WHAT RIGHTS FOR WOMEN? BRIAN DICKSON, THE *CHARTER*, AND GENDER ISSUES

ABSTRACT

Brian Dickson used his role as the first chief justice under the *Charter of Rights and Freedoms* to spell out crucial aspects of the new document, with a primary goal of exploring how individual and group rights can be protected against the dangers of governmental power. He also applied "*Charter* reasoning" to other cases in the field of human rights. Focusing on gender issues, I discuss Dickson's strategies as they were employed in three important cases. I then argue that Dickson's approach remains central in understanding how the Supreme Court functions in the current era.

In 1984, as the first *Charter* cases reached the Supreme Court, Chief Justice Bora Laskin died, and Prime Minister Pierre Trudeau appointed Brian Dickson, a member of the Court since 1973, to succeed Laskin. Soon after his appointment, Dickson reflected on the new document: "My own view is that the Charter marks the opening of a dramatic and historic new chapter in Canada's constitutional and jurisprudential evolution." He noted that the Court would need to provide "a liberal and purposive interpretation" of its provisions.[2]

The advent of the "*Charter* era" generated an array of important decisions that advance the position of women toward equality, and Dickson had a leading role in this revolution.[3] In this brief essay, I describe Dickson's general approach to the *Charter* and discuss his analysis in three gender-rights contests – one *Charter* case, and two human-rights statutory cases that were strongly influenced by "*Charter* reasoning." In the final paragraphs, I argue that Dickson's approach has had continuing influence in the field of gender, most recently in the area of gay rights.[4]

The influence of "*Charter* reasoning": Confronting bias at CNR

When the first cases under the *Charter* reached the Supreme Court, Dickson demonstrated his readiness to broaden the Court's role. In his first *Charter* opinion, *Hunter v. Southam* (1984), Dickson asserted that the Court must take a "broad, purposive approach," use the *Charter* "for the unremitting protection of individual rights and liberties," and be prepared to "constrain governmental action inconsistent with those rights and freedoms." Two years later, in *R. v. Oakes*, Dickson argued that the Court would be guided by fundamental values, including "respect for the inherent dignity of the human person [and] commitment to social justice and equality"; and he outlined an array of hurdles that would confront governmental action that might infringe on individual freedoms. In both cases, the Court was unanimous.[5]

Before Dickson and his colleagues could apply these broad principles to a *Charter* case concerned with women's rights, they faced an important case outside the *Charter*, under federal anti-discrimination legislation (the *Canadian Human Rights Act*). Here, it can be argued, Dickson demonstrated the critical and creative stance he was developing in the early Charter cases[6]. In *Action Travail des Femmes v. Canadian National Railway Co.* (1986), a federal human-rights tribunal found discriminatory attitudes at the Railway, and a workforce with only 6.11% women. The tribunal ordered CNR to hire "at least one woman for every

JAMESON W. DOIG[1]

Jameson W. Doig is Senior Scholar, Woodrow Wilson School, and Professor of Politics and Public Affairs Emeritus, Princeton University, where he has chaired the Department of Politics and the Canadian Studies program.

four non-traditional jobs filled in the future," until the goal of "having 13% of non-traditional positions filled by women is achieved."

CNR objected to the proposed "mandatory quotas" as a remedy not permitted under the *Canadian Human Rights Act*, and the federal Court of Appeal agreed with the railroad. At the Supreme Court, however, Dickson endorsed the affirmative-action order. In his opinion for a unanimous court, Dickson argued that the tribunal's quota system was consistent with the intent of the federal law, and that the statute must be given a "large and liberal interpretation." The tribunal's strategy was essential, he concluded, as a way to "destroy discriminatory stereotyping and to create the required 'critical mass' " of women, so the behavior of CNR workers and senior officials might then become self-correcting.

The *Charter* applied to abortion rights

The 1988 *Morgentaler* case was perhaps the most contentious litigation in the field of women's rights during Dickson's years on the Court. We begin in 1969, when the Canadian Parliament acted to make abortion, previously a criminal act, legal in one circumstance: "when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health" (*Criminal Code of Canada*, section 251). That determination would not be made by the woman and her physician, however; under s.251, it would be made by a "therapeutic abortion committee," comprised of "not less than three" doctors appointed by the hospital board where the abortion would take place. The doctor who would perform the abortion could not be one of the three. These and other hurdles in the law were challenged by advocates for women's rights, and Dr. Henry Morgentaler performed an abortion outside the guidelines. He was convicted and appealed, arguing that the law violated the *1960 Bill of Rights*. At the Supreme Court, Dickson wrote the majority opinion. "The values we must accept for the purposes of this appeal," he concluded in 1976, "are those expressed by Parliament" in the *Criminal Code.* Legislative supremacy won the day, the *1969 Act* was legal, and Dr. Morgentaler spent ten months in prison for violating the law.[7]

After the *Charter of Rights and Freedoms* was enacted, Dr. Morgentaler, now joined by two colleagues, again violated the requirements of section 251 of the *Criminal Code*. The government proceeded against the three, who argued that the law conflicted with section 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The case reached the Supreme Court in 1986, and the Court finally handed down its decision in January, 1988.[8] In urging that section 251 be allowed to stand, counsel for the Crown used the legislative supremacy argument: "it is not the role of the judiciary… to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments." Dickson, who wrote one of four opinions in the case, embraced a quite different perspective: "Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives… conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*."

Dickson decided to focus only on the issue of whether section 251 met the "procedural standards of fundamental justice." The *Charter's* section 7 protected the "security of the person" and Dickson explored in detail the obstacles that the provinces and the hospitals placed in the path of a woman seeking an abortion. Hospitals were not required to establish "therapeutic abortion committees" – and most hospitals in Canada had not done so. Moreover, some committees "routinely refuse abortions to married women unless they are in physical danger." Dickson's conclusion: the system created by Parliament "is manifestly unfair. It contains so many barriers to its own operation" that the choice of an abortion will often be unavailable or available only at great cost. Section 251 violated "principles of fundamental fairness."

Dickson was joined by Justice Antonio Lamer and (in a separate opinion) by Justices Jean Beetz and Willard Estey. Dickson's analysis did leave open the possibility that Parliament could design "an appropriate administrative and procedural structure" to protect the lives and health of women, and also to protect fetal interests. Justice Bertha Wilson provided the fifth vote to overturn section 251, though she was not pleased with Dickson's approach; Wilson argued that any effort to compel a pregnant woman to meet externally imposed constraints, in the early stages of pregnancy, was a violation of the *Charter*. Until Parliament could design a "structure" that would meet the concerns of Dickson and his colleagues,

Canada would have no law restricting a woman's right to an abortion.

Advocates of women's rights were, by and large, pleased with Dickson's opinion and with the overall outcome. Those who would leave the choice on abortion to the woman and her doctor would have preferred wider Court support for Wilson's opinion. Yet the possibility, left open by Dickson and his colleagues, that legislators could design a constitutional law on abortion meant that the Supreme Court had, in a sense, dodged a bullet. The political pressure would be focused on Parliament, rather than on the Court, in solving a problem that has roiled the political waters through many decades in both Canada and the United States.[9]

Reversing *Bliss*: A broader view of equality

In *Bliss v. A.G. of Canada* (1979), Dickson and all his colleagues concluded that discrimination based on pregnancy was *not* discrimination based on sex, and therefore the equality provisions of the 1960 *Bill of Rights* statute were not violated.[10] Ten years later, the justices again faced the "pregnancy" issue. In 1983, Susan Brooks and two other employees of Canada Safeway filed a complaint, arguing that the reduced benefits provided for pregnant women – compared with benefits available for all other health-related absences from work – constituted discrimination on the basis of sex, in violation of Manitoba's human-rights statute. Writing for a unanimous Court, Dickson flatly rejected the rationale he had once embraced in *Bliss*: "It is difficult to conceive that distinctions… based upon pregnancy could ever be regarded as other than discrimination based upon sex."[11] Dickson noted that more recent cases – including *Action Travail* – support the position that human-rights statutes must be given a "large and liberal interpretation," and he cited a *Charter* case recently decided, *Andrews v. Law Society of B.C.* (1989), to underscore the need to interpret equality rights broadly. Finally, Dickson drew attention to an argument by Safeway's counsel: failure to include pregnancy – or any other health risks not covered in its plan – was not discrimination, the advocate had argued, but only a reasonable decision to cover some risks and not others. Such "underinclusion", Dickson commented, can be a "backhanded way of permitting discrimination" – and so it was in this case. Dickson's analysis here would be drawn upon in future gender cases.

The case reached the Supreme Court in 1986, and the Court finally handed down its decision in January, 1988. In urging that section 251 be allowed to stand, counsel for the Crown used the legislative supremacy argument: "it is not the role of the judiciary . . .

Dickson's influence on the evolution of Canadian Jurisprudence

The main outlines of Dickson's approach to the *Charter* have remained intact at the Court since he retired in 1990. The Court has continued to use a "broad, purposive approach" (Southam) and it has generally employed the *Oakes* test in addressing the issue of whether governmental action that infringes on *Charter* rights is justified.[12]

As the Canadian courts have moved into new and controversial domains, the perspective that Dickson brought to the *Charter* is evident. In *Vriend v. Alberta* (1998), for example, the Supreme Court majority emphasized that the *Charter* was "part of a redefinition of our democracy," providing new and independent powers to the judiciary. They then quoted Dickson's opinion in *Oakes*, emphasizing the importance of accommodating "a wide variety of beliefs, [and] respect for cultural and group identity." And they cited his opinion in *Brooks* to underscore the principle that "discrimination can arise from underinclusive legislation." Employing these standards, the Court concluded that the government of Alberta had violated the *Charter's* equality provisions, by omitting *sexual orientation* from a 1990 provincial law that barred discrimination based on race, religion and other grounds. As Justice Frank Iacobucci concluded, "the exclusion of sexual orientation from the [Alberta law] does not meet the requirements of the Oakes test and accordingly, it cannot be saved under s.1 of the *Charter*." The Court majority then inserted "sexual orientation" into Alberta's anti-discrimination statute.[13]

Three years later, provincial courts grappled with the question of same-sex marriage, and Dickson's way of framing and analyzing the issue shaped the judges' analysis. In Ontario, Judge

LaForme asserted that the issue must be approached by "applying a progressive approach" to the *Charter*, as "judiciously noted in *Hunter v. Southam.*"[14] He then argued that denying civil marriage to same-sex couples would violate the equality provisions of the *Charter*. But was that violation of *Charter* rights justifiable under section 1? Here LaForme quoted Dickson's *Oakes* opinion: "The Court must be guided" by such values as "commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity…". Given this perspective, it is not surprising that LaForme concluded, after reviewing the Attorney-General's arguments for excluding same-sex couples from civil marriage, that "the infringement of the Applicants' *Charter* rights cannot be justified under s.1 of the *Charter*." Marriage licenses would soon be issued to heterosexual and gay couples on an equal basis in Ontario and across Canada.

The gender issues of greatest moment in the Supreme Court have shifted since Chief Justice Dickson retired in 1990, but his influence – in creatively framing and vigorously exploring the major issues to be considered in protecting gender rights – remains.

References

[1] My thanks to my fellow panelists at the ACS conference in Ottawa in April 2007 – Mary Eberts, Louise Langevin and Andrée Côté – for their suggestions, and to James Hendry, Kristine Connidis and Warren Newman for their comments on a draft of this essay.

[2] Brian Dickson, "The Canadian Charter of Rights and Freedoms and its Interpretation by the Courts," Princeton, NJ, April 25, 1985, pp.7-18.

[3] Dickson served as chief justice from 1984 until his retirement in 1990. He was joined by Justices Bertha Wilson and Claire L'Heureaux-Dubé as forceful advocates for the rights of women.

[4] James Hendry argues (communications to the author, June 27, 28, 2007) that the Supreme Court's evolving support for human-rights legislation against discrimination preceded the *Charter*, and that my interpretation places too much emphasis on the *Charter* as crucial to Dickson's actions in the 1980s. My own view is that the *Charter* was the most important factor in Dickson's thinking on the issues discussed below; see for example his 1985 speech (quoted above) and his opinions in such early cases as *Southam* (below).

[5] *Hunter v. Southam*, [1984] 2 SCR 145; R. v. Oakes, [1986] 1 SCR 103.

[6] On Dickson's active intertwining of *Charter* and human-rights thinking, see Robert J. Sharpe and Kent Roach (2003), Brian Dickson: A Judge's Journey, esp. ch. 19. Toronto: University of Toronto Press, 2003.

[7] *Morgentaler v. The Queen*, [1976] 1 SCR 616.

[8] *R. v. Morgentaler*, [1988] 1 SCR 30.

[9] Even the sharpest critics of the Supreme Court's "generous interpretation" of *Charter* rights seemed to be persuaded by Dickson's framing of the problem as simply procedural: "The majority of Supreme Court justices struck down Canada's abortion law in *Morgentaler* not by explicitly siding with the pro-choice position but by emphasizing the procedural defects of the law." (F. L. Morton & Rainer Knopff, The *Charter* Revolution and the Court Party, Peterborough, ON: Broadview Press, 2000, p.158). In my own view, a close reading of Dickson's opinion leads to the conclusion that the "procedural" weaknesses in the statute – as described by Dickson and his colleagues – were probably fatal. Legislators, sharply divided as they were known to be, would have great difficulty agreeing on a statute to restrict the right of a woman to make her own decision (at least in the first 3-5 months of pregnancy) and still meet Dickson's standards of "fundamental justice." Later efforts to enact a bill failed.

[10] *Bliss v. Attorney-General Canada*, [1979] 1 SCR 183. Writing for the Court in *Bliss*, Justice Roland Ritchie offered the view that "pregnant women" were denied benefits "because they are pregnant and not because they are female." The *1971 Unemployment Insurance Act,* which limited benefits available for pregnant women, was left intact.

[11] *Brooks v. Canada Safeway*, [1989] 1 SCR 1219.

[12] Peter W. Hogg, Constitutional Law of Canada (2005), chapter 35. Scarborough, ON: Thomson/Carswell, 2005.

[13] *Vriend v. Alberta*, [1998] 1 SCR 493. The Alberta law is called the *Individual's Rights Protection Act*; in legal parlance, the Supreme Court "read in" sexual orientation.

[14] He then quoted from Dickson's opinion in that case: the *Charter* must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers." *Halpern v. Canada* (A.G.), [2002], Ontario Superior Court.