Justice David H. Doherty Takes His Final Bow

Tom Curry, Katie Doherty, and David Humphrey

Associate Chief Justice John Morden defined "the 'good' judge" as a person who has a passion to do justice combined with the knowledge and skills necessary to give effect to this passion. He cited Simon Rifkind, a retired American trial judge, who said:

> The courtroom, sooner or later, becomes the image of the judge. It will rise or fall to the level of the judge who presides over it … No one can doubt that to sit in the presence of a truly great judge is one of the great and moving experiences of a lifetime.

Those who had the privilege of appearing before Justice David Doherty have been in the presence of a truly great judge. Besides possessing an abundance of the qualities that ACJ Morden described, Justice Doherty set a standard of excellence that lifted the quality of the work of the courts he served and the counsel who appeared before him. And he did it all for longer than anyone else. In total, he served as a judge for 35.5 years, 33.5 as a judge on the Court of Appeal for Ontario.

When he left the court on the afternoon of March 8, 2024, at a swearing-out ceremony that attracted hundreds in person and online, he took his final bow on a judicial career that will never be equalled. His contribution to the Canadian justice system extends beyond the length of his time on the bench. He is widely recognized as Canada's leading criminal law jurist, having written most of the important cases in the area. The body of his work in civil justice is just as impressive, defined both by the sheer volume of the cases he has decided and by the wide range of areas upon which he has written.

Despite these accomplishments, or perhaps because of them, he remains something of a mystery. Justice Doherty is an intensely private person. Over a judicial career of such an extraordinary length, he has rarely spoken in public, even on legal issues. He has an aversion to small talk and the legal social circuit. Indeed, it is entirely possible that some of the McCarthy & McCarthy lawyers where he practised for three years had no idea he had left the firm for the bench in 1988 until they saw his decisions in the law reports. The official firm history mentions him in a single sentence. His biography on the court website is merely two lines: the dates of his appointments. He does not appear in any court photo from this century.

So, the question arises: What explains this truly extraordinary jurist who has made such a singular contribution to Canadian law?

The origin story

David Doherty was born in Honduras on March 9, 1949, where his father, an Irish immigrant, worked for a mining company. His mother, Kathleen, was a nurse from a farm outside Guelph. Her first trip outside Canada was to relocate to Honduras.

David was the youngest of three children, with an older brother and sister. The family moved to Ancaster, Ontario, when he was about five. His parents raised a close-knit family and instilled both a strong work ethic and a sense of confidence in the children, who believed they could achieve their dreams. There were no lawyers in the family, and David's dreams did not include a wish to be a lawyer, let alone a judge.

A defining moment in the family's history and David's life was the tragic accidental death of his older brother, Tom, in 1965, at age 20. He was by all accounts a brilliant, charismatic, and high-spirited young man who was destined to accomplish great things, but he was less disciplined than his younger brother. It was Tom who introduced David to someone who would become a lifelong friend and criminal law expert, Justice David McCombs, another Ancaster legal success story. David Doherty loved and admired his brother, and after his death it could be said that he took on the challenge of being twice the son he would have otherwise been. His life's work has brought honour to his brother's memory.

David was the complete student, both brilliant in his academic work and, as his brother had been, a superb, fierce, multi-sport athlete. His excellence in football earned him a spot on the McGill University varsity team in his first year in 1967. He played for McGill at Varsity Stadium in the 1969 Vanier Cup but lost out to the University of Manitoba.

David studied history at McGill and excelled at that, too. His plan was to pursue graduate studies, and he had options to do so at a few American universities. Law school emerged as another option, and that choice narrowly won out. He enrolled at McGill law school in 1970.

It was at McGill that he met Barbara Carson, who was a student in physical education and a member of the McGill women's basketball team. They were married in Baie-D'Urfé, Quebec, in 1971, after his first year of law and moved west to London, where David transferred as a second-year law student at the University of Western Ontario. There he starred on the gridiron for the Mustangs, and Barbara taught high school. David graduated with a law degree in 1973, as the gold medallist and a member of the 1971 Vanier Cup championship football team.

Ten years later, Barbara graduated from Osgoode Hall Law School and began a successful career on Bay Street as a corporate lawyer. Only partly in jest, David has described the division of responsibilities in their marriage as follows: He takes care of all *Charter*-related issues that come up in the family, and Barbara takes care of everything else.

A year before David was appointed to the Supreme Court of Ontario (High Court of Justice), the family welcomed a daughter, Kathleen, who is now better known as Katie Doherty, a proud member of the talented group of Crown counsel at the Crown Law Office – Criminal.

The foundation of David's life and the source of his good fortune lies in the love and support of his family and the strength and commitment of his life partner, Barbara. Those ingredients allowed him to bring the full weight of his natural intelligence and towering work ethic to the task of learning and applying the law. The next step was to find the right environment and the right mentor. He found both at his first professional home: the Crown Law Office – Criminal.

The Crown Law Office

David has described his arrival in September 1973 as an articling student at the Crown Law Office as a matter of pure luck. As he tells it, he fell into the position. The gold medal helped. However it unfolded, it was there that David came under the tutelage of two mentors who shaped his natural gifts and powers of concentration.

The first was Clay Powell, who was the larger-than-life director of the Crown Law Office – Criminal. David has said he owes his career to Clay Powell. The lessons Clay taught about the responsibilities of Crown counsel and the importance of the criminal justice system have infused everything David has done since.

Clay Powell was a character. He instilled a love of hard work in his charges but made sure the office cultivated a sense of humour, including a healthy respect for a good practical joke. He earned the nickname "Butch," and it fit, right down to the cowboy boots. By the time Clay left the Crown's office for private practice in 1976, he had assembled an outstanding team. Besides David, the office featured names like David Watt, Edward Then, Douglas Hunt, and Ian MacDonnell.

The second important mentor to a young David Doherty was the legendary Arthur Martin. Justice Martin was appointed to the Court of Appeal in 1973, the same year David joined the Crown Law Office as a student. Much has been said about the impact that Justice Martin had in setting the trajectory of the court to the lofty heights that we now take for granted. He was part of a change that introduced an era of heightened respect for the court and its contribution. Along the way, Justice Martin adopted the role of teacher to a new generation of criminal lawyers, each of whom was eager to learn in his classroom at Courtroom 10 at Osgoode Hall. As David describes it, Arthur Martin patiently taught him the criminal law on a case-by-case basis. Unfailingly polite, Justice Martin would gently test the strength of the case, while allowing counsel a safe environment in which to learn.

During his time at the Crown Law Office, David conducted hundreds of appeals in the Court of Appeal and the Supreme Court of Canada and appeared in hundreds of trials and applications. He had a voracious appetite to learn and distinguished himself by the force of his intellect and prodigious work ethic.

A distinguishing feature of David's time at the Crown Law Office is the sheer number of compliments the Court of Appeal paid to his arguments and academic writing. The comments singled him out for praise in the technical merit of his legal argument and the elegance of his submissions. His approach to cases had common elements: a complete command of the record, a deep understanding of the legal principles and policy implications of the competing positions, and a presentation that was forceful, clear, and compelling. Justice Martin obviously appreciated David's skilled advocacy and his command of the criminal law. In his 1982 judgment in *R v Dunbar and Logan,* Justice Martin noted David's "most able argument," his "very able argument," and his "customary candour."

The *Charter* presented a new canvas for David's work and he dove right in, writing on a wide range of subjects, many of which wound up shaping the evolving criminal law of Canada.

Together with Doug Hunt, David was named Queen's Counsel in January 1985. Both were leaders of the bar who had already distinguished themselves in the courtroom. But David had by then cast his eye toward the bench and took the opportunity to expand his experience in private practice. In the summer of 1985, he joined the Bay Street firm of McCarthy & McCarthy.

The civil justice years at McCarthys

When we think about Justice Doherty there is a natural tendency to see him only as a criminal jurist. But he is much more. As great as the contribution he has made to the development of the criminal law in Canada is, his contribution to the development of civil justice can be seen as even greater.

The civil justice years (1985–88) have not been emphasized as part of the Doherty JA origin story, which has tended to draw a straight line from 18 King Street East to the bench. But to understand his contribution, that narrative must be balanced by describing his time in civil practice and how it influenced the arc of his judicial career.

A review of the 1985–88 law reports shows David's trademark fearlessness and competitive instincts were brought to a wide variety of cases. David's connection to the McCarthys firm was very strong. He had been opposite John Robinette on his first appearance in the SCC. Justice George Finlayson, David's colleague on the Court of Appeal and a McCarthys alumnus, wrote about David's experience in that appeal as an example of Mr. Robinette's mentorship. It is also a good example of the kind of mentee David Doherty was, taking in lessons and advice wherever and whenever he could.

In the fall of 1984, shortly before joining McCarthys, David had been Mr. Robinette's junior in the successful defence of then Crown attorney Casey Hill in the contempt proceeding brought in the High Court by the Church of Scientology.

Like John Robinette before him, David loved the vast expanse of cases within the universe of civil justice and the seemingly endless and novel legal issues they raised. He threw himself into learning the law and civil practice, while also pursuing a criminal defence practice. He defended medical malpractice actions, commercial cases, professional discipline proceedings, and everything in between. It was an exciting time in the profession and at McCarthys. The firm had lost Douglas Laidlaw to a tragic accident in the summer of 1984 and George Finlayson to the Court of Appeal in December of that year. David and Ian Binnie joined the firm in quick succession afterward as the next generation stepped up to the plate.

Despite the steep learning curve, civil practice added a new and wider dimension to David's work and made him a more complete lawyer at the time of his appointment to the High Court in September 1988. The one civil appeal in which he appeared before Justice Martin also occurred during his time at McCarthys. It was a dispute between the Ottawa-Carleton Regional Transit Commission et al. and a private tour bus operator, Carleton Bus Lines (Antrim) Ltd. The question was: "Is a sightseeing tour a passenger transport service?" Unfortunately for David, it is, and he lost the appeal.

As noted, while in private practice David continued to act in criminal cases, including as Crown counsel. The re-argument of the groundbreaking *Charter* appeal for the Crown in *The Queen v Mills* in the SCC was conducted while David was at McCarthys. He also conducted the defence at trial of a leading *Charter* case, *The Queen v Wholesale Travel*, that was eventually argued after David's appointment by Ian Binnie in the SCC in 1991. And he intervened for the Criminal Lawyers' Association before a five-judge panel of the Court of Appeal in *Regina v Harry Kopyto*. In what remains as a leading authority on contempt of court, the appeal considered the contempt finding made against Kopyto for suggesting that the courts and the RCMP were put together with Krazy Glue. The court's decision discusses arguments made by David for the sole intervener six times.

Judicial contribution to criminal law

Professor Don Stuart, of the Faculty of Law at Queen's University, summed up David's standing among judges when he bemoaned the fact that, in 2011, David had again been passed over for appointment to the Supreme Court: "Every person who is associated with criminal justice would know that David Doherty has written most of the leading judgements in most of the areas. He's our leading judge, really. It seems disappointing that he was not chosen."

Countless areas of the criminal law simply are the way they are because David Doherty established them as such. It is no overstatement to say that as an accused passes through the criminal justice system, every stage of the process engages a Doherty JA decision – or, oftentimes, several of his decisions: from detention to the standard for arrest and search incident to arrest, restrictions on police infringing a reasonable expectation of privacy in digital breadcrumbs, the test for admission of expert evidence, the admissibility of evidence under section 24(2), jury selection, and sentencing.

Our understanding of what constitutes crime in Canada has also been fundamentally shaped by the Doherty JA jurisprudence. His judgments govern our understanding of the elements of countless criminal offences.

Criminal appellate jurisprudence is equally stamped with the Doherty JA byline. He penned the leading decisions on all manner of appellate issues, including the test for state-funded counsel, misapprehension of evidence, uneven scrutiny, ineffective assistance of counsel, and application of the curative proviso.

A letter from Chief Justice of Canada Richard Wagner read at Justice Doherty's swearing out by Justice James MacPherson made these points:

> As Chief Justice of Canada, I am delighted to share a few words on the occasion of Justice Doherty's retirement … Over the years, Justice Doherty's work has left an indelible mark on this country's criminal law jurisprudence. His expertise is so widely acknowledged that it is something of a truism. Yet, we would be remiss not to celebrate his distinct legacy and thank him immensely.
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> Justice Doherty penned too many landmark decisions for anyone to list … As I reread his many decisions in preparing these remarks, two themes emerged. First, a commitment to clarity of language and thought. And second, fairness, as he was always sensitive to the context and the proper administration of justice. You see both where he cuts to the heart of a matter as he did in *R v Rover* when describing the right to counsel as a "lifeline" for detained persons and emphasizing its psychological value, a point the Supreme Court of Canada recently cited in *R v Dussault*. It is no surprise then, that Justice Doherty's decisions have been repeatedly cited not just in Ontario, but across Canada and even beyond by courts in Australia, Scotland, New Zealand, and Hong Kong.

But perhaps the best illustration of the extent of Justice Doherty's contributions to criminal law is the Supreme Court's recent decision in *Beaver*, where five of those decisions are cited.

Our country is better for Justice Doherty's abiding commitment to the law, particularly our criminal law.

David has a way of writing that plainly, yet poignantly, expresses some of the central concerns of the criminal law, and the delicate balancing of state interests against individual liberties. As former Chief Justice Beverley McLachlin wrote in a letter read at Justice Doherty's swearing out:

> [C]ounsel from across Canada continually refer to his work as constituting the highest and best expression of the law on difficult points of criminal law. Quite literally, David Doherty was and remains the consummate authority on the criminal law of Canada. I remembered thinking more than once as I perused his prose, "If only I could write like that." I never could.

Two examples further illustrate the signature clarity of his writing. In *R v Quercia*, David spotlighted the frailties of eyewitness identification evidence, writing: "The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law. That ghost hovers over this case." In *Brown v Durham Police Force*, a case dealing with the lawfulness of roadside detentions, he wrote: "The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free."

Judicial contribution to civil justice

The criminal justice system is necessary for the maintenance of order in society. Civil justice plays a similar role in providing social order and economic stability, checking the use of executive power, and resolving disputes peacefully. David's work in civil justice can best be understood by a review of the volume of the cases he decided and the breadth of the areas of the law upon which he wrote.

Since David's appointment, the Court of Appeal decided more than 35,000 reported cases (including single-judge motions). Doherty JA was on the panel (or was the motion judge) for nearly 5,500 of those decisions. Of those, 3,500 are identified as concerning criminal law and the balance are in civil and other cases. And his cases have had a lasting impact since he has written across the full spectrum of the court's work in civil justice.

Sense of humour and demeanour

Owing to both the intensity of his focus and his private nature, the bar developed the unjustified perception that Justice Doherty lacks a sense of humour. He contributed to the mythology by declaring privately that his own father had described him as the only Irishman without a sense of humour. In fact, David does have a sense of humour and is a practical joker.

Better known is Justice Doherty's courtroom style. Jurists, like advocates, develop their own unique courtroom style. Justice Doherty's intense courtroom demeanour is a defining feature of his time as a judge. There is no other judge who can be identified so readily by his courtroom presence – the intense focus, posture, and direct questions create tremendous force, texture, gravity, and – sometimes – fear, in the space between the court and counsel. How many of us have felt the crushing weight of that force.

David has said that counsel are entitled to expect a "hot court" – meaning one that is fully prepared to engage meaningfully with the issues on appeal. The bar was not always ready for the heat he brought to an oral hearing. David was trying to solve the legal problem raised by an appeal. He was always well prepared and focused on the issues that mattered. He made everyone around him better. No one wished to let him down, and therefore everyone elevated their performance. The results showed in the quality of his decisions.

Betsy Powell, a *Toronto Star* journalist and the daughter of Clay, wrote these words after David's retirement:

> His stern demeanour and gaze made many an unflappable lawyer second-guess themselves. Against his black robes, his now snow-coloured hair only adds to his air of authority. As he listens to oral arguments, he is a man of habitual gestures – a chin rested in his hand, a deep exhale conveying impatience, a pen sliding in and out of his mouth or glasses coming on and off his face. His interruptions can be curt, and even loud.

All that is true. And yet, there is no serious appellate counsel who would not choose him to preside over a panel. Everyone knows that he will do his best to do justice to the case and that there is no finer or more experienced judge before whom to plead your case.

Like Justice Arthur Martin before him, Justice David Doherty left his mark on Osgoode Hall – and Courtroom 10 in particular. It was only fitting that to mark his retirement, the retiring room behind Courtroom 10, named years earlier for Justice Martin, was renamed the Martin Doherty Room: the names of two titans of the Court of Appeal, side by side, forever guiding jurists who follow in their footsteps. Justice Martin would have approved.

The curtain falls

Everyone who knows David knows that that he would have preferred to continue sitting well past age 75. Among friends, he joked about pursuing a *Charter* challenge to the mandatory retirement requirement for judges. Perhaps he had "forgotten" that Ontario Provincial Court Judge Maurice Charles had already lost such an application in 1995. And, ironically, when Maurice Charles appeared in person to argue his appeal to the Court of Appeal, it was none other than Justice Doherty who joined the court in resoundingly dismissing the appeal, stating simply: "Nothing we have heard and read in the sub-missions of the appellant causes us to doubt the correctness of the decision of Ground J. Accordingly the appeal is dismissed." As much as David would now like to pursue his own challenge, he could not bring himself to challenge his own ruling.

David could not continue sitting past age 75, but he made sure that he sat as long as possible. On Friday, March 8, 2024, the day before he aged out of his dream job, David sat on a first-degree murder appeal with two of his cherished colleagues, ACJO Michal Fairburn, and Justice James MacPherson. David enthusiastically engaged with counsel during oral argument and delivered an oral judgment for the court, dismissing the appeal along with a compliment to young counsel for the appellant for her "excellent submissions." It was a fitting end. David had come full circle. He had been the beneficiary of Justice Martin's tutelage and encouragement from the bench; he closed his career encouraging a young lawyer embarking on her own advocacy practice.

After the appeal was dimissed, senior Crown and defence counsel on the case delivered brief tributes to Justice Doherty's monumental contribution to the administration of justice. David was conspicuously touched, and then appeared struck by the reality that this was the last time he would preside in court Barbara, Katie, and some friends and admirers were in Courtroom 10 to takein the moment. David's spontaneous parting comments said it all: "I love this place; I love this court."

Conclusion

On March 8, 2024, the bench and bar saluted Justice Doherty's dedication to the job of judging and his commitment to the real people and parties who came before him in each case. He made a lasting

and positive impact on the lives and work of countless judges, law clerks, court staff, and lawyers from all aspects of the bar. His work has also impacted millions of people across Canada.

Justice Doherty strengthened the fabric of the court and the profession, and he broadened and enriched the quality of the experiences of everyone he dealt with as a judge. Justice Doherty took his inspiration from the honour and dignity of the work of the court and the joy of the pursuit of his passion at the highest possible level. And he took us all along with him on that journey.

He has a profound love and respect for the law and justice and accepted that our system of justice was in his hands for safekeeping. He knew that it was his challenge to try to make it better. He accepted and answered that challenge, and his example encourages all of us to do our part. He is a living testament to the power of a single judge to positively influence the life of an institution and to improve the quality of the lives of those who serve the ends of justice, in any capacity. His personal standards of excellence shaped the court, the wider judiciary, and the profession. That example will endure to guide the court for generations to come.

We congratulate him on his remarkable career, and we thank him for what he has done to advance the cause of justice.

Notes

1. The Honourable John W. Morden, "The 'Good' Judge" (University of Toronto, Faculty of Law, Centre for the Legal Profession: Second Colloquium, March 2004); online: https://web.archive.org/web/20180222160008/https:/lsuc.on.ca/media/hon_john_morden_the_good_judge_mar0504.pdf. (The Simon Rifkind quote appeared in The New Yorker, May 23, 1983, at p 23. The edited text of "The 'Good' Judge" appeared in the Spring 2005 issue of The Advocates' Society Journal.)

2. The only potential challenger to designating Justice Doherty the longest-serving appellate judge in Canada is Chief Justice Lyman Poore Duff. However, the comparison is not a fair one. Chief Justice Duff's tenure was not restricted by the mandatory retirement age that currently governs federally appointed judges. The chief justice's tenure (beyond the mandatory retirement age) was extended by not one but two special Acts of Parliament during World War II.

3. Christopher Moore, *McCarthy Tétrault: Building Canada's Premier Law Firm* (Vancouver: Douglas & McIntyre, 2005) 375.

4. Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792–2013*, Osgoode Society for Canadian Legal History (Toronto: University of Toronto Press, 2014).

5. Clay also passed on a love of cigars that he had likely developed while a student with Arthur Martin, who was a cigar aficionado.

6. After working as a reporter at the *Toronto Telegram*, Clay attended law school at Osgoode Hall and obtained an articling position with the greatest criminal defence lawyer in Canadian history, Arthur Martin. It was Mr. Martin who suggested Clay join the Crown's criminal appeals division. His timing was fortuitous and ushered in the golden age of that office. Clay headed a new special prosecutions section in 1965 and built a group of bright, fair-minded, and superb prosecutors who developed a reputation for boldly tackling difficult and

complicated cases. Clay brought his own unique style and commanding presence into the courtroom, where he squared off against organized crime and white-collar fraud defendants. Along the way, he recruited, trained, and inspired a generation of leading appellate advocates.

7. In his paper "The 'Good' Judge" (*supra* note 1 at 5-16–5-17), former associate chief justice John Morden described Justice Martin's approach to the hearing of appeals: It was well known that Arthur Martin had an encyclopedic knowledge of the criminal law and an almost unequalled experience as counsel in criminal trials and appeals. If anyone was in a position to be "efficient" in the conduct of a hearing by stating his opinion at the beginning of the argument it was Arthur Martin – but, of course, he never did this. He showed respect for all counsel, experienced and inexperienced. He made it clear that he was genuinely interested in what they had to say. He brought out the best in them. His interventions took the form of gentle steering in the direction of what he considered to be the germane issues. This led to orderly hearings in which the losing counsel or litigant never had any cause to think that he or she had not been treated fairly.

8. A few examples demonstrate this point:
   - "Mr. Doherty, with the candour that we have come to expect of him" – *Regina and Beason* (1983), 7 CCC (3d) 20 (ONCA) at para 65.
   - "Extremely able argument" and "Mr Doherty made a strong attack on the judge's finding" – *R v Heaslip* (1983), 9 CCC (3d) 480 (ONCA) at para 46.
   - "Mr. Doherty also argued as a second string to his bow" – *R v Quin* (1983), 9 CCC (3d) 94 (ONCA) at para 5.
   - "Mr Doherty with his characteristic candour and fairness" – *R v Taylor* (1983), 7 CCC (3d) 293 (ONCA), at para 24.

9. *R v Dunbar* (1982), 68 CCC (2d) 13 (ONCA) at paras 23, 97, 128, 148.

10. Three examples of his work are leading academic articles in the Criminal Reports relied on in appellate courts across the country:
    - "'What's Done Is Done': An Argument in Support of a Purely Prospective Application of the Charter of Rights" (1982), 26 CR (3d) 121, cited in *R v Stevens*, [1988] SCJ No. 61 at para 13; *R v Thorburn* (1986), 26 CCC (3d) 154 (BCCA); *R v James* (1986), 55 OR (2d) 609 (CA).
    - "'Sparing' the Complainant 'Spoils' the Trial" (1984), 40 CR (3d) 55, cited in *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577 at para 32; *Re Seaboyer and The Queen Re Gayme and The Queen* (1987), 37 CCC (3d) 53 (ONCA); *R v O'Connor* (1994), 90 CCC (3d) 257 (BCCA) at para 16; *R v Grant* (2013), 302 CCC (3d) 491 (MBCA) at 73.
    - "Boron: Is Pre-charge Delay Relevant in Determining Whether s. 11(b) Has Been Infringed?" 36 CR (3d) 338 at p 342, cited in *Regina v Young* (1984), 13 CCC (3d) 1 (ONCA).

11. Mr. Finlayson quoted David in his biography of Canada's greatest advocate, *John J. Robinette, Peerless Mentor: An Appreciation*:

    After the oral argument was completed, the Court reserved judgment. I was getting changed in the gowning room, and Mr. Robinette came over and started to speak to me … I remember

him talking about the value of a prepared argument but the need to keep focused on the Court. He didn't say it in so many words, as if he was saying, "This is the first thing or the second thing you did right or wrong." He was really saying to me, "You know you have to keep your eye on the Court, and you can't lock yourself into a prepared argument without regard to what interests the Court."

The other comment I remember was about listening to the questions and thinking before you answered them. "You know, what he's really saying is, 'Listen to the question. Take your time. Answer the question.'" All of this was done in the most informal and friendly manner as if both he and I had been in the Court a hundred times before and we were sort of equal, chatting away about the art of oral advocacy.

I'll certainly never forget, firstly, that a person of his stature was prepared to take the time to talk with me and, secondly, the way he did it to make me feel so much as his equal and a fellow member of the bar and as someone who he found interesting and significant – if that's the right word – enough to talk to. It just struck me, in retrospect in particular, as such a humble and generous thing to do."
(*See John J. Robinette, Peerless Mentor: An Appreciation*, by George D Finlayson, 2003, The Osgoode Society (published in association with Dundurn Books), 275–76).

12. And Mr. Robinette wasn't his only fan – Alan Lenczner claims credit for bringing David to McCarthys after they were adversaries in a 10-week criminal trial called Regina v West in 1985. Over coffee after the trial Alan said he learned that David had wanted to be a judge from the age of 12; Alan encouraged him to come to McCarthys to learn civil litigation to enhance his experience – and he did.

13. *Ottawa-Carleton Regional Transit Commission et al. v Carleton Bus Lines Ltd. (Antrim) (1985), 11 OAC 350 (CA)*.

14. *R v Mills*, [1986] 1 SCR 863.

15. *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154.

16. *R v Koypto* (1987), 24 OAC 81 (CA).

17. A more unusual but amusing case concerned the matter of *R v Jenset*, 1986 CanLII 4614 (ON SC), where David moved successfully to quash a committal for trial following the refusal to grant his then unrepresented client an adjournment to finalize his retainer.

18. John Geddes, "The Man Who Got Passed Over for the Supreme Court," *Maclean's* magazine, October 24, 2011.

19. *R v Simpson* (1993), 60 OAC 327 (CA).

20. *R v Golub* (1997), 102 OAC 176 (CA).

21. *R v Ward*, 2012 ONCA 660; see also *R v Spencer*, 2014 SCC 43 at paras 31, 48; and *R v Bykovets*, 2024 SCC 6 at paras 34, 42, 52, 67.

22. *R v Abbey*, 2009 ONCA 624.

23. *R v Plaha* (2004), 189 OAC 376 (CA); *R v McGuffie*, 2016 ONCA 365.

24. *R v Parks* (1993), 65 OAC 122 (CA).

25. *R v Nur*, 2013 ONCA 677.

26. See. e.g., *R v Carbone*, 2020 ONCA 394; *R v Stordy*, 2024 ONCA 284; R v L.B., 2011 ONCA 153.

27. *R v Bernardo* (1997), 105 OAC 244 (CA).

28. *R v Morrissey* (1995), 80 OAC 161 (CA).

29. *R v J.H.* (2005) 192 CCC (3d) 480 (ONCA)

30. *R v Archer* (2005), 203 OAC 56 (CA).

31. *R v Gill*, 2019 ONCA 971.

32. When delivering the letter during Justice Doherty's swearing in, Justice MacPherson remarked as follows:

> I couldn't believe that, so I looked up *Beave*r and lo, and behold, five different decisions – they're not citing him one case five times; five different Justice Doherty decisions are cited in this single case. I can't imagine that has ever happened before.

33. *R v Quercia* (1990), 75 OR (2d) 463 (CA).

34. *Brown v Durham (Regional Municipality) Police Force* (1998), 43 OR (3d) 223 (CA).

35. At Justice Doherty's swearing out, Associate Chief Justice Michal Fairburn said:

> For anyone wondering in the fall of 1990 what this new judge on the Court of Appeal for Ontario would be like, the answer came very quickly – within a couple of months: a cutting-edge decision called *Quercia* shedding a spotlight on the frailties of eyewitness identification evidence.
>
> You know, we can sit here, and we could engage in an endless debate about the most jurisprudentially significant work that David Doherty has penned. And the truly incredible thing is that David has written in virtually all areas of the law. While the criminal bar absolutely claims him as their own as reflected in his receipt of the G. Arthur Martin Medal in 2019, the non-criminal bar loves him every bit as much. He courageously wrote the pioneering analysis in *Parks* over 30 years ago now calling out the grim reality and evil of anti-Black racism in Canada. He changed the test for the admission of expert evidence in *Abbey*. He wrote what is still the leading

decision on misapprehensions of evidence in *Morrissey*. And along with Chief Justice McMurtry, Justices Moldaver, Rosenberg, and Weiler, he wrote tirelessly on righting the wrongful conviction in *Truscott*. He penned *Simpson*, he penned *Golub, Batte, McGuffie*, and all of them are household names in criminal law, the list goes on, but so too does the list on the civil side,

36. See Westlaw.

37. Among his civil cases, he has been involved in dozens of distinct areas of substantive and procedural law. Many appeals raise multiple issues, so these numbers add up to more than the approximately two thousand civil appeals he heard.

    Civil procedure was engaged in nearly 1,800 cases; constitutional law in more than 800, and contracts in more than 400. His work in human rights, wills and estates, family law, the legal profession, corporations, banking, labour law, landlord and tenant issues, Aboriginal law, insurance, securities, natural resources, intellectual property, real estate, taxation, and maritime law amount to many hundreds more. The lowest category of legal issues concerned employment insurance appeals, of which there were only three.

38. A selection demonstrates this point:
    - In *General Accident Assurance Co. v Chrusz* (1999), 124 OAC 356 (CA), a leading case on the law of privilege, David wrote an influential dissent from a majority decision by his friend and colleague Marc Rosenberg. The case has been cited 579 times, including by the SCC in *Lizotte v Aviva Insurance Co. of Canada*, 2016 SCC 52 at para 38.
    - His reasons in *Budd v Gentra Inc.* (1998), 111 OAC 288 (CA), are influential on the law of oppression and have been cited in 101 other cases.
      He has written extensively on abuse of process, starting with *Wernikowski v Kirkland, Murphy & Ain* (1998), 111 OAC 288 (CA), cited 78 times.
    - Similarly, his reasons in *Schweneke v Ontario* (2000), 130 OAC 93 (CA), a leading case on issue estoppel, have been cited 74 times.
    - *Beals v Saldanha* (2001), 148 OAC 1 (CA), remains an important decision on the enforcement of foreign judgments.
    - In *Toronto (City) v C.U.P.E.*, Local 79, (2001), 149 OAC 213, his reasons on the law of res judicata and issue estoppel were largely adopted by Justice Arbour on appeal to the *SCC (Toronto (City) v C.U.P.E., Local 79*, [2003] 3 SCR 77).
    - The law of SLAPP suits was determined in his reasons in *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685, which were affirmed on appeal to the SCC (2020 SCC 22).
    - He wrote on extradition and sovereign immunity in *Schreiber v Canada (Attorney General)* (2001), 142 OAC 27 (CA) and stayed Karlheinz Schreiber's claim for damages.
    - His decision in *Keatley Surveying Ltd. v Teranet*, 2017 ONCA 748, aff'd 2019 SCC 43, is a leading case in copyright law that was also affirmed on appeal to SCC.

- *Das v George Weston Limited*, 2018 ONCA 1053, about costs in class proceedings, particularly about what is a "matter of public interest," has been cited frequently.
- *In Beard Winter v Shekhdar*, 2016 ONCA 493, he addressed the important point about the responsibility of a judge to carry on in the face of a meritless bias motion.
- *Dumbrell v Regional Group of Companies*, 2007 ONCA 59, remains a commonly cited authority on the importance of the factual matrix in the interpretation of written agreements.
- *Rodaro v Royal Ban*k (2002), 157 OAC 203 (CA), concerned the importance of the adversarial process to get at the truth in our courts. Justice Doherty wrote convincingly about the importance of the adversarial process to establish the truth. He concluded that a theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process and cannot stand.

39. Two public examples come to mind:

In 1997, David was asked by Alan Lenczner to write a character reference letter to the head of the English bar to vouch for Alan, who was seeking a special call to argue a case in the English Court of Appeal.

David's letter was an unusual reference:

> I am pleased to provide a character reference for Mr. Lenczner although I am somewhat puzzled that he would ask someone who actually knew him to provide such a reference.
>
> To my knowledge, Mr. Lenczner has never been to the penitentiary and is not currently under indictment. I am sure that not all of the allegations which have been made against him from time to time are true. Indeed, as none have been proved beyond a reasonable doubt, one must assume that he is innocent of all allegations no matter how irrational that assumption might be. I am sure I speak for all members of the legal profession in this Province when I say we would welcome Mr Lenczner's departure to the English Courts even if on a temporary basis. If further details are necessary I suggest you contact the RCMP.

It remains unknown what the English bar thought, but Alan did receive his call. Unfortunately for him, he lost the appeal.

Second, when Ian Binnie was named to the Supreme Court in 1998, David was asked to bring greetings from the Court of Appeal. He said:

> I will give the Court of Appeal's perspective on the appointment of Mr. Binnie. Our reaction was a little different from the reaction elsewhere. There was sort of a "Jonestown" atmosphere around the court. The chief justice took immediate steps: he closed off all access to the roof of Osgoode; he directed that all sharp utensils be locked up; no Court of Appeal judge was allowed into the subway alone for two

> weeks; and, lastly, he brought in one of those crack post-trauma teams to counsel us. We've all been through the sessions; most of us have come to grips with the fact that it wasn't a mistake. We've all checked our phone numbers, and they're not even close to Ian's. We've realized that we have to get on with life and get on with the reality of currying favour with the newest member of the Supreme Court

40. It has been said that as master of the rolls, Lord Denning chose to let counsel talk for as long as they wanted uninterrupted, so that he could understand the issues without the necessity of wading through irrelevant court papers in advance. To prevent them going on too long, he sat quietly and allowed them to wind up in their own time.

41. "For the Defence" (July 2020) 40:3. Criminal Lawyers' Association Newsletter at 16.

42. "'The Best Judge on Any Court': The Longest-Serving Judge on Ontario's Top Court Retires – with Parting Words for Doug Ford," *Toronto Star*, March 15, 2024.

43. *Charles v Canada (Attorney General)* (1998), 158 DLR (4th) 192 (ONCA), 1998 CanLII 19446 (ONCA)

44. *R v Klaric,* 2024 ONCA 184.

45. On June 24, 2024, the Law Society of Ontario granted David Doherty a doctor of laws degree, honoris causa (LLD), at the call to the bar ceremony in Toronto in recognition of his outstanding achievement in advancing the rule of law and the cause of justice.

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