

The First Decade of the 21st Century: The Supreme Court of Canada in Context

**Remarks of the Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada**

to CBA Conference on the McLachlin Court's First Decade

**Ottawa, Ontario
June 19, 2009**

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The Role of Democratic Values in Public Service

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Good afternoon. It is a daunting task, I must admit at the outset, for me to speak about the topic that this conference refers to as “the McLachlin Court’s First Decade.”

I feel a little like a student being asked to self-evaluate her performance on an exam. I strongly feel I should get an A-plus. But I know beyond a shadow of a doubt that there are likely to be other views on the subject. In such circumstances, a wise person might politely have refused this invitation. But – and you may draw your own conclusions about my wisdom — I did not, and the moment of self-evaluation is upon me.

Let me try to deflect the task by shifting the focus from me to the institution, from “McLachlin” to the Court. To label a court by one of its nine members serves us, no doubt, a convenient shorthand. I, myself, am guilty of referring to past eras of the Supreme Court as “the Laskin Court” or “the Dickson Court”. But it is only a shorthand. The fact is that the work of the Supreme Court of Canada is the collective product of all nine of its members. Each brings his or her

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own work, experience and knowledge of the law to every case. It is the sharing of the views of the nine members that gives the Court its strength. We all contribute to the work of the Court and its jurisprudence.

I quickly discovered, upon being named Chief Justice Designate, that the phrase “the authority of the Chief Justice” is a perfect oxymoron. I learned that there is a literary sub-genre known as Chief Justice jokes. I cannot accurately estimate the size of this sub-genre, since I am certain that there are many Chief Justice jokes that are never shared with the Chief Justice in question. But those I learned about all had one theme — the ultimate powerlessness that the trappings of Chief Justice conceal. As an ex-Chief from California put it, “They gave me the reins of power and then I discovered they weren’t connected to anything”.

But let’s get to the question of the day — how has it been, this first decade? Here, as a Canadian, I find myself on more comfortable terrain.

Have you noticed that Canadians seem to have a stock answer to the question “How was it?” — the same answer no matter what the circumstances.

“How’s the weather?”

“Not bad.”

“How’s work?”

“Not bad.”

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“How was it for you?”

“Not bad.”

It’s our stock answer for everything, “Not bad.”

So how was it for me — the first nine years and five months, that is?

Let me sum it up in two words: “Not bad.”

One of the most gratifying aspects of my tenure as Chief Justice has been the honour and privilege to work with fourteen extraordinary Canadian jurists — each amazingly talented and gifted in their own way: Claire L’Heureux-Dubé, Charles Gonthier, Frank Iacobucci, Jack Major, Louise Arbour, Ian Binnie, Michel Bastarache, Louis LeBel, Marie Deschamps, Morris Fish, Rosie Abella, Louise Charron, Marshall Rothstein, and Tom Cromwell. Each of them has given me that great gift without which a Chief Justice can be neither happy nor successful — their unqualified friendship and support. To my wonderful colleagues, thank you.

Another gratifying aspect has been the privilege of working with Chief Justices from all across Canada on the Canadian Judicial Council. As a group, Chief Justices are a sadly misunderstood lot. To evoke the image of 39 Chief Justices, Associate Chief Justices and Senior Judges meeting to discuss matters of mutual concern is to provoke at best a big yawn, at worst an immediate flight response. In fact, Chief Justices in Canada, much to my surprise, turned out to be neither boring nor intimidating. True, they can hardly be described as a docile lot. But they are smart, incisive, witty and passionately dedicated to improving the justice system. And on rare

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judicial “let-your-hair-down” sessions — if that metaphor is not misplaced in describing a covey of senior judges of a certain age — they can be downright fun. The last ten years have seen a fundamental reorientation of the Judicial Council, as it streamlined its complaints process and developed new policies with respect to legal education, the press and access to justice. It has been an exciting and stimulating ride, with exciting and stimulating colleagues. To my friends on the Judicial Council and all who so ably support them, thank you. The same goes for Brian Lennox and everyone at the National Judicial Institute, which has emerged as a world leader in judicial education in the last ten years.

But I must return to the Court, which is the focus of this conference. What of the work of the Court? Again, let me say, “not bad”.

First — and not unimportantly — we still have work. In 2007 a statistical blip led to jerimiads that the Court would soon be out of cases. Not so. Things picked up. In fact, we find ourselves quite occupied. The cases keep coming.

Second, we still have work of high quality and interest. The criminal law was sorted out, the big *Charter* questions had been decided, the doomsayers claimed. Indeed, for a while I must confess I worried that we would be left with nothing but judicial review, nine brilliant minds spinning out endless iterations of *Dunsmuir*. But my fears proved groundless. *Singh*, *Grant* and *Suberu* came along, not to mention *Turcotte*, *Clayton* and *Harrison*. And on the constitutional scene, sections 91

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and 92 of the *B.N.A. Act* emerged from long hibernation with signs of awakening. The old saws of “pith and substance” and “double aspect” bestirred themselves and revived to new life, in the face of the threat of “interjurisdictional immunity”. And if that’s not enough to excite you, I could go on and on.

Third, the Court’s work in the last ten years has been marked by a high degree of consensus, judged by the standards of final courts of appeal. In the first year I was Chief Justice, consensus peaked at 82% — that is, in 82% of the cases we were unanimous in the result. Unfortunately, the stats have been somewhat downhill from then on. The honeymoon high was never again equaled. Still, our consensus rates remain high, varying from year to year but generally in the mid-70% range, as the Court calculates these matters. This compares favourably, for example, with approximately 30% in the same period for the Supreme Court of the United States. The members of this Court, first and foremost its Chief Justice, believe strongly in the right of dissent and its significance in shaping the law. But we also believe in ironing out differences insofar as this can be done, to better fulfill our primary function — settling the legal questions of public importance that Canadian society brings up.

Fourth, the Court is working efficiently. This is nothing new. My predecessor Antonio Lamer prided himself on the efficiency of court operations, and justly so. Under Brian Dickson, he and his colleagues on the Court fashioned new rules to deal with the *Charter* era — time limits on hearings, an intervener process and a paper-based leave to appeal process. Without these reforms,

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the Court would never have coped with the huge burden of *Charter* litigation that marked the last decade and a half of the twentieth century.

In the last ten years, the Court has built on this legacy, meeting the new challenges to efficiency imposed by our own age. We have continued the drive for technological modernization. Over the past few years, the Court completed a renovation and modernization of the courtroom. All of the audio-visual equipment was replaced, improving sound quality in the courtroom, and improving broadcast quality of recordings of hearings. Computers have been installed on the bench, at the counsel tables, and at the media table allowing lawyers, judges and the press to call up electronic copies of the documents filed in an appeal during the course of argument. The lectern was replaced with one whose height can be adjusted to accommodate counsel in a wheelchair, or moved to fit counsel's height.

By and large, these changes have been smoothly implemented. It's true that we have moved monitor equipment into the courtroom to deal with the occasional heart attack of counsel caused by the new lectern being precipitously elevated or lowered when the wrong button is pushed. It's also true that we still haven't found a way to let counsel know precisely which judge is bearing down on them with a question. And it's true, I must admit, that even nine years after our invitation to address us simply as "Justice", confusion occasionally arises over whether we are lords, ladies or some other species of judicial esoterica.

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Not the least of the administrative accomplishments of the past ten years has been improving the quality of the coffee in the Supreme Court of Canada. The first promise I made to my colleagues upon becoming Chief Justice was to improve the quality of the Courthouse coffee. Having made this announcement, I immediately delegated the task of accomplishing it to Jack Major. Within a few weeks, we were all enjoying high-quality cappuccino. Whatever else they may say about my time as Chief Justice, I comfort myself with the knowledge that no one can dispute that the quality of the coffee has improved.

Fifthly, I believe that the Court is increasingly accessible, understood and accepted as an institution fundamental to Canadian democracy. I have already mentioned improved access through technological innovations like e-filing. But being accessible and understood and accepted is more than a matter of technology. In 2004, the Court's media program was expanded to provide for media lock-ups in particularly complex cases of public interest.¹ This year, the Court began webcasting appeal hearings and posting factums in appeals online. Canadians, from law students to members of the public, are tuning into our hearings in real time. We are not yet giving Oprah a run in the afternoon ratings, it is true. But we are helping Canadians better understand the vital work of the Court and how we go about accomplishing it.

This brings me to public understanding and acceptance of the Court as a fundamental institution of Canadian democracy. The two decades following the adoption of the *Charter* saw a

¹ Sauvageau et al, *supra* at 203.

lively dialogue on the role of courts in Canadian Democracy. One side of the debate focused on judicial activism — the fear that courts would overstep appropriate constitutional bounds and impinge on the proper functions of Parliament and the Legislatures. Some went so far as to argue that unelected courts were imposing their own policy views onto Canadian society. The other side of the debate took the position that in a constitutional democracy built on rights, courts must play a strong and independent role in upholding those rights, even if the result is the invalidation of laws passed by Parliament or the legislatures.

The last ten years have seen a shift in the debate. The stark either-or alternatives of absolute legislative power and court supremacy have given way, more and more, to a recognition that in a mature democracy of rights, both institutions are vital. Parliament and the legislatures, as the elected representatives of the people, bear the major responsibility of legislating for the good of Canada.

It is inevitable that particular decisions of the Court will be criticized. My hope is not that everyone agree with the Court's decision — that can never be. My hope is the more modest hope that whether people agree with a particular decision or not, they accept that it is the role of the court charged with upholding the rule of law and the constitutional order to make the decision, and understand that the members of the court have honestly wrestled with the difficult and complex issues at stake.

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So for all these reasons, I respond to the question of how the last ten years have been with the quintessentially Canadian answer, “Not bad”. Let me close with an historical perspective on where the Court stands, a decade after I became Chief Justice.

The Supreme Court of Canada is now one hundred and thirty-four years old. In Canadian terms, that is a long and venerable time. Over that time, the Court has evolved in response to changes in the Canadian constitution and Canadian society. Roughly speaking, and acknowledging room for debate over where precise boundaries lie, the history of the Court can be divided into three periods — the initial colonial period from 1875 to 1949; the emerging independence period, from 1950 to 1982; and the post-*Charter* period from 1982 to the present.

The Court did not get off to a scintillating start. Five of its six judges duly met in the Railway Committee room in the Parliament Building at the start of its first session on January 17, 1876. We are not sure what they did. All we know is what the record says; “There being no business to dispose of the Court rose.”² Things got so bad that a couple of years later a private member brought a bill to have the Court abolished. To judge by the debates, it was a hotly contested issue, but in the end the Prime Minister, John A. Macdonald, successfully postponed a final judgment on the bill until the desire for abolition dissipated.³

² B. Laskin, “The Supreme Court of Canada: The First One Hundred Years A Capsule Institutional History” (1975), 53 Can. Bar rev. 459 at 462-63.

³ See James G. Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 28-34.

Yet until 1949, when appeals to the judicial committee of the Privy Council were abolished, the so-called Supreme Court of Canada was not supreme. It was a colonial court. It was bound by precedent to do what the law lords in England ruled. This reflected Canada's status as a "Dominion", a term that effectively avoided the obvious question — dominion of whom? Of Great Britain? Or of its own peoples?

The statistics available for the tail-end of this period, 1944-1954, under the leadership of Chief Justice Rinfret, show that nearly 60% of the precedents cited in Supreme Court of Canada decisions were British cases.⁴ Nearly half of the constitutional cases decided by the Privy Council were appeals directly from the provincial courts of appeal.⁵ For half the cases, the Supreme Court of Canada was not even a step on the way.

Yet a few people saw a more important future for the Court. In what can only be termed a brave act of faith in the future, Prime Minister McKenzie King approved plans to build the magnificent and enduring building on Wellington Street that still houses the Court. The Queen Mother laid the cornerstone in 1939, noting, in what is the only feminist speech by British Royals that I know of, that it is only through the law that the true advancement of women can be secured.

⁴ P. McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada*, James Lorimer & Company Ltd., Toronto, 2000 at 24.

⁵ P. Hogg, *Constitutional Law of Canada*, Thomson/Carswell, looseleaf at 8-3.

In 1949, appeals to the Judicial Committee of the Privy Council were finally abolished and the Court entered its second period — the period of emerging independence. Like a young matron gathering up her new-found powers, the Court slowly took on an air of quiet confidence. To be sure, British law and British precedents still bulked large.⁶ But new, uniquely Canadian law began to emerge. Building on the *Alberta Reference*'s affirmation of the implied constitutional right of free political speech,⁷ the Court expanded the doctrine in *Saumur v. Quebec*⁸ and *Switzman v. Elbling*⁹. It broke new ground on aspects of Canadian federalism, breathing new life into the Peace, Order and Good Government Power,¹⁰ the federal trade and commerce power, and interjurisdictional power-sharing under the rubric of double aspect.¹¹ A distinctly Canadian jurisprudence was born.

The Court continued to gather strength under Chief Justices Bora Laskin and Brian Dickson. In 1975 the old monetary limits were replaced by a requirement of leave for all appeals except for criminal appeals as of right and references. This recognized a shift from an error-correcting role to

⁶ Under CJ Kerwin, 1954-63, 47% of precedents cited were British. Under CJs Taschereau, Cartwright and Fauteux, 1963-73, 33% of precedents cited were British: McCormick, *supra* at 47, 71.

⁷ *Reference Re Alberta Statutes*, [1938] S.C.R. 100

⁸ *Saumur v. Quebec*, [1953] 2 S.C.R. 299

⁹ *Switzman v. Elbling*, [1957] S.C.r. 285

¹⁰ *Johannesson v. Municipality of West St. Paul* [1952] 1 S.C.R. 198

¹¹ RE: *The Farm Products Marketing Act*, [1957] S.C.R. 198; *Murphy v. C.P.R.* [1958] S.C.R. 626.

a new role of establishing legal norms on issues of public importance,¹² and for the first time gave the Supreme Court of Canada control over its docket. Bold new decisions reflected the new role. In the Trilogy of *Thorson*, *McNeil*, and *Borowski*, the Court established a broader test for public interest standing to challenge government action in cases where there was no other reasonable or effective means to bring an issue before the courts.¹³ In the *Anti-Inflation Reference*, the Court considered extrinsic evidence of social and economic context in a division of powers case, paving the way for the contextual approach which the Court later followed in *Charter* cases.¹⁴ In *City of Sault Ste. Marie*, the Court synthesized the approach to *mens rea* in criminal law, outlining a spectrum of levels of *mens rea* from full *mens rea* offences, to strict liability and then absolute liability.¹⁵ The Dickson and Lamer Courts would later expand on this approach in the constitutional analysis of *mens rea*. And who can forget the *Patriation Reference*¹⁶, which paved the way for repatriation of the Canadian constitution and adoption of the *Charter of Rights and Freedoms*.

Even in dissent, the Laskin Court was breaking new ground. In the infamous case of *Murdoch v. Murdoch*, the majority of the Court held that Mrs. Murdoch's contributions to running

¹² P. Hogg, *supra* at 8-13; B. Laskin, *supra* at 463-64; D. Teeple, "The History and Role of the Supreme Court of Canada", 10 *Australian law Librarian* 216 at 221-22.

¹³ *Thorson v. Attorney General for Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575.

¹⁴ *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373.

¹⁵ *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

¹⁶ *Reference re a Resolution to amend the Constitution*, [1981] 1 S.C.R. 753

the family ranching business over many years were not sufficient to give her a property interest in the ranching business. Chief Justice Laskin's dissent held that the Mrs. Murdoch's contributions through her labour over the years should give her an interest in the ranching business, and to deny her this would be inequitable.¹⁷ Although *Murdoch* was not a constitutional case, Chief Justice Laskin's dissent foreshadows the development of our notions of gender equality the following decade under s. 15 of the *Charter*.

In 1982 the Constitution was repatriated and the *Charter* adopted. The Court entered a third era, defined by a critical new responsibility. To the Court's constitutional roles of division of powers and administrative review was added the task of reviewing challenged government action or legislation for compliance with the fundamental rights and freedoms protected by the *Charter*.

In those early years of the *Charter*, the members of the Supreme Court charted the path for the interpretation of the rights and freedoms contained in the *Charter*. The pundits who predicted that the Court would follow the conservative path it had trod with the Diefenbaker Bill of Rights were proved wrong. With vision and tenacity, the Court proclaimed that the *Charter* rights should be interpreted purposively and generously. We all know the cases that followed and set the framework within which we still work — *Oakes* and the doctrine of justification under s.1 of the

¹⁷ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

*Charter*¹⁸; *Big M* and the scope of freedom of religion¹⁹; *Ford* and *Irwin Toy* and their rich understanding of the right to freedom of expression rooted in democratic values²⁰; the *Motor Vehicle Reference* and substantive due process under s.7 of the *Charter*²¹; *Hunter v. Southam* and the right to be free from unreasonable searches and seizures.²² All this was made possible by the procedural changes I mentioned earlier.

Some see the decade of the 1990's that followed as a decade of consolidation. And so it was in many ways. Still, as someone who joined the Court in 1989 on the eve of Chief Justice Lamer's term, I can attest to the fact that these were heady times. *Hébert*,²³ *Brydges*²⁴, *Bartle*²⁵ and *Stinchcombe*²⁶ all broke new and important ground. Among the most significant developments of

¹⁸ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

¹⁹ *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295.

²⁰ *Ford v. Quebec*, [1988] 2 S.C.R. 712; *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927.

²¹ *Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

²² *Hunter v. Southam*, [1984] 2 S.C.R. 145.

²³ *R. v. Hébert*, [1990] 2 S.C.R. 151; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *British Columbia Securities Commissioner v. Branch*, [1995] 2 S.C.R. 3.

²⁴ *R. v. Brydges*, [1990] 1 S.C.R. 190.

²⁵ *R. v. Bartle*, [1994] 3 S.C.R. 173.

²⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

