

BEVERLEY McLACHLIN

THE RIGHT HONOURABLE CHIEF JUSTICE, SUPREME COURT OF CANADA (retired)



PHOTO BY ROY GROGAN, COURTESY SUPREME COURT OF CANADA

A Remarkable Journey to the 'Centre Chair'

Beverley McLachlin, widely regarded as one of the best legal minds to take a seat on the Supreme Court of Canada, stood alone on stage at the Winspear Centre in Sidney, a quiet seaside town on Vancouver Island.

It was September 29, 2019, and the (now retired) Right Honourable Chief Justice of Canada was in Sidney to promote her crime novel, *Full Disclosure*, and her memoir, *Truth Be Told: My Journey Through Life and the Law*, both released in 2019. It was a crowded publication year. Canadian academics Ian Greene and Peter McCormick had also published *Beverley McLachlin, The*

Legacy of a Supreme Court Chief Justice earlier in the summer.

In her customary self-effacing style, McLachlin shared her thoughts about growing up in the 1940s and '50s on a ranch nestled in the shadow of the Rocky Mountains of Southern Alberta, and the judicial career she had never sought. Over an unprecedented nine-year period, one judicial appointment after another led McLachlin directly to the Supreme Court of Canada. Even then, she had not reached her peak. After 11 years as a *puisne* (associate) jurist, she became the first female chief justice of Canada. When she retired in

December 2017, she was the longest serving chief justice in the Court's history (17 years, 341 days).

But it was McLachlin's little story about gardening that offered insight into her personality and her remarks about the job of judging that pulled her audience forward in their seats.

One day, seeking solitude in the garden of her Ottawa home with trowel in hand, clothes a little soiled from planting lily of the valley, she heard a voice. The housekeeper from the residence next door introduced herself, mistaking her for the gardener. She wanted to know whether the chief jus-

tice of Canada really lived here. “Yes,” McLachlin replied. In a conspiratorial tone, the woman pressed on — “What’s she like?” McLachlin, replied with a slight smile: “She’s nice. She likes gardening, but she isn’t very good at it.”

Always gracious, but perhaps not a gardener, McLachlin has been described in similar ways by journalists, academics, colleagues, and perfect strangers — grounded, unaffected, witty, in touch with her roots and, of course, in command of a razor-sharp intellect.

McLachlin has frequently explained her approach to the adjudication process as she did in an interview published by the *National Post* newspaper in 2015, and repeated elsewhere:

What you have to try to do as a judge, whether you’re on Charter (of Rights and Freedoms) issues or any other issue, is, by an act of the imagination, put yourself in the shoes of the different parties, and think about how it looks from their perspective, and really think about it, not just give it lip service.

McLachlin was putting herself in the shoes of others long before she reached the judiciary. She grew up in modest circumstances as Beverley Gietz, the eldest of five children raised on a remote ranch near Pincher Creek — 135 miles south of Calgary and about 85 miles north of the Alberta-Montana border.

Devouring books on a wide range of subjects, roaming the rugged landscape on horseback thinking about what she had read, pulling her weight with endless chores on the ranch, boarding in town so she could finish high school in a classroom rather than by correspondence — all helped instill strong personal values.

Those years also taught lessons about the people around her — fam-

ilies struggling to make ends meet living on prairie and range lands in frozen winters and hot summers. She made enduring friendships with smart, forward-thinking students from the nearby Piikani First Nation Reserve, a Treaty Seven member-nation of the Blackfoot Confederacy. They gave her insight into indigenous rights issues that would surface decades later in the Supreme Court of Canada.

Along with academic achievement and an astounding work ethic, those early years on the ranch fostered an enduring independence and pragmatism that contributed to her success. If

McLachlin had a flat tire on a remote country road, she would be more likely to pop the trunk and grab a tire iron than call for help.

McLachlin described herself as an “ordinary girl” during her high school years. But it soon became apparent that there was nothing ordinary about the girl from Pincher Creek.

After finishing high school at the top of her class, she travelled north to the University of Alberta in Edmonton. She planned to earn a bachelor’s degree in philosophy and languages, as well as a master’s degree and a PhD, and then secure a position as a university professor. Some of that happened. But the twists and turns of life change even well-crafted plans often unexpectedly, quickly, and dramatically.

In McLachlin’s case, those twists and turns led her away from a long academic career. Awarded a bache-

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lor’s (honours) degree in philosophy and languages in 1965, she was poised to begin the master’s degree in philosophy when she suddenly faced an unexpected decision.

Her future spouse, Roderick (Rory) McLachlin, a biologist, raised another prospect — “Have you thought about becoming . . . a lawyer?” Her logical, analytical mind was certainly suited to it. The question prompted discussions about the similarities between law and philosophy. Both had a good deal to do with moral questions about responsibility and issues linked to authority and power, guilt and innocence, consequences and accountability.

McLachlin did not leap at the idea. Instead, she sent a letter to the law school at the University of Alberta with a question — “What is involved in the study of law?” She received a reply in less than a week. Wilbur Bowker, ►



She soon found herself caught up in the full range of cases heard in the appellate court as well as something new — interpreting the Canadian Charter of Rights and Freedoms. The Charter became a key part of the Canadian constitution in 1982 and guarantees fundamental freedoms and democratic rights as well as mobility, equality, and language rights.

dean of law, a luminary in Canadian legal circles, and obviously aware of her undergraduate standing, did not answer her question. Instead, he sent a congratulatory message. She would soon answer the question herself — Dean Bowker admitted her as one of only seven women law students in a class of 65 students. Unwilling to completely abandon prior plans, she spent the summer before law school (and thereafter) working on her master's degree in philosophy.

Three years later, she emerged as the gold medallist of her law class — awarded to the student with the highest academic standing — with both

a law degree and the master's in philosophy conferred at the same convocation. It was 1968.

Beverley Gietz and Rory McLachlin had married the summer before she started third year. With law degree in hand, the bias against women in the legal profession — especially married ones — suddenly loomed large. One law firm didn't even offer articles of clerkship — the mandatory prerequisite to Bar admission — to married women. Another firm hired her, but she had to share an office with a first-year female associate. Male articling students had their own offices.

McLachlin was admitted to the Alberta Bar in 1969, the same year Rory earned his master of science degree. Two and a half years later, they left Edmonton and moved to Fort St. John, in Northern British Columbia, where Rory engaged in forestry field work. A few years later, they moved to Vancouver so

McLachlin could find more challenging legal work and Rory could pursue his PhD. She joined the leading law firm, Bull Housser & Tupper, and in 1974, McLachlin accepted a position at the University of British Columbia law school. Her dream of academia was finally fulfilled. She taught evidence and contracts but continued to do work with the law firm.

Another life-altering change came with the birth of her son Angus in 1976. With all that was swirling around her, her capable husband took on much of the childcare.

Four years later, a chance encounter changed her life again. She arrived

early for a law faculty-sponsored reception at UBC to discover another early attendee — the Chief Justice of the British Columbia Supreme Court, Allan McEachern. After chatting for a time, the Chief Justice asked her a question that sounded familiar — “Have you thought about becoming . . . a judge?” Her answer: “Never.” Chief Justice McEachern's question amounted to the “tap on the shoulder” then used to identify candidates for judicial appointment. Prime Minister Pierre Trudeau and Federal Justice Minister Jean Chrétien (later Prime Minister) were alert to the need for more women in the federal judiciary. She accepted an appointment to the intermediate-level Vancouver County Court. She was 37 years old. After just five months, Chrétien called again with an elevation in mind. McLachlin was sworn in to the Supreme Court of British Columbia in September 1981 as a superior court trial judge. She was now sitting on a constitutionally endowed court with both inherent and statutory jurisdiction.

Four years later in 1985, she achieved another elevation — she became the first woman appointed to the British Columbia Court of Appeal, the province's highest court. She soon found herself caught up in the full range of cases heard in the appellate court as well as something new — interpreting the Canadian Charter of Rights and Freedoms. The Charter became a key part of the Canadian constitution in 1982. It guarantees fundamental freedoms and democratic rights as well as mobility, equality, and language rights, all “subject only to such reasonable limits prescribed by law as can be demonstrated in a free and democratic society.” Legal challenges to the actions of the federal and provincial governments were now winding their way to the highest courts.

But when Conservative Prime Minister Brian Mulroney called McLachlin in 1988 offering her the position of Chief Justice of the Supreme Court of British Columbia, she turned it down. Her husband Rory was gravely ill with cancer. Once again, he influenced her career with sound advice: “take it.” She took it. Tragically, Rory died two days after her swearing in ceremony. He was 47 years old.

McLachlin was now on everyone’s radar for judicial advancement. A year after she left the Court of Appeal to return to the province’s superior trial court as its chief justice, her career moved in another direction. When Justice William McIntyre retired from the Supreme Court of Canada, Prime Minister Mulroney called again. She accepted the appointment as McIntyre’s replacement and settled in quickly. In 1992, she married lawyer Frank McArdle. Often described as a true gentleman with a lot of style, he proposed over the intercom on an Air Canada flight between Ottawa and London.

Eleven years later, McLachlin received another call from Chrétien, now the Prime Minister. On January 7, 2000, she was sworn in as the first female chief justice of Canada. McLachlin’s judicial career had moved along with appointments made by Prime Ministers representing both major political parties — the Progressive Conservatives and the Liberals — with merit and suitability of the appointments squarely at the forefront.

McLachlin had arrived on the bench in the early 1980s, a time when Charter issues were starting to flourish in the courts. By the time she arrived at the Supreme Court of Canada, some cases followed her there. Charter challenges arise in one of two ways — litigation over the constitutionality of legislation

affecting individuals, or as Reference cases. “References” represent the majority of constitutional law cases and arise from the Special Jurisdiction accorded to the Court in 1875. Special Jurisdiction means that the Court can hear issues that do not arise from legal disputes in the ordinary course, but have national importance. References almost always come from federal and provincial governments seeking an opinion on the constitutionality of proposed or existing legislation. If the legislation is unconstitutional, the referring government redrafts the legislation in the interests of passing laws not doomed to fail.

McLachlin found herself in an awkward position in 1993 when the Supreme Court was called upon to consider a challenge to the assisted suicide prohibition of the Criminal Code of Canada. When Rory McLachlin was ill with cancer, he had asked his wife to assist him in ending his life. She had declined. Later when the issue of assisted suicide arose in the Court, McLachlin asked then-Chief Justice Antonio Lamer whether she should recuse herself. In their discussions, he pointed out that judges are expected to bring real life experiences to their work.

The Court’s 5-4 majority decision in *R. v. Rodriguez* upheld the prohibition against assisted suicide based on the potential for abuse of vulnerable members of society, among other things. McLachlin penned her dissent based on the wording of the Criminal Code provision that she noted made the prohibition arbitrary — a physically able person could, by law, commit the non-criminal act of suicide, but a disabled person could not commit the same act for the same reasons but with assistance.

McLachlin, the only justice hearing *Rodriguez* still on the Court in 2015,

now considers her dissent a segue to the Court’s decision in *Carter v. Canada*, which decriminalized physician-assisted suicide. The Medical Assistance in Dying Act followed the Court’s decision. It provides a national framework that gives legally-eligible patients the option of dying with dignity in prescribed circumstances. The Supreme Court decided that there was an abundance of evidence from other jurisdictions in the intervening 22 years between *Rodriguez* and *Carter* that protections for the vulnerable had been proven effective.

Later in her time as chief justice, McLachlin found herself face-to-face with a hot-button political issue arising from Prime Minister Stephen Harper’s public attack on the judiciary.

Harper was said to have been seeking a more conservative voice on the Court. His opportunity came when one of the Court’s three mandatory Québec seats came open. The question was whether his nominee, Marc Nadon, had the requisite “recent legal experience with Québec civil law.” The requirement reflects the differences between the French civil law of Québec and the English common law that applies in the rest of Canada.

The nominee had practised navigation and transportation law for twenty years before he joined the Federal Court of Appeal, a national regulatory court that hears no Québec civil law. An Ontario lawyer filed a Charter challenge on the same day that Marc Nadon took his oath of office. The Québec government as well as the Québec Bar Association representing the province’s 28,000 lawyers launched a separate challenge to the appointment. Harper invoked the Court’s Special Jurisdiction to hear a Reference case and sought an opinion from the Supreme Court. ►

The Court ruled that Harper's nominee failed to meet the Québec practice requirement and declared the appointment invalid. The two remaining Québec judges on the Supreme Court supported the decision.

Harper's reaction was swift and unprecedented. He accused the Chief Justice of interfering in the judicial selection process and associated litigation claiming that she had contacted his office essentially to lobby against the Nadon nomination.

His conduct stunned the legal and academic communities and angered Canadians. As is her right, McLachlin had alerted the government to the eligibility issue that arose from the government's own list of prospective nominees provided to her office in a communication that predated any legal challenge and — as she explained in an interview after her retirement from the Court — even Nadon's nomination.

However, McLachlin's measured approach and strong defence of both the reputation of the Court and judicial independence prevailed. Four previous prime ministers (from both sides of the House of Commons), joined the groundswell of support for the Chief Justice, condemning what was widely perceived as Harper's attack on judicial independence and the Chief Justice's integrity. Following an investigation by the International Commission of Jurists in Geneva, the Prime Minister and his Justice Minister were sharply censured for their conduct. The incident highlighted the fact that the Charter granted the Supreme Court of Canada the power of oversight of the government and the civil rights of Canadians.

Despite her crowded work schedule, McLachlin rarely missed opportunities to speak with law students about the challenges ahead for them. Her

messages were clear — the law is not the preserve of judges or lawyers. It is the preserve of the people of Canada. Judicial rulings must be sensitive to consequences and judges must give some thought to how they are going to play out.

As Chief Justice, McLachlin also worked hard to achieve greater consensus in decision-making on a Court where multiple decisions in a single case had been routine. The Court's "univocal" decisions reportedly prevailed 57 percent of the time compared to 42 percent before her time as chief justice. McLachlin has attributed her success to encouraging lively debate, respectful discussions, and open minds.

In their book on Chief Justice McLachlin's legacy, Greene and McCormick succinctly capture her contribution to Canada:

It is evident that McLachlin has put a good deal of energy, thought and analysis into her decisions. She has advanced democratic rights by extending the franchise to prisoners. She has helped advance Aboriginal rights and ensure that Charter rights are protected for the most vulnerable in society, including those suffering from debilitating diseases, those accused of terrorism, sex workers, those addicted to hard drugs, and prisoners. Overall, she has been a strong defender of equality. She is Canada's "reasonable person," imagined by jurisprudence.

Prime Minister Justin Trudeau reflected the thoughts of many Canadians in his congratulatory message to the chief justice on her retirement in December 2017:

Chief Justice McLachlin remained grounded and down-to-earth

despite her meteoric rise through the judiciary since first being named to the bench in 1981. She understood that the law had to be meaningful and accessible to Canadians, and demonstrated this through judicial decisions written in clear, understandable language. She also appreciated the need for the law to evolve to respond to the needs of a changing society, and knew that, for public trust to be maintained, the law and the judiciary had to be relevant to the people they serve.

Indeed, McLachlin's leadership from the "centre chair" throughout her years as the first female Chief Justice of Canada has earned her the respect and gratitude of all Canadians.

Note: *I am indebted to the work of Ian Greene and Peter McCormick, Beverley McLachlin, The Legacy of a Supreme Court Chief Justice, published by James Lorimer & Company Ltd., Toronto (2019); McLachlin's personal memoir (a first for a Chief Justice of Canada): Truth Be Told, and her novel, Full Disclosure, both published by Simon & Schuster Canada in 2019, and the many magazine and newspaper offerings published throughout McLachlin's long career.*



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