2018

# Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership

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## Citation Details

Marcus Moore, "Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership" (2018) 86 Sup Ct L Rev (2d) lxiii.

# Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership

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## I. Reflecting on the Legacy of Chief Justice McLachlin

Writing the Introduction to a book about a person that needs no introduction presents a certain dilemma. Within the legal universe, Beverley McLachlin is a living legend. In legal circles around the world, the recently retired Chief Justice of Canada is as well-known as any jurist. The esteem she has earned within those circles is in equal measure. Her judicial career is, in several respects, unprecedented in Canadian history. Attempting to summarize that career and its recognitions, much less its meaning and legacy, within a brief introduction, would do no justice to them.

Thus, rather than introduce the Chief Justice, I will use these pages to introduce the much weightier tome in which they are found, which itself directly and courageously embraces that considerable challenge at the sensible length that it requires and that this short Introduction necessarily lacks.

Before doing so, I should note that much has already been said elsewhere about some of the highlights of Beverley McLachlin's long and successful career, as part of retirement ceremonies, statements released by leaders of the legal world's institutions, and popular press features. These are themselves inevitably selective and incomplete, as the number of such highlights bearing mention is genuinely beyond any

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realistic consensus enumeration. For instance, as a justice of the Supreme Court of Canada, she has personally authored 472 opinions.[1] And that counts nothing of her powerful influence as chief justice over the resolution of other cases in Canada's high court during her 18 years in that institution-shaping post. Nor does it account for her many achievements in the other aspects of the office of chief justice of Canada: namely, as head of the judicial branch of government; and as its chief representative to the Canadian public as well as to delegations of foreign jurists.

Hence, this tribute volume to Beverley McLachlin cannot overcome the incomprehensiveness of those prior discussions. What it can do, and what comprises its *raison d'être*, is to provide the scholarly perspective on her career that its significance merits, by bringing together the thoughtful reflections of more than 30 expert observers of impressive pedigree and diverse personal and intellectual viewpoints, illuminating a wide range of aspects of the Chief Justice's career. While, as mentioned, neither this *oeuvre* nor any can constitute the defining statement of Beverley McLachlin's illustrious life in the law or immense legal legacy, it is hoped that these pages will provide inspiration and useful guidance to the ongoing study that her extraordinary career calls for.

## II. OUTLINE OF THIS TRIBUTE VOLUME

In assembling this book, it quickly became clear to all involved that the tributes and analysis called for by Chief Justice McLachlin's career went beyond what could be captured in a single journal volume. As a result, the entries are divided into two halves, with the first half to be found in this SCLR Volume 86, and the second half forthcoming in SCLR Volume 87.

### 1. Scheme of Organization

This book has not been organized according to the customary scheme for judicial tribute volumes of an assemblage according to substantive fields of law. That choice is deliberate, and there are several reasons for it, which may merit explanation here.

To begin with, the jurisdiction of the Supreme Court of Canada, compared to many nations' Supreme Courts, is exceptionally broad.[2] Beverley McLachlin fulfilled her judicial function across the fullness of

1 See SCLR Vol. 87, Chapter 24 Table A. And this does not include *per curiam* judgments.

2 Supreme Court of Canada, <https://www.scc-csc.ca/court-cour/sys-eng.aspx>.

that domain, and over a range comprising the longest time on the Court in the modern era, and the longest-ever tenure as chief justice.[3] In the latter role, a chief justice's influence encompasses "the whole environment of decision-making," through responsibilities ranging from the caseload and schedule, to determining the composition of panels for each hearing, to shaping the nature of the deliberations within and beyond the judicial conference, to assigning the writing of reasons for judgment.[4] Bearing this in mind, it becomes clear that even to survey all the judgments personally authored by Chief Justice McLachlin would not remotely capture her influence on the jurisprudence itself. Indeed, a preoccupation with opinions personally authored could distort the picture because of, for example, the conference deliberations that precede the assignment of judgment-writing duties, practical factors bearing on those assignments (*e.g.*, each judge's workload at the time, particular areas of expertise, years of experience, etc.), and the Court-wide dialogue that often resumes at the stage of judges reviewing and commenting on a colleague's draft judgment in considering possible concurrence with it. The persistent treatment in scholarly literature of high court opinions as though they comprise strictly individual ideas developed in isolation by the judge whose name appears on them as their author, thereafter presented to and concurred in by fellow justices in the manner of the terms of a contract of adhesion, represents a fundamental misunderstanding of how the Supreme Court of Canada functions — at least in the McLachlin Era. It is not without reason that Supreme Court eras are often demarcated and referred to by the name of the chief justice presiding (*e.g.*, the "Dickson Court", the "Lamer Court"). Beyond this, Chief Justice McLachlin has been known for a collaborative attitude towards lower courts and decision-makers: empowering them by favouring a role for their discretion, guided by the frameworks established in Supreme Court precedents. Her influence on Canadian jurisprudence therefore echoes from every corner of Canada's legal system. For all these reasons, an earnest appraisal of her jurisprudential influence would come close to an encyclopedia of Canadian law since

[3] Supreme Court of Canada, News Release (12 June 2017) online: SCC: <https://scc-csc.lexum.com/scc-csc/news/en/item/5552/index.do>.

[4] Emmett Macfarlane, *Governing from the Bench*, p. 125.

the turn of the 21st century.[5] A different kind of tribute is accordingly called for.

Further, in an increasingly complex modern society, more and more often the legal problems which arise involve multiple intersecting and indeed interacting areas of law. As one recent example illustrates, the Supreme Court's case *Douez v. Facebook* involved the fields of: Private International Law; Consumer Law; Contract Law; Tort Law; Privacy Law; and Civil Procedure.[6] When decisions in cases such as these are "downloaded" from the Court by the profession, it is important that they not be simply dismembered into aspects relevant to discrete fields, at the risk of losing sight of points of significance to be found in the fields' intersection and interaction. For one thing, it is in that crucible that patterns form and eventually solidify into new fields of law — reflected, for instance, in the numerous established fields at the time of Beverley McLachlin's ascendance to chief justice in 2000 versus the few that existed a century earlier during the tenure of Chief Justice Strong. But even where intersections are mere anomalies, perceiving them through the lens of a particular field colours the way problems are understood and the solutions that correspondingly seem appropriate, in ways that may frustrate the ends of justice. This is demonstrated, for instance, in Chief Justice McLachlin's landmark judgment in the "pie minister" case, *Vancouver (City) v. Ward*, where it was considered that only damages could vindicate the particular infringement that occurred in that case, which in turn posed a dilemma: Viewed from a Tort perspective, damages *are* a typical remedy, but the claim was not made out. Meanwhile, from a Constitutional Law perspective, a violation was clear but damages were not a conventional Charter remedy. The resolution set out by the Chief Justice clearly recognized and responded to that otherwise dilemma.[7] A mere taxonomic take on cases might therefore risk occluding some of the more interesting jurisprudential wrinkles and innovations meriting scrutiny in appraising the Chief Justice's career.

Another crucial reason for avoiding an arrangement comprising assessed contributions to various substantive fields is that the duties of the office of chief justice of Canada extend not only beyond authored

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[5] This is not including her 11 prior years (1989-2000) as a Puisne Justice of the Supreme Court, and eight prior years (1981-1989) in B.C.'s courts earning the distinction that brought her to the Supreme Court.

[6] *Douez v. Facebook, Inc*., [2017] S.C.J. No. 33, 2017 SCC 33, [2017] 1 S.C.R. 751 (S.C.C.).

[7] *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.).

judgments to shaping the institutional context of the Court in which all of its decisions are made, as mentioned earlier, but also beyond the Supreme Court altogether. As head of the judicial branch of government, the chief justice has broad administrative responsibilities with respect to the Canadian judiciary. Moreover, serving as the chief external representative of that judiciary and of the Canadian justice system, the chief justice fulfils the need to nurture mutually supportive relationships with the domestic public as well as with the legal systems of other countries. As several essays in this volume detail, Chief Justice McLachlin took unprecedented strides in these arenas. These form essential parts of her legacy, wholly outside of her copious case law contributions. Indeed, it should be recalled that her tenure as chief justice coincided with: (1) the emergence of the Internet Age, with its attendant risks to maintaining public confidence from a domestic lay audience; and (2) the Age of Globalization, creating new opportunities for reciprocal learning through engagement with foreign legal officials. In that moment, Canada's legal system and its high court attained once unforeseeable levels of visibility, which required McLachlin C.J.C. to effectively *define* how the suddenly major function of chief external representative should be exercised, and reconciled with the other already weighty responsibilities of the office of chief justice. Her remarkable success on these fronts is widely-recognized by Court insiders and outsiders alike, and vital to appraising her achievements. With the inexorable march of cases and associated revision of case law, her extra-jurisprudential achievements might even outlive the most venerable of precedents that she or her Court laid down, in the longer-term of her legacy.

In short, Beverley McLachlin has had a judicial career like no other in Canadian history. Through a different approach reflecting the larger picture of her many duties, aspirations, and achievements, this tribute volume in her honour hopes to capture a measure of that distinction. For years to come, the contributions she made to the jurisprudence of different areas of Canadian law will continue to speak for themselves with their typical lucidity in the textbooks of every field. As part of the wider-focused discussions of the essays in this volume, aspects of that will also come through here. But the focus of the present work is on eliciting a sense of what lies behind and links these impressive and wide-ranging contributions together. The goal is to identify and interpret important cross-cutting themes to be found in the person, the judge, the judicial and leadership philosophies she cultivated, and their fruits.

This tribute to Chief Justice McLachlin is therefore organized around a selection of broad themes evoked by her far-reaching career. While there are many such themes to choose from, the set of four reflected upon by the various essays in this volume are intended to be overarching, orthogonal, and as a whole to cover crucial cross-sections of her career. Conversely, these also embrace expansive landscapes across which her legacy is certain to reverberate into the future. The four overarching themes, outlined below, are: *Living Leadership*; *The Canadian Idea*; *Harmony*; and *Judicial Virtues*.

It should be added that, while the submissions in this volume are conveniently grouped into sections corresponding to these overarching themes, the substance of many essays is pertinent to several or in some cases all four of the themes. On one hand, this supports the themes selected as broadly reflecting and overarching the Chief Justice's career, in that essays addressed to one of these themes cannot avoid, in discussing her career in high-level terms, bearing significant relevance to other themes. Meanwhile, on the other hand, it speaks to the interrelationship of the subjects captured by the themes: although they are meant to be orthogonal, they still intersect. In determining which essays are material to which themes (beyond the section in which they appear), researchers will find some assistance in this Introduction's Syllabus (below). Beyond that, the essays themselves — or indeed the reader's interpretation of them — are the most reliable guide to their relevance outside their volume-designated theme.

It perhaps also bears repeating that, although Chief Justice McLachlin's career is divided by this scheme of organization into overarching themes, that does not alter the aforementioned impossibility of comprehensive treatment of a career of such scope and significance. Hence, the essays grouped under each theme cannot come close to exhausting the compelling questions each theme raises in thinking about the Chief Justice's legacy. The outline of the themes which follows in this Introduction therefore goes well beyond what the essays in this volume can themselves cover, with the deliberate aim mentioned earlier of stimulating further study of far-reaching and important dimensions of the sure-to-endure legacy of Chief Justice McLachlin.

### *(a) Living Leadership*

In thinking about the career of Beverley McLachlin, one of the first and most compelling aspects that comes to mind is leadership. As alluded

to earlier, her leadership was manifest not only in the development of Canadian law through the landmark judgments she authored across a wide range of fields, but also through the duties she shouldered outside the common functions of Supreme Court judges as chief justice at a pivotal time. These additional responsibilities include: (1) duties to the Court, in (a) planning and supervising its administration, and (b) cultivating an institutional environment supportive of good collective decision-making by a high court; as well as (2) duties external to the Supreme Court, as (a) chief of the judicial branch of government, and (b) chief representative of the judiciary and of the Canadian legal system more generally, to both the public in Canada and legal officials abroad. In all of these facets, Beverley McLachlin's leadership was without a doubt exceptional and exemplary, so that her achievements as a leader constitute an essential panorama for appraising the legacy she leaves in place in retirement.

The prefix "*Living*" in the tribute's Living Leadership theme is meant to evoke, in a loose sense, the notion of "living law" — recognizing, alongside the positive law of the state, the coexistence and perhaps practical pre-eminence of unofficial "law" that can be found in certain social norms that govern associational processes.[8] In a parallel way, a fuller appreciation of the legacy of Beverley McLachlin's leadership requires significant attention to the ways in which, beyond her prescribed powers, she exhibited an enormous influence on associates and colleagues, the institution of the Court, the development of the law, and the evolution of the nation. This may well be the greater part of her "living" leadership, as accepted and appreciated within the concentric spheres of her leadership activity.

In all, then, the Living Leadership theme is meant to invite reflection on the sources, modalities, triumphs, and lessons to be learned from Beverley McLachlin's extraordinary term at the helm of the Canadian justice system. From this theme, emerge questions challenging yet compelling: What strategies did she employ in responding to the demand for leadership in guiding lower courts and other legal decision-makers? What philosophies guided her in developing the law to keep pace with changes in society, and maintaining public confidence in the Rule of Law as an impartial guardian of individual freedoms and collective needs? How did she approach leadership on matters such as the internal governance of

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[8] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*.

her Court, public outreach, judicial training and "accountability", the interaction between the judiciary and political authorities, and relations with foreign legal orders? How has her vision and execution of the role of Chief Justice of Canada shaped and transformed that office, the institution of the Supreme Court, the role of the judiciary in Canada, and the place of Canadian law in the world? What are the enduring legacies of her leadership, and how do they inform our appreciation of the challenges of leadership in those and other spheres, public and private? These are but a few of the important questions commended by the theme of Leadership in the career of Chief Justice McLachlin, one of the themes overarching the contributions to this volume, as well as inviting much future reflection beyond these pages.

*(b) The Canadian Idea*

Over the course of her career, the Chief Justice contributed in many important ways to giving meaning to the Canadian idea. From the 1998 *Secession Reference*, which extracted "the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the Rule of Law and respect for minorities,"[9] to the 2014 *Senate Reference*, which ruled that foundational institutions cannot be reformed unilaterally in a federal country,[10] she participated in many decisions by the Supreme Court that have helped shape the nation. Beyond constitutional arrangements' meaning and import, almost every area of societal interaction in Canada has been touched by judgments of the Court. But a country is more than even a complete set of individual and/or organizational interactions occurring in its territory, and associated governance controversies erupting and being resolved. It is a particular community that attracts a sense of belonging and imparts a sense of obligation among strangers who share a common land and cultural *acquis*, projecting a national idea that simultaneously unites them and distinguishes them from others.

The term national "*idea*" not national *identity* in this theme of the book reflects a concern that the term identity is too definite about the properties to which it refers — a psychic correlate of homogeneity, and of its instrument, assimilation.[11] As Chief Justice McLachlin has noted

[9] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 148 (S.C.C.).

[10] *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.).

[11] I use the term assimilation, in this context, in the sense of enforced conformity.

with approval, Canada has learned to temper those forces by embracing diversity and abiding its tribulations through conciliation.[12] What, then, is The Canadian *Idea*? This is a question that, by design, has no single, definite answer. Ideas live in the imagination, and every imagination is unique. Yet the question is essential: Canadians share a national idea, though the idea itself varies among them. Given that the Supreme Court is seized of disputes of national importance, it is appropriate that a volume appraising the career of Chief Justice McLachlin attend to aspects of The Canadian Idea that are contested as well as to those that are shared.

Unlike a fixed identity, any given idea is also inherently dynamic: an idea inquires, suggests, but never concludes; it remains open, not closed — like one of Canadian law's iconic doctrines, "the living tree, capable of growth and expansion within its natural limits."[13] Hence, particular visions of The Canadian Idea are able to organically evolve reflecting changes in Canadian society, just as Canadian society changes in reaction to evolving visions of The Canadian Idea. As a whole, then, The Canadian Idea does not claim to answer 'what is Canada, or Canadian law, or Canadian values?' but is a simultaneous account of both 'what have these been, and what are they becoming?' Rumination on the subject, because of its influence over the subject, places in flux that which it seeks to "identify," in the very moment of its conception. From this perspective, Chief Justice McLachlin's legacy in shaping The Canadian Idea is part of an ongoing process of that Idea's constant reconstruction. And that is equally the case whether, in any particular instance, the Idea, as it was before, ends up reinforced, refined, or revolutionized. As the Chief Justice said: "A judge's decision impacts directly and indirectly on people's lives and on the economic, social and constitutional development of the nation."[14] In every new moment the law confronts, "the question becomes: does the old law extend to the new situation? Even if the court says that it does, the court has sanctioned a development in the law. In this sense, judges inevitably make law."[15] And in so doing, they reshape The Canadian Idea.

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[12] Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance", at 14.

[13] *Edwards v. Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC), at 106-107.

[14] Beverley McLachlin, *A Canadian judgment: the lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003* (Christchurch: Centre for Commercial & Corporate Law, 2004), at 3.

[15] Beverley McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask. L. Rev. 309, at 311.

These two features — the non-identical and inherently dynamic aspects — of The Canadian Idea also mean that the submissions in this volume that touch on it contribute to evolving understandings of it, something in which the reader indeed also participates through how the reader interprets these and responds.

Chief Justice McLachlin's career presents an inspiring *tableau vivant* for the authors and readers of this volume to examine and imagine their story of The Canadian Idea. Her career is rich in relevant subject-matters and details to potentially focus on. I have mentioned constitutional issues relating to the composition of the nation and of its core governing institutions. Another constitutional topic of great interest to Canadians, which the Supreme Court was often seized of during Beverley McLachlin's term, was the elaboration of the *Canadian Charter of Rights and Freedoms*.[16] This epic national project was born only a few years before she arrived at the Court, yet already reached a stage of a certain maturity during her chief justiceship. In addition, Chief Justice McLachlin played a critical role in the development of Aboriginal rights under the Constitution. What will be the future of the grand project of Aboriginal reconciliation, and her legacy in it — things which are still only in the early stages of unfolding? What Idea(s) of federalism did the McLachlin Court pursue, 150 years after Confederation? What role do group rights under the Constitution, play in contemporary Canada?

For lawyers, the Constitution is a fundamental starting point in thinking about a nation. But how did McLachlin C.J.'s engagement with areas such as Administrative Law challenge this, and refocus attention on the interaction between Canadian law and society at street-level? Where does law as a whole, over which she has had such impact, fit into the bigger picture of The Canadian Idea? What influence has Canadian law, and an image of Canada reflected in it, had in the world, through the unprecedented international engagement she oversaw at the dawn of Globalization? How does her jurisprudence and conduct of the role of chief justice reflect, relate to, and reshape Ideas of Canadian society, institutions, history, values, and natural heritages? Beverley McLachlin's story has intertwined importantly with that of Canada's over the past three decades in innumerable ways. And to that extent, the enduring legacy of those engagements will be intimately shared by both.

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[16] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

*(c) Harmony*

In describing the jurisprudence that defined the McLachlin Court and distinguished it from previous Courts including particularly the preceding Lamer Court, expert commentators have often referenced such terms as "consensus", "nexus" or "proximity", "accommodation", "reconciliation", "compromise", and "balance". What meaning do these terms have, as found in the work of Chief Justice McLachlin and her Court? What is their significance for her, and for the problems that they are employed to address?

Beyond these questions which discretely correspond to each such term often used to describe distinct qualities of how the McLachlin Court and the Chief Justice approached problems and resolutions, the wider question that then ensues is: what ties commonly identified attributes together? Can a "general organizing principle" be found "which underpins and informs the various" qualities mentioned, "in various situations and types of relationships"?[17]

The hypothesis reflected in the third theme of this tribute volume for Chief Justice McLachlin, is that such a general organizing principle might be found in the notion of Harmony. For readers trained in law, harmony as referred to in this theme of the book does *not* mean the particularized legal doctrines employing that term in specific legal contexts, such as harmonization of laws to render them more uniform, or construction of related legal provisions so as to avoid conflict. These are sometimes applications, dealing with certain issues, of the general concept of harmony in common usage, which is incorporated also in such areas as philosophy, the arts, and social relations. It is to this general concept in common usage that the Harmony theme in this volume refers.

In that general sense, harmony might be glimpsed, for example, in the McLachlin Court's approach to seeking justice, by realizing a suitable relationship between multiple values at stake in a case. Noted qualities of balance, compromise, reconciliation *etc.*, in different cases all aim, in different ways suited to different contexts at achieving harmony in the sense just described. For example in Charter jurisprudence, the interests would include the individual interest asserted as protected by a right, the constitutional rights of other individuals and groups affected by that claim, and the needs of society where these limit rights no more than is

[17] *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 33 (S.C.C.).

reasonable.[18] Support of harmony is likewise a pattern of the McLachlin Court's federalism jurisprudence, which often sought to accommodate the cohabitation of both levels of government in a field where warranted, and indeed to facilitate their active cooperation.[19] In similar ways, the Harmony theme pervades other areas of the McLachlin Court's jurisprudence.

Through the jurisprudence, the Harmony theme also reveals efforts to foster a harmonious relationship between courts and other legal players: preserving institutional harmony between the political and judicial branches mirroring the separation of powers; striving toward systemic harmony between administrative law and judicial law; pursuing true and meaningful reconciliation with First Nations.

Outside the jurisprudence, the echo of the Harmony theme can be heard in the legacy of Chief Justice McLachlin's leadership. Frequent citation of the level of "collegiality" on the Court, for instance, testifies to her success in preserving harmony among the bench — a great challenge in collegiate courts, as evidenced by difficulties prior to her appointment as Chief Justice, and in other appellate courts wracked by division. Likewise, as the voice of the Canadian judiciary, the Chief Justice spoke often in public about themes related to a collaboration of legal rights and harmonious relationships toward the aim of justice.

The Harmony theme of this volume therefore raises several important questions: What is its meaning in these contexts? Does it provide a coherent way of considering oft-noted features of the McLachlin Court's jurisprudence, mentioned above (consensus, balance, *etc.*) as interrelated? What is its significance? Does it offer a helpful way of conceptualizing aspects of the approach of the Chief Justice and her Court's approach to solving legal problems? Should harmony be better-appreciated as an aim in resolving legal problems? How does it relate to other approaches to adjudication? Is it valuable, or just a choice of style? How does it affect, and how is it affected by, professional qualities for which Chief Justice McLachlin has been known and praised — judicial virtues, leadership skills, ethical conduct, *etc.*? This notion of harmony also generates questions

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[18] Charter, s. 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be demonstrably justified in a free and democratic society."

[19] See *e.g.*, The Long-Gun Case, *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 17 (S.C.C.).

concerning details: What sorts of interests can be brought into harmony as part of resolving legal disputes? How does harmony operate in different scenarios, including perhaps the most challenging situations — those involving express conflict among values, competing considerations, or divergent interpretations? In considering this new way of thinking about an approach to legal problem-solving that draws together oft-noted aspects of the work of the Chief Justice and the McLachlin Court, these are but preliminary queries. If it proves a useful avenue of inquiry, other questions will follow, calling for further study.

*(d) Judicial Virtues*

Chief Justice McLachlin has earned wide acclaim for the way in which she fulfilled her judicial functions. She is admired by fellow judges for her analytical prowess, transparent and concise writing, collegiality and cooperative spirit, and devotion to the judiciary as a governance institution. She is commended by practitioners for her fairness and impartiality, empathy and open-mindedness, judgment and practical wisdom. She is appreciated by academics for her dedication to not just deciding disputes but clarifying, rationalizing, and developing the law — as part of each case, and over longer time horizons within the jurisprudence. She is treasured by law students for her clear guidance and exposition of the law. She is esteemed by the public for her integrity, modesty, and sensitivity to social context. Notwithstanding the unusual controversy of the Nadon affair,[20] she is also respected by government officials for her judicial restraint, punctilious regard for the proper roles of the respective branches of government under the Constitution's separation of powers, and for the synergistic rather than antagonistic "dialogic" approach she adopted to the relationship between the branches as peers in the public service of governance.[21]

These and other judicial virtues she exhibited are easy to list, but much more difficult to explain, impart, and above all cultivate. The Judicial Virtues theme of this volume takes up this challenge. It does so on one hand by considering and building upon extant contemplations of certain virtues, and then searching for the particular ways in which these

[20] See *e.g.*, Lorne Sossin, "Court Dismissed", The Walrus (18 January 2015), online: <https://thewalrus.ca/court-dismissed/>.

[21] Beverley McLachlin, "Judicial Accountability", Supreme Court of Canada, online: <https://www.scc-csc.ca/judges-juges/spe-dis/index-eng.aspx>.

patterns took shape in the judicial life of Beverley McLachlin. The exceptionally wide recognition and high regard that she has earned also make her career a rich and tantalizing resource for considering or reconsidering from first principles the variety and nature of judicial virtues. Thus, this final overarching theme of the book also studies the qualities to be aspired to in the execution of the judicial role by, on the other hand, treating the extraordinary career of Chief Justice McLachlin as primary material from which to gain valuable insight and understanding into the meaning and pathways to achieving virtues she exemplified but that have thus far been less-chronicled.

From the Judicial Virtues theme, many vital questions emerge concerning our ideals about performance of the judicial function. These reach as far as the fundamental issue of what makes a particular quality in a judge's work a virtue? Relatedly, what is the relationship among the many different judicial virtues? Which virtues are foundational of others? Turning to the issue of application in all the diverse circumstances that different cases present, how does a judge identify the scenarios that call for virtues of one kind as opposed to another — such as for instance prudence versus reform initiative? And how does a masterful judge manage the divergences among the virtues perceived and prioritized by different constituencies of the adjudicative process? Gone are the days, the Chief Justice says, when judges could confine themselves to the ivory tower in resolving legal problems, given that problems are embedded in such profound and complex ways in modern social realities. How are the qualities which judges aspire to in the exercise of their functions affected by changes in social conditions? How are they influenced by the particular way certain cases (or kinds of cases) take shape through the litigation process, including the involved parties and interveners, the record, and the advocacy? Do the virtues called for vary in the substantive significance of what is at stake, and if so, how? Other questions flow from Canada being a multicultural society in a globalized world. What enables judicial virtues to be appraised in a way that is impartial, and not unduly subjective? Where can we see in practice the demarcation between what the Chief Justice calls "the judicial conscience" and what she calls the "personal conscience" of each judge, and in what ways is it appropriate for these to interact?

Few of these, or other, questions inspired by this theme of the volume have simple or easy answers. But they are important to our understanding of the judiciary as an institution, to its place within our broader constitutional arrangements, and to processes of social governance.

Beverley McLachlin's extraordinary judicial career offers an opportune angle from which to pursue these inquiries and hope to derive lessons from such study that may contribute to better understanding and cultivation of judicial virtues in our courts of the future.

## 2. Syllabus

The inaugural section of this volume in honour of Beverley McLachlin comprises a set of introductory texts by holders of the highest offices at home and abroad. Four distinguished such representatives, whose paths professionally yet intimately crossed Chief Justice McLachlin's, share their unique reflections. Each conveys their gratitude for the gift of service to society that her exceptional career constituted. And each expresses their personal admiration for the way in which she approached her professional activities.

These tributes appropriately begin with eloquent words of appreciation on behalf of Court and country from her successor as Chief Justice, The Right Honourable Richard Wagner, P.C. Chief Justice Wagner highlights McLachlin C.J.C.'s invaluable contributions to Canadian jurisprudence not only in substance but in approach. In this, he explains, she inspired all those who had the honour of working alongside her. Invoking a lesson of hers — that public confidence in the courts is not a function of the popularity of particular decisions but of the integrity of the judicial process — he calls for redoubled commitment to the Rule of Law, zealously guarded by an independent and impartial judiciary, as the bulwark of Canadian democracy. He accepts the torch from her steady, not failing, hands and pledges to further the values that the Supreme Court of Canada stands for, shaped and still to be guided by her legacy.

The succeeding tribute takes us back to when that Supreme career began, with Prime Minister Brian Mulroney's appointment of Beverley McLachlin to Canada's high court. Looking back, Prime Minister Mulroney appraises Canada's judiciary, led by McLachlin after her later ascendance to chief justice, as having become the best in the world. The source of its strength, he emphasizes, is its independence from the political branch of government: Judicial appointments and elevations have been made irrespective of politics, allowing for a judiciary that is not politicized. This, he counsels, in fact complements the political process, by allowing the bench's independent and expert judgment to handle issues so sensitive and explosive that they paralyze political leadership. But what of the temptations of such power? Here, he praises Chief Justice McLachlin

for the humility with which she approached the task, and invites future Canadian judges to be inspired by her example. Reciting a poem once written by American judge Learned Hand, Prime Minister Mulroney reflects on how within the spirit of liberty lies the ethic of (self) restraint.

Governor General Adrienne Clarkson builds on this meditation by Mr. Mulroney in her tribute, which follows. She praises Chief Justice McLachlin for having, alongside her legal acumen, a profound humanity, manifest in her empathy and understanding of others from all walks of life, and her salutary influence on human behaviour through an engaging leadership style that made the most difficult achievements routine. Reinforcing this theme, Madam Clarkson provides us a unique window into the Chief Justice's own humanity, bringing Beverley McLachlin vividly into sight in her other roles as, on one hand, a trailblazing early women's professional leader, and on the other, a woman simultaneously devoted to traditional roles of wife, mother, and homemaker. Of the greatest passion and renown was her cuisine — her cooking ability perhaps gave an added dimension to "chef" in her title of *Juge en chef*. The Governor General, referencing Viscount Sankey's "living tree", also ponders the interwoven evolutions of Canadian law and society that allowed for the nation's good fortune in having as chief justice an extraordinary "person" in Beverley McLachlin.[22] Other social-legal evolutions proceeded during Beverley McLachlin's chief justiceship, and more will yet be guided by her legacy into the future, Clarkson affirms.

That legacy has reached beyond Canada. In the preliminary section's final tribute, Chief Justice of the United States John G. Roberts confirms that Beverley McLachlin is known around the world as a leader among judges. She is especially renowned internationally, Chief Justice Roberts adds, for being exceptionally effective in the uniquely challenging role of a *chief* justice. He credits this in part to what he describes as her instinctive approach to law as a collaborative enterprise. Consistent with this volume's theme of Living Leadership, he also references the formal and informal dimensions of her effective leadership. Taking stock of her remarkable career, Roberts compares her to the great Chief Justice of the United States John Marshall: both, Roberts explains, elevated the stature of the constitution and of the courts in their respective homelands. Adding a cross-border dimension to Chief Justice Wagner's reflection, Chief Justice Roberts also extols Chief Justice McLachlin's dedication to

[22] Referring to the so-called "Persons" case: *Edwards*, *supra*, note 13, which opened the constitutional door of high office in Canada to women.

international leadership in promoting the Rule of Law and judicial independence — crucial to the kind of societies we have together shared, and must both remain steadfast in protecting.

Following the introductory section to the tribute volume for Chief Justice McLachlin, just described, the course of reflections moves on to pursuing the four overarching themes set out earlier as exemplifying her career, commencing first with the theme of Living Leadership.

Appropriately starting with where it all began, Chief Justice of Ontario Warren Winkler takes us in Chapter 1 back to the tiny but remarkable hometown he shared with Chief Justice McLachlin: Pincher Creek, Alberta. Bringing her formative environment to life in a way no other work published to date has, we see in the precocious child that she was then, and in the tight-knit community that encouraged and supported its youth to pursue their dreams, the seeds planted of the striking leader she grew into for Canada's justice system. The power of the Chinook winds through town also makes its impression, and adverts to the groundedness Beverley McLachlin had to develop, swept by its gales, in order to stay planted — a quality that would serve her equally well in the rarefied air to which her career took her. Surveying her contributions not only to the jurisprudence, but to the Canadian Judicial Council, and through the Chief Justice's Advisory Committee and the Task Force on Access to Justice, the chapter conveys the comprehensive scope of her effective leadership. Further, in the difficulty in finding words for his palpable sense of the informal dimension of her style of leadership, Chief Justice Winkler succeeds in relating the significance of that aspect of her leadership that is nowhere prescribed on paper, but was, and must be understood as, a Living thing.

The extra-jurisprudential leadership work of Chief Justice McLachlin, surveyed by Winkler, moves centre-stage in Chapter 2 in Professor Emmett Macfarlane's depiction of her roles as institutional leader and as public representative of the judiciary. Here again, her Living Leadership, working through informal modes of influence as aptly as through official duties, stands out. In describing this element, Macfarlane invokes the phrase "first among equals", notable as the conception of leadership chosen by Augustus: considered by many historians to be western history's most effective leader, eschewing the dictatorship style that ill-fated his great-uncle. Within Canada's Supreme Court, this approach fostered a collegiality much-needed at the time that Beverley McLachlin became chief justice.[23] Collegiality was

[23] Susan Harada, "The McLachlin Group: How Canada's first female Chief Justice has taken the heat off the Supreme Court", *The Walrus* (12 May 2009), online: <https://thewalrus.ca/>.

then leveraged to enhance consensus, bringing clarity and certainty to the law. But sometimes this came at a cost of analytical ambiguity and issue-avoidance, Macfarlane assesses. Externally, Chief Justice McLachlin's leadership increased transparency, access, and visibility of Supreme Court work. But these too, as Macfarlane sees it, have downsides. He queries, for instance, whether, in addition to the fault of the government, the Chief Justice may have been insufficiently cautious in what became *L'affaire Nadon*.[24] And he wonders whether her controversial use of the term "cultural genocide" in extrajudicial remarks may have gotten ahead of live cases in Aboriginal Law where such a fact-finding could carry important legal or political consequences.

Collegiality is the subject of deeper introspection in Chapter 3, where Dame Mary Arden, Lady Justice of Appeal and Head of International Judicial Relations for England & Wales,[24A] examines this quality from the perspective of leadership in appellate courts, typically being collegiate in design. Dame Arden provides a unique comparison of the distinctive profiles that collegiality has in intermediate appellate courts, such as her Court of Appeal of England & Wales, versus in final appellate courts, such as McLachlin C.J.C.'s Supreme Court of Canada.[24B] One observation is that in intermediate appellate courts, the volume of cases and time pressure is such that, without collegiality, they would be practically speaking unable to fulfil their function within the justice system. By contrast, in final appellate courts, where panels are larger and precedent is less constraining, collegiality supports the institutional design intent of collective decision-making and facilitates greater clarity and coherence in the law, given the wider variety of directions that individual opinions in a given case could otherwise simultaneously take off in. As an example, she cites the Supreme Court of Canada's landmark decision in *Carter*,[25] concerning assistance in dying, as the kind of major social change that would be difficult to appropriately modulate (and noting the Canadian Parliament's subsequent enactment of new legislation along the lines of the decision) without great collegiality. Dame Arden's thoughtful reflections help illuminate how the McLachlin

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[24] Sossin, *supra,* note 20.

[24A] After the completion of this book, shortly before it went to print, Dame Arden was elevated from the Court of Appeal to the Supreme Court of the United Kingdom.

[24B] *Id.*

[25] *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.).

Court excelled in fostering this judicial virtue that is, in appellate courts, a cornerstone of the leadership required of them.

One of the Puisne Justices who both contributed to and enjoyed the collegiality cultivated in the Supreme Court of Canada under Chief Justice McLachlin's leadership, addresses in Chapter 4 some other notable aspects of the Chief Justice's leadership. Justice Marie Deschamps conveys from experience how Beverley McLachlin, despite not being seen as a feminist in the same overt terms of some early peers such as Justices Bertha Wilson and Claire L'Heureux-Dubé, was nonetheless in her own subtle and perhaps indirect way a leading figure in the advancement of women's rights in the legal profession and in society more generally. Deschamps also emphasizes how Chief Justice McLachlin was a leader in changing norms governing the judicial function when it came to liberalizing recourse to extrajudicial civic dialogue, where proper. This was helpful in demystifying the office of judge, and proactively engaging the public with the duties and norms governing it, so as to enhance understanding. The result was to increase public confidence and protect the judiciary against the risk of unfounded attacks in popular media for "judicial activism". It also allowed Chief Justice McLachlin to serve as a model in addressing, in an appropriate manner, recent or upcoming challenges in the administration of justice, such as Charter interpretation, Aboriginal reconciliation, and criminal justice reform. The Chief Justice's prior career as a law professor made her particularly skilled in this, Deschamps testifies. Deschamps also brings into focus the truly global scope of Chief Justice McLachlin's participation, as the standard-bearer of Canada's legal system, in international deliberations with counterparts from around the world on common issues. Through these efforts, the Chief Justice showed the world how Canada has accommodated diversity and found ways to balance competing values.

Next, another former colleague from the McLachlin Court, Justice Thomas Cromwell, writes about an additional avenue of Chief Justice McLachlin's leadership outside the Supreme Court. The issue of access to justice is the subject of his Chapter 5. A crisis of overwhelming proportions and implications for the legal system in Canada and in many other developed nations, access to justice had also proven to be a persistent and particularly difficult problem to resolve. Justice Cromwell describes how, in moving to confront this immense challenge, the Chief Justice had "neither purse nor sword" at her disposal. In yet another Living aspect of her Leadership, she had to rely on "moral suasion". She

gathered support to convene an Action Committee on Access to Justice in Civil and Family Matters. Under her vision, this Task Force would also take a different approach than prior efforts at reform of access to justice: the Task Force brought together stakeholders from all constituencies of the system, in order to ensure the requisite buy-in for the transformative change desperately needed. At the same time, this approach would draw on the unique strengths of different system-actors through a collaborative process. From his front row seat as head of the Task Force, appointed by the Chief Justice, Cromwell relates the progress it has made to date, and the future promise it enjoys with Beverley McLachlin having been appointed by Chief Justice Wagner to become the next head of the Task Force soon after her retirement from the Supreme Court.

In Chapter 6, Dean Catherine Dauvergne delves into jurisprudential patterns that serve to illustrate Chief Justice McLachlin's leadership in overseeing the evolution of the law in synch with fundamental changes in society. Where circumstances required, this included Beverley McLachlin adapting the level of her own engagement with a particular body of law, in order to respond to that call for leadership. The example Dean Dauvergne discusses concerns Immigration & Refugee Law. Issues at that field's intersection with National Security Law were catapulted to social and political prominence by the calamitous terrorist attacks of 9/11, 2001. Laws passed in its aftermath aimed at tighter security, sometimes pressing the boundaries of cherished civil liberties and legal rights guaranteed by the Charter. In this context, Dauvergne notes a significant increase in Immigration & Refugee cases were taken up by the Supreme Court. Further, despite Chief Justice McLachlin's limited prior experience with this area of law, Dauvergne finds a sharp increase in McLachlin C.J.'s own individual participation — indeed often authoring the judgment of the Court, sometimes in cases overseeing major shifts in the field. Towards the end of the Chief Justice's tenure, as mass migrations led to increased xenophobia in western countries, Dauvergne wonders whether a potential bookending jurisprudential shift is heralded by the twin cases of *Appulonappa*[26] and *B010*,[27] once again authored by the Chief Justice, and demonstrating her typical sensitivity and leadership amidst changing social realities.

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[26] *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59, [2015] 3 S.C.R. 754 (S.C.C.).

[27] *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.).

It is to those evolving social realities, and partly-shared and partly-contending conceptions of them, that the volume turns next, interrogating how both the realities and the conceptions exercised influence on the Supreme Court and exhibited reciprocal influence by the Supreme Court. This group of reflections is found under the second overarching theme of this tribute to McLachlin C.J.C.: The Canadian Idea.

The topic is first broached in Chapter 7 through Professor David Schneiderman's examination of the McLachlin Court's handling of the relationship between Canada's different branches of government. Having reviewed different theoretical paradigms for this relationship, Schneiderman looks to how the McLachlin Court approached it in practice, focusing on cases involving claims of legislative privilege or executive prerogative, in the latter case sometimes supplanted by statutory discretion. He finds that the McLachlin Court's typical disposition was one of respect and deference to what the Court perceived as a necessary sphere of autonomy of the other branches within which to exercise their public responsibilities, while expecting for the judiciary the same in return. This it did not get in the Nadon Affair, where Schneiderman argues that the Chief Justice acted properly and the political branch of Canada's federal government vastly overstepped its bounds. Concluding his reflection, Schneiderman espouses that, in his view, courts' duties in relation to the other branches of government in Canada call for less faith and more suspicion than the stance often chosen by the McLachlin Court in navigating this relationship.

The proper way to conceive of the relationship between a different set of essential Canadian legal institutions — courts and administrative decision-makers — is the subject of Professor Kate Glover's Chapter 8. Noting that today far more Canadians have their legal concerns "administered" rather than court-adjudicated, she submits that the country is at a key moment in determining what will be the dominant conception of the administrative state's place in Canada's constitutional order. The traditional Subtractive theory, she argues, is fixated on the macrostructural contradistinction between courts and administrative bodies, and therefore struggles to understand administrative bodies in a way that enables them to fulfil the nature that flows from each's unique design. By contrast, the alternate Generative theory focuses on these very microstructural questions, and is therefore what is needed in this future-defining moment for administrative justice in Canada. In Glover's estimation, the Supreme Court of Canada, after a long-running internal jurisprudential debate, is now headed in the right direction — with an

assist from Chief Justice McLachlin, whose early but important opinions in *MacMillan Bloedel v. Simpson*,[28] *Cooper v. Canada*,[29] and *Ocean Port Hotel v. British Columbia*[30] helped chart the Court's present heading.

The interaction between the Constitution and the judiciary, and its impact on The Canadian Idea, is the topic of reflection for Professor Richard Albert in Chapter 9. The Charter, studies indicate, has joined Canadian cultural icons such as the maple leaf, and hockey, that resonate most with the Canadian people. In assessing this development, Professor Albert emphasizes the role of the judiciary, including pre-eminently, Beverley McLachlin, as expositors of the Charter's meaning, and stewards of its path to attaining the remarkable cultural status that it now holds. During her chief justiceship, there was also a need to engage the public on behalf of the judiciary in its role as guardian of the values underlying the Charter and justice in Canada more broadly. Chief Justice McLachlin embraced that role in her public discourses, becoming, in Albert's phrase, the nation's Conscience-in-Chief. Likewise, straddling what he calls the ceremonial and substantive dimensions of her office, she was the Charter's leading ambassador: teaching the world about the deepest values of Canadian society, reflected in and guided by the courts. Through the success of these efforts, she helped Canada become, as other studies support, a global role model and trendsetter for other legal systems contemplating their own future evolutions.

The constitutional spotlight moves from the Charter to federalism in Professor Wade Wright's investigation of the links between the McLachlin Court and The Canadian Idea in Chapter 10. The first pattern emergent from the jurisprudence is movement from the Classical approach of sharp division of federal and provincial powers, to a preference under the McLachlin Court for the Modern approach of allowing overlap where possible. Then in a second phase, the Court went further in that direction, coming to favour the Cooperative approach of in fact mediating and facilitating cooperative and proactive negotiation of potential overlaps between the two orders of government themselves. Professor Wright finds these patterns to be true in Chief Justice McLachlin's own reasons as much as in the Court's-at-large. The final

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[28] *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.).

[29] *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 (S.C.C.) [hereinafter "*Cooper*"].

[30] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.J. No. 17, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C.).

pattern is that the patterns initially described have exceptions — with all three approaches continuing to be used contemporaneously in at least some cases. For Wright, this is no accident on the part of the Court, but a conscious "theoretical pluralism", provoked by the complexity of the ever-evolving Canadian federation. It will be for future scholarship to uncover the details of related patterns among different social or legal contexts that underlie and explain the use of one approach to federalism versus another in any particular case.

A vantage point offering a wide vista on Chief Justice McLachlin's legacy for The Canadian Idea is presented in Chapter 11, discussing Chief Justice McLachlin's engagement of International and Comparative Law in their encounter with Canadian law and society. Professor Janice Gross Stein and Benjamin Smalley note that the timing of Beverley McLachlin's chief justiceship coincided with the Age of Globalization, a powerful transformative force across all social sectors. The openness to International and Comparative Law that she displayed, Stein and Smalley submit, springs from the plurality of Canada's own founding traditions as well as the Canadian value of multiculturalism. And conversely, this native background enabled McLachlin C.J., in extrajudicial speeches, to help guide global evolutions responding to some of the most pressing transnational challenges of law and society. Based on the Chief Justice's success, the authors share Beverley McLachlin's view that Canada is well-placed to be an exceptional leader in the global legal arena during an age where the inseparability of national and transnational spheres has become — notwithstanding present political resistance in some quarters — a reality of modern life.

Among the global connections forged by Chief Justice McLachlin was with the world's high courts that use the French language. Through these associations, her friendship developed with Guy Canivet, Chief Justice of France's Cour de cassation, and later judge of France's Conseil constitutionnel. Chapter 12 offers insight into Canada's approach, as navigated by the McLachlin Court, to handling politically divisive issues in society upon which the Constitution is silent. Illustrated by the case of same-sex marriage, Juge Canivet summarizes that the Supreme Court of Canada's response to this silence was to make clear that the government was constitutionally permitted to open civil marriage to same-sex couples without deciding whether the government was constitutionally

required to.[31] Canadian legislation to this effect subsequently passed without incident in 2005.[32] By contrast, in France, the Conseil constitutionnel, in view of the Constitution's silence, acknowledged that the government was not constitutionally required to open marriage to same-sex couples.[33] Protests ensued, and a law was passed opening it to same-sex couples, whereupon the Conseil ruled in light of the same constitutional silence that the new definition of marriage did not violate the Constitution either.[34] Opposing protests and counter-protests swept the country. Accordingly, in France, same-sex marriage was finally legalized in 2013 amidst tremendous social upheaval — upheaval not seen in Canada, in part perhaps due to the way in which the McLachlin Court chose to exercise its powers — including the discretion it held not to have to answer every question referred.[35]

The way in which the McLachlin Court, by its deft handling of delicate cases like that, helped avoid in Canada the social turmoil that France experienced *vis-à-vis* a similar issue, evokes the next overarching theme of this tribute volume to Chief Justice McLachlin: Harmony.

Leading off the discussion of that theme, I take note in Chapter 13 (in SCLR Vol. 87), of the general notion of harmony, associated with the just order in many cultures across the world and over history. I submit that it is a conception of justice given effect by many of Chief Justice McLachlin's efforts and achievements. It is also a notion that a variety of terms she has used in describing aims of judicial problem-solving seem to converge on. It fits together into a coherent whole several diverse objectives she has endorsed and qualities of her juridical approach for which others have praised her. Complementing specified rules, I suggest that harmony can serve as an outlook faithful to the legal system and oriented towards its aim of just order, apt to guide the judicial need to resolve the legal problems that arise in adjudication due to the rules' insufficiency to answer every legal question. The Chief Justice's work evinces this. Concerned with the proper relationship between elements (in this case of the legal system), and of the whole composed of them, harmony as an aim necessarily engages process

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[31] *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, 2004 SCC 79 (S.C.C.).

[32] *Loi sur le mariage civil*, L.C. 2005, c. 33.

[33] Cons. const., 28 janvier 2011, *Mme Corinne C. et autres [Interdiction du mariage entre personnes de même sexe],* JO, 29 janvier 2011, 1894, 2010-92 QPC (Cons. const.).

[34] Cons. const., 17 mai 2013, *Loi ouvrant le mariage aux couples de personnes de même sexe,* JO, 18 mai 2013, 8281, 2013-669 DC (Cons. const.).

[35] *Loi no. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe,* JO 18 mai 2013, 8253.

too: after first identifying the legitimate considerations invoked by a problem, the judge must find a harmonious way to give collective effect to them — thus resolving the system-disharmony revealed by the legal problem underlying the case. Chief Justice McLachlin's aversion to treating issues as simple either-or conflicts, and preference for tools of consensus, accommodation, and reconciliation, exemplify this process of seeking to harmoniously account for multiple legitimate interests where possible. I conclude by suggesting that there are reasons, in Chief Justice McLachlin's remarkable success, and in certain novel social conditions that prevailed contemporaneously with her career, to think that this approach may be promising for others tasked with similar duties in the future.

In Chapter 14 (in SCLR Vol. 87), Emeritus Dean and Professor Peter Hogg takes a closer look at the operation of reconciliation and accommodation, in the context of Aboriginal Law, being one area (among many) where Chief Justice McLachlin made great contributions to our jurisprudence. The Chief Justice's conviction regarding the importance of reconciliation, Professor Hogg appraises, drove the unprecedented and much-needed expansion of the rights and protections of Canada's Aboriginal peoples in decisions of the McLachlin Court. One aspect of this, critical to advancing harmony between the Aboriginal peoples of Canada and other Canadians, is the Crown's duty to consult and accommodate Aboriginal peoples when making decisions that could affect Aboriginal interests. This duty was first elaborated by the Chief Justice in her ground-breaking decision in *Haida Nation v. British Columbia (Minister of Forests)*.[36] The doctrine grew in importance over the course of subsequent jurisprudence of the Court, often with McLachlin C.J. leading the way. It has encouraged government policies to be more considerate of Aboriginal interests, thus furthering the broader goal of reconciliation. This will be, Professor Hogg assures, an abiding part of her legacy to her Court and her country.

When conflicts between competing interests cannot be avoided, other methods such as compromise and balancing are required in order to preserve stability and cohesion. In Chapter 15 (in SCLR Vol. 87), Professor Hoi Kong, the inaugural Beverley McLachlin Chair of Constitutional Law at UBC, scrutinizes in the context of that field the compromises for which the jurisprudence of the McLachlin Court has often been noted, and accordingly distinguished from the fractured judgments he describes as characteristic of the Court in the period

[36] [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.).

preceding her tenure. Yet this sort of compromise, Kong contends, is not mere pragmatism. It has theoretical significance, acknowledged in the Charter context through academic writings by the Chief Justice, in offering a principled defence of constitutional review and of reasonable accommodation in a diverse society. Whilst Kong notes that she has not commented on this in academic writings dealing with federalism, the theory she articulated in the Charter context is equally apt, he says, to the division of powers branch of Constitutional Law. Indeed, he notes that the McLachlin Court's federalism jurisprudence already reveals this same approach present also in its Charter cases. These patterns demonstrate the Court's acumen, under Beverley McLachlin's leadership, in achieving compromise that is valuable in fostering harmony in societal terms, as well as in governance terms with respect to both the separation and the division of powers.

Harmonious constitutional interpretation and governance among a different group of state organs — courts and administrative bodies — is the subject of analysis in Chapter 16 (in SCLR Vol. 87) by Dean Lorne Sossin. Invoking the proclamation by McLachlin J. (as she then was) dissenting in *Cooper*,[37] that "the Charter belongs to the People," Sossin examines what is necessary to fulfil the aspiration conjured by her memorable phrase: namely, that the Charter protection and remedies available to people should be the same regardless of where the state has delegated decision-making power affecting them; and in particular, it should not be lower in administrative bodies than courts, given that the former are where the law reaches most people. Further, as Sossin details, the spectrum of contemporary administrative bodies is extreme, including decision-makers with no formal legal training. A Charter that truly belongs to the people, he submits, should incorporate these unique perspectives and expertise into its overall interpretation, rather than being the exclusive purview of a special judicial caste. Sossin concludes by hoping that the Chief Justice's idea of The People's Charter will one day become a doctrine as essential and iconic in Constitutional Law as the Privy Council's Living Tree.

Chapter 17 (in SCLR Vol. 87) speaks to broader questions of how a multicultural society can dwell in harmony, and how a harmonious legal order can be nurtured despite the diverging viewpoints of members of such a society. Drawing a contrast to the United States, Senator Serge Joyal remarks that Canada has not sought an (impossible) uniformity of

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[37] *Cooper*, *supra*, note 29.

values through assimilation, but embraced multiculturalism, and the autonomy that underlies choices of cultural (political, moral, religious) identification. In that context, how can public decisions be made? Rule by majority will, alone, as the Chief Justice has noted, undercuts such a society by imposing the majority's viewpoint. Moreover, it makes of the law a political pinball between groups contending for majority status in any given decision at any given time, thereby progressively degrading harmony in social terms and in terms of the law's normative coherence. Law, once created, constitutes a fully independent source of authority — hence the phrase the "Rule of Law". Respecting its status as an independent, objective, and neutral order allows for a plurality of viewpoints to coexist in harmony rather than vie for supremacy in constant and unbounded civil conflict. Moreover, it allows for normative legal understandings to dwell in society in harmony with normative cultural understandings (again, whether religious, moral, political, or a combination) without the former being beholden to particular versions of the latter.

Given the law's critical social vocation, it is no surprise that it makes such challenging demands of those appointed as its guardians, including through what is the last overarching theme of the tribute volume to Chief Justice McLachlin: Judicial Virtues.

The topic of judicial virtues is introduced in Chapter 18 (in SCLR Vol. 87) by Professor and Emeritus Dean Daniel Jutras. Through a broad preliminary inquiry into this theme, Professor Jutras first seeks an appropriate standard by which to assess judicial greatness. Rejecting as unsuitable or uninformative a number of putative standards of judicial greatness proposed in various literatures, Professor Jutras finds a useful perspective in the field of Virtue Ethics. Among these, the virtue of "practical wisdom" is the one he identifies as most closely connected to the specific role in society that we assign to judges. More precisely, the virtuous judge — and therefore the great judge — is one that manifests practical wisdom through exceptional skills of situational perception, deliberative imagination, and remedial discernment. Having thus elaborated a framework for evaluating judicial greatness, in the final part of the chapter Professor Jutras applies it to judging the Chief Justice's career. Examining her career through this lens, he argues that Chief Justice McLachlin demonstrated this elusive virtue of practical wisdom over her career as a Supreme Court justice. Her legacy should, accordingly, permit her to be remembered as a great judge.

Many of the judicial virtues that Beverley McLachlin was able to reap as a justice of the Supreme Court of Canada were sown in her prior career(s). In Chapter 19 (in SCLR Vol. 87), Professor DeLloyd Guth focuses on these formative careers: as student of law and philosophy, legal practitioner, professor, trial judge, appellate judge, and then Chief Justice of the trial courts in British Columbia. At each stage, he notes, she very deliberately and proactively carried with her the lessons learned and deployed the skills honed in prior stages. From her pre-SCC career, it is her time as a trial judge that makes for Guth the strongest impression, particularly in cultivating the necessary virtues of the trial judge as "legal historian": the evidence is a question of historical fact, and the law itself also a matter of historical (legislative) fact. This is not to say that they are objectively determinable, for as any historian, the trial judge-as-legal historian cannot directly access the past, but only reconstruct it with the associated creative element. In this, Beverley McLachlin excelled, quickly earning notice in the case reporters, and by those who read them — leading to her swift and repeated promotion up the judicial hierarchy. Meanwhile, the research-intensive nature of the trial judge's duties as legal historian forced the young Judge McLachlin to develop an array of other virtues that would typify her later extraordinary career as Chief Justice of Canada — efficient use of time, ethos of consultation, skill of decision, ability to separate the wheat from the chaff within the issues, disciplined management of information, and command over process.

In Chapter 20 (in SCLR Vol. 87), Dean Jean-François Gaudreault-Desbiens, Professor Noura Karazivan, and Vanessa Ntaganda tackle the question of judicial evolution. Recalling Beverley McLachlin's forceful defences of freedom of expression early in her tenure on the Supreme Court, they ask what can reconcile these with decisions late in her career where she wrote or joined judgments that accepted significant government restrictions of speech? Part of the answer, they suggest, is the evolution called for by her transition from puisne justice to chief justice. As puisne justice, she could flag intellectual points and make her mark dissenting from stable majority judgments. As chief justice, she was responsible rather for preserving the Court's public legitimacy by keeping it in synch with societal consensus on outcomes, and for preserving her institutional leadership capacity by choosing her battles. Moreover, the institution of the Court had itself evolved as a result of express aims of her leadership, including objectives to enhance internal consensus and external legitimacy. This, they suggest, may have

increased the weight of those considerations in her later decisions in cases involving extreme forms of speech.

From evolution of judge and court, the discussion moves in Chapter 21 (in SCLR Vol. 87) to evolution of the law. Professor James Goudkamp looks at the international influence of landmark decisions by Chief Justice McLachlin. Using examples drawn from Private Law, he demonstrates how they have resonated across the common law-world, thanks to virtues of deliberation in departing from precedent, a development-orientation with respect to addressing shortcomings of existing law (whether these be in social or analytical terms), and the lucid communication ability manifest in her written reasons. His first example is *Norberg v. Wynrib*,[38] where note was taken abroad of the link she perceived between Private Law and Criminal Law with respect to wrongdoing, through the significance of the label that the law attaches to the conduct. Next is her opinion in *Hall v. Hebert*,[39] clarifying a rationale justifying but restricting the long-confounding Tort doctrine of illegality. *Hall* has, as Professor Goudkamp describes, become so revered that, even in foreign jurisdictions where it has only persuasive value, its authority is nevertheless so formidable that judicial opinions inconsistent with it still lay claim to its support. Lastly, her judgment in *Bazley v. Curry*[40] has reshaped vicarious liability around the world, by digging beneath an indeterminate formal rule and excavating the policy principles underlying the law, thus allowing for more rational and consistent adjudication. From a methodological standpoint, Goudkamp sees this influence as reflecting the virtues of careful attention to academic commentary, Comparative Law, and an inclination to refine rules to reflect more directly and transparently the policy foundations that underpin them.

A volume full of tributes finishes, appropriately perhaps, with the virtue of humility, extolled in Chapter 22 (in SCLR Vol. 87) by Professor Benjamin Berger. As a judicial virtue, the picture of this quality that has been depicted elsewhere is incomplete, Berger submits, for it fails to encompass the occasions in which circumstances demand bold action rather than restraint. But how can such boldness represent humility? The answer, Berger explains, is that humility is rooted in acceptance of one's position and role in respect of what circumstances demand of the exercise of power, including the courage to act where one's responsibilities so require. This picture of humility as subordination or surrender of person to station in life

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38 [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.).
39 [1993] S.C.J. No. 51, [1993] 2 S.C.R. 159 (S.C.C.).
40 [1999] S.C.J. No. 35, [1999] 2 S.C.R. 534 (S.C.C.).

(here, judicial office) — at least in exceptional circumstances — is more familiar in religious literature, including the tales from the Talmud which Berger here relates. The chapter demonstrates how Chief Justice McLachlin has exemplified this virtue in her judicial career. At the same time, Berger argues that the McLachlin Court's deference in the area of police powers fell short by the standards of this judicial virtue. It could be ameliorated in that context, he contends, by more careful attention to judicial responsibilities in relation to factors of vulnerability, history, and the differing roles of other system-actors.

Following this series of essays, a Concluding section of the tribute volume to Chief Justice McLachlin incorporates supplementary contributions of special kinds (*i.e.*, other than essays), as well as some final reflections on the significance of Beverley McLachlin's career.

Chapter 23 (in SCLR Vol. 87), entitled "Chief Justice McLachlin In Her Own Words", contains diverse thoughts and comments bound to be of great interest to future scholarly research across the span of law-related inquiry. Following the format of an in-depth, wide-ranging, unedited substantive interview with Beverley McLachlin, the chapter avails access to the Chief Justice's own uncensored thoughts and views on several aspects of her career and legacy. Her reflections in this chapter are guided by the expert questioning of one of Canada's long-time and leading justice beat reporters, Kirk Makin.

Subsequent to the precious resource of this open and expansive retrospection by the Chief Justice, Chapter 24 (in SCLR Vol. 87), contains more valuable information for researchers. Authoritatively compiled by the Supreme Court of Canada, Tables A and B present, respectively, complete listings of all of Beverley McLachlin's judicial opinions and speeches during her time as a member of the Supreme Court.

Finally, in the final chapter of the book, Daniel Jutras and Jessica Michelin analyze and discuss in Chapter 25 (in SCLR Vol. 87) patterns they draw from an accompanying enhanced table of case data concerning the body of the Chief Justice's jurisprudence from her tenure as a Supreme Court justice. These patterns, it is hoped, may be of interest to future studies of the Chief Justice, the Supreme Court, or Canadian jurisprudence.

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Oxford, U.K.
August 2018