Justice Bertha Wilson and the Politics of Feminism

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I. INTRODUCTION

Madam Justice Bertha Wilson’s biographer, Ellen Anderson, was adamant that the first woman appointed to the Canadian Supreme Court was not a feminist. Anderson makes the point in her book, *Judging Bertha Wilson: Law as Large as Life*, on the second page of the preface, and no fewer than three additional times in the book, noting that Justice Wilson “declines to identify herself as a feminist”, does “not consider herself a feminist”, was “avowedly not a feminist”, and finally that she “most emphatically does not consider herself a feminist”.1 Interestingly, none of these statements is a direct quote from Justice Wilson. Anderson herself is no fan of feminists — whom she describes as “confrontational” and “fervent” — or indeed of feminism, which she characterizes as given to “simple-minded dichotomies”, “self-righteous certainty” and “feminist rant”.2 In a previous publication, I expressed some concern over whether Anderson’s own anti-feminism impeded her ability to undertake an accurate assessment of Justice Wilson’s relationship with feminism.3 It is no longer possible to question Justice Wilson directly regarding her position on feminism. However, I have since had an opportunity to speak with Madam Justice Claire L’Heureux-Dubé, who served on the bench for many years with Justice Wilson, after she became the second woman appointed to the Supreme Court of Canada.
Justice L’Heureux-Dubé confirmed that Justice Wilson never self-identified as a feminist.4

The politics of feminism and the self-referential label “feminist” have long had an uneasy relationship with women in law. I want to use this forum to begin to reflect upon why individuals such as Justice Wilson, whose legal and judicial careers stand as such beacons for social justice advocates, were so reluctant to refer to themselves as feminists. I also want to question whether Justice Wilson’s apparent choice not to identify with feminism means that we are estopped from describing her as a “feminist judge”. I come to this discussion as a self-identified feminist of many decades, who has been involved as a writer, teacher and activist with the Canadian feminist movement. While I understand that feminists are undoubtedly capable of all the things Anderson accuses us of, the feminism that I and many others aspire to bears little resemblance to Anderson’s depiction of it. And I remain curious about Justice Wilson’s apparent uneasiness over the term “feminist”.

II. THE WIDER CONTEXT OF FEMINISM AND LAW

Mary Jane Mossman has noted that the early women lawyers in Canada were reluctant to call attention to their gender, and insistent on being treated as lawyers, rather than women lawyers.5 My preliminary research into the lives and careers of some of Ontario’s early women lawyers accords with this conclusion.6 Although many experienced discriminatory treatment from employers, colleagues, clients and judges, few were prepared to label the behaviour as “sexist”. In informal and confidential settings, they would recount innumerable incidents where

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4 Interview with Claire L’Heureux-Dubé, Ottawa, November 1, 2007.
5 Mary Jane Mossman, The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Profession (Oxford and Portland: Hart Publishing, 2006) [hereinafter “The First Women Lawyers”] noted, at 21, that women lawyers from earlier generations seem to have preferred to “eschew connections with the women’s movement in favour of strictly professional identities”. An example of a woman who was clearly an exception to this generalization was Margaret Hyndman, whose trail-blazing work on behalf of women distinguished her remarkable legal career. Even she, however, was reluctant to take on a gendered identity. She was quoted in 1949 in Maclean’s Magazine in an article titled “The Legal Lady”, at 23: “Only the fact that I am a lawyer matters. That I am a woman is no consequence.”
6 I have worked most extensively on the career of Clara Brett Martin, Canada’s first woman lawyer, but my conclusion is also based on informal discussions I have had over the past decades with some of the senior women lawyers in Ontario. See Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada (Toronto: Women’s Press, 1991), at chapter 10.
they had been refused jobs, treated differentially and dismissively by senior lawyers, colleagues and professional organizations, rejected by potential clients, and treated as curiosities by judges. Then they would insist that they had never experienced discrimination based on gender. In public, they preferred to speak of the men who had offered kindness and support, and to insist that women could succeed in law as well as men.

It is my sense that the first cohort of women decided that it was strategically wiser to ignore or discount the negative treatment, because to dwell on the difficulties would have left them too angry, bitter and depressed to continue their careers. Framing their experiences through consciously positive and optimistic philosophies, they chose instead to focus on instances of affirmative assistance. Perhaps they hoped that by giving public recognition to such acts and the generous individuals who were responsible for them, they could inspire others to emulate egalitarian behaviour. They chose to eschew any detailed analysis of sexism in law, and to put their energies toward the difficult job of simply trying to establish a foothold in a male-dominated profession.

Nevertheless, it is equally clear that the early women lawyers generally espoused a strongly pro-woman perspective. I have come across none who suggested that women should be subordinate to men, and none who expressed skepticism about the capacity of women lawyers to succeed in the profession. To the contrary, these lawyers seemed committed to heralding and celebrating the full integration of women in law, although they wished to do so without publicly calling attention to gender.

There was a noticeable shift after 1970, when a vibrant cohort of young women came through law school while “second-wave” feminism was growing and flourishing in the wider Canadian society.\(^7\) Prior to 1970, the percentage of women in law had hovered around 5 per cent. In 1970, the number jumped to 12.7 per cent, and by 1985, it had reached 45.7 per cent, in what has been described as “a revolution in numbers”.\(^8\)

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\(^8\) The phrase “revolution in numbers” is a quote from Rosalie Abella, as noted in *The First Women Lawyers*, supra, note 5, at 10. In 1945, 4.4 per cent of the law students in Canada were female; in 1960, it rose to 5.1 per cent; in 1970, 12.7 per cent; in 1980, 38.2 per cent; and in 1985, 45.7 per cent. See Statistics Canada, *Survey of Higher Education and Universities: Enrolment and...*
This numerically unprecedented cohort publicly drew attention to the multiple gender inequalities facing women in law, and collectively demanded wide-ranging changes. Not all of the younger women would have labelled themselves feminists. But the new era brought a certain “safety in numbers” and many of the women who became lawyers after 1970 recognized that they had the luxury of identifying with feminism because they were able to offer each other protection and support. The wider explosion of feminist activism that manifested itself simultaneously in electoral politics, education, the media, the family, health and welfare, the labour market, sports, and the arts, also made it possible for women lawyers to bring a fresh perspective to their profession.

Not surprisingly, some tensions arose between the new self-identified feminist cohort and the more senior women lawyers who had preceded them. The younger feminist cohort was insistent that gender mattered. As students, they took collective action within law schools as they demanded an end to unequal treatment, and launched public demonstrations over sexism in the bar admission course. They called attention to sexual harassment within the profession. They organized lobby campaigns to force governments to repeal sexist laws, and

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9 I have begun to compile some research on a cohort of feminist lawyers who graduated from law school between 1970 and the early 1990s, whose experiences and demands for change appear to have been unprecedented in earlier (and possibly subsequent) generations. For some initial analysis of this research, see Constance Backhouse, A Revolution in Numbers: Ontario Feminist Lawyers from the 1970s through the 1990s – Part I, Formative Years Through to the Call to the Bar, unpublished manuscript.

founded feminist legal organizations to advocate for women’s equality and to offer direct services to women clients. They championed concepts such as employment equity, demanding systemic changes within the legal profession and more broadly throughout society. Much of this must have seemed risky, even foolhardy, to many of the more senior women lawyers. More research needs to be done on the complex relationships between the two groups, but anecdotal evidence suggests some serious parting of the ways. 11 Occasionally there was rapprochement, but typically only when discussions moved beyond matters of strategy into core assumptions about gender, because both groups believed that it was essential that women succeed in law. There was little disagreement about the fundamental objectives, but deeply-rooted dissension over how best to move forward toward those goals.

In terms of chronology, Justice Wilson’s career marks her as one of the generation of early women lawyers. She entered law at a time when women represented fewer than five per cent of the profession. 12 She enrolled at Dalhousie Law School in 1954, was called to the bar in 1958, and began work with the Osler’s law firm in Toronto in 1959. 13 Yet her appointment as the first female judge of the Supreme Court of Canada was, in part, a response to the growing influence of feminism, and heralded by feminists within and outside of law as a cause for rejoicing. 14 Reflecting on this some years later, Justice Wilson stated:

When I was appointed to the Supreme Court of Canada in the Spring of 1982, a great many women from all across the country telephoned, cabled or wrote to me rejoicing in my appointment. “Now,” they said, “we are represented on Canada’s highest court. This is the beginning of a new era for women.” So why was I not rejoicing? Why did I not share the tremendous confidence of these women? First came the

11 In 1980, Leah Cohen and I were compiling research on sexual harassment within the legal profession, and I interviewed a senior Vancouver lawyer, Mary Southin, to ask her views. She objected to the very topic, stating, “That’s like something out of a book,” and adding that lawyers were “fair and honourable professionally”. She could not believe that a male lawyer might twin his unwelcome advances with threats of reprisals. “It staggers the imagination,” was her response. I realize in retrospect that the resulting article, published in the Canadian Lawyer magazine (February 1980) at 16-20, which juxtaposed her dismissive comments with details of egregious incidents of sexual abuse and humiliation, must have struck her as the height of folly. Informal conversations with Laura Legge, the first woman to become Treasurer of the Law Society of Upper Canada, indicate that of all the challenges she faced in her illustrious career, it was the behaviour of feminist lawyers that most upset her.


13 For dates, see Judging Bertha Wilson, supra, note 1, chapters 3 and 4.

14 Id., at 125.
realization that no one could live up to the expectations of my well-wishers.\textsuperscript{15}

It was Justice Wilson’s fate to have reached the zenith of her career at a time when feminist voices had reached an unprecedented strength within law. Her tenure on the Supreme Court of Canada and her work as chair of the Canadian Bar Association (CBA) Task Force on Gender Equality in the Legal Profession, with its final report released in 1993, brought her squarely into the feminist legal movement and the flowering of second wave feminism. It was a complicated juxtaposition.

\section*{III. BERTHA WILSON’S OWN EXPERIENCE OF GENDER IN LAW}

Even a cursory reading of Justice Wilson’s biography provides incontrovertible evidence that her legal career was greatly influenced by her gender. Justice Wilson experienced social exclusion as one of Dalhousie’s early women law students, none of whom were welcome in the university common room or the local fishermen’s tavern where the other students lingered. Dalhousie Law Dean Horace Read told Justice Wilson she should “just go home and take up crocheting”, and actively discouraged her from accepting a scholarship to do graduate legal studies at Harvard because there would “never be women academics teaching in law schools”.\textsuperscript{16}

It was difficult for women to find articles, and when she became the first female hired at Osler’s, she was warned that she could not stay permanently. She did stay, but Osler’s made her wait for nine years before bestowing partnership, in a milieu in which males were often given partnership in five. At first, she was not allowed to travel with male lawyers because of the potential for gossip. A woman who would have made a first-rate courtroom lawyer, she was not permitted to do litigation. Instead, she carved out a different path within the firm, as a “lawyer’s lawyer”, developing a separate legal research department (at the time an entirely new concept in Canadian legal culture), to conduct research on other lawyer’s files. Despite 16 years at the firm, she was never made senior partner or appointed to the senior management committee.\textsuperscript{17}

\begin{thebibliography}{9}
\bibitem{16} \textit{Judging Bertha Wilson}, supra, note 1, at 38-49.
\bibitem{17} \textit{Id.}, at 57-64.
\end{thebibliography}
Her appointment to the courts sparked serious resistance from several judges and she found herself isolated from informal judicial discussions in ways that marginalized her influence. Fanatical anti-choice proponents deluged Justice Wilson with hostile letters during her constitutional rulings on abortion, with comments so hateful that her staff at the court were too frightened to open the mail. Anti-feminist responses to the CBA Task Force were virulent and directed at Justice Wilson personally, causing her great anxiety and concern.\(^{18}\)

Anderson mentions these difficulties, but stresses that Justice Wilson “did not nurture any feminist resentments”, and that she had “no desire to assert herself as equal in the sense of being identical with the more prominent male lawyers”. While at Osler’s, Justice Wilson tried to make her marginalization work positively for her, and seemed to relish her role as the creator of an innovative research department, viewing the minimum contact with clients and freedom from rainmaking responsibilities as a plus. Anderson also stresses that Justice Wilson was “prepared to accommodate ... and learn from” the male judges who spurned her.\(^{19}\) Reflecting upon her appointment as the first woman on the Ontario Court of Appeal in 1976, Justice Wilson was quoted as emphasizing the need to approach the male-dominant world of law with caution:

> I don’t believe that when I went on the court that the male judges took it for granted that I was going to be able to do the job. I think, maybe, that the view was contrary. So, to go on there and start throwing your weight around when you were, in their eyes, a novice … Well, you have to gain acceptance through your ability first and they will listen to you … A lot of women, I think, are of the view that as soon as you get into a group, you can start trying to change things. I don’t think it works. I think you have to go through this process of proving yourself first.\(^{20}\)

Throughout her investigations into the status of women in the profession as part of the CBA Task Force on Gender Equality, Justice Wilson maintained that she personally had encountered “only isolated instances of discrimination” perpetrated by a few individuals “during all her years in the legal profession”. She was apparently shocked and taken

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18 Id., at 94, 128, 150-64, 346-50.
19 Id., at 57, 64, 94.
aback at the widespread reporting of sexism that women lawyers and judges divulged to the Task Force. Her experience on the Task Force brought her smack up against the changes that the new cohort of feminist lawyers were effecting. They were no longer willing to discount and ignore sexist treatment, and they felt safe reporting their problems to Justice Wilson’s Task Force, because they perceived the female Supreme Court justice as sympathetic and supportive, even as a fellow feminist. For Justice Wilson, “the whole experience became enormously painful”. In fact, Anderson suggests that it was not until after Justice Wilson released her Report, and felt the backlash that greeted the revelations therein, that she felt “her first unequivocal and deeply personal experience of gender discrimination”.22

Despite the multiple manifestations of differential gender-based treatment that Justice Wilson experienced throughout her career, her biographer reports that Justice Wilson believed she had never been subjected to “persistent or systemic discrimination”.23 It is a conclusion that seems surprising, but it is a perspective that would have accorded with the public commentary of many of the women lawyers and judges of her generation. In the decades in which Justice Wilson launched her career, accommodation was the watchword. During her formative years in law, “nurturing feminist resentments” would have been unproductive, and asserting a position of formal equality quite likely doomed to failure. Instead, Justice Wilson, like others of her generation, cautiously adopted strategies of responding to male exclusion and hostility with politeness and persistence, and the pursuit of somewhat different career trajectory paths.

It was a philosophy of life she brought forward into the 1970s, when the new cohort of feminist lawyers was demanding radical change. Their jubilance over Justice Wilson’s appointment to the Supreme Court

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21 Judging Bertha Wilson, supra, note 1, at 349-50. The Task Force Report suggests that women judges, who might have been reluctant to divulge information about sexist treatment publicly, felt confident in replying to the Task Force, knowing that Justice Wilson would be the only one to review their comments: Touchstones for Change: Equality, Diversity and Accountability, A Report on Gender Equality in the Legal Profession (Ottawa: Canadian Bar Association, August 1993), at 192-94 [hereinafter “Touchstones for Change”]. The contrast between their trust in Justice Wilson and their distrust of Chief Justice Lamer was well illustrated after the revelations of sexist mistreatment of female judges by their male colleagues became public. Chief Justice Lamer sought to identify the names of victims and culprits, and wrote to every federally appointed judge demanding details about unequal treatment. He received no replies. Judging Bertha Wilson, id., at 349.

22 Judging Bertha Wilson, id.

23 Id.
apparently made her uneasy, as must have their wish to claim her as a fellow-traveller within the wider feminist movement. And some feminists were equally uneasy over Justice Wilson’s appointment, knowing that the “first” women into male-dominant preserves were generally chosen precisely for their accommodating philosophies. Some even worried privately that the first female Supreme Court justice might issue anti-feminist judgments, deflating any argument that an all-male bench needed the presence of women to give voice to real gender equality.24

Furthermore, the feminist movement was never a monolithic or homogeneous phenomenon, as socialist feminists, radical feminists, liberal feminists and others struggled to define the goals and strategies of the new movement. It was sometimes difficult to know what “feminism” was, and many women expressed a sense of hesitation or uncertainty about identifying as feminist because they were not sure whether they qualified. As indicative of this, one woman with whom I was discussing this article quipped: “I wanted to ask: ‘Do you have to have a T-shirt and badge?’”25 When feminists began to engage in fractious debates over how to construct and delineate feminist principles, confusion reigned in many circles as women tried to decide whether they measured up to the movement’s demands.

Still others understood “feminism” and “feminists” to be distinctly negative terms. In the eyes of many, feminism became the “F word”.26 Women who wished to assert support for concepts such as equal pay and other doctrines of equality would commonly begin their discussions by saying “I’m not a feminist but …”. Justice Bertha Wilson’s biographer certainly would agree. She uses descriptions of feminism that emphasize

24 I admit to harbouring some concerns on this point, as did others with whom I discussed the matter. Christine Boyle made a similar point in her article, “Sexual Assault and the Feminist Judge” (1985) 1 C.J.W.L. 93, at 94, in which she suggested that a feminist might have ethical objections to accepting an appointment to the bench, since as a judge she would be restricted to mere reformism, or would find herself “giving credibility to a morally bankrupt system”. On the tendency to select women with male perspectives for elevation to positions of power, see generally Catherine A. MacKinnon, Feminism Unmodified (Cambridge: Harvard University Press, 1987) and Towards a Feminist Theory of the State (Cambridge: Harvard University Press, 1989).

25 I am indebted to Carolyn Bennett, M.P. for this wonderful quote.

26 One of the leaders of the post 1970s cohort, Ottawa lawyer Shirley Greenberg, noted that “feminists were reviled”. She did so on the occasion of receiving an award as an “exceptional woman” from the Hadassah-WIZO, adding: “I really feel that anything I do, or have done, is really because of my feminist convictions and my desire to advance the cause of women. Feminists have been reviled for decades, really, and it’s nice to see some are getting some positive recognition.” Jennifer Campbell, “Shirley Greenberg Receives Award for Efforts on Behalf of Women” Ottawa Citizen, October 24, 2007, at B3.
confrontational tactics and rigidity, and appears to have understood feminism as incorporating a pro-female, anti-male “bias”. To the extent that Bertha Wilson consciously or unconsciously accepted these characterizations, this might explain her rejection of the label. She may also have felt that if she publicly identified as a feminist, it would have attracted further dangerous backlash. She may have believed that claiming to be feminist was unwise, even impolite. Justice Bertha Wilson was not of the generation that marched in women-only “Take Back the Night” marches, or debated the transformative politics of radical lesbian separatism. The practices and strategies that were identified with the “feminist revolution” may have struck her as unfamiliar and out of character with her own world.

IV. WRITTEN EVIDENCE OF BERTHA WILSON’S PERCEPTIONS OF FEMINISM

Curiously, given her reluctance to identify as a feminist, the written record suggests that Justice Wilson did not fully adopt unfair stereotyped and pejorative understandings of feminism. To the contrary, she embraced a broad and inclusive definition. The best evidence of this is found in Touchstones for Change: Equality, Diversity and Accountability, the Report on Gender Equality in the Legal Profession, issued by the CBA Task Force that Justice Wilson chaired in 1993. Noting that gender discrimination was “more pronounced for female lawyers who bring a feminist perspective to their work”, her Report explained:

There are many misconceptions about the nature of feminism which are used to impugn the credibility of those who give voice to a feminist perspective. It is essential to recognize that everyone operates under a value system which shapes what they see and how they interpret what they see. Feminism is only one of these perspectives. The following definition of “feminism” may help to dispel some of the misconceptions:

A feminist is a person who believes women and men should be equal participants in society regardless of race, ethnic origin, economic background, gender, sexual orientation, or disability. A feminist believes women have not yet achieved equality in our society and that steps should be taken to correct this situation. Lastly, a feminist believes the world should be a comfortable place for women, men and children,
free of stereotypes and myths which restrict the roles each assumes.27

This is a wide-ranging and inclusive definition of feminism, one that appears to run directly counter to most or all of the negative qualities described above. Indeed, it is hard to imagine that many people would have difficulty agreeing to sign on to this version of feminist politic.

Justice Bertha Wilson’s Task Force Report also recognized the hostility that surrounded feminism, and expressed concern over the implications of this within the legal setting. It recounted a “disturbing level of anti-feminism” present in some law schools. Citing a survey at the University of New Brunswick, the Task Force noted that “about half of the women and a third of the men reported often hearing other students express derogatory or sexist comments about feminists”, and that “a substantial percentage of women had heard professors make derogatory or sexist comments about feminists”. In response, the Task Force recommended that law schools establish “on-going support programs to address the needs of students threatened by the poisoned environment”.28

In addition, the Report documented concerns expressed by young female judges. Justice Wilson’s Task Force Report continued:

Some of the younger women appointed were asked if they were feminists and told that feminists were unsuited for the judicial role because of their radical and biased views. Some were even told that feminism automatically disqualified them from sitting on cases involving sexual assault because of their anti-male prejudice! [The male members of the court] were simply applying their own preconceived ideas and exhibiting a mindset which clearly was not based on rational evidence but on myths and stereotypes accepted and applied without critical or constructive thought.

Those women judges were usually younger, recently appointed, and perceived by their male colleagues to be “radical feminists.” As has been pointed out by many writers on gender issues, a “radical feminist” in the eyes of some men may simply be a woman who believes in equality, publicly asserts that belief and attempts to achieve it. Because the existing norm has always been and still is the norm of inequality,

28 Id., at 33, 37.
equality must inevitably seem radical to some in that it is a total rejection of inequality. It does, indeed, go to the very “root” of it!29

The Report left no doubt where it stood on this alleged bias matter: “There would appear to be no justification at all for denying women judges the opportunity to sit on sexual assault cases or any other case in which women have been victimized by men.”30 The Task Force recommended that “Chief Justices and Chief Judges treat women judges on their court fairly in the assignment or allocation of work.”31

So we are left with the dilemma of a woman who defined feminism in terms that would seem to make it almost impossible for egalitarian-minded individuals to disavow, who objected to the “anti-feminist” actions of those who defined feminism pejoratively, but who still would not self-identify as a feminist.

V. CHARACTERISTICS OF A FEMINIST JUDGE

Is it possible to claim that a woman judge who did not self-identify as a feminist did in fact utilize and adopt feminist principles? Perhaps the first issue to clarify here is how we would define feminist judging. Christine Boyle was one of the first scholars to attempt to explore this complex question. Recognizing that feminism is not monolithic, and that differences within feminist theory might result in different responses to gender-related questions, she nevertheless argued that a feminist judge would focus critical attention on the matter of gender. She suggested that a feminist judge would not use gender neutral analysis when considering gender specific issues, would attempt to take into account women’s as well as men’s interests, and would not allow male interests to “masquerade” as human interests.32 Michelle Boivin has argued that a feminist judge would seek to improve women’s lives while paying attention to the diversity of women’s experiences, and the wider contextual and surrounding circumstances.33 In a fascinating, as yet unpublished paper, Rosemary Hunter has begun to explore the many ways feminism might influence judges as they negotiate court processes,

29 Id., at 192-94.
30 Id.
31 Id., at 195.
determine the outcome of cases, give reasons for their decisions, and engage in extra-curricular activities in areas such as law reform, public speaking and education, and mentoring of other women judges and lawyers.  

Based upon these parameters, there is much in Bertha Wilson’s career that appears to be demonstrably feminist. To begin with fundamentals, within her domestic home life she and her husband John, a United Church minister, struck an egalitarian bargain in which household responsibilities were shared between the spouses. When Justice Wilson first commenced her legal studies and throughout her career, she did the housecleaning, while John handled the “grocery shopping and all of the cooking”. When she spoke to young female law students and lawyers, Justice Wilson urged them to strike similar arrangements with their own domestic partners, stressing that without equality at home, there was little prospect of career advancement. She was “brutally frank” in warning women against partners “who were not prepared to treat them with equal respect for their career aspirations and equal sharing of domestic responsibilities”. Break it off “sooner rather than later” was her strict admonishment. Equally impressive, a woman without children of her own, she was one of the chief architects of Osler’s first maternity leave policy, an innovation she championed on behalf of the women who followed her into the firm as associates and partners in the early 1970s.

Other scholars have provided much more expert analysis of Justice Wilson’s judicial opinions than I am able to do here, so I will only briefly flag several key Supreme Court of Canada decisions that seem to highlight feminist characteristics. Her 1979 Court of Appeal decision in Bhadauria v. Seneca College was a trail-blazing ruling that would have recognized a new common law tort of discrimination. Had it not been later overruled by the Supreme Court of Canada, the landscape of human rights law would have been completely transformed, with great potential for an expansion of equality principles based on gender, race, sexual orientation and disability. Her 1990 Supreme Court of Canada decision in Lavallee dramatically refashioned the Canadian law of self-defence.

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55 Judging Bertha Wilson, supra, note 1, at 77, 199.
56 Id., at 71.
from its previously masculinist perspective, to take greater account of the gendered circumstances of battered women. Her 1988 Morgentaler decision struck down provisions in the Criminal Code that made it an offence to procure an abortion, in a ruling that emphasized the gendered distinctions involved in reproduction:

> It is probably impossible for a man to respond even imaginatively to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

Over time, the force of Justice Wilson’s personality was such that she was able to nudge some of the most influential judges on the Supreme Court of Canada to begin rethinking judicial perspectives on gender equality. Chief Justice Brian Dickson reportedly admired her efforts to reform common law to reflect changes in community values with respect to marriage and divorce in the Becker v. Pettkus case. And although his first impressions of the Lavallee case were opposite to those of Justice Wilson’s, she convinced him to transform his opinion. His biographers note that “Lavallee demonstrates Dickson’s growing attachment to Wilson’s equality views and his receptivity to her feminist perspective, which re-examined traditional legal doctrines in light of their effect on women.” Chief Justice Brian Dickson apparently once said that everything he knew about women’s rights, he learned from Justice Bertha Wilson.

Her extra-curricular activities off the bench offer additional evidence of risk-taking behaviour to publicly expose conduct that was sexist. In 1989, Justice Wilson gave a lecture at the Canadian Institute for Advanced Legal Studies at Cambridge University in England, and participated in a panel discussion with U.S. Supreme Court judge Sandra Day O’Connor and Lord Ackner of the British House of Lords. During

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42 Brian Dickson: A Judge’s Journey, id., at 405-406.
43 Interview with Claire L’Heureux-Dubé, November 1, 2007, Ottawa.
the lunch that preceded the lecture, Justice Wilson apparently asked Lord Ackner why no woman had ever been appointed to the House of Lords. His unflaggingly direct reply: “No woman had ever been qualified.” When the topic of women on the bench was raised during the public lecture that followed, Justice Wilson repeated Lord Ackner’s response, causing him to explode in fury, and to claim that his remarks at lunch had been “privileged”. Interrupted in mid-sentence, Justice Wilson insisted that she be allowed to complete her retelling of Ackner’s comments, a courageous act that reportedly caused some ruffled feathers and shocked reaction.44

Other public speeches reveal additional evidence of feminist perspectives. One of the most significant was the speech Justice Wilson gave at Osgoode Hall Law School in 1990, titled “Will Women Judges Really Make a Difference?”45 The public lecture came at a particularly fractious time at the school, as final settlement negotiations were still being worked out over the human rights complaint that more than 120 women lawyers, law professors and law students had brought against Osgoode for its failure to appoint a feminist associate dean, Mary Jane Mossman, to the more powerful decanal position.46 In her remarks, Justice Wilson quoted research from sociologist Norma Wikler, that offered “overwhelming evidence that gender-based myths, biases, and stereotypes [were] deeply embedded in the attitudes of many male judges, as well as in the law itself”, and that “gender difference” was a “significant factor in judicial decision-making”.47 She noted that Canadian feminist scholars had advanced two propositions: “One, that women view the world and what goes on in it from a different perspective from men; and two, that women judges, by bringing that perspective to bear on the cases they hear, can play a major role in introducing judicial neutrality and impartiality into the justice system.”48

45 The speech was delivered as the Barbara Betcherman Memorial Lecture, named after a young feminist Osgoode Hall law graduate whose brilliant career had been tragically ended in a motor vehicle accident. It was later published in (1990) 28 Osgoode Hall L.J. 507.
46 For a more detailed analysis of the complaint, see Constance Backhouse, A Revolution in Numbers: Ontario Feminist Lawyers from the 1970s through the 1990s – Part I, Formative Years Through to the Call to the Bar, unpublished manuscript.
48 Id., at 515.
Justice Wilson noted that in some areas of the law, “a distinctively male perspective” was “clearly discernible” and that this had resulted in “legal principles that are not fundamentally sound”, adding: “Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women’s sexuality that, in this day and age, are little short of ludicrous.” Her concluding words were: “If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.” The press coverage of the speech described the event as “electrifying”. The furor prompted the anti-feminist, conservative REAL women’s organization to launch a complaint against Justice Wilson, alleging that she was unfit to sit as a judge because of her feminist bias.

Shortly after her retirement, in 1991 Justice Wilson was appointed to chair the CBA Gender Equality Task Force. The resulting report was described by Justice Wilson’s biographer as being “as much of a bombshell” as the Women Judges and Difference speech one year earlier. Feminist analysis is laced throughout the 1993 Report. On the matter of curriculum development in legal education, the Report noted: “The principle of equality makes it clear that: a male perspective is not neutral; a white perspective is not neutral; a heterosexual perspective is not neutral; and so on”, adding: “[L]egal education must include a diversity of approaches to the law that reflect more than just one or two perspectives.” On the topic of judicial education, the Report noted that it was “regrettable that when Canada followed the United States’ lead in attempting to probe the degree of gender bias in its judiciary, the Canadian judiciary remained generally aloof from the process and did not provide the kind of leadership and support that many of the Chief

49 Id., at 514-15.
50 Id., at 522.
51 Bronwyn Drainie, “Trials and errors: in the case of the women v. the men at Osgoode Hall Law School, the jury is still out” Toronto Life, vol. 25, Issue 11 (August 1991), at 27.
53 Judging Bertha Wilson, supra, note 44, at 343.
54 Touchstones for Change, supra, note 21, at 30.
In response, the Report endorsed “compulsory training for judges, in both gender and racial issues”.56

In another example of risk-taking associated with this Report, Justice Wilson conducted a survey of the approximately 200 female judges in Canada, asking them whether they had ever personally experienced discrimination from their judicial colleagues. Recognizing the sensitivity of the question, Justice Wilson promised that she would be the only person to review the survey responses, that she would destroy the raw data as soon as these were summarized, and that she would protect the anonymity of all the participants. One hundred and thirty-two women responded. Fifty-eight reported having personally experienced discrimination on the bench. A number reported serious sexual harassment, identifying some offenders “well known for their proclivity in this direction”, and describing particularly egregious behaviour at judicial conferences where “alcohol is served”. All of this was duly documented in Justice Wilson’s final Report.57

The Report’s release caused great controversy, upsetting Chief Justice Lamer and British Columbia’s Chief Justice McEachern, both of whom condemned Justice Wilson’s findings. Chief Justice Lamer insisted that Justice Wilson disclose which judges had complained, and who they had identified as culprits. He was so incensed that he personally wrote to every federally appointed judge to invite them to report to him any “bias or unequal treatment at the hands of judges”. Not surprisingly, there were no takers on this invitation. Chief Justice McEachern demanded that Justice Wilson disaggregate the statistical results, so that he could demonstrate that there were no problems in British Columbia. Some members of the CBA insisted that if Justice Wilson would not reveal her sources, all of her evidence of discrimination was suspect. Justice Wilson responded that she had given her word that the participants would not be identified, and resisted all demands. She stood by her evidence, her analysis and her conclusions.58

In its assessment of substantive law, the Report articulated how central gender was to the development of legal rules and procedures:

55 Id., at 191.
56 Id.
57 Id., at 192-93.
58 Judging Bertha Wilson, supra, note 44, at 348-51.
The law as it has evolved over the centuries was made by men and for men. This recognition has sparked a great deal of interest among feminist lawyers and there is now a sizeable body of scholarship in both Canada and the United States on the extent to which an exclusively male perspective has conditioned the law and, in effect, suffused it with gender bias. Men have traditionally, and many still currently, view a male perspective as gender neutral. Yet one only has to think for a moment to appreciate that gender neutrality is a myth. [It is] very timely for the legal profession to review established legal principles from a female perspective, not because a female perspective is any more neutral than a male one, but because it is just possible that the combined perspectives might lead to a better, more relevant and more humane legal system.59

Despite the reference to “humane” as the rationale of a just legal system, this goes far beyond a philosophy of humanism, clarifying that there is no such thing as gender neutrality. Justice Wilson’s Report insists that the male assumptions that underlie legal rules must be displaced, and that justice requires the full inclusion of female perspectives and experiences. This fits squarely within her wide-ranging and inclusive definition of feminism, and makes it difficult to argue that feminist principles are not deeply embedded in the Report’s findings and recommendations. Her work with the CBA Task Force on Gender Equality suggests that there were certainly times when Justice Wilson spoke as a feminist and for the feminist movement.

VI. CONCLUSION

Justice Claire L’Heureux-Dubé recalls that she once confronted Justice Wilson with this query: “You say you’re not a feminist, but I think you’re the greatest feminist of all.” According to Justice L’Heureux-Dubé, her colleague was silent; Justice Bertha Wilson did not answer the implied question.60 The only comment I have been able to find that suggests that Justice Wilson was not as averse to the feminist label as we may suppose was published in a 1985 magazine article. Sandra Gwyn, a reporter for Saturday Night, wrote that Justice Wilson considered herself “a moderate feminist” while on the Court.61

59 Touchstones for Change, supra, note 21, at 257.
60 Interview with Justice Claire L’Heureux-Dubé, November 1, 2007, Ottawa.
Justice Wilson stood as a bridge between the former generations and the incoming cohort. Her character was formed in an era that erased gender and sought accommodation, and her subsequent career placed her squarely within the hotbed of feminist demands for revolutionary change.

It would undoubtedly have been easier for the first female Supreme Court judge to avoid the controversy associated with her many gender-focused judgments, the “Women Judges and Difference” lecture, and the CBA Task Force. Yet Justice Wilson’s career contains much that appears to be demonstrably influenced by feminism. She went further than many anticipated she might have, and became an icon for the young women lawyers who so desperately needed champions for equality in powerful places. Her uneasiness over the label “feminist” does not detract from the extraordinary influence she wielded with judicial decisions, public pronouncements, mentoring, and public policy reform that created marked inroads for women in law.

Is it disrespectful to claim Justice Wilson as a “feminist judge” when she herself apparently refused to so identify? Some will undoubtedly think so. Others might argue that had more women in influential positions publicly taken up the title “feminist”, it would have served to minimize the vituperative hostility and unfair maligning of feminism, to further isolate those who dismissed feminism as “the F word”. For me, it is certainly reason for sadness that a towering figure such as Justice Wilson was so reluctant to self-identify. We must ask ourselves how misconceived must be the movement which has contributed so much to the advancement of equality, if women such as Justice Wilson sought to separate themselves from it. The female judge who wrote so distinctly as a woman when she proclaimed the constitutional right to abortion, who brought to Canadian law a distinctly gendered sensitivity to woman-battering, who tried (and failed) to establish a new tort of discrimination, is someone who I would have hoped would have claimed the label of feminism with heart and soul.

Still others might argue that it is equally disrespectful to those who took the label “feminist”, with all the backlash that provoked, to count Justice Wilson among their movement’s leaders. That said, Justice Wilson’s advancement of legal thinking about equality and discrimination constituted a life contribution that outstripped most of the jurists who had gone before. For litigants and litigators seeking access to a hitherto unreceptive, closed legal system, she opened vistas of opportunity, imagination and hope. In the end, I have come to the
conclusion that it would be a mark of the greatest respect to identify Justice Bertha Wilson as a feminist, both as a tribute to her legacy and as a tribute to the feminist movement itself.