."<sup>67</sup>

### 3. Constitutionalism and the structure of *Charter* interpretation

While only time will tell which aspect of Dickson's constitutional legacy will be most long-lasting, there is little doubt that the present generation is most indebted to him for his design of the basic architecture of *Charter* interpretation. It is easy to forget that when the *Charter* was introduced in 1982, there was considerable uncertainty about many basic issues. Would the courts repeat the experience of the *Canadian Bill of Rights*<sup>68</sup> and interpret rights and freedoms narrowly, or would the courts see the *Charter* as a bold new initiative and read the constitutional guarantees generously? If rights were generously interpreted, how would the courts accommodate limitations implicit in the social order: by imposing definitional limitations on the rights themselves, or through the section 1 general limitations clause? How exacting would the courts be in assessing the claims of government that rights should be limited in order to advance broader social and economic objectives? To these, and many other, basic questions there were no certain answers.

In three seminal judgments, *Hunter v. Southam Inc.*,<sup>69</sup> *Big M*,<sup>70</sup> and *R. v. Oakes*,<sup>71</sup> Dickson laid out the broad contours of the interpretive approach to be followed. It was clear from these decisions that the Dickson Court would not repeat the disappointing performance of its predecessors under the *Bill of Rights*.<sup>72</sup> In *Hunter*, Dickson identified the essence of a constitution in eloquent terms:

A constitution ... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights

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<sup>67</sup> *Ibid.* at 459.

<sup>68</sup> S.C. 1960, c. 44, reprinted in R.S.C. 1985, Appendix III [hereinafter *Bill of Rights*].

<sup>69</sup> [1984] 2 S.C.R. 145 [hereinafter *Hunter*].

<sup>70</sup> *Supra* note 55.

<sup>71</sup> [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

<sup>72</sup> *Supra* note 68. For a more general discussion, see note 121, *infra*, and accompanying text.

and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.<sup>73</sup>

Drawing upon the metaphor of the constitution as a living tree, capable of expansion and growth within its natural limits, Dickson elaborated the “purposive” approach to *Charter* interpretation:

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.<sup>74</sup>

Dickson built upon this foundation in the *Big M* case, where he described the purposive approach in a passage now familiar to all students of the Constitution:

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.<sup>75</sup>

The purposive approach yielded a definition of freedom of religion that was generous and sensitive to the situation of religious minorities:

Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. ... Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.<sup>76</sup>

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<sup>73</sup> *Hunter, supra* note 69 at 155.

<sup>74</sup> *Ibid.* at 156.

<sup>75</sup> *Big M, supra* note 55 at 344.

<sup>76</sup> *Ibid.* at 336-37.

The purposive approach formed the cornerstone of *Charter* interpretation, but alone it was incomplete. The most difficult issue in the interpretation of *Charter* rights is reconciling the rights of the individual with the competing rights of others and with the interests of the community at large. The problem is especially acute where rights are broadly defined, as they were likely to be following the purposive approach. The language of section 1 provides the general concept for limiting *Charter* rights and freedoms, but it required a magisterial judicial effort to flesh out the meaning of "reasonable limits prescribed by law as can be justified in a free and democratic society." In *Oakes*,<sup>77</sup> Dickson provided the second foundational element of *Charter* interpretation. Dickson held that while the initial burden of proving a violation of rights rests with the individual asserting a *Charter* violation, once a *prima facie* violation is proved, the burden shifts to the party attempting to justify the infringement as a reasonable limit. It is at the justification stage that the court must consider the interest in limiting a right or freedom, and weigh collective interests or the competing rights of other individuals against the right of the claimant. The reconciliation of the competing interests against individual rights, Dickson wrote, is to be achieved by a "stringent standard of justification"<sup>78</sup> focusing on the legitimacy of the government's objective and the "proportionality" between the means chosen to achieve that objective and the burden on the rights claimant.

The language of *Oakes* is familiar to all who are concerned with the *Charter*, but given the elegance of the test prescribed by Dickson, it bears repetition here:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'.<sup>79</sup>

Purposive interpretation and the *Oakes* proportionality test do not, of course, mechanically resolve all issues of *Charter* interpretation. As with the text of the *Charter* itself, they must take their shape over time in the specific context of both the right or freedom at issue and the

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<sup>77</sup> *Supra* note 71.

<sup>78</sup> *Ibid.* at 136.

<sup>79</sup> *Ibid.* at 139.

competing values for which justification is claimed. They remain, however, the essential touchstones of *Charter* adjudication. They have become a fully integrated part of Canada's Constitution and represent a monumental legacy to constitutionalism in Canada.

### C. Protection of Minorities

The protection of minorities is one of the most notable features of Dickson's contribution to Canadian law. He wrote landmark judgments on anti-discrimination law, minority language rights, and Aboriginal rights. His work in this area demonstrates a remarkable empathy with the victims of discrimination and an ability to see the world and its problems through the eyes of Canada's most vulnerable people. In this lecture, I can do little more than sketch some of the highlights.

#### 1. Anti-discrimination law

Although he wrote only one judgment on the *Charter's* section 15 equality rights guarantee,<sup>80</sup> Dickson's human rights jurisprudence pushed our law significantly forward in its attempt to come to grips with various forms of discrimination. He dealt with the thorny issues of systemic discrimination and affirmative action in the *Action Travail des Femmes* case.<sup>81</sup> Various women filed a complaint with the Canadian Human Rights Commission alleging systemic discrimination in the hiring practices of the Canadian National Railway Company (CN). The Commission imposed an employment equity program designed to address both the negative stereotypes about working women, and the respondent's lack of commitment to deal with the strikingly low number of women in its workforce. It ordered CN to hire a minimum of one woman for every four people hired in non-traditional positions in each quarter until women comprised thirteen per cent of the company's workforce. In upholding the Human Rights Commission's order, Dickson rejected a "fault based" approach to discrimination on the ground that it "failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is

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<sup>80</sup> See *R. v. S.(S.)*, [1990] 2 S.C.R. 254.

<sup>81</sup> See *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 [hereinafter *Action Travail des Femmes*].

unintended and unforeseen.”<sup>82</sup> Referring to the Abella Report,<sup>83</sup> he identified systemic discrimination as

discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job” (see the Abella Report at pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.<sup>84</sup>

In Dickson’s view, the Commission was entitled to impose the remedy of an employment equity program

designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past: [but] ... an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.<sup>85</sup>

Dickson furthered the law’s understanding of gender discrimination in two 1989 decisions, holding that both sexual harassment<sup>86</sup> and the denial of sick leave benefits to a pregnant woman<sup>87</sup> constituted discrimination on the basis of sex. In the sexual harassment case, he wrote that sexual harassment in the workplace is “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences ... . [I]t is an abuse of both economic and sexual power ... [and] a profound affront to the dignity of the employees forced to endure it.”<sup>88</sup> In the pregnancy case, Dickson held that “it is unfair to impose all of the costs of pregnancy upon one half of the population” and found that “those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged ... .”<sup>89</sup> Dickson expressly

<sup>82</sup> *Ibid.* at 1135.

<sup>83</sup> R.S. Abella, *Report of the Commission on Equality in Employment*, (Ottawa: Supply and Services Canada, 1984).

<sup>84</sup> *Action Travail des Femmes*, *supra* note 81 at 1139.

<sup>85</sup> *Ibid.* at 1143.

<sup>86</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [hereinafter *Janzen*].

<sup>87</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 [hereinafter *Brooks*].

<sup>88</sup> *Janzen*, *supra* note 86 at 1284.

<sup>89</sup> *Brooks*, *supra* note 87 at 1243.

overruled the notorious *Bliss* case,<sup>90</sup> decided ten years earlier, in which the Supreme Court held that a pregnancy-based disadvantage did not constitute sex discrimination.

The depth of Dickson's understanding of gender issues is further demonstrated by his decision in *R. v. Morgentaler*<sup>91</sup> where he found the *Criminal Code* prohibition of abortion<sup>92</sup> a violation of the section 7 right to security of the person: "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."<sup>93</sup>

Dickson led a life of material prosperity and privilege, but he had a remarkable empathy for victims of discrimination and he seemed able to see the world through the eyes of others. For instance, when dealing with Sunday closing laws, his personal Christian beliefs did not prevent him from seeing the situation from the perspective of the believer of a minority religion. It is significant, I suggest, that in a key passage, he expressed the minority perspective in the first person:

If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.<sup>94</sup>

## 2. Language rights

Dickson had a strong belief in the importance of respecting and building upon the historic rights of Canada's French-speaking population. He saw language as "more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it."<sup>95</sup> The *Manitoba Language Reference*,<sup>96</sup> exemplifies this understanding. In *Société des Acadiens v. Association of Parents for Fairness in Education*,<sup>97</sup> a case dealing with section 19(2) of the *Charter*

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<sup>90</sup> *Bliss v. Canada (A.G.)*, [1979] 1 S.C.R. 183.

<sup>91</sup> [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

<sup>92</sup> R.S.C. 1970, c. C-34, s. 251.

<sup>93</sup> *Supra* note 91 at 56-57.

<sup>94</sup> *Big M*, *supra* note 55 at 338.

<sup>95</sup> *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at 362 [hereinafter *Mahé*].

<sup>96</sup> *Supra* note 49.

<sup>97</sup> [1986] 1 S.C.R. 549 [hereinafter *Société des Acadiens*].

guaranteeing the right of New Brunswickers to use either official language in the courts of the province, the majority of the Court rejected the proposition that this guarantee included the right to have one's case heard by a judge who could understand the litigant's language of choice without the aid of an interpreter. In his strongly worded dissenting judgment, Dickson disagreed with the majority view that language rights were to be narrowly interpreted. Writing for the majority, Beetz argued that language rights were the product of political compromise as distinguished from other *Charter* rights that are "seminal in nature because they are rooted in principle."<sup>98</sup> For Beetz, this difference dictated a cautious approach to the development of Language rights. In contrast, Dickson wrote that

[l]inguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history. The constitutional language protections reflect continued and renewed efforts in the direction of bilingualism. In my view, we must take special care to be faithful to the spirit and purpose of the guarantee of language rights enshrined in the *Charter*.<sup>99</sup>

He added:

What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to others. In the courtroom, we speak to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court.<sup>100</sup>

Dickson's views on language rights did carry a majority in *Mahé v. Alberta*,<sup>101</sup> which dealt with the section 23 guarantee of minority language education rights. Describing section 23 as the "linchpin in this nation's commitment to the values of bilingualism and biculturalism,"<sup>102</sup> he avoided the narrow approach of the majority in *Société des Acadiens*, stressing the remedial component of the section 23 guarantee and the importance of schools as community centres for linguistic and cultural activities. While accepting that language rights were different from other rights and that they were to be carefully interpreted, he held that "this does not mean that courts should not 'breathe life' into the expressed

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<sup>98</sup> *Ibid.* at 578, Beetz J.

<sup>99</sup> *Ibid.* at 564.

<sup>100</sup> *Ibid.* at 566.

<sup>101</sup> *Supra* note 95.

<sup>102</sup> *Ibid.* at 350.



purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.”<sup>103</sup> Dickson provided a liberal and flexible interpretation of the “where numbers warrant” requirement of section 23, opting for a “sliding scale” that guarantees the level of rights and services appropriate to the number of students involved. He also found that the *Charter* entitled minority language communities to an appropriate level of management and control of their children’s schools.

### 3. Aboriginal rights

Dickson’s interest in Aboriginal issues was longstanding and his contribution significant. He wrote many judgments on hunting, fishing, and treaty rights, tending to favour a generous interpretation of Aboriginal rights, while factoring in the need to balance regulation in the interests of society at large. Even before the entrenchment of Aboriginal rights in the *Constitution Act, 1982* he wrote of the need to accord “priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing.”<sup>104</sup> In *Nowegijick v. R.*<sup>105</sup> he insisted that treaties and statutes be interpreted generously to reflect Aboriginal interests, having “regard to [the] substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics.”<sup>106</sup>

Dickson’s judgments in *Guerin v. R.*<sup>107</sup> and in *R. v. Sparrow*<sup>108</sup> were truly seminal. In *Guerin*, he characterized Aboriginal interests in land as “a pre-existing legal right not created by Royal Proclamation, by ... the *Indian Act*, or by any other executive order or legislative provision.”<sup>109</sup> His recognition of the independent historical and cultural basis for Aboriginal title was accompanied by his characterization of a fiduciary relationship owed by the Crown to the Aboriginal peoples of Canada. He described this fiduciary obligation, like the Aboriginal interest in land it is intended to protect, as *sui generis*. It arises from the historic relationship between the Crown and the First Nations and from

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<sup>103</sup> *Ibid.* at 365.

<sup>104</sup> *Jack v. R.*, [1980] 1 S.C.R. 294 at 311.

<sup>105</sup> [1983] 1 S.C.R. 29.

<sup>106</sup> *Ibid.* at 41.

<sup>107</sup> [1984] 2 S.C.R. 335 [hereinafter *Guerin*].

<sup>108</sup> [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

<sup>109</sup> *Guerin*, *supra* note 107 at 379.

the inalienability of Aboriginal title except by way of surrender to the Crown.

In *Sparrow*, Dickson dealt with section 35 of the *Constitution Act, 1982*, which recognizes and affirms “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.” In an opinion he co-wrote with Justice La Forest, he rejected the contention that the guarantee of “existing” Aboriginal and treaty rights froze them precisely as they existed in regulated form in 1982. Dickson opted for a flexible interpretation that would allow evolution over time and require justification of all limitations, whenever imposed. Echoing the spirit of *Nowegijick*, he wrote that section 35 was to be given “a generous, liberal interpretation”<sup>110</sup> and, adopting the fiduciary analysis of *Guerin*, he imposed a fiduciary standard on the government when it seeks to justify measures limiting Aboriginal rights. He observed that “[o]ur history has shown, unfortunately all too well, that Canada’s Aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of Aboriginal rights and interests.”<sup>111</sup> The relationship between the government and Aboriginal peoples is to be “trust-like, rather than adversarial.”<sup>112</sup> The Aboriginal perspective should be taken into account when interpreting the rights at stake and government measures affecting Aboriginal rights “must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s Aboriginal peoples.”<sup>113</sup> Important as these decisions were, Dickson recognized that Canada had fallen well short of its moral obligation to respect and uphold the rights of First Nations. After his retirement from the Court in 1990, he continued to work towards the improvement of the relationship between Aboriginal and non-Aboriginal Canadians, especially through his efforts in establishing the basis for the Royal Commission on Aboriginal Peoples.<sup>114</sup>

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<sup>110</sup> *Sparrow*, *supra* note 108 at 1106.

<sup>111</sup> *Ibid.* at 1110.

<sup>112</sup> *Ibid.* at 1108.

<sup>113</sup> *Ibid.* at 1110.

<sup>114</sup> The work of the Commission culminated in a substantial report: see Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) (Co-chairs: R. Dussault & G. Erasmus). Hundreds of research reports and testimony from over two thousand witnesses are preserved on CD-ROM: See *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997).

#### D. Democracy

A central, perhaps preoccupying, issue of modern Canadian constitutional law is the need to reconcile the power of judicial review—implicit in the first three fundamental constitutional values I have discussed—with the fourth value, democracy. Is it consistent with our democratic values to permit unelected judges to strike down laws duly passed by the elected representatives of the people?

I will suggest that a significant element of Brian Dickson's constitutional legacy is the harmony he achieved between these apparently competing constitutional values. His thinking rested on two fundamental points, which were applicable both to judicial review on federalism ground, and to judicial review for the protection of minorities and fundamental rights and freedoms under the *Charter*. First, as Dickson saw it, in both federalism and *Charter* cases the courts have no choice but to exercise the power of judicial review, and in so doing they are responding to, rather than reacting against, explicit democratic choices. As Dickson explained:

The then prime minister, Mr. Trudeau, announced publicly that when it came to the preservation and protection of civil rights of Canadians, he preferred to have that responsibility entrusted to the courts rather than to the majority party that happened to be in office at a particular time in Parliament or in a particular legislature of a province. So it was clear that there was going to be a shift of power, and a very serious one, and one carrying a great deal of weight.<sup>115</sup>

Second, in the Dicksonian constitutional vision, judicial review is an essential aspect of an ordered democracy, exercised to further and to foster, not to frustrate, democratic values.<sup>116</sup> I consider each of these points, first in relation to federalism, and then with respect to constitutionalism and the protection of minorities.

In a federal state, judicial review on division of powers grounds seems inevitable. Canada could not exist as a single democratic state without federalism, and for federalism to exist there has to be a referee to resolve jurisdictional disputes. While one might imagine other ways or other institutions to resolve jurisdictional disputes, the political process has not displaced the courts and judicial review. Simply put, Dickson viewed federalism as a conscious political choice and judicial review in

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<sup>115</sup> *Portrait*, *supra* note 1 at 31.

<sup>116</sup> For a full development of this argument, see P.J. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987).

division of powers cases as a necessary and inevitable element of that choice.

I suggest as well that Dickson's federalism jurisprudence was informed by the values of democracy. As I have noted, he adopted a relatively deferential posture in federalism cases, using a variety of devices to avoid striking down laws. The result of deference and his encouragement of overlapping authority was to uphold laws to the greatest possible extent, thereby respecting the legislative choices of the elected representatives, and, indirectly, encouraging the political actors to work together to resolve differences. There is a clear parallel here to the Court's response in the *Patriation Reference*,<sup>117</sup> the most significant federalism challenge it faced while Dickson was a member. Federal unilateralism was rejected and the Court, in effect, forced the political actors to return to the bargaining table to achieve a consensual resolution.

There is, I suggest, a further element to Dickson's federalism decisions that can be seen as aiding rather than impeding the processes of democratic and political choice. An important element of Dickson's functional approach to resolving federalism cases was his attempt to locate jurisdiction at the level most suited to deal with the matter through democratic choice. As the Court stated in the *Secession Reference*, federalism "facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to [our] diversity."<sup>118</sup> This consideration clearly motivated his thinking on the desirability of provincial control over the administration of justice. He argued forcefully that prosecutorial authority should be located at the provincial level, where it would be sensitive to local concerns and conditions. The provincial capacity element of his test for the exercise of federal jurisdiction under the general branch of the trade and commerce power<sup>119</sup> also reflects his effort to locate authority at the level that best fostered effective political choice and decisionmaking.

Dickson's approach to constitutionalism, the rule of law, and judicial review under the *Charter* was also harmonized with his perception of democracy. He saw the centrality of the rule of law, and an independent judiciary as its guardian, as essential elements of an ordered democracy. He categorically rejected the contention that

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<sup>117</sup> *Supra* note 2.

<sup>118</sup> *Supra* note 4 at 251.

<sup>119</sup> See *Constitution Act, 1867 supra* note 25, s. 91(2). See, also, *General Motors, supra* note 12.

*Charter* adjudication was anti-democratic. As he and his colleagues have frequently observed,<sup>120</sup> the *Charter* was a product of democratic choice. 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. Dickson was keenly aware of the disappointing record of the Supreme Court under the *Bill of Rights*,<sup>121</sup> which he attributed in large measure to the fact that it lacked constitutional pedigree. He saw the entrenchment of the *Charter*, the explicit language of the supremacy<sup>122</sup> and remedies clauses<sup>123</sup> as conscious and deliberate choices by the political actors of the day. The generous and liberal interpretation Dickson accorded the *Charter* was, in his 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.<sup>124</sup>

The second aspect of the harmonization of *Charter* review with the values of democracy is the conscious attempt Dickson made in his *Charter* jurisprudence to reflect the values of democracy in his interpretation of guaranteed rights and freedoms. 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."<sup>125</sup> In the years to follow, Dickson frequently adverted to the needs of a mature democracy when interpreting *Charter* rights and freedoms. The Dicksonian vision integrates and harmonizes the constitutional protection of minorities and individual rights with the democratic process. It is, I suggest, a much richer version of democracy than raw

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<sup>120</sup> See, for example, *Reference Re section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 497, Lamer J.

<sup>121</sup> *Supra* note 68, Part I. While a member of the Manitoba Court of Appeal, Dickson had found a provision of the *Indian Act*, R.S.C. 1970, c. I-6, that denied a widow the right to administer the estate of her deceased husband, blatantly racist and contrary the guarantee of equality: see *Canard v. (A.G.) Canada* (1972), 30 D.L.R. (3d) 9. The Supreme Court of Canada reversed his judgment on the narrow valid federal objective test: see *Canard v. Canada (A.G.)*, [1976] 1 S.C.R. 170.

<sup>122</sup> *Supra* note 63, s. 52.

<sup>123</sup> *Ibid.*, s. 24.

<sup>124</sup> See "Portrait," *supra* note 1 at 31.

<sup>125</sup> B. Dickson, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" (Calgary, Canadian Bar Association, September 1983) [unpublished].

majority rule in which the power of numbers prevails over all other values. In *Oakes*, he wrote:

The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, 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. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.<sup>126</sup>

Dickson frequently adverted to the needs of a mature democracy when interpreting process. Dickson 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.”<sup>127</sup> 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 also 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.”<sup>128</sup>

In a 1988 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.<sup>129</sup> 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:

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<sup>126</sup> *Oakes*, *supra* note 71 at 136.

<sup>127</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 764 [hereinafter *Keegstra*].

<sup>128</sup> *Big M*, *supra* note 55 at 346.

<sup>129</sup> *R. v. Holmes*, [1988] 1 S.C.R. 914 at 931.

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. <sup>130</sup>

Dickson's contribution to anti-discrimination jurisprudence and his determination to protect religious and linguistic minorities, as well as his effort to enhance the rights of Canada's indigenous peoples may be seen as 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.'"<sup>131</sup>

Dickson's approach to section 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 a case dealing with Sunday closing laws,<sup>132</sup> where the Ontario 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. He noted 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."<sup>133</sup> He applied this analysis to uphold legislation impinging upon a former employer's freedom of expression by authorizing an arbitrator to require

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<sup>130</sup> *Ibid.* at 932.

<sup>131</sup> *Big M*, *supra* note 55 at 337.

<sup>132</sup> See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [hereinafter *Edwards Books*].

<sup>133</sup> *Ibid.* at 779.

an appropriate letter of reference.<sup>134</sup> Dickson assessed this as “a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee”<sup>135</sup> and concluded that “constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.”<sup>136</sup>

In *Keegstra*,<sup>137</sup> Dickson found that the *Criminal Code* prohibition of hate propaganda<sup>138</sup> infringed freedom of expression. He also held that this legislative measure could be justified under section 1 of the *Charter*. 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 hate propaganda prohibition protected democratic values better than the asserted right to freedom of expression. Dickson saw the anti-hate propaganda 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.”<sup>139</sup>

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.”<sup>140</sup> As hate propaganda subverts the democratic process, he found it to be a “brand of expressive activity ...

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<sup>134</sup> See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

<sup>135</sup> *Ibid.* at 1051.

<sup>136</sup> *Ibid.* at 1052.

<sup>137</sup> *Keegstra*, *supra* note 127.

<sup>138</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 319 (2).

<sup>139</sup> *Edwards Books*, *supra* note 132 at 756.

<sup>140</sup> *Ibid.* at 764.



wholly inimical to the democratic aspirations of the free expression guarantee."<sup>141</sup>

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 section 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,<sup>142</sup> Dickson accepted its inclusion in the Constitution as an essential term of the political bargain that broke the 1982 impasse,<sup>143</sup> and he joined the opinion of the Court establishing that the legitimacy of a legislative decision to invoke the clause is not open to review except on purely formal grounds.<sup>144</sup>

### III. CONCLUSION

The legacy of Chief Justice Brian Dickson touches all the fundamental values of Canada's Constitution. His judgments are characterized by clarity of thinking and eloquence of expression. They do more than decide the case at hand. They provide us with guidance and inspiration for the future. Dickson's judicial work reflects a coherent and integrated constitutional vision in which the fundamental values of federalism, constitutionalism and the rule of law, the protection of minorities and democracy work in harmony to provide a framework for the flourishing of Canadian society.

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<sup>141</sup> *Ibid.*

<sup>142</sup> See "Portrait," *supra* note 1 at 37.

<sup>143</sup> See B. Dickson, "The Canadian Charter of Rights and Freedoms and Its Interpretation by the Courts" (Address, Princeton University, 25 April 1985) [unpublished, archived: National Archives of Canada, MG31, E85, vol. 139, file 16].

<sup>144</sup> See *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

