

1-1-2006

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Recommended Citation

Peter Dostal & Jessica Gin-Jade Chan, "Principle and Imagination in Judging: A Conversation with Mr. Justice James MacPherson" (2006) 15 Dal J Leg Stud 273.

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INTERVIEW

**PRINCIPLE AND IMAGINATION IN JUDGING: A
CONVERSATION WITH
MR. JUSTICE JAMES MACPHERSON**PETER DOSTAL¹ AND JESSICA GIN-JADE CHAN²**I. INTRODUCTION**

In the fall of 2005, Mr. Justice James MacPherson of the Ontario Court of Appeal began his visiting term at the Dalhousie University Faculty of Law. During his visit, Justice MacPherson spoke with two students about several issues that have engaged him during his career as a lawyer, academic and judge.³ The conversation raised a number of questions about Canada's changing legal landscape, and how the judiciary has attempted to balance the role of legal principle and judicial imagination in law-making. How, for example, has the public's sceptical perception of our evolving justice system subjected judges to a higher degree of scrutiny? The result has often been an apparent trade-off between principle and perception. What are the new dilemmas in our administration of justice? More than ever before, an applicant's right to a principled and fair hearing has been compromised by systemic problems preventing access to the courts. Consequently, courts are being pressed to be more imaginative. To what extent, then, should judges articulate the intuitive (and sometimes personal) premise that often lies at the heart of their judgement? The weight of all these issues has placed judges in a position to re-consider their role in the justice system, and how they can balance principle and imagination to better adapt to the needs of society.

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³ Interview took place the morning of February 17th, 2006.

Justice MacPherson brings his unique perspective to these issues from his vast experience in the legal system. He was counsel for the Government of Saskatchewan in many early landmark constitutional decisions, he served as an officer in the Dickson Court⁴, and was later involved as a judge in several high profile decisions, such as the recent Ontario same-sex marriage appeal, *Halpern. v. Canada*.⁵ A graduate of Dalhousie Law School in 1976, Justice MacPherson has had a remarkable legal career. He began as a law professor at the University of Victoria, spent time as Director of the Constitutional Branch of Saskatchewan, and later was Executive Legal Officer of the Supreme Court of Canada. He was the Dean of Osgoode Hall Law School until his appointment as a judge of the Ontario Superior Court, and later the Ontario Court of Appeal.⁶

Early in your career, you acted as intervener on behalf of Saskatchewan for several landmark cases, so you know first-hand how significant the role of an intervener can be in influencing judges. You have recently advocated that courts encourage entrance of interveners through “broad and liberal definitions of the concepts of standing and interventions.”⁷ However, in 2000, Mr. Justice Bastarache of the Supreme Court of Canada suggested the intervener’s role may not need to be as expansive in the future.⁸ Based on your legal experience from both sides of the bench, what are your thoughts on the role of the intervener?

My experience has been that interveners often provide an important and a different perspective on a case. I’m a big fan of granting broad access to interveners in constitutional litigation—especially at the appellate level. At the trial level, courts need to be just a bit more careful because

⁴ (1985-1988).

⁵ (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529.

⁶ Ontario Court of Justice, General Division (1993-1999); Ontario Court of Appeal (1999-present).

⁷ Justice James MacPherson, “Civil Disobedience and the law: the role of legal professionals” (2003) 41 Osgoode Hall Law Journal 371.

⁸ Luiza Chwialkowska, “Rein in lobby groups, senior judges suggest” April 2000, *National Post*.

when you have a trial unfolding, witnesses are often present. If you have interveners trying to make their legal arguments right at the front-end, it can take some of the focus away from the conduct of the trial. But once you get to the appellate level—especially at the Supreme Court of Canada—the cases usually raise issues of national importance. And at that level, it is highly desirable to have as broad a range of views of the legal issues as you can possibly get.

During the same-sex marriage case⁹ in the Ontario Court of Appeal, there were five or six interveners on both sides. *Égale*¹⁰ was present—one of the best and most well-known interveners in our legal world—supporting gay and lesbian rights. We also had the Interfaith Coalition.¹¹ It was the umbrella for Christian, Hindu, Jewish and Muslim groups—all who opposed same-sex marriage—and represented by a very highly respected Toronto lawyer. Then we had a third group, called the Collation of Liberal Rabbis for Same-Sex Marriage. Today, I can still picture all three lawyers for those three groups. I see their factums and I remember their oral arguments. They were all helpful and good, though you can imagine how different they were.

As a judge, you can structure the role played by interveners. For example, interveners can be directed in terms of the time they are given in your appellate court, or instructed to only submit a factum but not do an oral argument. These are all ways to ensure that interveners don't take over a case. I usually would be more inclined to accommodate interveners, than to restrict them.

The public, nevertheless, has often displayed concern about whether interveners could negatively influence the court. Some have gone so far as to suggest that the courts could be hijacked by special interests. Do you think there are any dangers present in allowing for large numbers of interveners? For example, do you see any potential of the intervener being used to as a Trojan Horse for political or corporate groups that may not be directly affected by the issue?

⁹ *Supra* note 5.

¹⁰ *Egale Canada Inc.* (Equality for Gays and Lesbians Everywhere.)

¹¹ The Interfaith Coalition on Marriage and Family.

No, I find that most of the interveners who come in are quite open in saying, “Here’s our group and we want to say this, so please let us in to say it.” I don’t see anyone being so nuanced or subtle as to say, “Look, let’s not ask permission to be an intervener—let’s retain someone else to do it for us.” The National Citizen Coalition was a regular intervener a few years ago, and their views were certainly very similar to corporate Canada. Yet I never had any sense that there was anything overly subtle about how they got in front of the court. They were there because they were a well-funded interest group with a clear view of public issues.

Concern has also been directed at the issue of judges’ conduct within the courtroom. Some litigants worry that judges have made up their minds before entering the room, and might be overly combative towards the litigant. The concern is that this confrontational approach places judges in a role where they become advocates for a position, when their job is to judge, and not to fight. Nevertheless, the “jousting” matches between judges and litigants are defended as being a major aspect of the appellate process. What are your views on the utility and proper scope of these exchanges?

My starting point is that there is a world of difference between the role of a judge during a trial and the appellate process. A judge should be virtually silent in a trial. Our role is just like a traffic cop—to try to keep everything moving. Judges have to make rulings, and that means we do have to speak. But when the trial is unfolding and the witnesses are telling their stories, there is virtually, in my view, no role for a trial judge in any of that. If you read a trial transcript, you should not see “The Court” mentioned in more than the opening, recess, and the rulings.

An appeal is very different. The evidence is all in, the parties aren’t there, and there are no witnesses testifying. It is lawyers arguing about legal errors, and in the appellate process, I think it is fundamental that lawyers be challenged as they make their arguments. If a judge thinks certain things about a legal argument, a lawyer will want to know what those things are, so that he or she can respond to them.

So I think “jousting matches”—which aren’t a bad description of a lot of appeal cases—are not only normal, but also highly desirable in the appellate context. I think my adjectives to describe the appellate process would be “candour” and “courtesy”. The jousting should be character-

ized by “candour”. In this sense, the judge asks very clear questions, and signals to the lawyer what he needs assistance with. However, the judge must also exercise “courtesy”, and listen to the answers. As a judge, we cannot be too argumentative, rude, or long winded. By all means, ask questions and engage in rigorous discussions with the lawyers, but do it with courtesy.

The perception of judges has changed significantly since the years when you first started your legal career. The myth of the judges as oracles of justice has long since disappeared, and, consequently, the public has taken an active interest in the legal system and the composition of our courts. The recent release of the final part of the *Gomery Report*¹² points to this, recommending the devolvement of certain powers from the Prime Minister to parliamentary committees. This suggests that there is a greater likelihood that future judicial appointments will be subject to more scrutiny by committees. How do you feel this may effect the composition of the courts and our justice system?

There are a lot of judges who are opposed to having a new committee system to vet judicial appointments and interview potential judges. I don't share any of that. I think people who want to be judges will still apply for the job. I would not be troubled by appearing before a parliamentary committee and answering questions. Of course, there are a lot of questions a potential candidate would have to avoid. The main ones are questions which deal with particular areas of law, or what that candidate's views might be on cases likely to come before them.

I watched the swearing in of Chief Justice Roberts in the United States before the Senate, and I thought his answers were by and large terrific. He steered away from things he couldn't be too precise on, such as the question “are you going to reverse *Roe v. Wade*”—you can't answer an issue that may be before you in the next year or two—but he was still able to give a sense of himself as a professional and as a person to the public and the Senators.

¹² Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Canadian Government Publishing, 2006).

Some say that parliamentary committees mean that fewer good judges will apply to the bench because of their reluctance to go under that type of scrutiny. I say, “Tough luck, we don’t need them.” There are lots of other highly qualified people who would be willing to submit to that type of scrutiny.

Do you think changes to the appointment process will affect the principle of judicial independence? And what effect could they have on the politicization of the judiciary?

My sense is that it wouldn’t politicize the judiciary in Canada. Until I see a parliamentary committee being overtly political in their scrutiny of a judge, I would take the view that Canadian politicians understand the difference between politics and judicial life. That being the case, they would ask the type of questions that are legitimate for a potential holder of judicial office.

Of course, there is always a risk of going overboard, like it sometimes has in the United States. Usually though, the process makes you feel very good about the people who do get approved. The careful scrutiny has wiped out a couple of appointments in the United States, and these were good people to get wiped out. So until I see things going wrong in Canada, I would say that this value of openness can apply to the judiciary just as much as it does to the other branches of government.

In addition to issues of perception of our judges, there have been several concrete problems emerging from the daily operation of the courts. The type of people approaching the court to seek remedies has changed. There are a growing number of self-represented litigants appearing before both trial and appellate courts.¹³ Some have attributed it to growing distrust of lawyers, while others point to problems with the growing costs of litigation. What is your experience with this problem, and what are your thoughts on its resolution?

¹³ Chief Justice McMurtry, “Canada a Just Society?” (2005 Symons Lecture on the State of Canadian Confederation). The lecture pointed to access to justice by the poor this becoming one of most serious problems in the Canadian justice system.

I was a trial judge for six years, and I've been an appeal court judge for six years. If you ask me what major changes I've seen in our court system in those twelve years, I would say my observation is there are more and more cases in which people are representing themselves. This is not by choice, but because of financial difficulties.

These people are in either of two categories. One category is the poor. They have always had to represent themselves for lack of resources. But there's a new category—the middle class who just can't afford the steep fees that lawyers tend to charge. So the result is that even in a major appeal, it's not unusual to see someone with everything at stake in their lives representing themselves. It is a major and growing issue that is getting worse.

So how do you solve this problem? Our governments have got to be willing to increase funding and improve the delivery of legal aid for our poor. The model in some jurisdictions is to fund lawyers in the private sector to take on legal aid cases. True, the hourly rates that lawyers get for that are low, but nevertheless it's expensive if you are funding lawyers in the private sector on an hourly basis.

I'm actually a supporter of increasing government-run legal aid clinics. I think we should look at establishing more professional legal aid clinics on a province-wide basis, staffed by professional legal aid lawyers. Opponents say it will be a second rate system for poor people, but I just don't agree with that. I think we have some of the most dedicated and experienced lawyers in the legal aid clinics around the country, and there is nothing second-rate about how they deliver legal services at all. Nova Scotia actually is one of the better provinces in that regard. It has a very extensive system of legal aid clinics all around the province. My province of Ontario has a lot more to do in that area.

For the other category, middle-class people just aren't going to be able to apply for legal aid. Yet when you look at their resumes, you see that they simply can't afford litigation either. Quite frankly, I think lawyers are going to have to look at their fee structures—particularly in urban Canada. Our middle-class can't afford lawyers because lawyers cost too much. Many lawyers struggle to make a living, but lots of lawyers don't struggle at all. They make a very substantial amount of money. I think they need to recognize that the fee structure is sometimes too high, and drives people in directions they shouldn't have to go.

We simply can't just go on with our two-tiered system of legal services. The poor qualify for legal aid, while the wealthy can afford full-fee services from the big firms. The range of people and their legal problems are far too nuanced for those types of black and white categories. I think an interesting example is what some trade unions do for their workers: they contract with certain law firms to represent whatever's happening in the private lives of their members. This is done on a fixed or a modest fee. When I hear about this, it strikes me as a good model.

Do you think judges have an added duty towards self-represented litigants?

Yes, I do. That's an interesting question, because it's a question every judge faces. Some judges take the view, "I'm going to do nothing different at all, because I have to be absolutely impartial in the way I treat people." Other judges would say, "I am going to give an explanation of almost every facet of what will happen here, and I may even step in and assist the self-represented person during the trial at key moments with questions of examination or cross-examination".

I think most judges would fall somewhere between these views. They would probably say that we have a duty to try to carefully explain the trial process to the person from the start. This should be done on a very simple and clear level, so that they can understand the opening statements, which side goes first, when witnesses are called, and what a cross-examination is. All of this should be directed at the person who is going to have to walk through the process themselves. We also have to be willing to come back to this during the trial, especially if the person has obviously misunderstood something, or is getting it wrong.

Would you say this additional assistance to self-represented litigants has any adverse impact on a judge's discretionary independence?

No. If the assistance given is a procedural explanation of the litigant's role, I don't think that would create any perception of bias in favour of that person. Lawyers for the opposing side always understand why we do this. So far, I've never had a lawyer say to me, "I just think you're playing too much of a role in helping this person".

As soon as I know I have a self-represented litigant, I always carefully map out some instructions at the start of the trial to assist them. However, when we actually get to the trial, I don't feel I should intervene. It is the litigant's job to present their case, and to attack the other side as best they can.

A second but equally pressing problem with the operations of our courts is an ongoing difficulty with case management.¹⁴ Cases have consistently grown lengthier and more complex, which consequently puts heavy strain on the scarce resources of the courts, making them far less accessible. How would you characterize this problem, and how should courts ameliorate it?

There is no doubt that cases are getting longer, more complex, and more expensive. By and large that is undesirable, and steps need to be taken to correct it. I've never had a role in court administration, but it has always struck me how unfortunate it is that we have so many steps in litigation at the trial level in Canada. This means more than one judge is often involved, so you may have an early motion with one judge, and another preliminary motion with a different judge three months later. Then at trial, yet another judge will hear the same issue.

In the United States, most states assign a judge to a case as soon as the case is filed. The same judge will hear everything in the case, and that judge is responsible for moving the case. I think we need to look to that model in Canada. As a judge, if we know that this is our case, we will take a lot more control over it, and push lawyers to move it forward more quickly. If we watch over the same case, we will have an idea of whether it is too long, too expensive, or too complex. This is an area where I think the Americans are really probably better than us. In the United States, the trial for a high-profile person charged with murder will be over within a year. In Canada, the same trial may take three years.

About five years ago, a high-profile football player for the Baltimore Ravens was charged with murder on the day of the Super Bowl. The trial took place in May, just three months later. I remember thinking: What if

¹⁴ See Justice Roy McMurtry, "Report of the Honourable R. Roy McMurtry", (2005) Ontario Justice Education Network. Chief Justice McMurtry noted that cases are getting significantly more lengthy and complex.

someone from the Montréal Canadians was charged with murder on the same day, and represented by a leading defence lawyer? When would that trial take place in Canada? The answer would probably be more than two years after being charged. To me, that's just wrong.

Constitutional jurisprudence has seen its own changes over the years. As an experienced lawyer and judge of constitutional law, what do you see as being the next big area of constitutional litigation? Are there any major areas of constitutional law that you see as being unsettled?

I think the Supreme Court's decision in the *Chaoulli*¹⁵ case a few months ago is fascinating. For starters, it is a four-to-three split, with a very strong judgment written each way. It also raises the fundamental issue of how far the court will go in asserting positive rights and forcing governments to actually do things affirmatively in the delivery of services. We saw a bit of that in the *Dunmore*¹⁶ case. There, the Court said there is an obligation for governments with statutory regimes to protect workers in order to make sure they include vulnerable groups of employees in some of that protection.

In other words, if the government is going to step onto the stage, they have to make sure that they cover all the groups once they are on that stage. In *Chaoulli*, the majority stepped into the delivery of our healthcare system, using the *Charter*¹⁷ as a mechanism to do that. The minority said that is precisely the sort of thing a court should not do. I think that there will be some very interesting decisions dealing with what I call positive rights over the next few years.

There is another area that I think appellate courts will have to come to grips with. As judges, we always like to look at the jurisprudence and ask, "Is the law contributing to the progress of society?" During my lifetime as a lawyer, I would say that the law has contributed positively in most areas to Canadian society, our legal system, and the administration of justice.

¹⁵ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35.

¹⁶ *Dunmore v. Ontario (Attorney General)*, [2001] 2 S.C.R. 1016, 207 D.L.R. (4th) 193.

¹⁷ *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

However, we always need to ask, “Where is progress not happening?” I think criminal trials are significantly worse today than they were when I was a young lawyer starting out thirty years ago. I think much of the criminal *Charter* jurisprudence has made our process too complicated. Appellate courts have attempted to make the criminal process overly sophisticated and subtle by imposing too many restrictions on the way prosecutors and judges conduct themselves at trial. Our criminal trials are now too long, complicated, and expensive. The result is that they are not as fair or just as they were thirty years ago. I think appellate courts in particular have to ask themselves if they aren’t the main authors of that regression, and try to deal with it.

At the heart of all these changes, a judge remains a constant focal point. Indeed, this places a significant amount of pressure on them to be just and principled. However, what seems fair may not necessarily be what is principled. I wonder, when principle wins out over fairness, do you feel regretful of any of the decisions?

I have felt uncomfortable with some of the sentences that I felt I had to impose, though this occurred more during my time as a trial judge than an appeal judge. Today, we can have conditional sentences for all criminal offences. Appeal courts do try to set ranges for the sentencing of different offences. But the last thing you want is eclectic sentencing at the trial level. For example on Monday, someone charged with an offence might get a sentence of two years less a day to be served in their home; while on Tuesday, another person charged with exactly the same offence gets a sentence of three years in the federal penitentiary.

However, I have occasionally felt that the ranges were wrong when I looked at a particular case. Once, I had to sentence a Spanish American drug courier. He was a Spanish man from South America living in New York and trying to raise his young family. He had been offered \$1,000.00 to drive an old Cadillac across the border into Canada. The Cadillac had been shelled out so that a lot of cocaine could be put into the trunk, and this man who had never been to Canada in his life got caught at the border. When he came on for trial, the jury found him guilty and I had to impose a sentence at the end. This was an offence of importing, which was the worst offence. It was also for cocaine, which is a real bad drug. I knew I would have to sentence him to quite a lot, though on the

other hand, I knew that he was a courier who had crossed the border for \$1,000.00. I knew that he had a wife and two young children back in New York, and that he was from South America. So how long should he serve in a Canadian jail? Well, I had to follow the range for the offence, regardless. The sentence that I imposed was nine years. I remember thinking, “that’s so high”, and I wish I didn’t have to do that.

At the other end of the spectrum was a case where a trial judge had sentenced a son to house arrest for killing his mother. The jury had convicted him of second degree murder, and I thought: You shouldn’t be sentenced to house arrest for killing your mother. I felt that the sentence was not long enough in that case, but the law at the time allowed it.

It seems certain that the future legal landscape will present many novel challenges for judges where pure principle will still be compromised. How do judges balance a principled approach with all the other competing interests and, in particular, your own personal view of what is right for a case?

It is difficult, particularly at the appellate level. We want to try to do the right thing, but we also know that what we write at the appellate level will be what trial judges will have to follow. We do try to think through what we’re saying in each case, what the effect of that might be with future cases down the road, and try to factor that in as we’re making our decision. Essentially, we’re gazing into a crystal ball.

Chief Justice Dickson once said the role of a judge is to combine principle and imagination. It’s tough to do. Principle is so much easier for lawyers and judges because that’s what we’re taught from year one in law school—applying principles and knowledge. Finding the right case in which to use our imagination and advance the law is hard, but I think it’s important to occasionally try.

Most judges like to think that they are trying to make decisions that are principled and anchored in the jurisprudence. They try to balance their application of the principles to the facts of the case. You get a bit uncomfortable if you start to move outside of that. So we never like to say that there is also a personal element present—either in terms of a lifetime of experience and values, or our view of those litigants. We are never comfortable in thinking that these influence our decisions a lot. Yet the reality is that if a judge lives a professional life before they

become a judge, their view of the litigants and their own experiences and values are important in the decisions they make. It's not surprising that those will continue to be important when they are a judge; but how they quantify and articulate that is difficult, because they're not used to thinking that way when they are a judge.

Oliver Wendell Holmes once described this as the "inarticulate major premise". Most judges would say "boy, if I had a major premise I'm going to articulate it" and they do. For the most part, what they think they are doing is articulating in terms of the legal principles and their application to the evidence—the mix of law and facts. But there is a level below "major premise", which may be inarticulable for judges in the sense that they feel it, and it is important to their decision. They may not articulate it, but it is an intuitive feeling for the people that are involved in the case.

This was in my head during the *Halpern* case when we were considering whether to suspend the declaration. I looked at all the section 15 jurisprudence that came before *Halpern*. I also looked at the reality of the people standing before me. The question I asked myself was, "Are gay people capable of long, lasting, intimate relationships?" My answer was, "Of course." When then, should we recognise their right—now, or two years from now? I had to ask, "Why not now?"