

Chief justice rued abortion ruling, book says

Text based on Dickson's private papers gives insight into Supreme Court rulings

By KIRK MAKIN

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Years after he voted to reverse Henry Morgentaler's 1974 jury acquittal on charges of performing illegal abortions, chief justice Brian Dickson of the Supreme Court of Canada began to regret his harsh decision, says a new book on the late legendary judge.

He stepped down from the bench in 1990 and died in 1998 at the age of 82.

"In retrospect, it may not have been the wisest thing to do," chief justice Dickson is quoted as saying in the book, based on interviews and 200 boxes of private papers.

He was privately horrified by a defence strategy predicated on Dr. Morgentaler's belief that an individual can ignore the law if his cause is sufficiently virtuous, according to the authors of *Brian Dickson: A Judge's Journey*.

When Dr. Morgentaler again came before the court in 1988, chief justice Dickson suddenly found himself holding the swing vote during a private conference of the seven judges who heard the case. With his brethren deadlocked 3-3, the book says, chief justice Dickson saw a way to come full circle.

This time, he voted to strike down the abortion law. However, he based his decision on the unconstitutionality of a cumbersome procedure for approving abortions, allowing him to uphold the acquittal but avoid sanctifying Dr. Morgentaler's decision to flout the law.

"Dickson now accepted many of the same arguments that had failed to move him or any member of the Court in the Morgentaler 1," say the authors, Ontario Court of Appeal Judge Robert Sharpe and Kent Roach, a University of Toronto law professor.

The story is one of many drawn from the trove of private material. Others include disputes over how broadly to interpret the Charter of Rights and a near-rebellion that chief justice Dickson was forced to extinguish when a group of Quebec lower-court judges became incensed about their low salaries.

The Dickson Papers are housed in the National Archives of Canada, and will become publicly accessible in 25 years. However, chief justice Dickson permitted

Judge Sharpe, his former executive legal assistant, to have access. As his co-author, Prof. Roach, a leading constitutional scholar, was also given access.

In a preface, the authors spoke of their anguish about how they ought to deal with memos written by other judges.

"If every comment or tentative thought were exposed to public view and scrutiny, discussions among judges could be inhibited and judicial decision-making might be adversely affected," they reasoned. "A judge might well hesitate to explore ideas or test views with his or her colleagues if no discussion could be kept private."

They said that they elected to temper discretion with the public right to know.

Lorne Sossin, U of T associate professor of law and one-time law clerk in the Supreme Court, predicted Thursday that some judges will be nervous about the precedent, but most will recognize the importance of demystifying the court. He said the process of agonizing over rulings, trading draft opinions and being "wracked by doubt" is an important dimension of judging.

One of the most nerve-racking cases the court dealt with involved constitutionality of patriating the constitution. The book describes chief justice Dickson's humiliation when then-prime minister Pierre Trudeau condemned the ruling in a speech at which the chief justice was sitting in the front row.

Chief justice Dickson later angrily described the attack as "profoundly political, out of date and superficial," the book says.

The book reveals a judge who was well-attuned to public reactions and often plagued by rulings he came to regret. "I got the feeling occasionally, [Dickson's] judgments were written to catch the media," former judge Gerard La Forest remarked to the authors.

In another important case involving the rights of common-law spouses -- *Pettkus vs. Becker* -- judge Dickson instructed a clerk to fine-tune his draft "in light of comments, favourable and unfavourable," that came after an earlier ruling had gone against a farm wife.

The repositioning of his argument worked.

Several judges swung to his approach -- in spite of a memo from judge Ronald Martland calling it "palm tree justice."