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# Immigration Law under the McLachlin Court

Catherine Dauvergne\*

## I. INTRODUCTION

Chief Justice McLachlin's years at the helm of the Supreme Court of Canada coincided with two important changes in immigration law. The first was a shift of immigration matters towards the centre of political contestation in Canada, as well as in many other Western liberal democracies. The second shift, directly related to the first, was a movement towards more detail and specificity in immigration legislation, and a concomitant reduction in the discretionary ambit for frontline decision-makers. As a result of these two developments, the McLachlin Court witnessed an increase in the number of immigration cases that reached the Supreme Court of Canada, and a transformation in the type of issues that arose within immigration law.

This paper examines the immigration jurisprudence of the Supreme Court of Canada during the McLachlin years, and considers the influence that these two shifts had on the way the Court responded to immigration law questions. It also considers the role that Chief Justice McLachlin herself played in this area of law. Overall, a close look at the realm of immigration law confirms the narrative running through many accounts of Chief Justice McLachlin's long and distinguished tenure: she provided steady and determined leadership, and led by example and sheer hard work. While immigration law is not generally considered a high-profile part of her legacy, Chief Justice McLachlin wrote a number of highly significant decisions in this area, and participated in almost every ruling. It is certainly the case that by the end of her term as Chief Justice, immigration lawyers and scholars had a very different understanding of the role of the Supreme Court than they did when she was appointed to the Court in 1989, or even in 2000 when she became Chief Justice.

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This analysis proceeds by first describing the political backdrop to immigration law during the McLachlin Court's tenure. It then assesses the Court's work in this area; and finally, concludes by reflecting on Chief Justice McLachlin's legacy in Canadian immigration law.

### 1. Immigration Law in the Early 21st Century

From the vantage point of 2018, it is difficult to imagine the legal and political backdrop for immigration law in the 1980s which was characterized by broad swathes of discretion and bipartisan approaches at the national level in Canada. The idea of a global asylum crisis was barely on the horizon. In 1987, American scholar Stephen Legomsky published his seminal work *Immigration and the Judiciary* in which he demonstrated that immigration was a realm of strong executive power with very high levels of discretion, attracting a unique form of deference from the courts.<sup>1</sup> His analysis drew from empirical work in Britain and the United States, but the trend was notable throughout the common law world.<sup>2</sup>

By the 1990s, however, change was on the horizon. A sharp spike upwards in the number of people seeking asylum around the globe throughout the 1980s (which pales in comparison with the present) brought with it the beginning of a new politics of immigration in Canada, and across similarly situated Western liberal democracies. This new politics in turn brought new legal developments. Final level appellate courts had a key role to play in reshaping the terrain. The landmarks in Canada include the *Singh v. Minister of Employment and Immigration*<sup>3</sup> decision of 1985, the first Charter<sup>4</sup> ruling on non-citizen rights. This hastened the introduction of Canada's Immigration and Refugee Board in 1989, the nation's largest administrative tribunal which now occupies much of the terrain of immigration law in this country. Shortly after, in 1992, the judicial review jurisdiction of the Federal Court and Federal Court of Appeal (as they are now known) were sharply reduced in immigration matters.<sup>5</sup> These changes provide immigration decisions with a thick layer

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<sup>1</sup> Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon, 1987).

<sup>2</sup> See Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005).

<sup>3</sup> [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.).

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>5</sup> In order for an immigration judicial review to be heard by the Federal Court, that court must first grant leave, which it has done over the past decade for approximately 15 per cent of

of insulation from constitutional review; they also ensure that the Federal Court has not become a *de facto* immigration court, which it otherwise would be.<sup>6</sup> More has been done in Canada than in any other Western liberal “settler state” to limit the role of courts in immigration matters. Despite this, the McLachlin Court made more, and more significant, decisions in the area of immigration than any of its predecessors.

In the mid-1990s, the government began accepting more immigrants in the “economic” category than in the “family” category for the first time (a move which the Trump administration in the United States was promoting as an option in 2018), and in 2002, new comprehensive immigration legislation was introduced in Canada, providing an overhaul of immigrant, refugee, and temporary admissions for the first time since the 1970s.<sup>7</sup> At the outset, the *Immigration and Refugee Protection Act* (“IRPA”) was touted as “framework” legislation, meaning that it provided a structure and key principles, while ensuring flexibility by anticipating that many of the law’s details would emerge through subsequent regulatory or even policy development. In other words, the law was built to accommodate political change. The new legislation enumerated 27 separate “objectives”, ensuring that whatever actions were taken, they would be in keeping with the aims of the law.<sup>8</sup>

In 2005, when the first case interpreting the IRPA reached the Supreme Court of Canada, Chief Justice McLachlin penned the Court’s

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judicial review applications. For the resulting judicial review decision to be appealed, the first instance judge must “certify” a question for the Federal Court of Appeal to consider. These two very significant hurdles are added to the usual barriers of time and expense, as well as the leave procedure of the Supreme Court of Canada, to sharply reduce the immigration law matters that reach the highest court. A series of developments from the late 1970s to the early 1990s created this regime, culminating in the *Act to amend the Immigration Act and other Acts in consequence thereof* (S.C. 1992, c. 49, amending R.S.C. 1985, c. 1-2) which transferred judicial review authority over all decisions taken under the *Immigration Act* to single judges of the Federal Court, Trial Division, and access to appeal from a Trial Division judicial review decision was subject to a requirement that the Trial Division judge certify that the case involve a serious question of general importance.

<sup>6</sup> The website of the Federal Court indicates that between January 1 and December 31, 2017, the most recent period for which statistics are available, of 6,766 decided applications for leave and judicial review in the area of immigration, 1,195, or 17.66 per cent, were granted leave, which means that more than 80 per cent never made their way to court (see Federal Court of Canada, *Statistics Activity Summary — January 1 to December 31, 2017* (Ottawa: Federal Court, 2017), online: <[http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc\\_cf\\_en/Statistics/statistics-dec17](http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics/statistics-dec17)>). A study by Sean Rehaag provided similar data, demonstrating that between 2005 and 2010, 14.44 per cent of applications for leave and judicial review of refugee matters were granted leave (see Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 *Queen’s L.J.* 1, at 51).

<sup>7</sup> See *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [hereinafter “IRPA”].

<sup>8</sup> *Id.*, s. 3.

unanimous ruling. She summarized the purpose of the new legislation as follows:

The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security ...<sup>9</sup>

Despite the 27 discrete objectives contained in the legislation, there is no doubt that the Chief Justice accurately captured the law's animating force. While much of the consultation and drafting took place prior to the terrorist attacks of September 11, 2001, the security politics ushered in by that moment provided the final momentum to ensure smooth passage for the bill.

The transformation of Canadian immigration law began rather than ended with the *IRPA*. In 2004, influenced by the inception of the Homeland Security agency in the United States, Canada's Martin government created the Canadian Border Services Agency, and explicitly transferred responsibilities for some immigration matters to a security agency for the first time. That same year, the Canada-U.S. Safe Third Country Agreement<sup>10</sup> transformed Canadian refugee law by intertwining some aspects of it with American law for the first time in history. In 2006, Stephen Harper's Conservative government came to power, ushering in a decade of ongoing legislative change in immigration, refugee, and citizenship law. The Harper decade marked an unprecedented pace of change. The Conservative immigration agenda included the *Balanced Refugee Reform Act*,<sup>11</sup> the *Faster Removal of Foreign Criminals Act*,<sup>12</sup> the *Zero Tolerance for Barbaric Cultural*

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<sup>9</sup> *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at para. 10 (S.C.C.) [hereinafter "*Medovarski*"]. The question in *Medovarski* was how to interpret transitional provisions of the new Act. In light of the Chief Justice's statement regarding the purpose of the Act, the conclusion that the type of "stay" that would justify withholding deportation ought to be narrowly interpreted was easy to reach.

<sup>10</sup> *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, December 5, 2002, CTS 2004/2 (entered into force December 29, 2004).

<sup>11</sup> S.C. 2010, c. 8.

<sup>12</sup> S.C. 2013, c. 16.

*Practices Act*,<sup>13</sup> and the *Strengthening Canadian Citizenship Act*,<sup>14</sup> to list a few of the more flamboyant titles. The end result was an immigration law framework that many ordinary Canadians find hard to believe, so far is it from our much-cherished immigration mythology. The current Trudeau government is reworking some of these changes, but thus far its reform focus has been on highly symbolic aspects of the legal regime that affect comparatively few people. Large system changes such as a complete reform of economic category admissions, much stricter removal (read: deportation) rules in cases of criminal conduct, a new system for refugee status determination, and striking new limits on second generation citizenship, have not been altered. As of mid-2018, there is no suggestion that these far-reaching provisions of the Harper decade will be changed.<sup>15</sup>

With new legislation being passed on a regular basis since the turn of the 21st century, and with much of it aimed at the type of security and criminality objectives that run close to the limits of human rights protections, it is hardly surprising that more cases ended up on the Supreme Court of Canada docket during these years. Furthermore, the large ambit of discretionary administrative decision-making that was described by Legomsky has been progressively curtailed by this legislative onslaught. A good example of this is the provision allowing for humanitarian and compassionate exceptions to the law. In the 70s, 80s, and 90s, this provision was a one liner. Today it consists of three pages of text in the Act,<sup>16</sup> and is accompanied by regulations and policy guidance. These humanitarian and compassionate provisions alone were amended in 2010, 2012, and 2013 (not counting changes to the supporting regulations). With each legislative addition of precision, there is less discretion for frontline decision-makers, and therefore more ways in which they can go wrong. With so much more law on the books (by simple measure of volume), there is much more that is open to challenge. Furthermore, with increasing political focus on immigration,

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<sup>13</sup> S.C. 2015, c. 29.

<sup>14</sup> S.C. 2014, c. 22.

<sup>15</sup> Interestingly, it has recently been announced that the Trudeau government intends to remove one category of health inadmissibility from the *Immigration and Refugee Protection Act* (see e.g., Kathleen Harris, "Ottawa to Present Plan to Amend Policy that Rejects Immigrants on Medical Grounds by April, Hussen Says" *CBC* (15 February 2018), online: <<http://www.cbc.ca/news/politics/immigration-hussen-medical-inadmissibility-1.4537076>>). This provision is long-standing in Canadian immigration law, and was not significantly altered by the Harper government. It is a provision which is often subject to successful requests for exceptions on humanitarian grounds.

<sup>16</sup> IRPA, *supra*, note 7, s. 25.

the question of whether an immigration case raises an issue of national importance, such that the Supreme Court might be tempted to grant leave for an appeal, is more likely to be answered in the affirmative.

These shifts in the Canadian immigration landscape find parallels across the Western liberal democratic landscape.<sup>17</sup> The hardening of borders, the emergence of immigration as a central issue in electoral politics, the increasing vilification of migrants, and an unprecedented number of people seeking refuge have now become familiar to us. Juliet Stumpf coined the term “crimmigration” in 2006 to describe the increasing criminalization of immigrants and immigration.<sup>18</sup> As clunky as the word sounds, its intuitive logic is undeniable.

All of these developments form the backdrop to the McLachlin Court’s encounter with immigration law.

## 2. The Rulings of the McLachlin Court

In the 18 years that The Right Honourable Beverley McLachlin served as Chief Justice, the Supreme Court of Canada handed down 22 immigration law decisions. I have taken a broad approach to this count, by including all cases that arose under either the earlier *Immigration Act*,<sup>19</sup> or the IRPA, as well as all the *Citizenship Act*<sup>20</sup> cases. This approach overstates the label “immigration law” in two ways. The first is by counting cases that interpret only the provisions of the Refugee Convention,<sup>21</sup> which arise because the Convention is implemented into Canadian law by including some of its provisions within the immigration legislation. The second over-inclusion results from the addition of citizenship cases that deal with the transition between immigration law and citizenship law that occurs when a person naturalizes. These cases are not truly “immigration law”, but share a thematic terrain, and often citizenship law and immigration law are responsive to similar political

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<sup>17</sup> I explore this maelstrom in *The New Politics of Immigration* (New York: Cambridge University Press, 2016).

<sup>18</sup> Juliet Stumpf, “The Crimmigration Crisis: Immigrants Crime and Sovereign Power” (2006) 56:2 A.U.L. Rev. 367.

<sup>19</sup> R.S.C. 1985, c. I-2.

<sup>20</sup> R.S.C. 1985, c. C-29.

<sup>21</sup> *1951 Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150, as amended by the *1967 Protocol relating to the Status of Refugees*, January 21, 1967, 606 U.N.T.S. 267 [hereinafter “Refugee Convention”].

pressures.<sup>22</sup> I have excluded extradition cases from this dataset despite the fact that extradition also deals with movement across borders, because those cases only rarely touch on questions of immigration and nationality, and because they do not fit within the trend towards heightened political contestation and a reduction of discretion. The resulting group of cases is somewhat smaller than what would be included by a focus on the rights of non-citizens, and thus gives a clearer picture of a particular area of the law.<sup>23</sup> By comparison to this group of 22, in the preceding 11 years, when Justice McLachlin was a puisne judge on the Court, 11 decisions in this category were handed down.

One of the most notable distinctions between these two groups of decisions is that Chief Justice McLachlin took a more active role in immigration law matters once becoming the Court's leader. Of the 11 rulings between 1989 and 1999, she was on the panel in eight rulings, and did not write any opinions. Once becoming Chief Justice, she was on the panel in 21 of 22 rulings, and penned six unanimous or majority opinions, and one dissent.<sup>24</sup> Among the rulings she chose to write were the first decision under the IRPA, the two leading rulings on immigration law's security certificate procedure (which have attracted attention around the world), and a significant ruling reading down human smuggling provisions which marked an important shift in the progress of "cimmigration".

What these rulings have in common, and share with the others penned by McLachlin C.J.C., is that they have strong criminal law themes. Accordingly, one conclusion may be that as immigration law turned

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<sup>22</sup> Further, similar access restrictions apply in the area of citizenship. The Federal Courts Citizenship, Immigration and Refugee Protection Rules, SOR/93-22, apply to citizenship and immigration, and r. 3 states that "[t]hese Rules apply to the following applications and appeals under the *Citizenship Act* and the *Immigration and Refugee Protection Act*: (a) applications for leave; (b) applications for judicial review; and (c) appeals to the Federal Court of Appeal from judgments of the Federal Court".

<sup>23</sup> That is, as opposed to a particular group of people. My 2013 paper "How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill L.J. 703, takes this broader question as its starting point, and as a result looks at a larger group of cases: 24 in total between 1982 and 2012.

<sup>24</sup> See *R. v. Appulonappa*, [2015] S.C.J. No. 59, [2015] 3 S.C.R. 754 (S.C.C.) [hereinafter "*Appulonappa*"]; *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, [2015] 3 S.C.R. 704 (S.C.C.) [hereinafter "*B010*"]; *Canada (Citizenship and Immigration) v. Harkat*, [2014] S.C.J. No. 37, [2014] 2 S.C.R. 33 (S.C.C.); *Febles v. Canada (Citizenship and Immigration)*, [2014] S.C.J. No. 68, [2014] 3 S.C.R. 431 (S.C.C.) [hereinafter "*Febles*"]; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "*Charkaoui (No. 1)*"]; *Medovarski, supra*, note 9; *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 (S.C.C.) [hereinafter "*Lavoie*"].

more significantly towards criminalization, it moved more directly into an area where Chief Justice McLachlin has had an authoritative voice. I am not persuaded, however, that this is the sole variable at work. Given that this distinction emerged only after she became Chief Justice, and that she sat on cases with criminal themes during her time as a puisne judge, I think this set of decisions reflects a conscious embrace of leadership, possibly because of the increasing importance of immigration questions to the national polity during this time period. This conclusion is bolstered by the fact that as Chief Justice she chose to sit on almost every immigration panel.

Twenty-two is a very small number of cases in comparison with many other legal subjects the McLachlin Court addressed. Given the atypical journey an immigration case has in reaching the Supreme Court because of the Canadian government's steadfast efforts to limit access to the courts, every single one of these cases is important. Looking briefly at each of these rulings gives a good sense of what has been important in immigration law over the past three decades.

The cluster of cases from the 1990s when McLachlin J. was a puisne justice (there were none in 1989) is a good starting point. Of the 11 decisions from that decade, three deal with interpretations of the Refugee Convention, and thus make contributions to international law.<sup>25</sup> These rulings are relevant everywhere in the world where the Refugee Convention is in force, and are only characterized as immigration rulings because of Canada's mode of incorporating international law. Two other judgments interpret *Citizenship Act* provisions.<sup>26</sup> Two more cases focus on vital procedural questions that arose in the context of immigration law.<sup>27</sup> Finally, four cases concern interpretations of Canada's *Immigration Act*.<sup>28</sup> Among the 11 cases, an intersection with criminality

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<sup>25</sup> See *Canada (Attorney General) v. Ward*, [1993] S.C.J. No. 74, [1993] 2 S.C.R. 689 (S.C.C.) [hereinafter "*Ward*"]; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.) [hereinafter "*Pushpanathan*"]; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] S.C.J. No. 78, [1995] 3 S.C.R. 593 (S.C.C.).

<sup>26</sup> See *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] S.C.J. No. 82, [1997] 3 S.C.R. 391 (S.C.C.) [hereinafter "*Tobiass*"]; *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358 (S.C.C.) [hereinafter "*Benner*"].

<sup>27</sup> See *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.); *Reza v. Canada*, [1994] S.C.J. No. 49, [1994] 2 S.C.R. 394 (S.C.C.) [hereinafter "*Reza*"].

<sup>28</sup> See *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711 (S.C.C.) [hereinafter "*Chiarelli*"]; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] S.C.J. No. 38, [1993] 1 S.C.R. 1053 (S.C.C.) [hereinafter "*Dehghani*"]; *Chen v. Canada (Minister of Employment and Immigration)*, [1995] S.C.J. No. 17,

is at the heart of one Refugee Convention decision and one of the substantive rulings on the *Immigration Act*. Criminality casts a shadow over at least two of the other rulings as well, but in the 1990s, it was not the dominant theme.

In this group of cases we find the most significant refugee law ruling to date in Canada — *Ward*<sup>29</sup> — and the case which is arguably the most well-known of all Canadian administrative law rulings of the 20th century, *Baker*.<sup>30</sup> So, it is not the case that nothing significant was taking place. What is remarkable, however, is that neither of these cases was treated by the Court as being about criminality in a significant way. Patrick Francis Ward had been a member of an Irish paramilitary group, which he later fled when its criminal methods became too much for his conscience, and he ended up needing protection from the group. In the 21st century this case would almost certainly have been about the Refugee Convention's exclusion provisions,<sup>31</sup> but in the 1993 judgment, exclusion was scarcely noted. Mavis Baker was a migrant whose status in Canada had long since lapsed and who was struggling with mental illness. In 1999, the case centred on humanitarianism and compassionate considerations, and the phrase “illegal immigrant”, which would undoubtedly predominate these days, was not even mentioned.<sup>32</sup>

Justice McLachlin, as she then was, did not have a strong voice in immigration law in her first decade on the Court. She sat on eight of the panels, and in each case concurred with a unanimous or majority judgment.<sup>33</sup> This pattern of involvement makes her firm hand with immigration matters as Chief Justice all the more remarkable.

An examination of the rulings during her years as Chief Justice shows marked differences from the 1990s group of decisions. The change ushered in by the shifting politics of immigration is discernible even at a bird's-eye-view. Of the 22 decisions, 17 involve interpretations of

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[1995] 1 S.C.R. 725 (S.C.C.) [hereinafter “*Chen*”]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter “*Baker*”].

<sup>29</sup> *Supra*, note 25.

<sup>30</sup> *Supra*, note 28.

<sup>31</sup> See Refugee Convention, *supra*, note 21, art. 1F. Article 1F of the Refugee Convention sets out three categories of individuals who are excluded from refugee protection on the basis of their criminal (or other reprehensible) acts.

<sup>32</sup> Remarkably, in the 37 pages of the ruling as printed in the *Supreme Court Reports*, the word “illegal” occurs only three times. Twice this is in reference to how Mavis Baker supported herself, and once it is a quotation from the ministerial guidelines which refers in full to an “illegal *de facto* resident” as a hypothetical instance (*Baker*, *supra*, note 28, at 835 (S.C.R.)).

<sup>33</sup> See *Baker*, *id.*; *Pushpanathan*, *supra*, note 25; *Chen*, *supra*, note 28; *Reza*, *supra*, note 27; *Dehghani*, *supra*, note 28; *Chiarelli*, *supra*, note 28; *Benner*, *supra*, note 26; *Tobiass*, *supra*, note 26.

immigration legislation (which over this time frame includes both the *Immigration Act* and the IRPA), only two concern the Refugee Convention,<sup>34</sup> two consider adjacent procedural matters,<sup>35</sup> and only one involves the *Citizenship Act*.<sup>36</sup> This picture demonstrates a significantly higher degree of engagement with immigration legislation than the cases of the preceding 11 years. What is more, across all 22 rulings, the central issue is intertwined with criminality in all but six.<sup>37</sup> In 16 cases, the individual at the heart of the dispute was alleged or had been proven to have committed a crime that did not simply involve a breach of some aspect of immigration law itself. This group includes the Refugee Convention cases, which concern exclusion, and the procedural matters, and deal with steps in the conviction process.

It is in this group of cases that Chief Justice McLachlin demonstrates her leadership style. Her role here is characterized by persistence and a phenomenal work rate. As Chief Justice, she moved decisively into the area of immigration law, which had not previously been her bailiwick. Moreover, in a number of key cases, she wrote for the majority. The turn towards criminalization within immigration law undoubtedly made this transition easier for her, but with other strong criminal law voices on the Court, and with several others who had taken the lead in previous immigration matters, this outcome was not foreseeable. It is revealing to take a closer look at the seven judgments she penned, and perhaps to muse a wee bit about these choices. Of the seven, four stand out as clear turning points for Canadian immigration law.<sup>38</sup> But of course, every Supreme Court of Canada ruling is a turning

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<sup>34</sup> See *Ezokola v. Canada (Citizenship and Immigration)*, [2013] S.C.J. No. 40, [2013] 2 S.C.R. 678 (S.C.C.); *Febles*, *supra*, note 24.

<sup>35</sup> See *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39, [2008] 2 S.C.R. 326 (S.C.C.); *R. v. Pham*, [2013] S.C.J. No. 100, [2013] 1 S.C.R. 739 (S.C.C.).

<sup>36</sup> See *Lavoie*, *supra*, note 24.

<sup>37</sup> See *Lavoie*, *id.*; *Kanthisamy v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 61, [2015] 3 S.C.R. 909 (S.C.C.); *Canada (Attorney General) v. Mavi*, [2011] S.C.J. No. 30, [2011] 2 S.C.R. 504 (S.C.C.); *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 58, [2005] 2 S.C.R. 706 (S.C.C.); *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 (S.C.C.). The *Chieu* ruling is indirectly tinged with criminality as its companion case *Al-Sagban v. Canada (Minister of Citizenship and Immigration)* ([2002] S.C.J. No. 2, [2002] 1 S.C.R. 133 (S.C.C.)) did involve an immigrant with a criminal conviction in Canada. Mr. Chieu had misrepresented facts in an immigration application.

<sup>38</sup> Two of the four cases were heard together (*Appulonappa*, *supra*, note 24; *B010*, *supra*, note 24) but dealt with differing statutory provisions and are each full decisions in their own right, not true companion cases.

point in some sense. The other three include a follow-up to one of these pathbreakers, a notable dissent, and a recent Refugee Convention decision that firmly rejects a turning point.

The first turning point ruling penned by McLachlin C.J.C. is *Medovarski*, mentioned above.<sup>39</sup> At first blush, *Medovarski* scarcely looks like turning point material because its sole concern is transitional provisions of the IRPA — as such its ruling applies to a strictly limited group. The case involved two permanent residents: Olga Medovarski, convicted of criminal negligence causing death after a drunk driving offence; and Julio Esteban, convicted of conspiracy to traffic cocaine. Under the previous legislation, they each would have been able to appeal the removal order that resulted from their criminal sentence. Under the new legislation, that appeal no longer existed, but Medovarski and Esteban had been convicted prior to the new law, and thus were captured by transitional provisions. The case reads primarily as a detailed and technical statutory interpretation puzzle, but the essence of the ruling is straightforward and significant: in looking at the overall ambit of the new legislation, and in particular at its stated objectives, McLachlin C.J.C. concluded that with the new legislation Parliament intended to prioritize security over other immigration objectives such as the integration of newcomers.<sup>40</sup> This conclusion marks a significant turning point for Canadian immigration law, and powerfully reflects the political atmosphere of its time. While immigrant advocates had seen the writing on the wall, the large number of enumerated objectives for the IRPA had left some hope that the new law would not be reduced to a singular focus. Chief Justice McLachlin saw incisively through the obfuscation of the legislation, and said so directly.

In contrast to the *Medovarski* ruling, the second turning point decision penned by McLachlin C.J.C. had all the hallmarks of significance. Argument in the case now known simply as *Charkaoui (No. 1)* by immigration lawyers was heard over three full days and 18 parties were granted intervener status.<sup>41</sup> Both of these numbers are exceptional. By comparison, the *Delgamuukw*<sup>42</sup> case was argued over two days and

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<sup>39</sup> See *supra*, note 9 and surrounding text.

<sup>40</sup> See *Medovarski, id.*, at para. 10.

<sup>41</sup> *Charkaoui (No. 1)*, *supra*, note 24. The hearing was held on June 13, 14, and 15 in 2006 and the ruling handed down on February 23, 2007.

<sup>42</sup> *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter “*Delgamuukw*”].

the *Secession Reference*<sup>43</sup> over four; an average case has a half-day hearing. *Charkaoui (No. 1)* was a signal case because it tested the limits of the Charter as deployed in the war on terror. Under the IRPA, it is permissible to detain non-citizens in anticipation of removing them from Canada. A similar provision is used and accepted throughout Western liberal democracies. Two complications arise, and formed the challenge in this case. The first is that some individuals are unlikely ever to be deported, because to do so would almost certainly lead to their torture or death.<sup>44</sup> As a result, their detention continues, potentially indefinitely. The second complication is that under the legislation's "security certificate" procedure, the evidence that forms the basis of this detention can be provided in secret to the judge who makes the order. In the version of the legislation brought before the Supreme Court, the evidence did not need to be shared with the individual concerned or with their lawyer. This procedure was used primarily for evidence gathered by national security agencies in Canada, or obtained from the agencies of allied states.

The capacity to use immigration law provisions to effect indefinite detention of terrorism suspects without airing the evidence publicly or testing it against a criminal standard was deployed in a number of Western liberal democracies in the immediate aftermath of the 9/11 terrorist attacks on the United States, and consequently tested in pinnacle courts.<sup>45</sup> In *Charkaoui (No. 1)*, McLachlin C.J.C. wrote for a unanimous Court. This is another mark of her leadership on the Court — in matters of this heft, she was often successful in fostering consensus. The case raised a complex series of Charter arguments, and the ruling is a carefully crafted parsing. The Court upheld a number of aspects of the security certificate regime, but struck down as discriminatory a process rights distinction between foreign nationals and permanent residents, and set a requirement that the government devise a system for some limited

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<sup>43</sup> *Reference re Secession of Québec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Secession Reference*"].

<sup>44</sup> The Supreme Courts's 2002 ruling in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.) does make it possible in narrow circumstances for Canada to deport an individual to a *prima facie* risk of torture, but in practice this option has not been used. Chief Justice McLachlin was part of the unanimous Court in *Suresh*.

<sup>45</sup> Key rulings on the subsequent challenges in English-speaking common law jurisdictions include *A and Others v. Secretary of State for the Home Department*; *X and Another v. Secretary of State for the Home Department*, [2005] 5 L.R.C. 34, [2004] UKHL 56 (U.K.H.L) in the U.K.; *Zaoui v. Attorney-General*, [2005] 1 NZLR 577 (N.Z.C.A.) in New Zealand; *Al-Kateb v. Godwin*, (2004) 79 ALD 233, [2004] HCA 37 (H.C.A.) in Australia.

airing of “secret” evidence. What truly makes the case a turning point for immigration law is McLachlin C.J.C.’s approach to interpreting section 7 of the Charter.<sup>46</sup> Previously, section 7 had been applied in immigration cases on the basis of understanding “principles of fundamental justice” in an immigration context. In the *Charkaoui (No. 1)* ruling, the Court began instead from a “security context”, charting a new direction for basic reasoning about the functions and limits of immigration provisions.<sup>47</sup>

The final two key rulings penned by Chief Justice McLachlin are a closely linked pair of judgments handed down in November 2015: *Appulonappa* and *B010*.<sup>48</sup> These two are not true companion decisions as they deal with different sections of the IRPA, and each ruling is fully reasoned in its own right. The matters were, however, heard together and the rulings were handed down on the same date and cross-reference one another. The *Appulonappa* and *B010* cases mark a turning point in the progress of criminalizing immigration. They were heard together because they both dealt with the question of whether those who assist others to enter Canada in breach of immigration laws are engaged in “people smuggling” if their actions include feeding or otherwise caring for others with whom they are travelling, including their own children. The Court writes of assisting “close family members” and “legitimate humanitarian aid”.<sup>49</sup> In *B010*, all the individuals had been excluded from the refugee determination process on the basis of serious criminality because of these actions. In *Appulonappa*, the case reached the Supreme Court of Canada after a criminal prosecution for people smuggling was detoured by a constitutional challenge to the wording of the IRPA’s smuggling offence. By grouping *Appulonappa* and *B010* together, the Supreme Court brought together a criminal prosecution and a regular immigration proceeding. From one perspective, bringing immigration and criminal cases together in this way is the apex of “cimmigration”. But on the other hand, the criminal case introduced a different series of procedural considerations than the immigration cases, different Charter arguments, and a different type of evidentiary record, which appear to have played a role in the conclusions.

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<sup>46</sup> Charter, *supra*, note 4, s. 7.

<sup>47</sup> *Supra*, note 24, at paras. 23-27. The previously leading case on the interpretation of s. 7 in immigration legislation matters was *Chiarelli, supra*, note 28, a ruling in which McLachlin J. (as she then was) was a member of a unanimous panel.

<sup>48</sup> *Supra*, note 24.

<sup>49</sup> *Appulonappa, supra*, note 24, at para. 11.

Whether or not the Court was directly influenced by these distinctions, the resulting rulings were more favourable to the migrants in question than almost every other ruling at every level of court where criminality and immigration had been intertwined. My speculation is that the strong protections for the accused that come with criminal prosecution played a role in framing these cases differently for the Court. In other words, the progress of “cimmigration” in these cases is so advanced that it works to the benefit of migrants. Chief Justice McLachlin wrote both decisions. The influence of criminality is clear from her opening paragraph in the *B010* ruling:

The smuggling of human beings across international frontiers is a matter of increasing concern all over the world. Those who are smuggled pay large sums for what are frequently life-threatening journeys to countries for which they have no documentation or right of entry. Some of these migrants are refugees who have a well-founded fear of persecution in their home country and a right to protection under Canadian and international law. The smugglers, for their part, cynically prey on these people's desperate search for better lives to enrich themselves without heed to the risks their victims face. The smugglers' activities are often controlled by extensive transnational criminal organizations which Canada and other states seek to combat through multilateral cooperation.<sup>50</sup>

Chief Justice McLachlin drew directly on a comparison with the criminal law in interpreting the inadmissibility provision at issue in *B010*, stating:

Thus the apparent similarity between the *IRPA* concept of “organized criminality” and the *Criminal Code* concept of “criminal organization” is no coincidence. Both provisions were enacted to give effect to the same international regime for the suppression of transnational crimes such as people smuggling. Section 37(1)(b) should be interpreted harmoniously with the *Criminal Code*'s definition of “criminal organization” as involving a material, including financial, benefit.<sup>51</sup>

Chief Justice McLachlin's summation of her reasoning in *B010* focuses on strictly separating criminal reasoning from immigration reasoning, thus ensuring that the criminal inadmissibility provision she is analyzing must match the relevant crime, and not include a potential penumbra of related activity:

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<sup>50</sup> *B010*, *supra*, note 24, at para. 1.

<sup>51</sup> *Id.*, at para. 46.

The wording of s. 37(1)(b), its statutory and international contexts, and external indications of the intention of Parliament all lead to the conclusion that this provision targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. To justify a finding of inadmissibility against the appellants on the grounds of people smuggling under s. 37(1)(b), the Ministers must establish before the Board that the appellants are people smugglers in this sense. The appellants can escape inadmissibility under s. 37(1)(b) if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.<sup>52</sup>

It is too soon, in mid-2018, to predict whether this important turn in reasoning will leave a strong impression on subsequent jurisprudence, but the potential for a salubrious flow-on effect is clear.

Chief Justice McLachlin penned three other immigration rulings. The 2014 decision in *Harkat* considered whether the government's responses to the earlier *Charkaoui No. 1* ruling met the standards set by the Court on that occasion.<sup>53</sup> Chief Justice McLachlin wrote for the approving majority in this case, building on from her work on *Charkaoui (No. 1)*. In the second case handed down in 2014, the Chief Justice penned another set of majority reasons in *Febles*.<sup>54</sup> Here the issue before the Court was how to interpret the Refugee Convention provision excluding individuals convicted of serious non-political crimes from refugee protection. In this case there was an opportunity to break new ground, but the majority of the Court was content to make small clarifications and generally affirm the direction of lower courts.

The remaining immigration judgment penned by McLachlin C.J.C. was chronologically her first, and her only dissent.<sup>55</sup> In the 2002 *Lavoie* ruling, McLachlin C.J.C. wrote that provisions of the *Public Service Employment Act*<sup>56</sup> establishing preferences for Canadian citizens constituted discrimination on the basis of citizenship and were indistinguishable from the issue in the seminal *Andrews v. Law Society*

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<sup>52</sup> *Id.*, at para. 72.

<sup>53</sup> *Canada (Citizenship and Immigration) v. Harkat*, [2014] S.C.J. No. 37, [2014] 2 S.C.R. 33 (S.C.C.) [hereinafter "*Harkat*"].

<sup>54</sup> *Supra*, note 24.

<sup>55</sup> *Lavoie*, *supra*, note 24.

<sup>56</sup> R.S.C. 1985, c. P-33.

of *British Columbia* ruling.<sup>57</sup> Justice L'Heureux-Dubé concurred. The plurality of their colleagues found either that there was no equality rights infringement (Arbour and LeBel JJ.) or that the infringement was a reasonable limitation (Bastarache, Gonthier, Iacobucci, and Major JJ.). The Chief Justice's dissent is characteristically strong and clear:

The very act of forcing some people to make such a choice [changing their citizenship] violates human dignity, and is therefore inherently discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1).<sup>58</sup>

Chief Justice McLachlin's track record as a dissident is important, but not central to her legacy.<sup>59</sup> It seems she dissented when she found it necessary to do so, but preferred to persuade others to her view whenever possible. Her reasons in *Lavoie* reflect this disposition: she dissents in clear strong terms, on matters of deep principle.

## II. CONCLUSION

Chief Justice McLachlin's work in the area of immigration law is emblematic of her leadership style. When something needed doing, she stepped up. She led the Court by sheer hard work and clearheaded reasoning. During her term as Chief Justice she took on a disproportionate workload in the immigration law area, despite a much smaller role in this area prior to becoming Chief. Why would she have made this choice? It is impossible for me to know for certain. But it is undeniably the case that during her time at the helm of the Court, immigration matters were increasingly hotly contested, legally and politically, across all Western liberal states. She led in a

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<sup>57</sup> [1999] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.). This case was the Supreme Court's first Charter equality rights decision. The Court held that a rule limiting admission to the legal profession to Canadian citizens and excluding permanent residents was a breach of the Charter.

<sup>58</sup> *Lavoie*, *supra*, note 24, at para. 5.

<sup>59</sup> See Marie-Claire Belleau & Rebecca Johnson, "Judging Gender: Difference and Dissent at the Supreme Court of Canada" (2008) 15:1-2 Intl. J. Leg. Prof. 57.

time when xenophobia was ascendant and intermingled deeply with terrorism fears that go to the heart of our society and our democracy. This meant that the immigration matters that came before her Court, despite the enormous restrictions that made them few in number, all go in some way to the heart of our identity as a nation and our core understandings of liberty, equality, and justice. In this setting, leadership matters immensely. Chief Justice McLachlin responded accordingly.

