Introduction: The Dickson Legacy, The Legacy of a Judicial Humanist

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IT MIGHT WELL HAVE BEEN just a "love in," an outpouring of sentimental appreciation for a remarkable human being about whom Dale Gibson, Trevor Anderson, Jim MacPherson, and Bob Sharpe all spoke so eloquently. That would have been deserved and it would have been "all right." But left to the anecdotal and impressionistic and the vagaries of nostalgia (and none of the many contributions were merely that) it would have missed the mark. It would have told us something of the living legend and not enough of the legacy. This diverse and, in many ways, quite remarkable collection of papers[1] delineates — or rather begins to outline — the "Dickson Legacy" (as we came to call it) without losing the aura of feeling which, in my view, is an integral part of the record of a person[2] best described as a "judicial humanist." Humanism may sometimes appear in the robes of sentiment, but rooted — as it was with Dickson — in a disciplined but not dogmatic understanding of the place of individuals (particularly, dependent, disadvantaged and vulnerable persons) in contemporary society it is far more lasting and important in its effect than "a furtive tear."

These few paragraphs are not intended as either a summing up or a critical assessment of the papers delivered during the symposium: both would be presumptuous. I may be forgiven however if, in order to underscore my assertion about the Chief's humanism and his profound understanding of the vulnerability of the disadvantaged in a contemporary society, I cite passages from five of his opinions, passages adverted to by several of the participants in the symposium.

In *Oakes*,[3] often considered the starting point of a formalistic approach to the application of section 1 of the *Charter*, Dickson was

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[1] Delivered over a two day period in Winnipeg on 19 and 20 October 1990 as part of a tribute to "the Chief" — the Right Honorable Brian Dickson P.C. — occasioned by his retirement from the bench.

[2] Although no doubt the record about which we spoke is that of the court as well as the person, it was surely the *Dickson* court, a court inspired by his integrity and his vision.

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

careful to provide at least the beginning of a context for such application:

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.[4]

As if to close the social context parentheses, Dickson, in *Edwards Books*,[5] stated in part:

[T]he courts must be cautious 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.[6]

Slaight Communications[7] and *Irwin Toy*[8] provide two useful and, I would suggest telling examples of whom he considered to be "less advantaged persons" in contemporary society.

In *Slaight*, he wrote:

It cannot be over-emphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and an employee. Thus, in a general sense, this case falls within a class of cases in which governmental objective is that of protection of a particularly vulnerable group, or members thereof.[9]

With respect to children as a vulnerable group he said in *Irwin Toy*:

In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government,

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[4] *Ibid.* at 136.

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

[6] *Ibid.* at 779.

[7] *Slaight Communications Inc.* v. *Davidson* (1989), 59 D.L.R. (4th) 416.

[8] *Irwin Toy Ltd.* v. *Quebec (AG)* (1989), 94 N.R. 167.

[9] *Supra*, note 7 at 423.

there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.[10]

Janzen[11] and *Brooks*,[12] though not *Charter* cases, strikingly underline Dickson's — and the Dickson Court's — awareness of the disadvantaged and special position of women in society. In *Janzen*, the Chief Justice stated:

When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be [women].

[W]omen may be at greater risk of being sexually harassed because they tend to occupy low status jobs in the employment hierarchy. Arjun Aggarwal, in his article quoted earlier, offers an additional explanation for the increased vulnerability of women to sexual harassment. Drawing an analogy to the practice of racial discrimination where racial slurs reinforce perceived racial inequality, Aggarwal argues that sexual harassment is used in a sexist society to (at pp. 5-6): "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status".[13]

In *Brooks*, he said:

Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon

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[10] *Supra*, note 8 at 248.

[11] *Janzen* v. *Platy Enterprises Ltd.*, [1989] 4 W.W.R. 39 (S.C.C.).

[12] *Brooks* v. *Canada Safeway Ltd.*, [1989] 4 W.W.R. 193 (S.C.C.).

[13] *Supra*, note 11 at 64-65.

one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women. It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation, more particularly, the Unemployment Insurance Act, 1971.[14]

It seems to me (and this is touched on in my commentary on Peter Hogg's paper[15] and adverted to as well by Peter Russell in his paper[16]) that if what we were talking about on those two memorable days in October 1990 was left at the level of either sentiment or merely description and doctrinal definition, or the kind of "neutral assessment" urged by, for example, Herbert Wechsler[17] earlier or to some extent David Beatty currently,[18] we would miss an important jurisprudential issue on which a lot more work needs to be done. That issue may be defined, as Peter Russell does, as understanding the "transmission belt" between social movements and judicial opinions; or, perhaps, it may be more completely described as the "dialectics of decision making" — that is, the relationship of conflict and reconciliation between the social movements of the day and the struggle (too often a losing struggle, it is true) to free doctrine from the fetters of the past.

A brief introductory piece is not the place to essay that task even in a sketchy way; but I am moved now — as I was at the time — to conclude by suggesting (no doubt with characteristic optimism) what Errol Mendes suggested at the conclusion of his thoughtful article "In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test"[19]:

The constitutional balancing of the Supreme Court is beginning to shape what our own free and democratic society will look like in theory into the next century. The Supreme

[14] *Supra*, note 12 at 212.

[15] "The Contribution of Chief Justice Dickson to an Interpretive Framework and Value System for Section 1 Of The *Charter of Rights*," *infra*.

[16] "The Dickson Legacy: Prudential Wisdom for Canada," *infra*.

[17] H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L.R. 1.

[18] D. Beatty, "A Conservative's Court: The Politicization of Law" (1991) 41 U.T.L.J. 147; see also as a critique thereof R.J. Sharpe's comment at (1991) 41 U.T.L.J. 469.

[19] E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test" (1990) 24:1 R.J.T. 1.

Court is finally beginning to build our own Canadian constitutional vision of the "just society" — at least in theory. We must now hand the theory back to the people and begin the social revolution in practice.[20]

In an advanced and leisurely democracy such as Canada the "social revolution in practice," at least historically, may amount in the main to sustained pressure for social change over some considerable period of time. The "Dickson legacy" is the legacy of a court which was able, over time, to both articulate and respond to at least some of the *contemporary* values of this free and democratic society and some of the pressures for change and, on the whole, to do it remarkably well.

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[20] *Ibid.* at 35.