

Responsabilité, fraternité et développement durable en droit:

Une conférence en mémoire de l'honorable Charles D. Gonthier

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

20-21 Mai 2011 à la faculté de droit de l'université McGill

May 20-21, 2011 at the McGill University Faculty of Law

Manuscripts de la conférence Conference Proceedings

Method and Matter in the Gonthier Legacy: Legal History and Judgment Writing 1989-2003

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METHOD AND MATTER IN THE GONTHIER LEGACY:
LEGAL HISTORY AND JUDGMENT WRITING, 1989-2003

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What can we know about Charles Gonthier's legacy? What do we need to know?

He came to the Supreme Court of Canada on 01 February 1989, as an urgently needed successor to Justice Jean Beetz, whom he deeply admired and whose judgment style he respectfully emulated. They were the same age, sixty-one years old. Gonthier was sitting two days after appointment,¹ with no allowance for apprenticeship, and soon was called upon to write his first judgment for his unanimous six senior colleagues in *Elsom v. Elsom*,² heard three weeks after appointment (22 February 1989) and delivered within three months (18 May 1989). This reflected as much Chief Justice Brian Dickson's discipline as Justice Charles Gonthier's dedication.

The post-1982 *Charter* Court had seen a dramatic drop in its number of judgments³ and in the speed with which they were rendered. This frustrated Chief Justice Dickson, especially whenever Justices Beetz or Le Dain had agreed to write first drafts for circulation. Dickson tried

¹ *Maurice v. Priel*, (1989) 1 SCR 1023.

² (1989) 1 SCR 1367.

³ The Supreme Court of Canada averaged annually 85 judgments in 1962-1972, and 125 each between 1973 and 1982 inclusive, but then went back to 85 between 1983 and 1988, followed by a 117 annual judgment average 1989-1998. The Laskin Court 1973-83 had a 121 judgment average, the Dickson Court had a 99 case average, and the first decade of the McLachlin Court, 2000-10, has had a 72 judgment annual average.

to run a tight unit, where the calendar, the clock, the corporate mind and his own military experience shaped Court scheduling. He did not know how to push Beetz, who avoided the Court's third floor collegial lunches and spent weekends in Montreal as a fourth for bridge at his retired mother's residence. Although still the second youngest person on the Court (to Antonio Lamer), physical health worries encouraged Beetz's early retirement on 10 November 1988 and he died less than three years later, aged 64. Simultaneous to Beetz's retirement, Justice Gerald Le Dain had suffered a temporary health crisis; and just twenty days after Beetz's departure, on 30 November 1988, Dickson seized the opportunity to negotiate Le Dain's early retirement at age 64 from the Court.⁴

So Charles Gonthier arrived in Ottawa, appointed by the government of Prime Minister Brian Mulroney; and Chief Justice Dickson could anticipate that judgment writing deadlines would be met and that any case backlog eliminated. Everyone at the Court, including colleagues, knew what getting on Dickson's "bring forward" desk calendar meant; and woe to anyone who did not deliver on time!⁵ Therefore, in Justice Gonthier's first two years, 1989-1991, which were Dickson's last and Antonio Lamer's first as Chief Justice, the Court hugely produced 133 and 140 judgments, respectively.

⁴ The legal history of this twin exit episode has been partially addressed, albeit it not for the memories of Jean Beetz and of Gerald Eric Le Dain, who died nineteen years after retirement, 18 December 2007, aged 83. It is noted in some detail in *Brian Dickson: A Judge's Journey*, by Robert J. Sharpe and Kent Roach (Toronto: The Osgoode Society, 2003), pp. 300, 374-5, 428 and 431-4.

⁵ I was seconded by Chief Justice Dickson to the Court from the Faculty of Law, University of British Columbia, 1987-8, as its first and only "consultant curator," to oversee creation of archival and records management processes, supervised by the Registrar's office of Guy Goulard and then Anne Roland.

Gonthier's *métier* had been as a trial judge for fourteen years, in the *Cour supérieure du Québec* where colleagues knew him as intelligent, professional, modest, collegial and humane. His method was too intelligent to take a more mechanical approach to appellate judging, that was literalist or formalist, that looked to enforcing the letter of the law or emphasized form over substance. He was too professional to find sources outside the law as authority, rarely invoking the elasticity of "common sense" or of equity's vocabulary to justify judicial creativity. He was too modest to claim special merit or talent, or to put the sound of his voice above the silence of his listening ear. He was too collegial to seek a spotlight career in place of teamwork and shared credits. And he was too humane to abstract an individual litigant's misery, whatever the event that had provoked the civil dispute or the violent victimization. Charles Gonthier's temperament was a marvelous mix of shyness and the connoisseur's tastes — in fine arts, literature, wine and cuisine — quick with a supportive smile and slow with a disappointed frown.

There were two legal historical giants in Quebec whose biographies he most admired: his maternal grandfather, Charles Joseph Doherty (1855-1931)⁶ and Pierre-Basile Mignault (1854-1945).⁷ Three generations of *Cour supérieure* judges began with great-grandfather Marcus Doherty, then grandfather Charles for fifteen years (1891-1906). He resigned from the bench prior to being elected in 1908 a Member of Parliament from the St. Anne constituency and then became the federal Minister of Justice for ten years from 1911 until 1921, through the

⁶ Library and Archives Canada, "Le fonds Charles Joseph Doherty," Manuscript Division, R4647-1-0-F, formerly MG-27, II D- 6, Finding Aid No. 496.

⁷ Library and Archives Canada, "Le fonds Pierre-Basile Mignault," Manuscript Division, R8017-2-3-F, formerly MG-30 D-1, Finding Aid MSS0570.

tumult of World War I and the Winnipeg General Strike. His eventful public career had begun at age of thirty as a captain in the 65th Regiment (later *Les Fusiliers Mont Royal*) sent to defeat Louis Riel at Batoche. Charles Doherty went on to be a Canadian negotiator and signer of the Treaty of Versailles (1919), an ardent promoter of *La Cour permanente de justice internationale* (World Court), Canada's eager representative at the League of Nations, and the first Honourary President of the Canadian Bar Association. These became causes that the proud grandson, Charles Doherty Gonthier, comfortably identified with, for juristic internationalism and for the larger context of Canadian law. In an obituary *hommage* in 1931, Pierre-Basile Mignault recalled school boy days shared with Charles Doherty at St. Mary's College in Montreal, in legal studies at McGill, in his own practice before *le juge Doherty*, and of Doherty's "le sens légal" as being "a gift of the gods."⁸

From someone as austere and single-minded as Mignault, this was highest praise indeed. In the Emperor Justinian's sixth-century Roman imperial law, a special source of authority was the *jurisprudentia* of academic commentators. From post-Napoleonic Lower Canada to the current Quebec Civil Code, no one has fulfilled that role of jurispudent better than Pierre-Basile Mignault. But his was a narrower, strictly provincial vision of law that made Charles Gonthier uncomfortable.

Mignault had graduated in law from McGill in 1878, two years after Charles Doherty earned his B.C.L. He then practiced in Montreal for three decades while publishing books that

⁸ P. B. Mignault, "The Right Honourable Charles J. Doherty: An Appreciation," (1931) 9 *Canadian Bar Review* 629-633.

remain standard legal authorities: on parliamentary law, parish law and his *Code de procédure civile annoté*. Between 1895 and 1916 he produced his nine scholarly volumes, *Le droit civil canadien*. He was Professor of Civil Law at McGill, 1912 to 1918, when he was appointed to the Supreme Court of Canada, during Charles Doherty's tenure as federal Minister of Justice. He reached mandatory retirement on 30 September 1929, died sixteen years later at age 92, and remains, in the chosen word of David Howes, Québec's champion of "monojurality."⁹ Just as Charles Gonthier drew method and matter as a judge from his grandfather, Charles Doherty, for what I have called "juristic internationalism," so Charles Gonthier did not accept the juristic turning-inward that Mignault's monojurality identified for Québec.

Mignault entered Charles Gonthier's life most recently in the year 2000, when Mignault's grandchildren offered him the manuscript "Letters Sent Home", addressed to his mother. These are his twelve long journals of a grand European tour in 1880 made by Pierre-Basile Mignault, his brother Louis Mignault and Joseph Frémont, celebrating their graduation in law from McGill. Justice Gonthier invited me to begin a joint venture, transcribing the handwritten 1883 text to a word processor disque, which is now permanently preserved and available in the Library and Archives Canada.¹⁰ The 200 page single-line spaced text is a meticulously detailed narrative. At various pages it takes you from one *objet d'art* to the next, room by room at the Louvre, the British Museum, the Vatican and London's National Gallery — a perspective frozen for the pre-1880 world, before all impressionist, expressionist, modernist abstractions. Justice Gonthier took special note of the young Mignault's passion for

⁹ David Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929," (1987) 32 *Revue de droit de McGill/McGill Law Journal* 523-558.

¹⁰ *Supra* note 7.

ultramontane Roman Catholicism, that reactionary theology of Vatican I (1869) and Pope Pius IX (1846-1878), the Marian visions at Lourdes and every city's cathedral. This further complicated Gonthier's respect for Mignault's massive jurisprudential legacy for Quebec, albeit *ancient regime* Quebec. For all of this the trip was both beautifully but often boringly recorded, with parts copied straight out of a Baedeker guide.

We have then two methods to begin with, two jurisprudential models for Charles Gonthier, both rooted in Quebec: his grandfather Charles Joseph Doherty's juristic internationalism and its opposite, Pierre-Basile Mignault's monojuralism. The former accepted a polyjurality when searching for specific authorities and experiences, looking at law and legal system comparatively, be it statutory, common law, code or convention. To embrace Doherty's jurisprudence was to reject Mignault's monojurality, which searched for authority within "la pureté de notre droit."¹¹

Gonthier's juristic internationalism was never theoretical, never rooted in the philosophical universalism of natural law or in search of a *grundnorm*, to be applied deductively to a case's facts. Rather, he followed his grandfather in making comparative law his method and allowing any non-Quebec, non-Canadian law or procedure to be a possible alternative, to be examined according to the reasoned needs created by Quebec and Canadian laws. He wrote in 161 cases, out of the 1576 judgments rendered at the Supreme Court of Canada during his fourteen year tenure there, slightly over ten percent. The majority of his cases arose from

¹¹ P.-B. Mignault, "L'avenir de notre droit civil," (1923) 1 *Revue de droit de McGill/McGill Law Journal* 56 at 57; also, J.-G. Castel, "Le juge Mignault défenseur de l'intégrité du droit civil québécois," (1975) 53 *Canadian Bar Review* 544.

Quebec and were civil, not criminal, pleadings; and in none of these written judgments did he narrow the issue or the authority, in Mignault fashion, exclusively to an application of the Civil Code or to an avoidance of “*de droit anglais*” or to slavish adherence to the French text.

Rather, the Gonthier method was transparently, rationally systematic and very much within the unified Anglo-French common law tradition. He structured his judgment writing in the conventional epistemological style that outlined what the Supreme Court of Canada needed to know: first, summarize the “facts and proceedings” at trial; second, identify the legal issues, meaning the questions of law; third, identify “relevant legislative provisions”; fourth, recite the “decisions of the courts below”; fifth, provide an analysis of each side’s submissions and the lower court reasoning; and sixth, provide a brief conclusion and disposition. This was the Gonthier era’s refinement of the structured approach to judgment writing that had evolved between the post-Judicial Committee of the Privy Council (1949) and pre-Charter (1982)¹² era. Justice Gonthier did not invent this method of appellate analysis but he certainly further entrenched it, as any of his judgments indicate.

As Professor Robert Kouri, at the University of Sherbrooke’s Faculty of Law, has pointed out,¹³ one of Justice Gonthier’s greatest jurisprudential contributions has been in the area of causation, in law of obligation (tort) cases of medical liability. In 1991 he wrote for a majority of

¹² For example, in 1982, both Chief Justice Laskin and Justice Jean Beetz separately used a more case specific, topical structuring of dividers: Laskin in *CRTC v. CTV*, (1982) 1 SCR 530, and Beetz in *Royal Trust Co. v. Tucker*, (1982) 1 SCR 250. In the latter, Justice Beetz followed Mignault’s style and substance on trust law in Quebec!

¹³ Private e-mail correspondence to me, 04 April 2011.

six, La Forest dissenting, in *Laferrière v. Lawson*,¹⁴ a classic model for his unique analytical skills. Here he displayed his grandfather's juristic internationalism as well as his comparative law commitment. The judgment was structured as outlined above: facts at trial (*i.e.*, Dr. Lawson had not followed-up a breast cancer biopsy), lower court judgments, issues at law, analysis (*i.e.*, the "loss of chance" liability in Belgium, France, Quebec, the U.K. and U.S.A., surveying the legal academic literature), then the Gonthier analysis summarised with nine "observations," applied to the case's specific facts, ending with a three-line "disposition" award. Eighty-eight pages, double-spaced, of tightly argued, carefully documented analysis, citing twenty-eight case judgments from Quebec, Belgian, French and Canadian courts, only two statutory authorities (the *Charter* and the *Civil Code of Lower Canada, 1841-1867*), and twenty-one academic jurisprudential writings. Along the way are pearls of methodological wisdom:

It is difficult to explain why different legal systems approach a problem in different ways. Mindful of the dangers of comparative law unequipped with full information and understanding of other legal systems, I will nonetheless hazard a few observations.

And again, regarding expert evidence:

...a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence.

Scientific findings are not identical to legal findings.¹⁵

¹⁴ (1991) 1 SCR 541. This has become Canada's leading case for causation in tortious liability, where probabilities rule and civil responsibility must be assessed. He confirmed his judgment in a second medical liability case, *St. Jean v. Mercier*, (2002) 1 SCR 491, involving alleged maltreatment by an orthopaedic surgeon.

¹⁵ *Laferrière v. Lawson*, *supra* note 13, pp.73, 79.

There is a cautious intellectual discipline in all of this that liberated Gonthier from teleologically driven consequentialism, where the desired result could trump reason and law.

Nowhere was this more evident than in the unanimous *per curiam* judgment for the Quebec *Secession Reference*.¹⁶ Until the working case file archives for each of the nine justices in that case are opened — which means not in my lifetime or for most of yours — we cannot know which parts of that judgment were authored by whom. However, it bears unmistakable tracings of the Gonthier pen, his method and his mind, as one of the three Quebec justices. The cited legal authorities draw on juristic internationalism: forty-six cases, seventeen academic publications and seventeen statutory sources, including *Magna Carta*, the English *Bill of Rights* (1688), the U.S. Constitution of 1789, the British North America Act of 1867, the *Charter*, and at least four international conventions. The judgment begins with objections to the Supreme Court of Canada’s jurisdiction in the matter, before addressing three substantive questions of law, analysing each historically and legally, to find that there is “no right, under the Constitution or at international law, to unilateral secession ... without negotiation.” Any careful reading of the Gonthier *opera omnia* will recognise in this judgment the fulfillment of every criterion he ever employed in his commitment to rule of law.

Justice Gonthier had been appointed to the *Cour supérieure* on 17 October 1974 after twenty-two years in practice, having earned his call to the Barreau du Québec in 1952. As a trial judge he wrote 141 judgments, for an average of ten per year; and that trial judging

¹⁶ *Renvoi relatif à la sécession du Québec*, (1998) 2 SCR 217.

experience made him consistently reluctant, later as an appellate justice, to doubt or over-rule any trial judge's judgment of facts or to nullify a jury's verdict. He went to the *Cour d'appel* fourteen years later (24 May 1988) and then, after only eight months, arrived at the Supreme Court of Canada; but even in that two-thirds of one year visit he wrote ten judgments. No surprise then that, with such consistent productivity, Chief Justice Brian Dickson was delighted to welcome him to Ottawa on February 1st, 1989.

His conscientious collegiality is clear from the judgment writing numbers. In that total of 161 judgments, written during his fourteen years at the Supreme Court of Canada, almost half (79) were for unanimous colleagues. He dissented in only eighteen cases, indicating that he was a consensus builder and a magnet for majorities. In fact, forty-one of his judgments were *motifs majoritaires* and another twenty-three were *motifs concordants*. His concurrences were brief and designed to add further criteria to a majority's text. For example, in *R. v. Butler*,¹⁷ the obscenity case, he added a fourth element to Justice John Sopinka's three thresholds. "[T]he manner in which the material is presented may turn it from innocuous to socially harmful." His mischievous example was to contrast sexual intercourse detailed in a book with a highway billboard displaying fully nude actors in the act. This added a Marshall McLuhan moment to a majority judgment that at times could be legally tedious. In so doing, Justice Gonthier reminded us that, while reading was an individual private medium, obscenity was more than a matter of content. A photograph displayed for expressway traffic created a public medium that became "socially harmful," with the crucial difference being in "the manner of representation."

¹⁷ (1992) 1 SCR 452, with the Gonthier concurrence at 511.

Much more needs to be said about Justice Gonthier's method and matter in judgment writing, about juristic internationalism and monojurality, about his jurisprudential debts to Charles Joseph Doherty, Pierre-Basile Mignault, and others. He was always the first to footnote his sources and to acknowledge the influences of others. When we went to work on Mignault's travelogue, I thought that I had found a fellow legal historian; but when combing his judgments to see how he might have used legal history, I came away empty-handed. He was no name-dropping judge, never referencing great judges, great cases, great statutes to decorate his analysis. Instead, he kept his eyes on the uniqueness of the facts and law in each case, his ears open to alternative arguments, his mind sharply focused on polyjurality and methodically applied reason, and his heart gently alert to the human drama behind and beneath every story brought before him. That is the Gonthier legacy from which we must learn.