

Closing Address

The Honourable Mr. Justice W. Ian BINNIE*

When I was first asked to speak today it was on the understanding that I would make a few lighthearted comments after lunch. After hearing a few minutes ago about the death of former Chief Justice Brian Dickson, I don't feel very much like making the attempt to be entertaining, and even if I did I doubt very much if you would be in the mood to be entertained.

It seems more appropriate that we take a few minutes to think about an individual who has had such a momentous impact on our legal system and, more importantly, on the way non-lawyers across the country view human rights and the role of law in shaping our society.

While Chief Justice Dickson had obviously retired from the Court before I got there, I had the privilege of appearing before him over the years, probably more times than he cared to see me.

All of us who were privileged to argue cases from time to time before "the Dickson Court" fell under the spell of his qualities as a judge and as a human being.

I want to mention four of those qualities, and then talk a little bit about his philosophy in terms of the issues that have been discussed by this Conference over the past couple of days.

His first great quality as a judge was that he paid attention. Chief Justice Dickson had the endearing quality of looking at you as if you were the only source of enlightenment in the world and nodded his head with encouragement at the completion of each point. You took it that even if none of the other judges appreciated the subtleties of your argument, he not only understood but probably agreed with you. In retrospect, I have to admit he was just hoping to nudge me to wrap it up and move on to the next point.

I had not appreciated the universality of his habit of nodding until I heard of a case in the Ontario courts some years ago involving a vexatious litigant who was representing himself. He was carrying on at great length about the failure of narrow judicial minds at every level of the court system to grasp the justice of his many cases when he paused and corrected himself. "There was one judge who understood exactly what I was saying," he said, "it was the Chief Justice of Canada."

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The second thing I want to remember about Chief Justice Dickson was an intellectual honesty that was frank and admirably confrontational. Sometimes, if you were on the losing side, it could be brutal.

I had the dubious pleasure of arguing the *Guerin* case before the Supreme Court for the Attorney General of Canada. We had, we thought, erected an impregnable fortress of legal argument around the proposition that whatever duties were owed by the Crown to aboriginal peoples did not amount to a trust enforceable at law. The point is not that we lost the case. The point is that he took every one of our arguments and met it head on. We had argued that as Indians held their rights at the pleasure of the Crown, there was no trust because there was no trust property. We argued that the Crown was not the agent of the Band. We argued that one could not read into s. 18 of the *Indian Act* an intention on the part of Parliament to impose a trust or trust-like obligation on the Crown. He accepted these technical objections for what they were, but proceeded to develop a theory of liability extrapolated from general notions of fiduciary obligation which he pronounced to be *sui generis*. He didn't avoid our arguments. He simply ran over them. The result was that we won a few technical battles but lost the war. Nevertheless, we felt that our objections, mean-spirited as he may have considered them, had been fully addressed. He was responding to what he considered to be the higher call of justice.

He also showed great technical dexterity in building into current decisions pegs on which to hang the outcome of cases he anticipated would follow in the future. You may recall, for example, in *Guerin* where he proclaimed that the Indian interest in the reserve lands that had been leased to the Shaughnessy Golf Club in Vancouver was not by grace and favour but was a "legal interest." He then asserted, and at that point it was no more than an assertion, that it made no difference to the outcome that the case involved reserve lands as opposed to "unrecognized aboriginal title in traditional tribal lands" because both interests were of the same legal character. At one stroke he transformed the aboriginal interest in land, which had been considered merely a possessory interest held at the pleasure of the Crown (as characterized by Lord Watson in the *St. Catherines Milling Company* case), into a legal interest enforceable against the Crown. That skillful piece of footwork, which is the source of all of the subsequent case law dealing with the aboriginal interest in land, is buried inconspicuously in the rolling majesty of his decision on an altogether different (albeit related) topic.

This brings me to the third great quality of Chief Justice Dickson, which is that he was a visionary. As my anecdotes about the *Guerin* case were intended to illustrate, he saw beyond the world as it is, and worked to bring about a world as he thought it should be. He fulfilled the words of the poet, pronounced as an epitaph, I think, at the funeral of Robert Kennedy :

[...] Some people look at things as they are and ask the question why. I look at things that never were, and ask why not.

The fourth great quality he possessed, and it comes out in what I have just said, was a fierce independence of mind. I think he would, for example, have expressed profound disagreement with the mission statement of this conference [which is set out in the program as follows] :

The purpose of the conference is to examine the coordination issues which arise in the justice system in Canada as efforts are made to address the "changing demands made upon the system." The focus will be on the coordination issues raised by the interaction between the various elements of the system, including governments, courts, administrative tribunals, and providers of alternative dispute resolution services.

He was of course interested in all of the elements of the justice system that have been under discussion, including techniques of ADR, the role of administrative tribunals, the role of the courts in fashioning public policy, aboriginal justice, and the Ontario Criminal Process Review Committee. But I don't think he would agree that any of these "elements" could be characterized as a "changing demand." In other words, as in so many of the appeals he heard, he would have challenged the basic premise on which this whole conference is constructed.

I think he would say, for example, that the conference's preoccupation with ADR does not so much signal a "changing demand" as it does public frustration with the continuing failure of the court system to meet a longstanding demand for access to justice without delay and excessive expense. This is a demand that the public has been pressing for years.

A second example. I don't think Chief Justice Dickson would have agreed that in 1998 the phenomenon of administrative tribunals poses a "changing demand" upon the court system. After all, Lord Hewart wrote *The New Despotism* in the 1940's, and governments ever since then have expressed the need for a flexible instrument of public policy accountable in more or less specific ways to the executive rather than to the judiciary. This is not some new "changing demand" on the part of government. There has been a continuing complaint from government that the courts are making unreasonable attempts to "judicialize" administrative procedures. This was a central concern of the judgments of Chief Justice Dickson even before he wrote *Martineau v. Matsqui (No. 2)* in the early 1980's.

A third example. I don't think Chief Justice Dickson would have agreed that there is anything new about courts making public policy. The history of judicial policy making in this country goes back at least to its treatment of temperance legislation at the end of the 19th century, and runs through to the 1930's when the *Alberta Press Bill* was struck down and thereafter, in the Dickson era, to cases such as *Operation Dismantle* in 1984 where the Supreme Court rejected the argument that courts should stay away from "political questions." In *Operation Dismantle* Chief Justice Dickson appeared unperturbed at the prospect of inserting the Court between the government and its defence policy. At issue was the government's decision to facilitate the testing of Cruise Missiles over Canadian soil. As he saw it, the protesters were asserting rights under s. 7 of the *Canadian Charter of Rights and Freedoms*, and if they made out a case to his satisfaction, he proposed to give them relief. Fortunately for the government, he concluded that the issue was simply not "justiciable" because of the speculation inherent in the question of whether testing cruise missiles did or did not move the doomsday clock towards or away from nuclear war.

Chief Justice Richard Scott spoke in his paper this morning of the *Thompson Newspapers* case, and the widespread controversy it aroused because of the Court's alleged insensitivity to the political process. Former Minister of Justice John Crosbie, at the Canadian Bar Association this year, said the Supreme Court's decision in that case to strike down the ban on publication of opinion polls within 72 hours of a federal election showed that the courts had now become the "Godzilla" of government, and Parliamentarians the "Mickey Mouses." This is one of those issues that would have presented no difficulty to Chief Justice Dickson. The *Thompson Newspapers* case represents in some respects a rerun of his decision in *Operation Dismantle* 15 years ago. The media, rightly or wrongly, alleged that their freedom of expression under s. 2(b) of the Charter, and the right of the public to receive the news, should not be interfered with. I think Chief Justice Dickson would have said, as he said consistently throughout his judicial career, that he was not so much concerned about "where" the threat to individual liberty originated, as he was about "what" the threat consisted of, and how it should be addressed in the context of a free and democratic society.

Outside the area of the Charter, he was readier to acknowledge that the politicians had a point.

In the *Auditor General* case, he concluded that the Auditor General ought to get Cabinet confidences, if at all, through the Public Accounts Committee of the House of Commons. He thought that in the absence of Charter issues the courts ought not to be getting between Parliament and its servant, the Auditor General. He was always conscious of what he called "the balance" between constitutional actors. In the *Auditor General* case, the plaintiff was a high profile public official seeking to expand his mandate, not an ordinary citizen seeking to vindicate his Charter rights.

Again, in *Beauregard*, Chief Justice Dickson did not hesitate to sweep aside the argument of certain judges that it was a violation of their judicial independence to require them to contribute to their own pensions. He again saw it as a question of general public policy. Everyone in this day and age contributes to the cost of providing a pension, and he thought it would be disingenuous for judges to hold that judicial independence requires non-contributory pensions. There was no Charter or other constitutional right to a free lunch.

In all of these instances, and in others too numerous to mention, Chief Justice Dickson moved effortlessly in the realm of public policy anchored, as he saw it, in the basic tenets of the Constitution. He would not have seen the policy role as a "changing demand" newly placed upon the judicial system. It is as old as the Constitution. Nor, as these examples show, did he consider the policy function limited to Charter issues. He made no apologies to those who accused him of "judicial activism."

The conference has devoted a good chunk of this morning's session to aboriginal justice issues. This is an area of the law that Chief Justice Dickson revolutionized. I don't think he would have agreed with the premise that aboriginal justice represents a "changing demand." One of the great themes that runs through his judicial career is his insistence that aboriginal peoples are entitled to a place in the Canadian constitutional scheme that is more responsive to their cultural, spiritual and socio-economic circumstances. He was already in full stride 20 years ago in *Kruger* when he described aboriginal rights as a

tapestry "woven with history, legend, politics and moral obligations." His empathy for aboriginal people led him on through the seismic blast of *Guerin*, and finally to the high water mark of his judicial treatment of aboriginal rights, the mighty *Sparrow* case. After his retirement of course he was instrumental in the preliminary work that led to the *Royal Commission on Aboriginal Affairs*, and, I believe, in providing some legal opinions on aspects of its substantive work thereafter. He would, I think, be aghast to hear that aboriginal demands for justice could be characterized as a "changing demand." I think he would have considered it a demand that had been on the table since at least the *Royal Proclamation of 1763*, if not before.

On the first branch of the conference mission statement, I think he would have said that the issue is not so much the changing demands placed upon the court system as it is the continuing failure of the court system to adapt itself to meet longstanding grievances.

The second branch of the conference mission statement might not fare much better. It addresses the "coordination issues raised by the interaction between the various elements of the system." I have to confess that I'm not sure what this means.

One concern seems to be the quality of justice meted out by administrative tribunals, and the implications for the administration of justice of compulsory ADR in some provincial jurisdictions.

We are asked to take administrative tribunals as an example. Some of the conference participants have expressed concern about the "rough and ready justice" meted out by government boards. The implication is that the ways of the courts are better. Yet Lord Wolfe, the Master of the Rolls in England, produced a report a few years ago in which he concluded that the court system in that country produced at the end of the day a result that scores very poorly in terms of access to justice. The final judgment might be outstandingly just but along the way cost and delay works procedural injustice for many of the litigants.

I think one of the preoccupations of Chief Justice Dickson was to avoid inflicting such "procedural injustice" on government agencies by over-judicializing their practices. While rough and ready justice is problematic, it is a whole lot better than no justice at all. Like Lord Wolfe, and the Committee of the Canadian Bar Association on civil justice that he participated in, Chief Justice Dickson was concerned about sweating some of the unnecessary costs out of the section 96 court system itself in order to improve access to justice.

On that topic the conference heard from Justice Archie Campbell about how the Ontario *Criminal Process Review Committee* wants to wring excess costs out of the criminal system. Most observers blame the lawyers for excess costs but I do not think this view would have prevailed in the Dickson court. Take the exponential growth in the use of experts. In both civil and criminal cases, the runaway use of experts and pseudo-experts on every conceivable issue adds time and costs to the general quagmire. And yet from the lawyer's point of view, if he or she does not pursue every aspect of a case to its bitter end, the courts are ready when the case is lost to find error in its prosecution with the benefit of hindsight. Few lawyers get sued for "over-lawyering" a file, yet the lawyer who

attempts to keep the work proportional to what is in issue is likely to be told by the court at his malpractice trial that he made a strategic decision not to pursue a particular piece of evidence or a particular line of argument and must now carry the can for the disastrous outcome.

But I digress.

Chief Justice Dickson might have raised a few questions about the conference's emphasis on ADR. One of the remarkable features of this program is the number of retired judges who are here to promote ADR. Critics of the court system have identified the judges as being part of the problem and yet here they are presenting themselves as part of the solution.

This is the Procter and Gamble marketing strategy. If you can't improve the product, entice the customer by changing the package. ADR experience across the country suggests, ironically, that the public has continuing confidence in the judges, and has confidence in the rules that the judges administer. Various ADR organizations report a higher demand for former judges as arbitrators and mediators than for current lawyers. What the public dislikes is that in the ordinary courts the judges and the rules come packaged in a hideous environment of cost and delay. ADR is a way for these members of the public to take back control over the resolution of their own disputes.

I think Chief Justice Dickson would have accepted that there are numerous reasons for preferring ADR, including the possibility of privacy (as in the *McCain* case), and the ability to customize the ground rules on which a dispute is to be resolved. There are areas such as labour law and commercial contractual disputes which have always put great reliance on ADR. All of this does not detract from the more fundamental point that a growing number of litigants are being driven from the courts in despair because they cannot obtain speedy and inexpensive justice. The popularity of ADR is not a solution to that problem. It is simply further proof of the scale the problem has attained.

I think Chief Justice Dickson, with his views about access to justice, would have wanted us to address the core problems in the litigation process as well as how to "coordinate" the court structure with other avenues of redress, such as ADR, that have grown up to serve a public disenchanted by the failure of the courts to adapt themselves.

Many of you know Chief Justice Dickson better than I did, and will have your own memories at a time like this. We were all touched in one way or another by his warmth as a human being, and his compassion both to those who appeared before him, and to the human beings he all too clearly perceived behind each piece of litigation. However, such qualities, welcome as they are, do not I think capture what was unique about this man.

What I think propelled Chief Justice Dickson to the heights he attained was his extraordinary "focus," his ability to grasp the fundamental legal issue, clearing away all the surrounding underbrush, and, once found, his refusal to be distracted from pursuit of the just solution, wherever his vision of justice might take him. He was a truly great man and it is fitting that this conference should have been considering some of these matters so close to his heart at the time of receipt of the terrible news of his passing.