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## Reflecting on a Legacy

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# Reflecting on a Legacy

Jamie Cameron\*

Bertha Wilson’s journey was storied, if unlikely in certain ways. She was the Scottish minister’s wife who immigrated to Canada and many years later became the first woman to sit on the Supreme Court of Canada. She arrived at the Court momentarily, in time to witness the historic repatriation of Canada’s Constitution and enactment of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> Bertha Wilson was not impelled to law school in the 1950s by focus or ambition, nor did she aspire to the judiciary. She did not seek out the powers and responsibilities of judicial office, but was chosen for public service. Yet if she found judicial decision-making lonely, it was also a source of immense fulfillment for her: first at the Ontario Court of Appeal and then at the Supreme Court of Canada, where she was, truly and quintessentially, a “faithful steward of the law”.<sup>2</sup>

Bertha Wilson reported being daunted — and humbled — by the hopes and expectations that were prompted by her judicial appointments, and she spoke, too, of the apprehension she and others felt at being called upon to interpret the Charter. If Justice Wilson was intimidated by the challenges she faced at the Supreme Court of Canada, there is little

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\* Professor, Osgoode Hall Law School and Editor, *Reflections on the Legacy of Justice Bertha Wilson*. I am honoured to be the editor of this collection and would like to thank all those who have worked with me on this tribute to the late Bertha Wilson. I am grateful to each one and especially to those who set other work aside or otherwise found the time to write a paper because it was important, for personal or academic reasons, to participate in this collection. I would also like to thank Chief Justice McLachlin and Justice MacPherson for their valuable contributions to this collection. Finally, I would like to thank LexisNexis for approaching me and asking me to edit a tribute to Bertha Wilson; in particular, I thank Bernard Sandler for supporting and promoting the project with unfailing enthusiasm, courtesy and professionalism, and Suzanne Akehurst for leading the editorial team.

<sup>1</sup> Bertha Wilson was appointed to the Supreme Court of Canada in March 1982 and sworn in on March 30, 1982; the *Constitution Act, 1982* and *Canadian Charter of Rights and Freedoms* were enacted on April 17, 1982; see Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

<sup>2</sup> At the time, she declared herself “a true servant of the law” and expressed her trust that “within the collegial structure of this national Court I can be a faithful steward of the best of our legal heritage”; “Response of Madame Justice Wilson”, Swearing-in at the Supreme Court of Canada (March 30, 1982), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 15, at 18 [hereinafter “*Wilson Speeches*”].

evidence of it in her jurisprudence. In a relatively short period of time — from 1982 to early 1991 — she generated a body of jurisprudence that is distinctively Wilsonian. This body of work, along with the leadership roles she assumed in post-judicial assignments, has made her an icon of Canadian law.<sup>3</sup>

Events would determine that Justice Wilson could not simply be a judge, a woman judge, or even the first woman judge at the Supreme Court of Canada. Rather, she was remade in the image of those who sanctified her as a feminist and activist, or demonized her for similar reasons. While many were quick to claim and applaud her as a feminist judge, she was too feminist for some and not feminist enough for others. To be feminist in any way or at all reflected negatively — in certain quarters — on perceptions of Justice Wilson's capacity to decide cases impartially. In addition, she was seen by some as a judicial activist — one who inappropriately promotes the powers of courts by substituting subjective preferences for the policy choices of democratically elected representatives. Her Charter decisions were resisted by those who harboured doubts about the wisdom of adopting constitutional rights and fretted about the Charter's consequences for Canada's tradition of parliamentary supremacy.

Formal and reserved, Justice Wilson was “not exactly modest”, but neither did she call attention to herself.<sup>4</sup> In her Scottish way, she projected “a strenuous dignity and control, a sort of refusal ... to feel any need to turn [her] life into a story, either for other people or for [herself]”.<sup>5</sup> Though she resisted the labels she considered unfair — labels that did not reflect who she thought she was or who she wanted to be — the perceptions which define her image have been persistent. As she once remarked, “[w]e tend to see what we want to see and our perceptions are coloured accordingly.”<sup>6</sup>

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<sup>3</sup> Bertha Wilson was Chair of the Canadian Bar Association's national Task Force on Gender Equality, which produced the “Touchstones” Report: *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993). She also served, tirelessly, as a Commissioner on the Royal Commission on Aboriginal Peoples (1991-96); the Report of the Royal Commission on Aboriginal Peoples, which was issued in November 1996, comprised five volumes spanning some 4,000 pages.

<sup>4</sup> Alice Munro, “No Advantages”, in *The View From Castle Rock* (Toronto: McClelland and Stewart Ltd., 2006), at 20 (explaining that “self-dramatization” got short shrift in the families of her Scottish ancestors, and was frequently and explicitly discouraged as a result).

<sup>5</sup> *Id.*

<sup>6</sup> “Guaranteed Freedoms in a Free and Democratic Society — A New Role for the Courts?” — Address to the 22nd Australian Legal Convention (July 1983), in *Wilson Speeches*, *supra*, note 2, 100, at 111.

Already Justice Wilson has been the subject of a biography,<sup>7</sup> an academic symposium<sup>8</sup> and much commentary.<sup>9</sup> Yet she fascinates us still. It may be that “[t]here are some stories which have to be retold by each generation ... because of some queer quality in them which makes them not only [that person’s] story but our own.”<sup>10</sup> Hers are the stories — the challenges, victories and defeats — of a generation of women in the profession, not to mention activists and scholars, and men as well as women, who came of age when Wilson and the Charter arrived at the Court. “The instability of human knowledge is one of our few certainties” — lives are changed in retrospect, and “almost nothing we are told remains the same when retold.”<sup>11</sup> In Justice Wilson’s case, the positions which were once staked so forcefully may be less compelling today, and may have lost some of their sting.

This collection offers diverse reflections on Bertha Wilson’s legacy by a strong and diverse group of scholars which includes some of her law clerks.<sup>12</sup> The contributors are a deliberate mix of men and women from different generations, who work in different fields of law and approach her legacy from distinctive perspectives. Though these reflections take the form of a tribute to Justice Wilson, who died in April 2007, the authors are aware of the tendency for biographical and legacy scholarship to treat its subject as a “faultless hero”.<sup>13</sup> As Felix Frankfurter once observed, in commenting on the praise of famous men, “[i]t is for our sake that we are to praise them, for ... they have given us

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<sup>7</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001) [hereinafter “*Judging Bertha Wilson*”].

<sup>8</sup> See “The Democratic Intellect: A Symposium to Honour the Contributions of Madame Justice Bertha Wilson” (1992) 15 Dal. L.J.

<sup>9</sup> For a critical analysis of Justice Wilson’s legacy, see Robert E. Hawkins & Robert Martin, “Democracy, Judging and Bertha Wilson” (1995) 41 McGill L.J. 1.

<sup>10</sup> Hermione Lee, *Virginia Woolf* (United Kingdom, Vintage, 1996), at 769 (quoting Woolf, discussing Shelley).

<sup>11</sup> Janet Malcolm, *Gertrude and Alice* (New Haven: Yale University Press, 2007), at 186.

<sup>12</sup> Former clerks who are contributors include Philip Bryden (1984-85), Tanya Lee (1987-88), Kent Roach (1989-90), and Robert Yalden (1990 and 1991).

<sup>13</sup> Philip B. Kurland, “Judicial Biography: History, Myth, Literature, Fiction, Potpourri” (1995) 70 N.Y.U. Law Rev. 489, at 500 (Symposium on Judicial Biography). See also Jamie Cameron, “In the Shadow of the Truth: Bertha Wilson and the Challenge of Legacy Scholarship” [unpublished paper on file with the author, presented at the international conference, “Law and Society in the 21st Century: Transformations, Resistance, Futures”, Humboldt University, July 26, 2007].

an ‘inheritance’.”<sup>14</sup> And as Hugo Black noted, “[t]o be wholly neutral, [for instance] in discussion of slavery, would probably be rather boring.”<sup>15</sup> The articles in this collection are not especially critical of Justice Wilson, but nor are they unguarded in praise of her contributions. Each seeks, in its own way, to do “justice to [her] achievements without obscuring [her] complexities”.<sup>16</sup>

These reflections do not offer commentary on all aspects of Justice Wilson’s professional life, nor is the treatment of her Supreme Court jurisprudence comprehensive. The collection considers the nature of her contributions to family law, torts and criminal law, as well as to administrative law and the *Canadian Charter of Rights and Freedoms*. More vital than what the authors say about Justice Wilson’s influence on legal doctrine are their ideas about her conception of judicial role and how she impressed her views of what justice requires on the Court’s jurisprudence, across a range of issues.

Looking at the nature and scope of Justice Wilson’s body of work is an obvious starting point, and the collection offers an invaluable “empirical snapshot” of her jurisprudence. In “Voicing an Opinion” Marie-Claire Belleau, Rebecca Johnson and Christina Vinters count cases and provide graphs which sort Justice Wilson’s judicial work by the type of opinion she wrote (*i.e.*, unanimous, majority, dissenting, partially dissenting, concurring) and her method of participation (*i.e.*, signing versus authoring an opinion).<sup>17</sup> Their empirical work is enriched, in a second part of the article, by their analysis and reflections on points of institutional ethnography, which probe the meaning and significance of voice, authorship and collaboration in the production of judicial opinions. “Voicing an Opinion” is complemented by a table of cases, which appears as an appendix, and provides a coded chart of Justice Wilson’s decisions by year.<sup>18</sup>

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<sup>14</sup> Quoted in Kurland, *id.*, at 498 (stating, in full that “[i]t is not an exhortation for a gesture of pietistic generosity, the placing of verbal flowers on the graves of famous men. It is for our sake that we praise them, for, as Ecclesiasticus added, they have given us an ‘inheritance’. We commune with them to enlighten our understanding of the significance of life, to refine our faculties as assayers of values, to fortify our will in pursuing worthy ends”).

<sup>15</sup> J. Woodford Howard, Jr., “Objectivity and Hagiography” (1995) 70 N.Y.U. Law Rev. 533, at 547.

<sup>16</sup> Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (United Kingdom: Oxford University Press, 2004), at xix (speaking of Hart).

<sup>17</sup> Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, “Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson” (2008) 41 S.C.L.R. (2d) 53.

<sup>18</sup> See “Appendix A” (2008) 41 S.C.L.R. (2d) 409, prepared by Marie-Claire Belleau, Rebecca Johnson, Christina Vinters and Andrew Tomilson.

Bertha Wilson's relationship with feminism is a vital part of her legacy which invites further examination and discussion. Justice Wilson signalled her ambivalence in 1985 when, in the first interview she ever granted, she described herself as a "moderate feminist", before adding that she had "little patience with feminists who demand that she use her position on the court to battle for women's rights".<sup>19</sup> Sternly, she announced that "if I went around making speeches and displaying a bias it would make me completely useless as a judge".<sup>20</sup> Ironically, the very allegation which was unimaginable to her — that she was biased because of her feminism — would repeatedly be made against Justice Wilson, at formal and informal levels, in the years that followed. Against the weight of consensus, and for reasons that remain unknown, late in life Bertha Wilson was moved to disclose — through her biographer — that she was not a feminist at all.<sup>21</sup>

Because it was so incontrovertibly assumed that she was a feminist, Justice Wilson's disavowal came as a surprise and presented a puzzle. Mary Jane Mossman's article, "'Contextualizing' Bertha Wilson" provides an analysis that might explain, in part, why Justice Wilson was uneasy with feminism, and unwilling to embrace it.<sup>22</sup> In exploring how women like Bertha Wilson coped in a profession that set so many barriers for women, Mossman concludes that to succeed in the profession it was necessary for Justice Wilson and her proximate contemporaries to take ungendered stances: to insist on being a lawyer rather than a woman lawyer. By doing so, they positioned themselves for advancement at a time when the "gatekeepers" were under pressure to appoint women to the judiciary. Constance Backhouse continues the discussion of Justice Wilson's feminism by examining the role of self-identification in considering who is or is not a feminist. She shows that much in Bertha Wilson's career was influenced by feminism, that she advanced women's rights in important ways and that she promoted opportunities for women in the profession. Backhouse concludes that "it would be a mark of the greatest respect to identify Justice Bertha Wilson

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<sup>19</sup> Quoted in Sandra Gwyn, "Sense and Sensibility", *Saturday Night*, July 1985, at 19.

<sup>20</sup> *Id.*

<sup>21</sup> Anderson, *Judging Bertha Wilson*, *supra*, note 7, at 134 and 135-36 (stating that Wilson was "avowedly not a feminist", and "most emphatically does not consider herself to be a feminist").

<sup>22</sup> Mary Jane Mossman, "'Contextualizing' Bertha Wilson: Wilson as a Woman in Law in Mid-20th Century Canada" (2008) 41 S.C.L.R. (2d) 1.

as a feminist, both as a tribute to her legacy and as a tribute to the feminist movement itself.”<sup>23</sup>

As mentioned above, Justice Wilson’s activism has been so controversial over the years that it is almost legendary in status. From that perspective, it is striking that several articles independently come to the conclusion that her approach to decision-making was fundamentally pragmatic — in the sense of being informed by a perceptive awareness of the limits of the law and of the need for judges to address the dynamics of change with sensitivity and humility. For instance, Colleen Sheppard finds significant evidence of feminist pragmatism in her jurisprudence: an approach that combined Justice Wilson’s pragmatic awareness of context and the constraints of social realities with the commitment to equality which is at the heart of feminist theory.<sup>24</sup> As Sheppard explains, Justice Wilson’s “awareness of the imperfect choices at the heart of judging prompted her to insist that we be vigilant in continuing to question, to reconsider, to seek to develop the law to create and recreate moments of justice in a constantly changing world”.<sup>25</sup> From a less explicitly feminist perspective, Kate Sutherland focuses on the roles of precedent, principle and pragmatism in Justice Wilson’s torts jurisprudence and reaches similar conclusions. For her, Justice Wilson cannot be easily characterized, though her nuanced and contextualized liberalism — which blended principle with pragmatism and infused autonomy with equality — makes her a “cautious optimist about the progressive potential of tort law”.<sup>26</sup>

Some contributors, like Robert Leckey and Philip Bryden, take a longer view of Justice Wilson’s work in particular areas. In “What Is Left of *Pelech*?”, Leckey challenges the standard critique of the *Pelech* trilogy, which is offered by feminists, in the main — that her opinions inappropriately privatized the family — for obscuring the trilogy’s important public dimensions.<sup>27</sup> The dynamics of the *Pelech* debate and

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<sup>23</sup> Constance Backhouse, “Justice Bertha Wilson and the Politics of Feminism” (2008) 41 S.C.L.R. (2d) 33, at 52.

<sup>24</sup> Colleen Sheppard, “Feminist Pragmatism in the Work of Justice Bertha Wilson” (2008) 41 S.C.L.R. (2d) 83.

<sup>25</sup> *Id.*, at 101.

<sup>26</sup> Kate Sutherland, “Precedent, Principle and Pragmatism: Justice Wilson and the Expansion of Canadian Tort Law” (2008) 41 S.C.L.R. (2d) 131.

<sup>27</sup> Robert Leckey, “What Is Left of *Pelech*?” (2008) 41 S.C.L.R. (2d) 103 [hereinafter “Leckey”]. See *Pelech v. Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.); *Richardson v. Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 (S.C.C.); and *Caron v. Caron*, [1987] S.C.J. No. 32, [1987] 1 S.C.R. 892 (S.C.C.).

the rapid re-conceptualization of family relations in recent years speak to Leckey of larger themes which engage “the uncertainties of legal judgment, the variability of the conditions in which texts are read and interpreted, and the complexity and unpredictability of the life of ideas”.<sup>28</sup> In the end he reminds us that, although she was surely criticized at the time, Justice Wilson was “soberly aware”, in her pragmatic wisdom, of “the limits on the powers of judges and lawyers to remake the world”.<sup>29</sup>

Likewise, Philip Bryden draws on Bertha Wilson’s concurrence in *National Corn Growers Assn. v. Canada (Import Tribunal)* to provide a retrospective comment on her contributions to administrative law.<sup>30</sup> He does not identify *Corn Growers* as a highlight in her judicial career or claim that she provided a “fully satisfactory” view of judicial review of decision-making by administrative tribunals.<sup>31</sup> Rather, Bryden’s detailed analysis of administrative law from *Corn Growers* to the present shows how the Wilson concurrence retains vitality, as a source of debate. Bryden regards this as a testament to “the power of her expression of her insights” and concludes that for fostering debate — in administrative law as well as in other areas of law — Canadians “owe her a profound debt of gratitude”.<sup>32</sup>

Bertha Wilson had no experience of criminal law before being appointed, and readily voiced her uncertainty in addressing questions of criminal responsibility. Nonetheless, she generated an impressive body of decisions at the Supreme Court, in Charter and non-Charter settings, which were highly protective of the accused’s interests on matters of substantive and procedural law. Benjamin Berger explores this aspect of her legacy from the perspective that criminal judgment has always been a fearful event.<sup>33</sup> For that reason, he says that we should want judges who are seized with a keen sense of the limits and consequences of the criminal law: judges who bring a due measure of fear to the task and tremble at the moment of judgment.<sup>34</sup> His article explains why Justice

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<sup>28</sup> Leckey, *id.*, at 128.

<sup>29</sup> *Id.*, at 129.

<sup>30</sup> [1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324 (S.C.C.). Philip Bryden, “Justice Wilson’s Administrative Law Legacy: The *National Corn Growers* Decision and Judicial Review of Administrative Decision-Making” (2008) 41 S.C.L.R. (2d) 225.

<sup>31</sup> *Id.*, at 262.

<sup>32</sup> *Id.*

<sup>33</sup> Benjamin L. Berger, “A Due Measure of Fear in Criminal Judgment” (2008) 41 S.C.L.R. (2d) 161.

<sup>34</sup> *Id.*, at 165.



Wilson was such a judge. In discussing some of her best-known decisions, Berger describes her as a judge “who is palpably aware of the complexities of the lives that appear before her in a criminal case, [of] the violence of the criminal law, and [of] the consequent ethical imperative to proceed with caution and humility”.<sup>35</sup> He concludes that her responses — “rich with a sense of the need for caution and humility in the use of the criminal law” — are “an ethical resource to which we can turn and a voice of conscience that we ought to heed”.<sup>36</sup>

Kent Roach also writes about Justice Wilson’s contributions to the criminal law, but draws as well from Charter jurisprudence in characterizing her as a classically liberal judge.<sup>37</sup> Without discounting her work on behalf of women or her compassion for the disadvantaged, he singles out “steadfast commitment to the principles of classical liberalism that protected individuals in all their individuality from the state” as Justice Wilson’s most distinctive and important contribution.<sup>38</sup> Roach ends on a note of regret that that so few judges today are willing — especially on questions of criminal responsibility — to follow in the footsteps of a woman who served “as a principled conscience for liberal values that are an important part of our heritage”.<sup>39</sup>

Bertha Wilson had the privilege of sitting on the Court when the Charter arrived, and she addressed the task of Charter interpretation with vigour, conscience and painstaking care. Tanya Lee’s discussion of Charter interpretation in the early years recaptures the sense of the moment — the excitement, trepidation and uncertainty of decision-making when “everything was unknown and anything was possible”.<sup>40</sup> Lee offers an extensive review of the challenges the Court faced as well as the choices that had to be made, at the level of interpretation, in pivotal cases. Lee’s overview of this critical period in the Charter’s early history isolates and underscores the vital role Justice Wilson played in creating a framework of analysis for adjudication.

Meanwhile, Robert Yalden singles out a few significant decisions to offer an insider’s perspective on Justice Wilson’s approach to decision-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 190 and 192.

<sup>37</sup> Kent Roach, “Justice Bertha Wilson: A Classically Liberal Judge” (2008) 41 S.C.L.R. (2d) 193.

<sup>38</sup> *Id.*, at 222.

<sup>39</sup> *Id.*, at 223.

<sup>40</sup> Tanya Lee, “Justice Wilson and the Charter: An Engagement to Keep” (2008) 41 S.C.L.R. (2d) 263, at 264.

making.<sup>41</sup> Rather than join issue on the question of her activism, he presents a “more textured discussion” which shows how conscious Justice Wilson was of the constraints of her role and how unremittingly methodical she was with each and every decision. As he explains, Bertha Wilson put “extraordinary pressure” on herself and her clerks to prepare judgments that set out analytic tools that would provide useful guidance in subsequent decisions. Yalden’s account of his clerking experience not only provides insights into key decisions but also attests, in endearing but dispassionate terms, to the work ethic and professionalism of Justice Wilson’s chambers.

Adam Dodek considers Justice Wilson’s approach to the relationship between rights and their limits in an article he titles, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights”.<sup>42</sup> He makes the perceptive — if heretical — suggestion that Justice Wilson’s conception of the Charter was originalist in a certain way, in being rooted in the events of 1980-82 and the democratic choice that was made to create constitutional rights enforced by judicial review. Dodek shows how Justice Wilson made sense of a structural framework that created an analytical separation between the Charter’s rights and freedoms, and their reasonable limits under section 1. Section 1 and the *Oakes* test are the centrepiece of an article which concludes that Justice Wilson fulfilled her duty as she saw it — “fidelity to the strictness of the *Oakes* framework which she believed correctly encapsulated the transformative purpose of the Charter project”.<sup>43</sup> Dodek muses that her jurisprudential outlook serves as a reminder of “what the Charter’s destiny might have been and perhaps what is still possible one day”.<sup>44</sup>

Jamie Cameron’s article is the last in the collection. She finds it striking that Justice Wilson, who spoke predominantly from the minority position, came to exercise tremendous influence over the Charter’s interpretation.<sup>45</sup> Her discussion explores the power of certain concurring opinions but comments, as well, on how utterly unique Justice Wilson

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<sup>41</sup> Robert Yalden, “Working with Bertha Wilson: Perspectives on Liberty, Judicial Decision-Making and a Judge’s Role” (2008) 41 S.C.L.R. (2d) 297.

<sup>42</sup> Adam M. Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights and Their Limits” (2008) 41 S.C.L.R. (2d) 331.

<sup>43</sup> *Id.*, at 370.

<sup>44</sup> *Id.*

<sup>45</sup> “Justice in Her Own Right: Justice Bertha Wilson and the *Canadian Charter of Rights and Freedoms*” (2008) 41 S.C.L.R. (2d) 372.

was as a judge. Despite disagreeing with many of her substantive positions, Cameron admires Justice Wilson for having the courage and the will to “act singly” whenever she thought there was a point of principle at stake. For Cameron, the hallmark of Justice Wilson’s legacy is that she was, at all times and without reservation, a justice in her own right.

Whatever their tenure may be, all justices of the Supreme Court of Canada have a legacy. That said, some legacies are more storied, more serendipitous, more timely, than others. For the reasons that are explored in this volume, Justice Wilson’s legacy is especially rich. As Tanya Lee put it so simply and yet so well: Bertha Wilson had an engagement to keep with history. The reflections we offer in this collection are not definitive: Justice Wilson’s place in history will be understood in different ways, at different points and places in time, by different commentators.<sup>46</sup> In these pages we have reflected on Bertha Wilson’s legacy as thoughtfully, faithfully and honestly as possible; we hope, within the limits of our understanding, that we have done justice to her memory in this collection.

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<sup>46</sup> See also Kimberley Brooks, editor, *One Woman’s Difference: The Contributions of Justice Bertha Wilson* (forthcoming, U.B.C. Press).