

## Dickson on Federalism: The First Principles of His Jurisprudence

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### I. INTRODUCTION

THE TASK OF ATTEMPTING TO DEFINE Chief Justice Dickson's public law jurisprudence is daunting. He had a long career, wrote in a high proportion of the cases in which he participated, and often wrote very extensive reasons for judgment. The purpose of this note is to attempt to distill the essentials of his approach to one area: federalism. The aim is to look for first principles; not axioms from which conclusions can be drawn apodictically, but driving ideas that apply across a wide variety of cases, and give a reasonable measure of consistency and predictability to his decisions in particular cases. As the object here is to try to find the core ideas that animate a large mass of decisions and words, the presentation will be kept as austere and simple as possible.

The methodology proposed here is to review all the cases he wrote (marked in text in boldface) or voted on, including in lower-level courts, on federalism. Ideally, the exploration would be extended to all of his judgments in all areas, to give overall pattern, and better inform understanding of his approach to specific issues;<sup>1</sup>

Ideally, there should be thorough statistical analysis of results (e.g. how often provinces have their authority upheld, how often the federal authority, and a cross-comparison with other judges);

It is to be hoped that the principles identified here are not merely the creation of the observer, but have an objective basis in his series of opinions; as Dickson was painstaking explainer of his decisions, and self-conscious about his methodology and role of the courts and judges,

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<sup>1</sup> The subject matter of this study is authority of federal and provincial orders of government to act. Detailed studies of *Charter* cases are excluded. While all of Dickson's writings should be studied, there is special value in looking at the surrounding context of public law — including, e.g., administrative and municipal law. Constitutional jurists should take an expansive view of their subject matter; see B. Schwartz, "General National Agreement: The Legal Sanction for Constitutional Reform in Canada" (1981) 6 *Queen's L.J.* 513a.

many of the principles should be explicitly acknowledged in his opinions, not merely inferable.

## II. THE FIRST PRINCIPLES OF DICKSON'S JURISPRUDENCE ON FEDERALISM

THE FIRST FOUNDATIONAL PRINCIPLE is a particular form of *Legalism*; its features are:

### A. Legalism: Role of Courts

Courts are seen as the "guarantors of the constitution": *Reference Re Manitoba Language Rights*.<sup>2</sup> Dickson:

- rejected the idea that ultimately the "dignified" branch of government (Governor-General, Lieutenant Governor) or the people themselves through elections are the appropriate remedial bodies; see *Reference Re Manitoba Language Rights*<sup>3</sup> and *Amax Potash v. Saskatchewan*<sup>4</sup>;
- was willing to answer questions about political conventions; *Reference Re Amendment of Constitution of Canada*;<sup>5</sup>
- supported expansive decisions on standing; *Thorson v. A.G. Canada*<sup>6</sup> and *Min. of Justice v. Borowski*;<sup>7</sup>
- rejected the notion that there are "political questions" which are inherently beyond scope of Charter review: *Operation Dismantle v. R.*;<sup>8</sup> and
- strongly supported the role of the Superior Courts, resisting erosion of their status by creation of provincial administrative tribunals;<sup>9</sup> or even federal action.<sup>10</sup>

While Dickson did emphasize the supremacy of the courts, he was prepared to give some respect to the actual practice of democratic

<sup>2</sup> [1985] 2 S.C.R. 347, *per curiam*.

<sup>3</sup> *Ibid.*

<sup>4</sup> [1977] 2 S.C.R. 576.

<sup>5</sup> [1981] 1 S.C.R. 753 (joint majority judgment).

<sup>6</sup> 1 [1975] S.C.R. 138.

<sup>7</sup> [1981] 2 S.C.R. 575.

<sup>8</sup> [1985] 1 S.C.R. 441, agreeing with Wilson J.

<sup>9</sup> *Reference Re Residential Tenancies Act*, [1981] 1 SCR 714; *A.G. Quebec v. Farrah*, [1978] 2 S.C.R. 638; *Crevier v. A.G. Quebec*, [1981] 2 S.C.R. 220.

<sup>10</sup> *McEvoy v. A.G. N.B. and A.G. Canada*, [1983] 1 S.C.R. 704.

accountable branches of government as a guide to interpreting the constitution; see *Di Iorio v. Warden of Montreal Jail*.<sup>11</sup>

### **B. Legalism: the exhaustive search of precedent for underlying purpose and structure**

Dickson may be classified as a judge in the “Herculean” style — he exhaustively reviewed precedent and political practice, looking for underlying purposes and policies that animate them; *viz* Ronald Dworkin, “Hard Cases” in *Taking Rights Seriously*. He was a blend of “formal” and “grand style” judge (*viz* Karl Llewellyn, *The Common Law Tradition*). He took a purposive and contextual approach to precedent and adjudication, but he believed in trying to find inherent in the materials, and to develop and articulate, well-defined doctrinal structures.

One aspect of Dickson’s legalism was his willingness to exhaustively and expertly review relevant case law and state practice. He did not, unlike many contemporaries, “cut-and-paste” material he appears to have studied or digested, or cite cases and articles he had not personally read;

Dickson’s interest in the academic literature is less striking in his federalism judgments than in *Charter* cases. But it is in some ways a natural outgrowth of the phenomenal diligence and the receptivity to the wisdom of others that marked his review of the case laws.

Unfortunately, one of Dickson’s unintended legacies may be a certain number of Supreme Court of Canada judges who “grandstand” — who pattern themselves after his thoroughness and search for overarching structure, and end up writing lengthy, ambitious judgments that outrun their understanding of the subtleties of fact, law, policy and philosophy;<sup>12</sup>

### **C. Legalism: Creation of “Mediating Doctrines”**

Dickson believed in creating and developing well defined “mediating doctrines” to go between the general language of the constitution and specific cases — *e.g.*, his 5-part test of the “general trade and commerce” branch of s. 91(2);<sup>13</sup> his 3-part test for whether a function

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<sup>11</sup> [1978] 1 S.C.R. 152.

<sup>12</sup> See B. Schwartz, “Oracles and Performers, or Philosophers and Sages?”, O.L.R.C. Conference on Judicial Appointments, Queen’s Law School, October 1989.

<sup>13</sup> *A.G. Canada v. Canadian National Transportation*, [1983] 2 S.C.R. 206.

could only be vested in Superior Courts, *Residential Tenancies, supra*.

Some of the mediating doctrines<sup>14</sup> involve "factor analysis" — in the manner of the *Second American Restatement of Conflicts of Law*;

The mediating doctrines appear to be designed with a view to accommodating competing interests; (in the *Charter* context, Dickson often favours encouraging "fine-tuning" of legislation, that is, finding ways of achieving one value without doing disproportionate damage to another).

#### **D. Legalism: Respect for Process Values**

Dickson had a lawyerly solicitude for process on matters large as well as small. In conjunction with his respect for allowing substantive values to be made by democratically accountable bodies, he would insist that:

a) The position of the legislature ought not to be usurped by executive fiat,<sup>15</sup>

b) Constitutional change should not take place without adequate consultation with the provinces.<sup>16</sup>

(In the *Charter* context, Dickson often preferred to rest his decision on "procedural" rather than substantive grounds — see, e.g., *R. v. Morgentaler*.<sup>17</sup>)

## **II. THE SECOND FUNDAMENTAL PRINCIPLE**

THE SECOND FUNDAMENTAL PRINCIPLE of Dickson's approach is respect for democracy, and appropriateness of governmental intervention to promote public welfare.

Dickson has strong respect for principles of democracy — that courts should not lightly intervene in matters decided by democratically accountable branches of government. Furthermore, he was very

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<sup>14</sup> e.g., the *Canadian National* tests.

<sup>15</sup> *Reference Re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373.

<sup>16</sup> *Reference Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, *per curiam*; *Reference Re Amendment of Constitution of Canada, supra*, note 5.

<sup>17</sup> [1988] 1 S.C.R. 30.

sympathetic to the role of government in promoting social welfare against private interests. In the *Charter* context, he resisted attempts to use the *Charter* to weaken or invalidate “progressive” social welfare legislation of any sort — viz his approach to s. 7 of the *Charter* in the context of *Irwin Toy v. A.G. Quebec*<sup>18</sup> and *Edward Books & Art Ltd. v. R.*<sup>19</sup>

### III. HOW DICKSON RESOLVED THE TENSION BETWEEN HIS TWO FOUNDATIONAL PRINCIPLES

FOR DICKSON TO SUPPORT INTERVENTION of the courts in face of his second foundational principle — respect for social welfare state — he required two bases:

1. A mandate in constitutional texts. Dickson would not “invent” limitations on governmental action *ex nihilo*.<sup>20</sup>

(Possible exception: Dickson did try to protect freedom of political expression in the pre-*Charter* era: see *McNeil v. Nova Scotia Board of Censors*<sup>21</sup> and *Dupond v. City of Montreal*,<sup>22</sup> in which Dickson, dissenting, departs from his usual tolerance for concurrency and *quasi*-criminal legislation by the provinces. But while not spelled out, it could be argued that political democracy has strong textual foundations: see *Reference Re Alberta Statutes*;<sup>23</sup> and that the “anti-democratic” objection to judicial review does not apply when courts are protecting the democratic process; see Ely, *Democracy and Distrust*)

2. A belief that behind the text lay an important moral and political value.

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<sup>18</sup> [1989] 1 S.C.R. 927 (joint majority opinion with Lamer and Wilson JJ).

<sup>19</sup> [1986] 2 S.C.R. 713.

<sup>20</sup> See *Harrison v. Carswell*, [1976] 2 S.C.R. 200.

<sup>21</sup> [1978] 2 S.C.R. 662.

<sup>22</sup> [1978] 2 S.C.R. 770.

<sup>23</sup> [1938] S.C.R. 100, *per* Duff C.J.

#### IV. APPLICATION OF THE FOREGOING ANALYSIS TO SPECIFIC CONTEXTS: PROVINCIAL RIGHTS

CONSISTENT WITH THE FOREGOING ANALYSIS, Dickson would not strike down provincial legislation merely because it stretched the literal and traditional boundaries of provincial authority. Private individuals who sought to strike down provincial legislation merely because it invaded federal jurisdiction almost always lost. Thus, Dickson:

- often in dissent, upheld provincial legislation against attack on formal grounds; he often took pains to point out that legitimate provincial interests were involved;<sup>24</sup>
- supported the existence of very broad areas of concurrent jurisdiction: *Multiple Access v. McCutcheon*;<sup>25</sup> *A.G. Quebec and Keable v. A.G. Canada*.<sup>26</sup> With respect to issues such as public inquiries, he is open to the criticism that he was not sufficiently sensitive to such values as doubling a citizen's vulnerability to government attack, or discouraging duplicative and wasteful over-government. Perhaps towards the end of his career he became more sensitive to the risks of "double vulnerability"; he concurred in the majority judgment that struck down a public inquiry in *Starr v. Houlden*;<sup>27</sup>
- rejected "enclave" theories, whereby federal land<sup>28</sup> or "peoples"<sup>29</sup> are immune from provincial legislation;
- favoured construing legislation, whenever possible, so as to be constitutional rather than *ultra vires*;

Consistent with principle III, what values justified striking down provincial legislation?

##### A. Protection of Position of Superior Courts

As mentioned earlier, Dickson was prepared to strike down even "social welfare" legislation if its decision-making mechanism amounted, in view, to a usurpation of the role of the superior courts by an administrative agency.

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<sup>24</sup> *Canadian Industrial Gas and Oil Ltd. v. Saskatchewan*, [1978] 2 SCR 545.

<sup>25</sup> [1982] 2 S.C.R. 161.

<sup>26</sup> [1979] 1 S.C.R. 218.

<sup>27</sup> (1990), 68 D.L.R. (4th) 641 (S.C.C.).

<sup>28</sup> *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754.

<sup>29</sup> *Dick v. R.*, [1985] 2 S.C.R. 309.

### B. Protection of the Rights of Aboriginal Peoples

Dickson gave expansive readings to textually rooted rights of aboriginal peoples under various constitutional provisions, including natural resources transfer agreements. He favoured a “citizens-plus” model — that aboriginal peoples have all rights of other citizens, plus special rights; *A.G. Canada v. Canard*.<sup>30</sup> Dickson certainly was a leader in establishing a sympathetic approach of the Courts to rights of aboriginal peoples.<sup>31</sup> But occasionally he ruled against the position of aboriginal peoples.<sup>32</sup>

### C. Respect for Official Languages Guarantees in the Constitution

Dickson upheld guarantees of official bilingualism in many cases, e.g., *Forest v. A.G. Manitoba*;<sup>33</sup> *Blaikie v. A.G. Quebec*;<sup>34</sup> *Societe des Acadiens du Nouveau Brunswick v. Association of Parents for Fairness in Education*.<sup>35</sup> But here again he was not receptive to only one side of the issue. In *R. v. Bilodeau*,<sup>36</sup> he adopted a relatively narrow reading of s. 23. (Presumably, adopting countervailing values including allowing provinces, including Quebec, to manage their own language policies, as per principle II);

### D. Respect for Denominational School Rights Under Constitution

Dickson upheld the immunity of denominational school guarantees in s. 93 against provincial government discretion and even the *Charter*; *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*;<sup>37</sup> *A.G. Quebec v. Greater Hull School Board*.<sup>38</sup> Here again, however, Dickson was not totally partisan; he rejected a “s. 93” claim as unfounded by

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<sup>30</sup> 30 D.L.R. (3d) 9 (Man. C.A.); overr'd 52 D.L.R. (3d) 548 (S.C.C.).

<sup>31</sup> See *Jack v. R.*, [1980] 1 S.C.R. 294, *Sparrow v. R.*, [1990] 1 S.C.R. 1075 (joint majority opinion with La Forest J.), *Nowegijick v. R.*, [1983] 1 S.C.R. 29, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

<sup>32</sup> See, e.g., *Myran v. R.*, [1976] 2 S.C.R. 137, *R. v. Mousseau*, [1980] 2 S.C.R. 89.

<sup>33</sup> [1979] 2 S.C.R. 1032.

<sup>34</sup> [1979] 2 S.C.R. 1016.

<sup>35</sup> [1986] 1 S.C.R. 549.

<sup>36</sup> [1986] 1 S.C.R. 449.

<sup>37</sup> [1987] 1 S.C.R. 1148.

<sup>38</sup> [1984] 2 S.C.R. 575.

historical practice in *Greater Montreal Protestant School Board v. A.G. Quebec*.<sup>39</sup>

### **E. Immunity of One Order of Government From Interference By Another**

Dickson J. was prepared to shield the internal functioning of the federal government from provincial interference (e.g., *Keable*<sup>40</sup>) but took a more restrictive view of the scope of that immunity than his colleagues (see *A.G. Alberta v. Putnam*<sup>41</sup>).

### **F. Protection of the Canadian Economic Union Recognized In Section 121 of the Constitution Act, 1867**

Dickson J. was prepared to strike down provincial legislation that *unfairly* favoured local interests over those in other provinces; *A.G. Manitoba v. Manitoba Egg and Poultry Association* ("Chicken and Egg Reference").<sup>42</sup> But his test was substantive fairness; it was not sufficient to invalidate provincial legislation that it "affected" interprovincial trade. While on the Manitoba Court of Appeal he specifically found Manitoba hog marketing regulations, which extended to imports, to be a fair and reasonable scheme to ensure orderly marketing; whereas the Supreme Court struck down the legislation as being a direct interference with interprovincial trade: *Burns Foods v. A.G. Manitoba*.<sup>43</sup>

### **G. Charter Rights**

This is a topic in itself, but clearly Dickson J. was a moderate "activist"; he was prepared to use the *Charter* to resist excesses by both orders of government.

## **V. THE FEDERAL GOVERNMENT**

WITH RESPECT TO THE FEDERAL GOVERNMENT, Dickson took a similar approach, except that he would strike down federal legislation that intruded on a core jurisdiction of a province.

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<sup>39</sup> [1989] 1 S.C.R. 377.

<sup>40</sup> *Supra*, note 26.

<sup>41</sup> [1981] 2 S.C.R. 267.

<sup>42</sup> [1971] S.C.R. 689.

<sup>43</sup> 35 D.L.R. (3d) 581 (Man. C.A.); rev'd 40 D.L.R. (3d) 731 (S.C.C.).

Dickson was, perhaps, "harder" on federal legislation than on provincial legislation. But there was a reason for his attitude. Dickson favoured very wide concurrency. If the federal government does not approve of what a province does, it can override it. A province, on the other hand, cannot protect itself. The reasoning is largely explicit in *R. v. Hauser*.<sup>44</sup> (In reality, the ability of the federal government to "override" provincial involvement may be very limited; according to Beetz J.'s judgment in *Dick*,<sup>45</sup> the federal government cannot oust provincial legislation in a paramount field simply by declaring its intention to do so; there must be an "operational conflict".)

At first glance, cases such as *Labatt Breweries of Canada Ltd. v. A.G. Canada*<sup>46</sup> and its companion case *Dominion Stores v. R.*<sup>47</sup> are puzzling. They involved federal legislation that seemed to be in the common interests of consumers and producers, and could have easily been upheld in a manner consistent with the wording of the Constitution and precedent. Dickson was always sympathetic to the activist state, and in his provincial rights judgments, loathe to take a narrow, technical, reading of the scope of legislative authority. But in cases like *Labatt*, Dickson must have been concerned that allowing detailed federal legislation of particular industries would open the way to excessive intrusions on the "core" provincial authority over local commerce.

## CONCLUSION

MY IMPRESSION IS that Dickson's "federalism" jurisprudence is not in fact merely a matter of "ad hoc" interest balancing, but embodies a discernible set of basic principles. Further research could proceed in the following directions. It should be possible to explore Dickson's public law decisions generally, including his *charter* decisions, to determine whether consistency can be found in the larger scheme of things. I would speculate that it can. The same commitment to the legalism and the social welfare state would likely be found in a systematic study of Dickson's administrative and public law judgments. Special attention should be paid to how Dickson weighed individual freedom against the need for state intervention to protect

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<sup>44</sup> [1979] 1 S.C.R. 984.

<sup>45</sup> *Supra*, note 29.

<sup>46</sup> [1980] 1 S.C.R. 914.

<sup>47</sup> [1980] 1 S.C.R. 844.

groups that Dickson perceived as socially vulnerable or historically victimized. I expect it would be found that while Dickson had valued individual freedom to a considerable extent, he tilted farther than many of his colleagues in favour of limiting freedom to promote equality. I would also expect a systematic study to reveal that Dickson tended to favour the claims of groups (denominational schools, aboriginal peoples, minority language communities) with special historical claims over the general principle of the political equality of all Canadians.