

# McLachlin's Law: In All Its Complex Majesty

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## **Part VII**

# **The Legacy and Contributions of Beverley McLachlin**



# McLachlin's Law: In All Its Complex Majesty\*

Jamie Cameron\*\*

## I. INTRODUCTION

Beverley McLachlin was a member of the Supreme Court of Canada for 28 of the Charter's<sup>1</sup> first and most formative 36 years — for 10 years as a *puisne* judge (1989 to 1999) and another 17 as Chief Justice (2000 to 2017). No other judge has had as distinguished a career on the Court, and it will be a long time, if ever, before another jurist has as much impact on the Charter. She was an exemplary Chief Justice, one of Canada's finest, and is deeply respected as a jurist.

The enigma of McLachlin is that her jurisprudence has so neatly defied categorization. She handily interleaved liberal and conservative outcomes in her decisions, and in her earlier years was styled a hybrid — a pragmatist, empathetic libertarian, hard-headed liberal, and a chameleon, not to mention an “eclectic” and “somewhat unpredictable” judge.<sup>2</sup> Those in search of an

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\* Chief Justice Beverley McLachlin, “Unwritten Constitutional Principles: What is Going On?” (speech delivered at the Lord Cooke Lecture, Wellington, New Zealand, December 1, 2005) (explaining that judicial conscience is informed by the law “in all its complex majesty”): <<https://www.fact.on.ca/judiciary/NewZeal.pdf>>, at 25 [hereinafter “McLachlin, ‘Unwritten Constitutional Principles’”].

\*\* Professor, Osgoode Hall Law School, York University. I thank my colleagues, Professors Benjamin Berger and Sonia Lawrence, for inviting me to participate in the Constitutional Cases Conference and contribute this paper to the volume. I also owe great thanks to my Research Assistant, Ms. Bailey Fox (J.D. 2019), for her invaluable assistance on the paper. I am also grateful for the helpful and supportive comments of the anonymous reviewer, and for further insights from my Research Assistant Mr. Matti Thurlin (Joint J.D./Philosophy program). For an early blog version of this paper, see J. Cameron, “Dissent and Empathy: Hallmarks of a Complex Judicial Personality” (Part II, I-CONnect Symposium on “The Legacy of Chief Justice Beverley McLachlin” (December 6, 2017), online: <<http://www.iconnectblog.com/2017/12/cameron-on-the-chief-justice/>>.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>2</sup> Sean Fine, “The Most Important Woman in Canada” *Saturday Night* (December 1995), at 9 [hereinafter “Fine, ‘The Most Important Woman’”]; B. Wallace, “Stepping Out into the Light: New Chief Justice Beverley McLachlin wants a more open Supreme Court of Canada” *Maclean's* (November 15, 1999), at 32 [hereinafter “Wallace, ‘Stepping Out’”] (articles on file with author).

ideological or philosophical thread were stumped, prompting one commentator to ask, “[w]here is the articulated vision, from the bully pit, of better law in a better society?”<sup>3</sup>

Beverley McLachlin did not fit “pre-conceived stereotypes” and her “lack of apparent ideology” meant that there was no “easy rallying point for critics” or, to be frank, for her admirers.<sup>4</sup> If there is no shame in a legacy consisting in a head count of landmarks — which in her case would be lengthy — quite simply Beverley McLachlin was nobody’s champion. She was fundamentally a careful and disciplined judge who was seemingly as comfortable exercising judicial power as not. She did not maintain constant positions over time and presided over a Court that showed little compunction in overruling its own landmarks.<sup>5</sup> On its face, her legacy perplexes.

There remains a sense of unease or discomfort that this jurist’s essential view of justice was so well hidden from view. In a way, the explanation is simple. Promoting a vision was not her priority and Beverley McLachlin was not one to justify or glorify her work. If she did not withhold, nor did the judge advance a theory or philosophy that enlarged the contours of her decisions, binding the jurisprudence together. As a matter of self-description she placed herself in the middle, with a stated goal of judging cases “as honestly” as she could, “without

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<sup>3</sup> Philip Slayton, “Judging Beverley McLachlin” *Maclean’s* (July 9, 2009), online: <<https://www.macleans.ca/news/canada/judging-beverley/>> [hereinafter “Slayton, ‘Respect’”].

<sup>4</sup> Kirk Makin, “First female chief justice draws praise: Legal experts hail tough, independent Beverley McLachlin” *The Globe and Mail* (November 4, 1999) [hereinafter “Makin, ‘First female chief justice’”] (article on file with author); Wallace, “Stepping Out”, *supra*, note 2.

<sup>5</sup> See, e.g., *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.); *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3 (S.C.C.) [hereinafter “*Mounted Police Assn.*”] and *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 (S.C.C.) [hereinafter “*Saskatchewan Federation of Labour*”] (overruling the “Labour Trilogy”, see *Saskatchewan Federation of Labour*, *id.*, at para. 106; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 (S.C.C.); *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.); *United States v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.) [hereinafter “*Burns*”] (effectively overruling *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.) [hereinafter “*Kindler*”]); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.) [hereinafter “*Bedford*”] (effectively overruling *R. v. Downey*, [1992] S.C.J. No. 48, [1992] 2 S.C.R. 10 (S.C.C.) [hereinafter “*Downey*”]; “The Prostitution Reference”: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.); and *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 (S.C.C.) [hereinafter “*Carter*”] (effectively overruling *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1994] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Rodriguez*”]).

becoming too strategic”, and keeping the law “clean, simple, and relevant”.<sup>6</sup> By accounts, she invested little ego in decision-making, once remarking — modestly enough — that she would merely like to be remembered as a “competent” or a “good jurist, a serious jurist”.<sup>7</sup>

That Justice McLachlin’s core commitments — what was sacred to her in judging — are relatively unknown heightens interest in her as a jurist. Offered here is an impression of a judge whose philosophy of justice and judging is, almost literally, hidden in plain sight. Sleuthing her extra-curial speeches and writings reveals that a jurisprudence, which on first impression appears plain-spoken and untroubled by theoretical concerns, was grounded in a process of internal dialectic. The elements of that dialectic, of what Justice McLachlin thought of as “reasoned legal conscience”, surface more freely in a venue of speeches, addresses, interviews, and publications.<sup>8</sup> There she had opportunities, within the constraints of office, to comment more openly on her experience of judging. What emerges is a portrait of a jurist whose views are methodical, fastidious, and deceptively complex.

The McLachlin dialectic confronted the tension between an unyielding commitment to the rule of law and a style of decision-making she described as “conscious objectivity”.<sup>9</sup> For her it was a matter of choosing between the demands of law’s authority, in all its potential rigidity, and the need for justice to reflect values of empathy and humanity. To address that challenge she adopted a methodology that distilled the law’s “complex majesty”, balancing the rule of law’s legality and empathy’s humanity through a process of studied and disciplined flexibility.

No one should assume this was an easy task for her. As Chief Justice she admitted to being preoccupied, agonizing about decisions and lying awake at night worrying about the impact of decisions on those “caught up in the machinery of justice”.<sup>10</sup> Her calibrations favoured the rule of

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<sup>6</sup> Joseph Brean, “‘Conscious Objectivity’: That’s how the Chief Justice defines the top court’s role” *National Post* (May 23, 2015), online: <<https://nationalpost.com/news/conscious-objectivity-thats-how-the-chief-justice-defines-the-top-courts-role-harper-might-beg-to-differ>> [hereinafter “Brean, ‘Conscious Objectivity’”]; Geoffrey Scotton, “McLachlin Responds to Allegations of Judicial Activism” *The Lawyers Weekly* (September 10, 1999) 19:17.

<sup>7</sup> Janice Tibbetts, “Building Consensus” *Canadian Lawyer* (July 2013) 24, at 26 [hereinafter “Tibbetts, ‘Building Consensus’”]; Kirk Makin, “Ten years as top judge and she’s still losing sleep” *The Globe and Mail* (January 10, 2010), online: <<https://www.theglobeandmail.com/news/national/ten-years-as-top-judge-and-shes-still-losing-sleep/article1366103/>> [hereinafter “Makin, ‘Ten Years’”].

<sup>8</sup> McLachlin, “Unwritten Constitutional Principles”, *supra*, note \*, at 26.

<sup>9</sup> See discussion, *infra*.

<sup>10</sup> Makin, “Ten Years”, *supra*, note 7.

law on some occasions and other values, such as diversity, inclusion, and accommodating difference, on others. A jurisprudence attuned to that dynamic, focused in the moment on the demands of each context, neither aimed for nor conformed to pattern.

Exploring the McLachlin dialectic does not produce a tidy account, and nor is that its aspiration. The discussion that follows offers a dialectic of its own, seeking insight into Beverley McLachlin's manner of reconciling the law's authority with justice's humanity. Its scope is selective, travelling lightly over a monumental legacy by way of extra-curial reflections and a sampling of the jurisprudence. Much in the way of the judge herself, its aims are modest and focus on identifying points of traction in the interactions between her core commitments in judging.

## II. IN HUMILITY AND INTEGRITY

On taking office as Chief Justice, Beverley McLachlin promised to persevere “in humility and integrity” through a collective process of listening, considering and reconsidering, to find the “best answers, and hence the ‘right’ answers” to the difficult legal questions the Court would face.<sup>11</sup> Over the years, she asked and answered all manner of profoundly challenging questions, in several hundreds of decisions. If a review and comparison of her pre- and post-Chief Justiceship jurisprudence cannot be undertaken, some context can at least be provided.

At first impression, there are continuities but also differences between her two segments of office, which reflect her priorities as leader of the Court as well as an evolution in her judging. From 1989 to 2000, as *puisne* judge, McLachlin J. showed little reluctance to invalidate legislation and did so in high-profile cases.<sup>12</sup> In time, the uncompromising voice of the 1990s softened, attenuating and folding into a style of decision-making adapted to her conception of the Chief Justice's office. The headstrong independence and individualism that marked her jurisprudence in the first 10 years shifted to a style, as Chief Justice of Canada, that focused on the McLachlin Court's hallmark of consensus-based decision-making.<sup>13</sup>

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<sup>11</sup> Quoted in Cristin Schmitz, “Service to Country is Top of Her List” *The Lawyers Weekly* (January 28, 2000), 19:35.

<sup>12</sup> See *infra*, note 14.

<sup>13</sup> See Tibbetts, “Building Consensus”, *supra*, note 7.

The years following the Charter's early landmarks were raucous. The Lamer Court fractured on divisive issues and its enforcement of Charter rights provoked voluble criticism. Rather than flinch Beverley McLachlin stepped confidently into the fray, delivering forthright, surprising, and controversial pronouncements on Charter rights.<sup>14</sup> Rather than defer to then-Chief Justice Dickson or to the Court's other women justices, Justices Wilson and L'Heureux Dubé, she staked her own path and at one point was described as "a sort of anti-Bertha".<sup>15</sup>

Justice McLachlin joined the Court at a time when women's issues had high profile, the Charter's conception of equality was formative, and the performance of its women judges was closely tracked by advocates and opponents of feminism alike. In this milieu she could be prickly, once stating that "[t]he day I wake up and look in the mirror and say, 'I decided a case to please this interest group or that interest group' — no matter how sympathetic I may be to their goals — that's the day I'm not fit to be a judge".<sup>16</sup> Though scolded for her perceived insensitivity to women's issues, feminists warmed to her during the 1990s.<sup>17</sup> Determined to speak on her own, the judge at times wrote separately, occasionally appending brief and "antiseptic" concurrences to L'Heureux-Dubé J.'s more provocative reasons.<sup>18</sup> She could also surprise, as when she teamed up with L'Heureux-Dubé J. to speak in a decidedly different voice in *R. v. R.D.S.*<sup>19</sup>

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<sup>14</sup> See, e.g., *R. v. Seaboyer*; *R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.) [hereinafter "*Seaboyer*"]; *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"]; *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.); *RJR-MacDonald v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter "*RJR-MacDonald*"].

<sup>15</sup> Fine, "The Most Important Woman", *supra*, note 2, at 5 (noting that of the 17 cases she and Wilson J. heard together they only agreed once).

<sup>16</sup> *Id.* (also expressing the hope, *id.*, at 9, that "both men and women can see me first and foremost as an impartial judge").

<sup>17</sup> Paul Bunner, "McLachlin's Choice: Aristocrat or Democrat?" *Alberta Report* (November 22, 1999) 18 (noting that "prominent liberal feminists were expressing 'satisfaction' with her 'evolving' legal philosophy").

<sup>18</sup> Slayton, "Respect", *supra*, note 3. See, e.g., *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (S.C.C.) (writing a concurring dissent to express agreement with her interpretation of the *Tax Act* and conclusion); *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.) (writing a separate concurrence to express her own concerns about stereotypical assumptions); *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.) (writing separately and placing the focus on statutory interpretation). Justice L'Heureux-Dubé thought the two were "on the same wavelength" but said McLachlin "was reluctant to take risks". Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: University of British Columbia Press, 2017), at 437.

<sup>19</sup> [1997] S.C.J. No. 8, [1997] 3 S.C.R. 484 (S.C.C.) [hereinafter "*R.D.S.*"].



When appointed Chief Justice in 2000, Beverley McLachlin was seen as “somebody who does not and will not fit into preconceived stereotypes”, and as a judge who has a “‘less transformative’ interpretation of the Charter as an agent of social change”.<sup>20</sup> As one observer put it, Justice McLachlin “regards the law, with a capital L, above any cause or personal belief”.<sup>21</sup> For most of her tenure as Chief Justice, the McLachlin Court tended to exercise judicial power quietly, even sparingly, at times turning to statutory interpretation or reading laws down to avoid invalidating statutes or granting a remedy.<sup>22</sup> At a cadence of about one per year, the spacing between landmarks grew, and in 2010 the Chief Justice stated that “most of the significant *Charter* of rights battles” had been fought, leaving the Court to tinker with and refine doctrine.<sup>23</sup> In an exit interview, Justice Binnie remarked, in similar terms, that the McLachlin Court was more of a consolidator than a “cutting-edge innovator”, before adding, “[w]hich is not to say that I see the court as timid”.<sup>24</sup>

That view would prove premature as the landmarks issued, one after the other, in the McLachlin Court’s later years.<sup>25</sup> Faced with opportunities and imperatives the Court responded boldly, demonstrating institutional confidence and conviction in its mission of review. This burst of activism bears the Chief Justice’s imprimatur and forms an important part of her legacy. With limited internal division and masterful leadership she moved the Court through a period of momentum and drama, rendering high impact decisions that bore the telltale signs of her straightforward,

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<sup>20</sup> Makin, “First female chief justice”, *supra*, note 4; J. Beltrame, “Judging Beverley: The Chief Justice is Putting her Stamp on the Supreme Court” *Maclean’s* (May 20, 2002) (article on file with author) [hereinafter “Beltrame, ‘Judging Beverley’”].

<sup>21</sup> Beltrame, “Judging Beverley”, *id.*

<sup>22</sup> See, e.g., *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2, [2001] 1 S.C.R. 45 (S.C.C.) [hereinafter “*Sharpe*”]; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*, [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815 (S.C.C.).

<sup>23</sup> Makin, “Ten Years”, *supra*, note 7.

<sup>24</sup> Kirk Makin, “Justice Ian Binnie’s exit interview” *The Globe and Mail* (September 23, 2011), online: <<https://www.theglobeandmail.com/news/national/justice-ian-binnies-exit-interview/article2178895/singlepage>>.

<sup>25</sup> See, e.g., *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, [2014] 1 S.C.R. 433 (S.C.C.); *Reference re Senate Reform*, [2014] S.C.J. No. 32, [2014] 1 S.C.R. 704 (S.C.C.) (government institutions); *Mounted Police Assn.*, *supra*, note 5; *Saskatchewan Federation of Labour*, *supra*, note 5 (labour relations); *Carter*, *supra*, note 5; *R. v. Nur*, [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 (S.C.C.) [hereinafter “*Nur*”] (s. 7 and s. 12 rights); *Tsilhqot’in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) (Aboriginal rights); *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, [2014] 3 S.C.R. 31 (S.C.C.) (access to justice).

bespoke logic. Rather than call attention to transformative change — which was not the Chief Justice's way — the Court's blockbusters often read as decisions that quite simply were dictated by the demands of justice.<sup>26</sup>

As Chief Justice, Beverley McLachlin was a selfless leader who dedicated herself to the consummate task of promoting and protecting the institutional legitimacy of the Court. She was fiercely protective and, if it is difficult to know whether her formative years on the Lamer Court shaped this view, there can be little doubt that “protecting and preserving the Court's reputation from political attack” was a priority.<sup>27</sup> Most notably, when confronted by the Prime Minister of Canada, she defended the office of the Court, treating it as collateral that her name and reputation might be tarnished in the process.<sup>28</sup> Meanwhile her jurisprudence reflected Justice McLachlin's values of modesty, humility and selflessness, to the point of reaching “a certain effacement of who she is”.<sup>29</sup> The Chief Justice made few claims for her legacy, allowing at most the hope that the McLachlin Court might be remembered as a “productive, respected Court” that took each case “as it [was] given” and tried to “do its best on every one of them”.<sup>30</sup>

One constant over the years was the internal dialectic that defined her jurisprudence. As she once explained, in decision-making “one has to examine her conscience very carefully” and, for her, that meant engaging a dialectic between the rule of law and a conception of justice grounded in humanity.<sup>31</sup> Paradoxically, Beverley McLachlin's theory of judging was at once more straightforward and more complex than might appear. In her words, a judge must hold “uncompromisingly” to her conscience and “do justice” but “stay within the proper confines of [a judge's]

<sup>26</sup> See, e.g., *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter “PHS”]; *Bedford*, *supra*, note 5.

<sup>27</sup> Beltrame, “Judging Beverley”, *supra*, note 20, at 28 (article on file with author).

<sup>28</sup> In 2014, then-Prime Minister Harper and then-Justice Minister MacKay publicly challenged the Chief Justice's integrity on an appointments matter. See generally, J. Cameron, “Law, Politics and Legal Building at the McLachlin Court in 2014” (2015) 71 S.C.L.R. (2d) 3-22, at 20-24 (describing these events and their impact on the Court). On retiring, the Chief Justice stated: “I never felt fear. I didn't even feel anxiety .... I did not want it [the PMO news release] to tarnish the office of chief justice or the court. I had devoted my whole life, or a good part of it, to doing whatever I could to make the court a wonderful and hopefully respected institution. My concern was that somehow this might tarnish the image of the court.” Sean Fine, “How Beverley McLachlin found her bliss” *The Globe and Mail* (January 13, 2018), at A15, online: <<https://www.theglobeandmail.com/news/national/beverley-mclachlin-profile/article37588525/>> [hereinafter “Fine, ‘Bliss’”].

<sup>29</sup> Fine, “Bliss”, *id.*, at A13 (quoting David Sandomierski, a former law clerk).

<sup>30</sup> Tibbetts, “Building Consensus”, *supra*, note 7.

<sup>31</sup> Makin, “Ten Years”, *supra*, note 7.

role.”<sup>32</sup> Conscience, in turn, was circumscribed by the rule of law and guided, in serving the fundamental principles of justice and democracy, by values of “good faith, reason, and diligence.”<sup>33</sup> Rather than apply it clinically, the judge tempered the rule of law, in particular, through a style of decision-making she referred to as conscious objectivity. Resolving the tension between the law’s imperatives and what conscious objectivity’s humanity might require is the defining feature of her jurisprudence.

### III. THE RULE OF LAW: OUR MODERN SHAMAN<sup>34</sup>

The rule of law is singular in our legal system and forms the main branch or trunk of our living tree constitutionalism.<sup>35</sup> In its time and place, the rule placed a check on the arbitrary exercise of authority and promised that laws would apply equally to all.<sup>36</sup> Now dismissed by some as “meaningless rhetoric”, the rule is evermore contested, at once signifying everything and nothing.<sup>37</sup> Despite a “shared ideal or concept of the Rule of Law — marked in part by such traditional desiderata as that both ordinary citizens and public officials should be ruled by law,” there is “widespread confusion and uncertainty about the ideal’s precise content.”<sup>38</sup> At best, it might be “no more than an honorific title for an amalgam of [] values”; at worst, it serves as an “analytic jumble that can foster nothing but confusion until its diverse and competing values are disaggregated”.<sup>39</sup> Examining the richness of the concept of the rule of law is outside the scope of this paper.

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<sup>32</sup> McLachlin, “Unwritten Constitutional Principles”, *supra*, note \*, at 20-22, 24.

<sup>33</sup> *Id.*, at 26.

<sup>34</sup> The Right Honourable Beverley McLachlin, P.C., “Diversity and the Rule of Law” [hereinafter “McLachlin, ‘Diversity’”] in R. Albert & D. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (UK: Cambridge University Press, 2017), at 33.

<sup>35</sup> See, e.g., *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.); *Reference re: Manitoba Language Rights (Man.)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721 (S.C.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

<sup>36</sup> See generally Peter W. Hogg & Cara F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (Summer 2005) 55 U.T. L.J. 715 [hereinafter “Hogg & Zwibel”].

<sup>37</sup> *Id.*, at 716, 732.

<sup>38</sup> Richard Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse” (1997) 97 Colum. L. Rev. 1, at 55 [hereinafter “Fallon”]; see also Allan Hutchinson & Patrick Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987) [hereinafter “*Ideal or Ideology?*”].

<sup>39</sup> Fallon, *id.*, at 41.

More to the point, Justice McLachlin formed a relationship of her own with the rule of law, returning to the topic often and with passion in her reflections and speeches.<sup>40</sup> Her rule of law was constant and fastidious but fluid as well; she enforced its manifest and essential rigidity but allowed and even required it to evolve. That negotiation between the rule of law as imperative and its capacity to adapt is at the heart of the McLachlin jurisprudence.

The rule of law is a principle of authority and means, emphatically, that the law's commands must be obeyed.<sup>41</sup> As Justice McLachlin explained, "a fundamental tenet of the rule of law is that all people are subject to its authority."<sup>42</sup> The essence of the rule is all encompassing, making "total claims upon the self" and leaving "no aspect of human experience unaffected by its claim to authority."<sup>43</sup> In principle uncompromising and egalitarian, the rule directs that laws of general application must apply without relief, exemption, or regard for individual circumstances.

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<sup>40</sup> See, e.g., "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004) 9 [hereinafter "McLachlin, 'Freedom of Religion'"]; The Right Honourable Madame Justice Beverley McLachlin, "Rules and Discretion in the Governance of Canada" (1992) 56 Sask. L. Rev. 167 [hereinafter "Rules and Discretion"]; "Unwritten Constitutional Principles", *supra*, note \*; "The Relationship Between the Courts and the Media" (speech delivered at Carleton University, January 31, 2012), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>> [hereinafter "The Relationship Between the Courts and the Media"]; Remarks of the Right Honourable Beverley McLachlin, P.C., "Administrative Tribunals and the Court: An Evolutionary Relationship" (speech delivered at the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, ON, May 27, 2013), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>> [hereinafter "An Evolutionary Relationship"]; "Openness and the Rule of Law" (speech delivered at the Annual International Rule of Law Lecture, London, U.K., January 8, 2014), online: <[https://www.barcouncil.org.uk/media/270848/jan\\_8\\_2014\\_-\\_12\\_pt\\_rule\\_of\\_law\\_-\\_annual\\_international\\_rule\\_of\\_law\\_lecture.pdf](https://www.barcouncil.org.uk/media/270848/jan_8_2014_-_12_pt_rule_of_law_-_annual_international_rule_of_law_lecture.pdf)> [hereinafter "Openness and the Rule of Law"]; "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" (speech delivered at Annual Pluralism Lecture, Global Centre for Pluralism, Toronto, ON, May 28, 2015), online: <<http://tomorrow.is/wp-content/uploads/2016/12/20150528.BeverleyMcLachlin.GlobalCentreforPlualism2.pdf>> [hereinafter "Reconciling Unity and Diversity"]; McLachlin, "Diversity", *supra*, note 34; Remarks of the Right Honourable Beverley McLachlin, P.C., "The Decline of Democracy and the Rule of Law: How to Preserve the Rule of Law and Judicial Independence" (speech delivered at the Saskatchewan and Manitoba Courts of Appeal Joint Meeting, Saskatoon, SK, September 28, 2017) online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2017-09-28-eng.aspx>> [hereinafter "The Decline of Democracy and the Rule of Law"].

<sup>41</sup> Hogg & Zwibel, *supra*, note 36, at 716 (the rule of law "presupposes that laws will usually be obeyed" and breaches met with enforcement) and at 717 ("[a] culture of obedience to the law is [the rule of law's] central requirement").

<sup>42</sup> McLachlin, "Freedom of Religion", *supra*, note 40, at 16.

<sup>43</sup> *Id.*, at 9, 14.

Unless strict legality can be relaxed, the rule of law will necessarily support and require unjust outcomes, and the question that arises is whether and how humanity's needs can be accommodated.<sup>44</sup> A classic instance of this dilemma prior to the Charter is *R. v. Morgentaler*, which tested the status of necessity in a criminal prosecution against Dr. Morgentaler.<sup>45</sup> Unsympathetic to the doctor's claim that it was necessary to perform illegal abortions, Dickson J. strenuously defended the rule of law, stating unequivocally that individual conscience — and its perception of exigency — cannot override the law's commands.<sup>46</sup> By contrast, in allowing the necessity defence to prevail, Laskin C.J.C.'s dissent responded to the circumstantial needs of justice.<sup>47</sup>

The Charter's arrival in 1982 shifted this dilemma in a new direction, creating dual rules of law comprising the traditional rule, understood as parliamentary supremacy, and the constitutional rule, which confirms the Charter as the supreme law of the land.<sup>48</sup> Justice McLachlin's conception of the relationship between the two has been fluid over time, in part reflecting the rhythms of Charter interpretation as new-found rights and freedoms initially ascended and then settled. For instance, before being appointed Chief Justice, she remarked that “[o]ne instinctively doesn't like to set aside legislation [which] has a good and salutary goal,” and added that “I don't view it as the end of the world if the court says, ‘No, Parliament has gone too far’”.<sup>49</sup> Many years later, as Chief Justice she declared that “[t]he courts have to be respectful of Parliament's role and the executive's role”, commenting as well that “[w]e're often giving a

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<sup>44</sup> “Unwritten Constitutional Principles”, *supra*, note \*, at 6 (explaining that “lawmakers may abuse their power by deviating from reason and enacting unjust laws” and that “just laws will become unjust in certain circumstances”). See also Hogg & Zwibel, *supra*, note 36, at 718 (stating that “[t]he rule of law is not a protection against laws that are bad”).

<sup>45</sup> [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616 (S.C.C.) [hereinafter “*Morgentaler*”].

<sup>46</sup> *Id.*, at 678 (stating that “[n]o system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value”). But see *R. v. Perka*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.) (setting a standard for necessity) and *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) (invalidating the *Criminal Code*'s framework for therapeutic abortions under s. 7 of the Charter).

<sup>47</sup> Chief Justice Laskin would have restored the jury's verdict of acquittal, on grounds of evidentiary sufficiency and because the illegal abortion concerned an emergency for a woman who was “a friendless stranger in this country, adrift more or less in an unfamiliar locality”: *Morgentaler*, *id.*, at 655.

<sup>48</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1). See Allan Hutchinson & Patrick Monahan, “Democracy and the Rule of Law” in *Ideal or Ideology*, *supra*, note 38, at 97-125 (discussing this juxtaposition and, at 100, lamenting the constitutional Rule of Law as a “clear check on the actual impact and expansion of a rigorous democracy”).

<sup>49</sup> Fine, “The Most Important Woman”, *supra*, note 2, at 6.

measure of deference to ministerial decisions and it's not just lip service," because Parliament has a right to make its choices.<sup>50</sup>

As for its meaning, Justice McLachlin's rule of law embraced the traditional conception as well as its enlargement and evolution. Noting that "[t]hings are not as simple as Dicey perceived them", she observed that the rule of law more profoundly embodies "the fundamental expectations for decision-making in a democratic society".<sup>51</sup> Functionally, the rule of law provides "a structure of legal and political values" and yields "at the periphery and sometimes at the core (*as in the case of the Charter*)" to the demands of "practicality, flexibility and individual justice".<sup>52</sup> Nor, in her view, can it foreclose discretion, as once thought, because decision-making does not "always call for one right answer in every case".<sup>53</sup>

Her extra-curial reflections returned, at intervals, to a familiar or favourite theme that, to be legitimate, the rule of law must be organic as well as robust.<sup>54</sup> Institutionally, this insight was reflected in the recognition that public confidence in the judiciary is a cornerstone of the rule of law. Justice McLachlin was fond of observing that the Court and judicial system belong to the Canadian public.<sup>55</sup> She saw herself, the judiciary, and the courts as the servants of democracy and considered it essential to publicize what judges do.<sup>56</sup> Realizing that access to justice engages foundational rule of law values, she acted on her commitment to an open, transparent, and accessible court.

Justice McLachlin considered it the vital duty of courts and judges to advance and protect the law's legitimacy, in part by inflecting it with organic content and flexibility. Under this view, the rule of law is dynamic and responsive to shifting conceptions of justice. Not long ago she even declared it our "modern shaman", instilling values of listening

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<sup>50</sup> Brean, "Conscious Objectivity", *supra*, note 6.

<sup>51</sup> "Rules and Discretion", *supra*, note 40, at 168-69.

<sup>52</sup> *Id.*, at 170, 171 (emphasis added).

<sup>53</sup> "An Evolutionary Relationship", *supra*, note 40, at 5.

<sup>54</sup> Note also that judicial independence was another rule of law theme for her. See, e.g., "The Decline of Democracy and the Rule of Law", *supra*, note 40.

<sup>55</sup> See, e.g., The Honourable Madame Justice Beverley McLachlin, "The Role of Judges in Modern Commonwealth Society" (1995) 53 *Advocate* 681, at 682 [hereinafter "The Role of Judges"] (stating that judges in modern society are not "potentates" but "servants of the people in the highest and most honourable sense of that term"); Wallace, "Stepping Out", *supra*, note 2 (stating that the law is "not the preserve of the judges or a few lawyers" but is "the preserve of the people of Canada").

<sup>56</sup> "The Relationship Between the Courts and the Media", *supra*, note 40; "Openness and the Rule of Law", *supra*, note 40.

and respecting one another to reach a concept of justice that harmonizes with social reality.<sup>57</sup> In her words, “[t]he confidence of the citizen that her human dignity and right to choose to be different will be respected and enforced through the rule of law is the bedrock upon which civilized intercourse in a diverse society rests”.<sup>58</sup>

This brief account of select extra-curial reflections brings to life a layered and formative conception of the rule of law that grounded Beverley McLachlin’s decision-making. A rule of law that for her was modern and shamanistic had richness and depth because it must: the law cannot demand obedience unless the democratic community accepts its legitimacy and has confidence that the justice system is fair and inclusive. This conception, which she articulated in a variety of speeches, allowed and required the law to accept “respectful accommodation” and the demands of diversity.<sup>59</sup> A style of decision-making she referred to as conscious objectivity was the bridge between the conventional and shamanistic conceptions of the rule and her way of rendering the rule meaningful and responsive.

#### IV. CONSCIOUS OBJECTIVITY

Beverley McLachlin’s style of judging revolved around a concept of objectivity that she shaped and practised over the years.<sup>60</sup> By her own description, decision-making is “an act of imagination” that draws on an “attitude of ‘active humility’”.<sup>61</sup> Objectivity, in her conception, enabled a judge to set aside “preconceptions and prejudices” and achieve “a level of detachment.”<sup>62</sup> In the moment, this methodology places a judge in a litigant’s shoes so that she can experience that person’s perspective before deciding what justice requires.<sup>63</sup>

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<sup>57</sup> McLachlin, “Diversity”, *supra*, note 34, at 33.

<sup>58</sup> “Reconciling Unity and Diversity”, *supra*, note 40, at 15.

<sup>59</sup> McLachlin, “Diversity”, *supra*, note 34, at 29 and 31.

<sup>60</sup> See, e.g., “The Role of Judges”, *supra*, note 55, at 685; The Right Honourable Beverley McLachlin, “The Supreme Court and the Public Interest” (2001) 64 Sask. L. Rev. 309, at 315-16; Chief Justice of Canada McLachlin, “Judicial Power and Democracy” (2000) 12 Sing. Ac. L.J. 311, at 329 [hereinafter “Judicial Power and Democracy”]; “Judging: The Challenges of Diversity” (speech delivered at the Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, Scotland, June 7, 2012), online: <<http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>> [hereinafter “The Challenges of Diversity”].

<sup>61</sup> “The Role of Judges”, *id.*, at 685.

<sup>62</sup> *Id.*

<sup>63</sup> “Judicial Power and Democracy”, *supra*, note 60, at 329.

Looking back, a little-known incident at the outset of her Supreme Court tenure telegraphed this approach and demonstrated its power in decision-making. In the summer of 1989, only a few months after she was appointed, the Court heard an extraordinary, expedited appeal. The matter concerned an injunction Ms. Daigle's abusive ex-partner had obtained to prevent her having an abortion. When the judges learned that Daigle had terminated her pregnancy before the hearing, Dickson C.J.C. "wanted to end the case on the spot".<sup>64</sup> That is reportedly when McLachlin J. intervened, inviting the judges to put themselves in Daigle's position and imagine what it might be like to carry a fetus to term in the circumstances of that relationship.<sup>65</sup> At the end of the hearing the Court quashed the injunction.<sup>66</sup>

The McLachlin methodology embraced empathy but was more centred on a concept of objectivity. In light of her commitment to the rule of law, an approach too open to empathy in decision-making might have been out of character and uncomfortable for her. Justice McLachlin patterned her approach to decision-making in the 1990s when the Court's other women judges — Justices Wilson and L'Heureux Dubé — were polarizing, controversial figures. While too much empathy was not the primary irritant, their decisions generated considerable discussion about women judges, the role of feminism, and concerns about judicial impartiality.

The Charter furor of the 1990s demonstrated how controversy could erupt when decision-making departed from conventional understandings — or misunderstandings, depending on point of view — about the nature of judging. Subsequent debate about empathy in decision-making was triggered, in the United States, by then-Senator and later President Obama's views on the attributes of a good judge.<sup>67</sup> In at least some quarters, empathy was associated with "liberal activism" and dismissed as anathema to the rule of law.<sup>68</sup> But as Obama explained, empathy is simply the ability to "imagine standing in [others'] shoes" and "imagine

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<sup>64</sup> Recounted in Robert Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 392-95.

<sup>65</sup> Justice McLachlin told the authors "I thought I could almost see [Dickson's] face change"; *id.*, at 394.

<sup>66</sup> *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.) (decision rendered on August 8, 1989 and reasons by "the Court" rendered on November 16, 1989).

<sup>67</sup> See generally, T. Colby, "In Defense of Judicial Empathy" (2012) 96 Minn. L. Rev. 1944 [hereinafter "Colby"].

<sup>68</sup> *Id.*, at 1952, n. 27.



looking through their eyes.”<sup>69</sup> Framed that way it is neutral because it is inclusive, calling “us all to task, the conservative and the liberal, the powerful and powerless, the oppressed and oppressor.”<sup>70</sup> In practice, it counters complacency by confronting limited vision, serving as a form of perspective taking that sees and engages the emotions of another person’s circumstances.<sup>71</sup> According to Richard Posner, an internal perspective — the putting oneself in the other person’s shoes — is an exercise of empathetic imagination that lacks normative significance.<sup>72</sup>

Justice McLachlin’s concept of conscious objectivity resonated with that conception of judicial empathy and aligned with her idea of “informed impartiality.”<sup>73</sup> She acknowledged that subjective influences, including emotions and a sense of justice, are part of objectivity, and are not an unwelcome or intrusive influence.<sup>74</sup> Impartiality in a diverse society does not mean that all preconceptions and personal inclinations must be eliminated, though it does require a judge to evaluate and identify inappropriate preconceptions and prejudices.<sup>75</sup> Under this view, impartiality is promoted through mindful attention to introspectiveness, openness, and empathy, which are the sensibilities that expose a judge to the phenomenon of difference. In particular, empathy emphasizes the “common humanity of us all” and recognizes the “legitimacy of diverse experiences and viewpoints.”<sup>76</sup>

In Justice McLachlin’s conception, a judge who is able to use her imagination and systematically imagine how each sees the situation will “truly hear the parties who appear before her.”<sup>77</sup> Fundamentally, that is what litigants want: “a judge who is aware of the influence of her own experiences and perspectives, who is willing to act on different views and ideas and who has the capacity to truly hear and understand the perspectives of all those who come before her.”<sup>78</sup> Described that way, conscious objectivity is in harmony with an evolved and shamanistic conception of the rule of law. In other words, to ensure its authority and

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<sup>69</sup> Quoted in Colby, *id.*, at 1963-64.

<sup>70</sup> *Id.*, at 1963 (quoting President Obama).

<sup>71</sup> *Id.*, at 1958.

<sup>72</sup> Richard Posner, *Overcoming Law* (Boston: Harvard University Press, 1995), at 381.

<sup>73</sup> “The Challenges of Diversity”, *supra*, note 60, at 6.

<sup>74</sup> See *R.D.S.*, *supra*, note 19, at para. 29 (stating that while judges “can never be neutral” they must “strive for impartiality”) and at para. 38 (stating that judges “cannot be expected to divorce themselves” from their pre-judicial experiences).

<sup>75</sup> “The Challenges of Diversity”, *supra*, note 60, at 13.

<sup>76</sup> *Id.*, at 12.

<sup>77</sup> *Id.*, at 13.

<sup>78</sup> *Id.*

legitimacy, the rule of law must embrace diversity, tolerance, inclusion, and the accommodation of difference — which are precisely the values engaged by this methodology. Not to embrace and engage through this process, in her view, would place public confidence in the courts, the judiciary, and the law itself at risk.<sup>79</sup>

The discussion that follows these themes through her jurisprudence can do no more than offer a preliminary, limited, and selective glimpse of the judge at work over the years. This glimpse shows a focus on decision-making “in the small” — finding the best answer in the moment — and not on grand theory or transformative change. It is evident, throughout, that the rule of law served as a default setting for her in a dialectic that was fluid. Moreover, Justice McLachlin’s brand of conscious objectivity was intuitive, taking guidance from the values that informed and constituted her reasoned legal conscience. What emerged through her process of internal dialectic was less a theory of justice than a manner of decision-making that presents its own distinctive — even singular — conception of justice.

#### V. INTERNAL DIALECTIC: THE LAW IN CAPS AND THE EMPATHETIC IMAGINATION

As *puisne* judge, Beverley McLachlin went “out of her way to be non ideological” because, as one observer explained, “she believes in the law — THE LAW in caps”.<sup>80</sup> At the time she expressed the hope that, despite being perceived as tough, the “humanity and caring” in her decision-making would be understood.<sup>81</sup> On retiring, the Chief Justice reinforced the point, stating “[i]t’s the humanity in every case that is so important to me, and it always has been”.<sup>82</sup> Her jurisprudence offers a narrative of these core commitments — the rule of law and humanity — and their dialectical interaction over time.

A suite of decisions on mental disorder in the criminal law is the starting point because it provides striking example of the dialectic at work, offering direct and valuable insight into Justice McLachlin’s decision-making process. Early in her tenure on the Court she wrote a

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<sup>79</sup> *Id.*, at 5, 24 (stating that the ultimate challenge of judging in a diverse society is public confidence in the judiciary and the rule of law). See also “Reconciling Unity and Diversity”, *supra*, note 40, at 15-16 (explicitly linking tolerance and respect for diversity to the rule of law).

<sup>80</sup> Fine, “The Most Important Woman”, *supra*, note 2, at 8 (quoting DeLloyd Guth).

<sup>81</sup> *Id.*

<sup>82</sup> Fine, “Bliss”, *supra*, note 28.

dissent in *R. v. Chaulk* that privileged logic and legality at the expense of insight.<sup>83</sup> After finding that the presumption of sanity in section 16(4) of the *Criminal Code*<sup>84</sup> did not violate the Charter, she concluded that a section 16 defence was unavailable where an individual committed an act, knowing it was against the law.<sup>85</sup> Her analysis of “knows” and whether it should support a broad or narrow section 16(2) defence can best be described as formalistic. Justice McLachlin was unable or unwilling to accept that mental disorder can compel an individual to act on delusions or other forms of disorder, despite knowing the law. Not surprisingly, her concerns were grounded in rule of law considerations; she considered it fundamentally problematic to grant the defence to a person who knew an act was legally wrong. In her view, “absence of moral appreciation is *no excuse* for criminal conduct.”<sup>86</sup>

Less than 10 years later, her landmark decision in *Winko v. British Columbia (Forensic Psychiatric Institute)*, expressed a different appreciation of mental disorder and those found not criminally responsible (“NCR”).<sup>87</sup> In the interim, she backtracked from her dissent in *Chaulk*, all but abandoning it in *R. v. Oommen*.<sup>88</sup> There, the evidence established that the defendant knew murder was legally wrong but was subject to powerful delusions. In such circumstances, McLachlin J. recognized that mental disorder may deny an individual the capacity and choice to obey the law. Her majority reasons finessed *Chaulk*’s focus on legal versus moral wrong by asking whether mental disorder deprived Oommen of the capacity to exercise a rational choice between the two.<sup>89</sup> Recognizing that a break with reality can destroy an individual’s capacity to obey the law dispelled the rule of law concerns that troubled her so greatly in *Chaulk*.

Only a few years later, Justice McLachlin’s ground-breaking decision in *Winko* established a framework of principle for Part XX.1’s system of

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<sup>83</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.) [hereinafter “*Chaulk*”].

<sup>84</sup> R.S.C. 1985, c. C-46 [“hereinafter “*Criminal Code*”].

<sup>85</sup> *Chaulk*, *supra*, note 83, at 1398-1403 (maintaining that the presumption relates to the capacity for choice and not to the elements of the offence or to particular defences) and at 1408 (stating that s. 16(2) uses the word “wrong” without modification and “should be read simply in the sense of what ought not to be done or omitted”).

<sup>86</sup> *Id.*, at 1411 (emphasis added) and 1412 (asking why it should matter whether an individual’s moral mechanism broke down because of a disease of the mind and not because of a “morally impoverished upbringing”).

<sup>87</sup> [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 (S.C.C.) [hereinafter “*Winko*”].

<sup>88</sup> [1994] S.C.J. No. 60, [1994] 2 S.C.R. 507 (S.C.C.).

<sup>89</sup> *Id.*, at 516, 518, 520 (drawing a distinction between abstract knowledge that an act is wrong and the capacity to apply that knowledge).

forensic detention for NCR and unfit criminal offenders. *Winko* was the Court's first opportunity to address Parliament's overhaul of forensic mental justice under the Charter, and it achieved a masterful balance between the criminal law's goals of protecting public safety and promoting the rehabilitation of forensic offenders.<sup>90</sup> Though *Winko* is a landmark for many reasons, what stands out is McLachlin J.'s response to the vulnerability of mentally disordered offenders. It is significant, for example, that *Winko* drew a strong and careful distinction between punishment and treatment, stressing that mentally disordered offenders can only be detained for legitimate treatment purposes.<sup>91</sup> In addition, her *Winko* reasons firmly indicated that the exacting standard of least onerous and least restrictive applies to restrictions on the liberty of NCR offenders.<sup>92</sup> Of greatest interest is Justice McLachlin's evident empathy for those who suffer from mental illness. After noting that the mentally ill have "long been subject to negative stereotyping and social prejudice" she repeated, throughout her reasons, that Part XX.1 offenders must at all times be treated with the utmost fairness and respect for their dignity.<sup>93</sup>

The contrast is dramatic: while *Chaulk* elevated abstract, formalistic reasoning, *Winko* represented an act of empathetic imagination. Together, these decisions witness an important and compelling shift, in less than 10 years, that speaks to Justice McLachlin's openness and humility as a jurist. Just as formalism can be found elsewhere in her jurisprudence, *Winko*'s attention to fairness for forensic offenders is emblematic of her ability to mesh the rule of law with the humanity and caring that was so important to her. Though there were other shifts in direction, none was as revealing of the internal dialectic's evolution as *Chaulk*, *Oommen*, and *Winko*.<sup>94</sup>

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<sup>90</sup> See *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) (invalidating the automatic detention of those found not guilty by reason of insanity); *Criminal Code*, *supra*, note 84, Part XX.1 was enacted in 1991, S.C. 1991, c. 43.

<sup>91</sup> *Winko*, *supra*, note 87, at para. 41 (stating, among other things, that the NCR offender is not criminally responsible, but ill and that "[p]roviding opportunities to receive treatment, *not imposing punishment*, is the just and appropriate response" (emphasis added)).

<sup>92</sup> *Id.*, at para. 42.

<sup>93</sup> *Id.*, at paras. 35 and 42 (stating that "... Parliament has signalled that the NCR accused is to be treated with the utmost dignity and afforded the utmost liberty compatible with his or her situation").

<sup>94</sup> See discussion of *Kindler*, *supra*, note 5, and *Burns*, *supra*, note 5.

## VI. LEGALITY'S RULE OF LAW

It is a judge's sworn duty to uphold the rule of law, and Justice McLachlin was not one to shirk that duty. Her commitment to the rule of law is the frame in which her jurisprudence rests and, as a few examples attest, she did not hesitate to protect the law's authority when she thought it necessary.

On several occasions Justice McLachlin supported labour unions, though not when the rule of law was directly at stake.<sup>95</sup> In *United Nurses of Alberta v. Alberta (Attorney General)*, she decided against a union and in doing so expressed an uncompromising view of judicial authority.<sup>96</sup> In strong reasons she described strike action in contravention of a legal directive as an act of "public defiance", an "open, continuous and flagrant violation of a court order". Justice McLachlin reacted to the impact on "the respect accorded to edicts of the court", upholding the conviction for contempt because the rule of law is "at the heart of our society"; as she declared, "without it there can be neither peace, nor order nor good government."<sup>97</sup> Justice Cory's dissent strongly challenged her rule of law analysis, claiming that the offence requires a serious public injury, and warning against the use of criminal contempt on labour issues.<sup>98</sup>

Justice McLachlin invoked the rule of law in contempt proceedings again in *MacMillan Bloedel Ltd. v. Simpson*, which concerned the constitutionality of federal legislation transferring jurisdiction over charges against minors to youth court.<sup>99</sup> While Lamer C.J.C. found the provision unconstitutional because it undermined the Court's authority, McLachlin J.'s dissent held that courts must conform to the rule of law and "abide by the dictates of the legislature", including laws placing limits on their powers.<sup>100</sup> For her the rule of law was governing, and the Court was bound to accept Parliament's decision to alter the jurisdiction of the courts.

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<sup>95</sup> See, e.g., *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.) (secondary picketing); *Health Services*, *supra*, note 5 (collective bargaining); *Mounted Police Assn.*, *supra*, note 5 (collective bargaining) with LeBel J.

<sup>96</sup> [1992] S.C.J. No. 37, [1992] 1 S.C.R. 901 (S.C.C.). The Alberta Labour Relations Board directive was filed with the Court of Queen's Bench.

<sup>97</sup> *Id.*, at 932 and 931 (commenting, also, that the rule is "directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect").

<sup>98</sup> *Id.*, at 913 and 915 (setting a high threshold of violence for the rule of law and adding that using contempt against labour unions could reflect adversely on judicial impartiality).

<sup>99</sup> [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.).

<sup>100</sup> *Id.*, at para. 80.

Justice McLachlin also wrote strongly on behalf of Aboriginals and their communities, though not when the rule of law was at risk.<sup>101</sup> In *R. v. Nikal*, the Court restored an Aboriginal man's acquittal on a charge of fishing without a licence.<sup>102</sup> Justice Cory found that although the licence requirement did not violate section 35(1) of the *Constitution Act, 1982*, the conditions for the licence did.<sup>103</sup> Justice McLachlin strongly objected to the suggestion that collateral issues could excuse the failure to obtain a licence. Whatever their nature, defective or impermissible conditions could not negate a requirement that licensed activities — whether for fishing, discharging pollutants, or driving a car — be duly authorized.<sup>104</sup>

Justice McLachlin also set herself apart in *R. v. Marshall's* decision to extend Aboriginal fishing rights.<sup>105</sup> There, she challenged a definition of the right as an indeterminate, “generalized abstraction”, because it could only function “illegitimately” to create an entitlement of broad and undefined scope.<sup>106</sup> Doubt about the legitimacy of the Court's authority to extend title in that way raised rule of law issues for her. The day after being appointed Chief Justice, and without referring directly to *Marshall*, she stated that “[y]ou cannot divorce the law ... from the consequences,” admonishing that judges should give thought to how their rulings will fit “the institutional matrix of society”.<sup>107</sup> It was her way of processing concerns about *Marshall's* consequences for the legitimacy and authority of the law.

The rule of law was otherwise pervasive in her decision-making, at times in unexpected contexts. For instance, Justice McLachlin invoked the rule of law in *R. v. Keegstra*<sup>108</sup> to limit the scope of section 2(b) of the Charter. Despite concluding that the *Criminal Code's* hate propaganda provision was unconstitutional, her dissent adopted a narrow approach to the Charter's guarantee of expressive freedom. After agreeing that “[t]he nature of the content of expression can *never* function to exclude it” from

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<sup>101</sup> See, e.g., *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.).

<sup>102</sup> [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013 (S.C.C.).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at para. 74.

<sup>105</sup> [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 (S.C.C.), Gonthier J., concurring [hereinafter “*Marshall*”].

<sup>106</sup> *Id.*, at para. 112.

<sup>107</sup> “McLachlin's Choice”, *supra*, note 17, at 3. Meantime, *Marshall* stirred so much controversy that the Court took the unprecedented step of issuing a clarification: *R. v. Marshall*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533 (S.C.C.).

<sup>108</sup> *Supra*, note 14.

section 2(b), she held that violence and threats of violence are an affront to the rule of law and not protected by the Charter.<sup>109</sup> Over the course of time that position was confirmed in several decisions.<sup>110</sup>

Justice McLachlin's disapproval of constitutional exemptions was also rooted in the rule of law. In *R. v. Ferguson*, she held that the constitutionality of mandatory minimum sentences cannot be addressed on a case-by-case basis, because that would render "the bright line required for constitutional certainty elusive."<sup>111</sup> Under her reasoning, exemptions buy flexibility but undermine the rule of law, and she simply could not abide a remedy that determined the scope of the law's authority on a case-by-case basis.<sup>112</sup> A similar issue arose with the Court's practice of suspending declarations of invalidity, leaving unconstitutional provisions in place to enable a parliamentary response during the suspension period. Whatever that implies for the constitutional rule of law, Justice McLachlin refused to grant an exemption to those who remained subject to an invalid but enforceable law. An exemption could only be sought and granted on a selective, *ad hoc* and potentially arbitrary basis and that, in her view, undermined the law's authority. As noted below, she maintained this position even when it imposed severe hardship on individuals.<sup>113</sup>

The rule of law, conventionally understood, was fundamental to Justice McLachlin's decision-making. As a few examples demonstrate, enforcing the law's authority was her first priority. This duty also drew her toward formalistic reasoning in some instances.

A well-known example is *R. v. Hess*, where she maintained that a *Criminal Code* provision prohibiting sexual intercourse with a female under age 14 violated section 15 of the Charter because it failed to

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<sup>109</sup> *Id.*, at 826 (emphasis added) and at 830. Compare Dickson C.J.C., at 731-32 (concluding that threats of violence can only be classified by their content and are not excluded from s. 2(b)).

<sup>110</sup> See, e.g., *R. v. Khawaja*, [2012] S.C.J. No. 69, 2012 SCC 69, [2012] 3 S.C.R. 555 (S.C.C.) [hereinafter "*Khawaja*"] (stating, at para. 70, that excluding acts of violence from s. 2(b) but including threats of violence makes little sense: neither is worthy of protection because both undermine the rule of law).

<sup>111</sup> [2008] S.C.J. No. 6, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 71 (S.C.C.) [hereinafter "*Ferguson*"].

<sup>112</sup> *Id.*, at para. 67; see generally, *id.*, paras. 67-73 (discussing the rule of law).

<sup>113</sup> In addition to *Ferguson, id.*, see *Carter, supra*, note 5 (denying exemptions during the period of suspended invalidity of the criminal prohibition on assisted suicide, on rule of law grounds); see also *Carter v. Canada*, [2016] S.C.J. No. 4, 2016 SCC 4, [2016] 1 S.C.R. 13 (S.C.C.) (dissenting opinion, confirming this view) [hereinafter "*Carter II*"].

protect males of the same age.<sup>114</sup> In dismissing this logic as “rigid formalism”, Wilson J. cautioned against “an overly simple comparison” of men and women.<sup>115</sup> While agreeing that “[i]t borders on the fictional to suppose” that males could require this protection, McLachlin J. refused to compromise on the abstract question of constitutional law. No person should be convicted under an invalid law, and it was therefore open to a defendant to raise any available constitutional defect.<sup>116</sup> Her reasoning was principled, if formalistic: to her an unconstitutional provision was an insult to the rule of law that invited invalidation, regardless of the status of the party before the Court.<sup>117</sup>

The point warrants a textual footnote on mandatory minimum sentences under section 12. In *R. v. Goltz*, McLachlin J.’s dissent would have invalidated the sentencing provision in its entirety to avoid the prospect of reading it down and effectively applying a constitutional exemption on a case-by-case basis.<sup>118</sup> In reaching that conclusion she relied on her controversial decision in *R. v. Seaboyer*.<sup>119</sup> *R. v. Nur* was yet more explicit, pronouncing that the rule of law is manifestly offended when “bad laws” are left on the books.<sup>120</sup> Like *Hess*, *Nur* cited *Big M* for the proposition that no one should be subjected to an unconstitutional law; as she stated, the Constitution belongs to all citizens, “who share a right to the constitutional application of the laws of Canada.”<sup>121</sup>

By its nature the rule of law is a matter of discipline and logic. As seen above McLachlin J. thought so in *Chaulk*<sup>122</sup> and *Nikal*,<sup>123</sup> but also in *Kindler*.<sup>124</sup> There, she concluded that extradition to the United States, without assurances that capital punishment would not be sought, did not

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<sup>114</sup> [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.) (dissenting opinion, finding a justifiable breach of s. 15 and upholding the s. 15 and s. 7 breach under s. 1 of the Charter).

<sup>115</sup> *Id.*, at 929.

<sup>116</sup> *Id.*, at 946.

<sup>117</sup> *Id.*, at 945-46 (citing *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.)). See also *Keegstra*, *supra*, note 14, at 849; *Zundel*, *supra*, note 14, at 743 (maintaining, in both instances, that the Court’s focus was on the constitutionality of *Criminal Code* provisions and not on the offensiveness of the expression).

<sup>118</sup> [1991] S.C.J. No. 19, [1991] 3 S.C.R. 485, at 526 (S.C.C.). But, see *Sharpe*, *supra*, note 22 (employing statutory interpretation to make child pornography legislation consistent with the Charter).

<sup>119</sup> *Id.*, at 525-26; *Seaboyer*, *supra*, note 14.

<sup>120</sup> *Supra*, note 25, at para. 51 (invalidating one of Parliament’s mandatory minimum sentences for firearms offences).

<sup>121</sup> *Id.*

<sup>122</sup> *Supra*, note 83.

<sup>123</sup> *Supra*, note 102.

<sup>124</sup> *Supra*, note 5.



offend section 12's guarantee against cruel and unusual punishment. Setting Canada's decision to extradite off and formalistically compartmentalizing it from the issue of punishment enabled her to find that capital punishment did not violate the Charter. In purely formal terms — though surely not in reality — Canada's extradition had nothing to do with any decision to impose or carry out capital punishment.<sup>125</sup>

Justice McLachlin's commitment to the rule of law rarely wavered. Yet, as noted, justice and humanity were high-priority values in her decision-making. She reconciled those values with the duty to uphold the rule of law through a form of dialectic between the two. For her, confronting and resolving that tension was a matter of judicial conscience.

## VII. EMPATHY'S RULE OF LAW

Though her role behind the scene in *Daigle v. Tremblay* provides an earlier and compelling example, Justice McLachlin first spoke of conscious objectivity in 1995.<sup>126</sup> In a certain way conscious objectivity placed a check on the rule of law because it contemplated a process of careful listening — and positioning — to consider, openly and emphatically, humanity's context and how it could or should be accommodated. Despite a preoccupation with this approach, Justice McLachlin never promised or even suggested that conscious objectivity would favour any point of view. Her level of empathetic engagement varied, in part because it interacted with and was subject to the rule of law, and also because it reflected her core views about what was fundamentally just or unjust in different settings. "Empathy without an agenda" was therefore a fitting description of her approach as her empathetic imagination was activated in some contexts but not in others.<sup>127</sup>

Two decisions from the 1990s show her dialectic at work in circumstances where the practice of conscious objectivity reinforced rule of law analytics. Justice McLachlin's dissent in *R. v. Downey* provides an

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<sup>125</sup> *Id.*, at 846-47 (stating that the effect of any Canadian law or government act is "too remote" from the possible imposition of the penalty to "attract the attention of s. 12"). The Court found it unnecessary to overrule *Kindler* in *Burns*, *supra*, note 5, and avoided awkwardness for the newly appointed Chief Justice by deciding the case by anonymous opinion by "the Court".

<sup>126</sup> McLachlin, "The Role of Judges", *supra*, note 55, at 685.

<sup>127</sup> Fine, "The Most Important Woman", *supra*, note 2, at 6.

illustration. There she was earnest, verging on angry, in describing the irrational and unfair effects of the *Criminal Code*'s prohibition against living on the avails of prostitution.<sup>128</sup> In invalidating the prohibition she pointed to its dire effects on the lives of prostitutes, depriving them of "human relationships", isolating them from friends or family, and forcing them, predictably, "onto the streets or into the exploitive power of pimps".<sup>129</sup> Coming from a judge who had quickly established herself as a confident jurist it was an unusually powerful dissent.<sup>130</sup>

*Finlay v. Canada (Minister of Finance)* is notable for a different reason.<sup>131</sup> Though it reads primarily as a decision that is focused on technical analysis, McLachlin J.'s dissent made explicit and empathetic reference to the parties who would be affected. The issue there was whether the Canada Assistance Plan permitted a province to make deductions from assistance payments to cover the overpayment of social benefits.<sup>132</sup> Justice McLachlin's reasons called attention to the "human reality of persons in need", who have no savings or reserves and who — without their monthly allocation of basic needs — would be left without food, shelter and other basic necessities.<sup>133</sup> That human reality complemented the legal analysis and for her formed an important part of her reasoned legal conscience.

In *Downey* and *Finlay*, McLachlin J. blended powerful analysis with a conception of justice grounded in humanity. When synchronization was not possible, she at times acknowledged the dilemma but adopted the default position, enforcing the rule of law. Decisions that might have kept her up at night, worrying about those "caught up in the machinery of justice," include *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*<sup>134</sup> and *British Columbia (Attorney General) v. Christie*,<sup>135</sup> in both she explicitly voiced her sympathy for parties whose

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<sup>128</sup> *Supra*, note 5.

<sup>129</sup> *Id.*, at 47.

<sup>130</sup> See "Stereotyping means unfair justice system for women" *The Lawyers Weekly* 11:2 (May 10, 1991) (on file with author) (quoting from a speech by McLachlin J. which was highly critical of the criminal law's treatment of women, including by attacking the problem of prostitution by "putting the burden squarely on the shoulders of women").

<sup>131</sup> [1993] S.C.J. No. 39, [1993] 1 S.C.R. 1080 (S.C.C.).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*, at 1117-18.

<sup>134</sup> [2004] S.C.J. No. 41, 2004 SCC 78, [2004] 3 S.C.R. 657 (S.C.C.) [hereinafter "*Auton*"].

<sup>135</sup> [2007] S.C.J. No. 21, 2007 SCC 21, [2007] 1 S.C.R. 873 (S.C.C.) [hereinafter "*Christie*"].

claims she nonetheless rejected.<sup>136</sup> Most poignant, perhaps, was the status of assisted suicide in the wake of *Carter*, which left the *Criminal Code*'s prohibition in place during the period of suspended invalidity.<sup>137</sup> In refusing to grant constitutional exemptions, the four dissenting judges in *Carter II* — which included the Chief Justice — stated that "... [w]e do not underestimate the agony of those who continue to be denied access to the help they need to end their suffering."<sup>138</sup> Despite empathetic consideration that were impossible to ignore, the rule of law governed and the dissenting opinion found that the issue could only be addressed through an orderly process of democratic law-making.

As a form of "contextualized judging", conscious objectivity was deeply influenced by perceptive sensibility, and that may explain why the judge's empathy was more readily activated in some contexts than others. At times she seemed to apply a reverse methodology, placing the litigant in the shoes of a third party, or reasonable person, and assessing the claim from that perspective. These are the claims that fell short on values of justice and humanity and did not resonate with Justice McLachlin's judicial conscience.

An example is *Lavigne v. Ontario Public Service Employees Union*,<sup>139</sup> which concerned a non-member's objection to mandatory union dues that supported non-workplace objectives. Skeptical that section 2(d) could even include an element of non-association, McLachlin J. accepted a right of freedom from "enforced association with ideas and values", but proposed a narrow conception of breach based on forced ideological conformity.<sup>140</sup> Under this view, compelled association would only matter under section 2(d) when an individual was "reasonably associated" with an objectionable message; in other words, coercion was not a matter of subjective perception but determined, instead, by objective assessment.<sup>141</sup> Abstracting the issue of compulsion and deflecting it to an objective

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<sup>136</sup> Makin, "Ten Years", *supra*, note 7. *Auton*, *supra*, note 134, at para. 2 (stating that "[o]ne sympathizes with the petitioners" who sought health care funding for autistic children); *Christie*, *id.*, at para. 29 (stating that "[n]otwithstanding our sympathy for Mr. Christie's cause" we are compelled to dismiss his challenge to a provincial tax on legal services).

<sup>137</sup> *Carter*, *supra*, note 5 (invalidating the assisted suicide provision but suspending the declaration of invalidity to give Parliament an opportunity to enact a new law).

<sup>138</sup> *Supra*, note 113, at para. 14.

<sup>139</sup> [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.).

<sup>140</sup> *Id.*, at 343-44 (stating only that she was "inclined to the view" that compulsory association violates s. 2(d)).

<sup>141</sup> *Id.*, at 344-45 (also explaining that "public identification" is not necessarily a prerequisite because the question is whether there is activity, when fairly adjudged, that brings an individual involuntarily into association with ideas and values).

bystander was a clear departure from conscious objectivity. In the circumstances, McLachlin J. may have harboured rule of law concerns about a definition of section 2(d) that would enable individuals to dissociate from various legal responsibilities and obligations.<sup>142</sup>

Another illustration is *Gosselin v. Quebec (Attorney General)*,<sup>143</sup> which considered whether a provincial benefits scheme discriminated against welfare recipients under age 30. *Gosselin* was potentially a landmark because it posed a threshold question about the imposition of positive obligations under the Charter.<sup>144</sup> Facing a 5-4 split and powerful dissenting opinions by Arbour, Bastarache and L'Heureux-Dubé JJ., the Chief Justice dismissed the appellant's challenge as "utterly implausible".<sup>145</sup> In her view there was no breach of section 15 because a "reasonable person" in Gosselin's position would have understood the merits of the program. Once "reasonabilized", Gosselin would realize that the scheme did not treat her and others her age as "less worthy and less deserving of respect" in a way that marginalized or denigrated them.<sup>146</sup> As in *Lavigne* this analysis essentially reversed the method of conscious objectivity; rather than place herself in Gosselin's shoes, the Chief Justice appeared to do the opposite, putting Louise Gosselin in the shoes of a putatively reasonable welfare recipient and assessing the claim from that perspective.

In addition, a cluster of decisions suggests that conscious objectivity was less intuitive for Justice McLachlin in the interface between law and religion.<sup>147</sup> In an extra-curial reflection she wrote of the rule of law's "seemingly paradoxical task" of preserving its authority and "carving out a space within itself" to recognize the dignity of individuals and communities bound by a religious world view and ethos.<sup>148</sup> At the time,

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<sup>142</sup> Compare with *RJR-MacDonald*, *supra*, note 14 (finding that mandatory unattributed warnings on tobacco packages violate "the right to say nothing" and were not justified under s. 1).

<sup>143</sup> 2002 SCC 84, [2002] 2 S.C.R. 429 (S.C.C.).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, at para. 47.

<sup>146</sup> *Id.*, at paras. 44, 69.

<sup>147</sup> Compare *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.) (carving out a space for religion within the rule of law) and *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37, [2009] 2 S.C.R. 37 (S.C.C.) [hereinafter "*Wilson Colony*"] (discussed *infra*), and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54, 2017 SCC 54, [2017] 2 S.C.R. 286 (S.C.C.) [hereinafter "*Ktunaxa Nation*"] (restricting the scope of religious freedom, holding that (at para. 71) "... The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit").

<sup>148</sup> McLachlin, "Freedom of Religion", *supra*, note 40, at 16 and 28.

she supported accommodation, but only if it would not compromise the “integrity of the rule of law and the values for which it stands”.<sup>149</sup> As her section 2(a) jurisprudence makes clear, Justice McLachlin was fundamentally troubled by the tension between religious freedom and the rule of law. Yet in resolving this tension she was reluctant to forsake the rule of law; when religion competed with law’s authority, her modern shaman was not generous enough to carve a space out for forms of observance that imposed a cost on society.<sup>150</sup>

*Lakeside Colony of Hutterian Brethren v. Hofer* demonstrates that the judge’s analysis on matters of religion could be formalistic and even clinical.<sup>151</sup> While the majority decision concluded that dissident members of the community were expelled in violation of natural justice, her dissent described the church as “open, considered and eminently fair.”<sup>152</sup> Rather than fault the church she found that by rejecting the “offer” of punishment the appellants chose not to return to the community. In her view, those who had “self-expelled” from the community could not ask the law to look with favour on their claim.<sup>153</sup>

The judge’s concurring reasons in *Adler v. Ontario*<sup>154</sup> are important because they foreshadowed her majority opinion in *Wilson Colony*.<sup>155</sup> In *Adler* she noted that “[v]irtually every aspect of human conduct is capable of being the subject of religious belief”, and recognized that religious belief or conduct will inevitably conflict with “the legal prescriptions of society”.<sup>156</sup> While agreeing that the state’s denial of funding for private religious day schools was a form of discrimination, she found that it did not strike at “the heart of the religion” or compel individuals to violate their beliefs.<sup>157</sup> That it imposed a burden on religious practice did not render it unconstitutional.

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<sup>149</sup> *Id.*, at 28.

<sup>150</sup> See Howard Kislowicz, “Part III: Chief Justice McLachlin, Collective Religious Freedom Rights, and the Space for Religion Within the Rule of Law”, I-CONnect Symposium on “The Legacy of Chief Justice Beverley McLachlin” (December 6, 2017), online: <<http://www.iconnectblog.com/2017/12/kislowicz-on-chief-justice-mclachlin/>> (stating that “[p]erhaps anxiety about the rule of law’s continued authority helps explain judicial reticence about collective rights”).

<sup>151</sup> [1992] S.C.J. No. 87, [1992] 3 S.C.R. 165 (S.C.C.).

<sup>152</sup> *Id.*, at 232.

<sup>153</sup> *Id.*, at 232 and 229-30.

<sup>154</sup> [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609 (S.C.C.) [hereinafter “*Adler*”].

<sup>155</sup> *Supra*, note 147.

<sup>156</sup> *Adler, supra*, note 154, at para. 224 (challenging the province’s failure to fund private religious day schools under ss. 2(a) and 15 of the Charter).

<sup>157</sup> *Id.*, at para. 223.

That point of view set up her majority opinion in *Wilson Colony*, where she echoed *Adler*'s distinction between coercive interference with religious freedom and a mere failure by the state to relieve the cost of complying with the law.<sup>158</sup> The context was a mandatory driver's licence photo and whether it violated the section 2(a) rights of Hutterites who are prohibited by the Second Commandment from allowing an image to be taken. Stating that the Charter does not "indemnify practitioners against all costs incident to the practice of religion", the Chief Justice maintained, to the contrary, that society "reasonably" expects adherents to bear such costs.<sup>159</sup> In a lapse of empathetic imagination — which again reversed the practice of conscious objectivity — she proposed that colony members who were unable to drive could simply hire drivers or arrange for third parties to provide transportation.<sup>160</sup>

Generally, her section 2(a) jurisprudence confirmed Justice McLachlin's unwillingness to accommodate religious freedom. Other decisions that invite deeper analysis include *R. v. S. (N.)*,<sup>161</sup> *Ktunaxa Nation v. British Columbia*,<sup>162</sup> and *Law Society of British Columbia v. Trinity Western University*.<sup>163</sup> It is clear that these issues posed a fundamental and distinctive test of the judge's process of internal dialectic.

Finally, the limits of conscious objectivity were also evident in *R. v. Khawaja*, which engaged section 2's fundamental freedoms globally in a challenge to the motive clause in the *Criminal Code*'s definition of terrorism.<sup>164</sup> The Chief Justice curtly rejected the claim. As she explained, "[a]nyone who reads the entire provision" would realize that it does not target protected expression, and therefore a chilling effect could

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<sup>158</sup> *Id.*

<sup>159</sup> *Wilson Colony*, *supra*, note 147, at para. 95.

<sup>160</sup> *Id.*, at para. 97. As Abella J. put it in dissent, the mandatory photo requirement is a form of indirect coercion, and to suggest third party transportation is a solution fails to appreciate the role self sufficiency plays in defining the community's religious integrity. *Id.*, at paras. 170 and 167.

<sup>161</sup> [2012] S.C.J. No. 72, 2012 SCC 72, [2012] 3 S.C.R. 726 (S.C.C.) (creating a test to determine when a witness's right to wear a head covering is constitutionally protected and when an accused's rights prevail and raising access to justice implications for women from religious minorities).

<sup>162</sup> *Supra*, note 147 (writing, with Rowe J., to reject an inclusive conception of religion that was open to Aboriginal spirituality).

<sup>163</sup> [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.) (writing separately to support the Law Society's non-accreditation of TWU's law degree, in circumstances of a mandatory religious covenant, to avoid condoning discriminatory practices).

<sup>164</sup> *Supra*, note 110. The motive clause defined terrorism, in part, as activity undertaken in whole or in part for a "political, religious or ideological purpose, objective or cause".

only arise from a “patently incorrect understanding” of the clause.<sup>165</sup> Here, as well, a form of reverse methodology was at work: rather than imagine how the provision might chill political, religious or ideological expression, the Chief Justice declared that no one who read it properly would give the clause that interpretation. Her dismissal of concerns, in the face of language explicitly targeting constitutionally protected activity, was notably counter empathetic.

The discussion suggests that decision-making was much as Justice McLachlin described it in her extra-curial commentary: an exercise in listening carefully, deciding each case on its own merits, and following her conscience to determine the right answer in every instance. Her process was informed by a decisional presumption in favour of the rule of law and some tendency toward a formalist’s view of principle. At the same time, that presumption was offset by conscious objectivity, which served as the judge’s way of seeking and finding justice and humanity within the rule of law’s template. Still, it ought not be assumed that this dialectic was binary, posing a stark choice between two choices because, importantly, the rule of law and the empathetic imagination could work in tandem. While Justice McLachlin’s decisions on fundamental justice stand at this intersection, two others show how she enlarged the rule of law to modernize and legitimize the law’s authority.

### VIII. DIALECTICAL COMPLEMENTS

It is indubitably recognized that the section 7 trilogy of *PHS Community Services*; *Bedford* and *Carter* mark the apex of Justice McLachlin’s tenure as Chief Justice.<sup>166</sup> Much has and will be written of the transformative power of these decisions and how they defined her and the work of her Court. For present purposes, their importance is in providing a glimpse of what the truth — her truth in judging — looked like to her.

The fundamental justice trilogy is distinctive because the rule of law’s disapproval of arbitrary measures was in harmony with conscious objectivity’s search for decision-making values of caring and humanity. The breakthrough was *PHS*, with *Rodriguez* and *Chaoulli* serving as its

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<sup>165</sup> *Id.*, at para. 82 (emphasis added) and 81 (stating, as well, that any chill in religious and ideological expression flowed from the 9/11 climate of suspicion, and not from the legislation).

<sup>166</sup> *PHS*, *supra*, note 26; *Bedford*, *supra*, note 5; *Carter*, *supra*, note 5.

forerunners.<sup>167</sup> Whereas *Rodriguez* was a dissent and *Chaoulli* a plurality opinion, *PHS* was a unanimous majority opinion, and was followed by *Bedford*, another unanimous majority opinion. *Carter* was not written in the Chief Justice's name but was grounded in and inspired by her decisions in *Rodriguez*, *Chaoulli*, *PHS* and *Bedford*.

The *Rodriguez* dissent was a turning point for Beverley McLachlin, personally and as a jurist. It is notable for the doctrinal link she drew between *Morgentaler*'s concept of manifest unfairness and arbitrariness under section 7's principles of fundamental justice. Moreover, as a matter of decision-making methodology, she integrated the elements of her doctrinal and empathetic imaginations, expressing — with evident emotion — her deep disapproval of a law that scapegoated Sue Rodriguez by forcing her to bear the burden that others might be improperly swayed to commit suicide.<sup>168</sup> This dissent was an unquestionable call to conscience and an early hallmark of Justice McLachlin's concept of conscious objectivity.

More than 10 years later, *Chaoulli* was only a little less remarkable. The decision was brave and unexpected because the plurality opinion by Chief Justice McLachlin and Major J. challenged an iconic and seemingly untouchable health care system. Few predicted the outcome, which found that a provincial prohibition on private health insurance violated the Charter because members of the public were prevented from taking steps to protect their own health.<sup>169</sup> Quite simply, prohibiting private insurance to protect a monopoly that could not deliver timely health care services was arbitrary.<sup>170</sup> The McLachlin-Major plurality accepted that health care is a core prerogative of democratic governance but could not countenance an arbitrary interference with section 7's primal guarantee of security of the person. The point again is to pause and observe the intersection of section 7's doctrinal imagination and the empathetic imagination's solicitude for meaningful access to health care services.

Justice McLachlin dissented in *Rodriguez* and wrote a plurality opinion in *Chaoulli* before writing unanimous opinions in *PHS* and *Bedford*, both which led to the Court's decision in *Carter*. It is accepted

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<sup>167</sup> *Rodriguez*, *supra*, note 5; *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli*"].

<sup>168</sup> *Rodriguez*, *id.*, at 621.

<sup>169</sup> Justice Deschamps wrote separate reasons concurring in the result but grounded her decision in the Quebec *Charter of human rights and freedoms*, R.S.Q., C-12 [now CQLR, c. C-12].

<sup>170</sup> *Chaoulli*, *supra*, note 167, at para. 153.



that the magnitude of the *PHS-Bedford-Carter* trilogy cannot easily be overstated. Each is a socially transformative icon of fundamental justice under section 7, and in each the Court assumed the authority to act as an agent of change. *PHS*, *Bedford* and *Carter* are also an exercise in doctrinal and empathetic imagination: the evolution and synthesis of section 7's principles of fundamental justice coincided with the demands of empathy for marginalized drug users, sex trade workers, and those suffering but prohibited from making a choice to end their life. Of the three, *PHS* stands out as the breakthrough, the decision that forged a vital and unforgettable connection between rule of law and empathy's concern for at risk and marginalized populations.

The issue in *PHS* was whether the federal government violated the Charter by refusing to exempt the Downtown Eastside's safe injection sites from federal drug laws. Finding a violation and ordering *mandamus* against the government required a careful and somewhat novel analysis. What should not be overlooked is the structure and sensibility of the Chief Justice's majority opinion. It is difficult not to be struck and even moved by the care she took to establish the factual framework for the Downtown Eastside's safe injection sites ("DTES"). Her account of the DTES — its population, its sheer vulnerability and the realities of drug addiction — were the backdrop and key to her conclusion that to refuse an exemption, in the circumstances, was an arbitrary departure from the public health objectives of the site and violation of the Charter.<sup>171</sup>

*Bedford* was extraordinary for many reasons, not least of which was that it was a unanimous decision of the Court. From any perspective, that must be considered a remarkable feat for the Chief Justice. It is especially interesting, in light of her dissent in *Downey*, that she so effectively joined the two elements of her internal dialectic and persuaded all members of the Court to sign the opinion. Though much of the commentary has trained its attention on her synthesis of section 7's principles of fundamental justice, the context was again of central importance. Vitally, she linked the lived experiences of sex trade workers to the harms they were exposed to by arbitrary laws. She synthesized section 7's key principles of fundamental justice for the first time and, in doing so, repeatedly emphasized the criminal law's egregious impact on sex trade workers engaged in the legal practice of prostitution.<sup>172</sup>

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<sup>171</sup> *PHS*, *supra*, note 26, at paras. 4-20.

<sup>172</sup> *Bedford*, *supra*, note 5, at paras. 3-14 (outlining the applicants' circumstances).

Finally, *Carter* was an unsigned opinion of the Court but unmistakably vindicated the *Rodriguez* dissent and did so from the vantage of agreement by the full Court. This decision marked the high point of the Chief Justice's dialectical journey, fusing her doctrinal and empathetic imaginations in a triumph of judicial conscience that was likely more meaningful to her because of its endorsement by "the Court".

These fundamental justice decisions both stand apart from and yet ground the narrative of Justice McLachlin's dialectical journey. Together they represent the defining moments — the magic moments — in her legacy.

### IX. THE RULE OF LAW AS MODERN SHAMAN

Justice McLachlin's loyalty was to the law and her duty to protect its authority, and she believed that to preserve its legitimacy the law must be available, responsive and relevant to all members of the community. She enlarged her rule of law to incorporate values of democratic participation, transparency, and access to justice, as well as to accommodate the demands of "practicality, flexibility, and individual justice".<sup>173</sup>

It can be forgotten, for instance, that *Sauvé v. Canada (Chief Electoral Officer)*, was fundamentally a rule of law decision.<sup>174</sup> That is significant because *Sauvé* 2002 was a "second look" decision and when the question of disfranchising prisoners returned, the Court divided by a 5-4 margin.<sup>175</sup> To explain why denying prisoners the right to vote violated the Charter the Chief Justice's majority opinion looked to the rule of law. She openly appealed to a modern conception of the rule, stating that the government's exclusionary policy "undermines the legitimacy of government, the effectiveness of government, and the rule of law", impermissibly countermanding the message that "everyone is equally worthy and entitled to respect under the law".<sup>176</sup> In her estimation, disfranchising prisoners was "more likely to erode respect for the rule of law than to enhance it".<sup>177</sup> The Chief Justice's claim that democratic participation would motivate prisoners to respect the law

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<sup>173</sup> "Rules and Discretion", *supra*, note 40.

<sup>174</sup> [2002] S.C.J. No. 66, 2002 SCC 68, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Sauvé* 2002"].

<sup>175</sup> *Sauvé v. Canada*, [1993] S.C.J. No. 59, [1993] 2 S.C.R. 438 (S.C.C.).

<sup>176</sup> *Sauvé* 2002, *supra*, note 174, at para. 58.

<sup>177</sup> *Id.*

was intimately linked to her enduring focus on legitimacy as the cornerstone of law's authority.<sup>178</sup>

As discussed above, the vitality of the justice system was a central piece in her conception of the rule of law. Justice McLachlin emphasized public access to the Court's work as the linchpin of confidence in the judiciary, the law's authority, and the rule of law.<sup>179</sup> As a jurist, she supported the open court principle, stating on one occasion that it lies "at the heart of the rule of law".<sup>180</sup> She valued access to justice, maintaining in 1994 that the justice system must be accessible to adjudicate claims that the Charter has been violated.<sup>181</sup> Nor should it be overlooked that her support for damages under section 24(1) of the Charter is closely related to these themes.<sup>182</sup> Still, her rule of law could also work in a different direction, as *R. v. Hall* demonstrates.<sup>183</sup>

What stands out finally, though, is the Chief Justice's majority reasons in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*.<sup>184</sup> There, she read access to justice into section 96 of the *Constitution Act, 1867*,<sup>185</sup> to support her conclusion that hearing fees that impose undue hardship on litigants are unconstitutional. Her rationale

<sup>178</sup> *Id.*, at para. 38 (emphasizing that depriving "at-risk" individuals of their "sense of collective identity and membership in the community" is "unlikely to instill a sense of responsibility and community identity"). See also *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 158, at 186, 188 (S.C.C.) (majority opinion upholding provincial boundaries on a principle of effective rather than equal representation, citing "evolutionary democracy", "pragmatism", and "respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society").

<sup>179</sup> See, e.g., Chief Justice Beverley McLachlin, "Courts, Transparency and Public Confidence – To the Better Administration of Justice" (2003) 8 Deakin L. Rev. 1, at 9 (stating, in particular, that courts "preserve public confidence in the justice system" as a "necessary and key element of maintaining the rule of law"; and that public confidence "is thus a prerequisite for the existence of the rule of law and a cornerstone of democratic civil society").

<sup>180</sup> "Openness and the Rule of Law", *supra*, note 40, at 24.

<sup>181</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) (stating, at 945, that the cardinal principle is that "the courts must be able to provide a full and effective remedy for any Charter infringement").

<sup>182</sup> *Vancouver (City) v. Ward*, [2010] S.C.J. No. 27, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.); *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24, [2015] 2 S.C.R. 214 (S.C.C.) (dissenting opinion); *Ernst v. Alberta Energy Regulator*, [2017] S.C.J. No. 1, 2017 SCC 1, [2017] 1 S.C.R. 3 (S.C.C.) (dissenting opinion).

<sup>183</sup> [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309, at para. 27 (S.C.C.) (upholding a second look bail provision that authorized the denial of bail to maintain confidence in the administration of justice, because "public confidence and the integrity of the rule of law are inextricably intertwined").

<sup>184</sup> *Supra*, note 25.

<sup>185</sup> (U.K.), 30 & 31 Vict., c. 3.

invoked the rule of law, explaining that the threat was not abstract or theoretical but real. If government action could not be challenged in court, the state would be seen as above the law; without access to courts, the creation and maintenance of positive laws would be hampered; and the division of responsibility between legislatures and courts would be skewed.<sup>186</sup> Her innovative and even radical use of the rule of law to ground a claim under section 96 did not go unchallenged.<sup>187</sup>

*Trial Lawyers* points up the malleability of her concept, showing how far the rule of law had come from its more conventional iterations elsewhere in her jurisprudence. Moreover, like *Sauvé*, *Trial Lawyers* demonstrated the interface between the rule of law and the role of humanity in reasoned legal conscience. As she put it, the fee scheme was “arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment”.<sup>188</sup> *Sauvé* and *Trial Lawyers* are distinctive, if not singular, for the way they inflected the rule of law with modern content and in doing so reflected the common bond that links the legitimacy of the law with its capacity for justice and humanity.<sup>189</sup>

## X. WHERE THE OBSERVERS STAND<sup>190</sup>

Canada is not much in the habit of comparing and pronouncing on the greatness of its Supreme Court judges, as occurs in the United States. Yet when the measure of a judicial life is taken, instinct gravitates toward the jurists who are singled out as the mavericks, champions, intellects, and characters of Supreme Court history. Beverley McLachlin's legacy does not conform to type and cannot be reduced to one word or to any easy characterization. As once stated, “where she sits” may depend on “where the observers stand”.<sup>191</sup> In other words, how she is regarded might be a function of what an observer chooses to see, whether it be liberalism or conservatism; activism or restraint; the rule of law or conscious objectivity. By her own

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<sup>186</sup> *Supra*, note 184, at para. 40.

<sup>187</sup> While Cromwell J. wrote concurring reasons ducking the constitutional issue, Rothstein J. wrote a forceful dissent which maintained, among other things, that “[d]ressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law ... cannot be used to support striking down the hearing fee scheme”: *id.*, at para. 98.

<sup>188</sup> *Id.*, at para. 60.

<sup>189</sup> I am indebted to Ms. Bailey Fox for pointing out that the arbitrariness of the fee (*id.*, at para. 55) and economic hardship for litigants who cannot afford it led to a disposition that excused Ms. V from paying the fee, despite the Chief Justice's well-known aversion to exemptions (*id.*, at para. 69).

<sup>190</sup> Fine, “The Most Important Woman”, *supra*, note 2, at 9.

<sup>191</sup> *Id.*

admission she never set her sights too high, aiming only to be remembered as a “competent” or a “good” jurist. Though it is stunningly obvious that Beverley McLachlin vastly over-achieved that goal, there is a risk of her diffidence or self-effacement influencing, or even defining, her legacy.

Though an unparalleled judge at the Court, she remained something of an enigma throughout. What emerges from this study is the profile of a judge who was methodically and fastidiously analytical, determined to make the law legitimate by keeping it “simple, clean and relevant”, and mindful all the while that the law serves values of justice and humanity. The one cause Justice McLachlin served was the law. In that service she guarded her independence to decide each case on its own, by her lights and no one else’s. As this study attests, she guarded this independence above all else. On reflection, it is a testament to her judicial conscience — and will — that she could dispassionately address each case on its own merits, seeking the one answer that would achieve singular justice in that instance. Her methodology of justice in the small nonetheless generated a jurisprudence that includes breakthrough decisions and unforgettable moments. All that said, the McLachlin legacy consists more truly in her decision-making than in the decisions she made.

There is considerable scholarly debate and discussion of the follies around judicial biography and the related field of legacy scholarship. In light of her unremitting humility, hagiography may be less a concern for Beverley McLachlin, as she has done as much as she could to discourage it. But the temptation to build a narrative that makes a story is another issue that surfaces in the genre. In the search for essentials there may be such a thing as “imposing too much coherence on the story”.<sup>192</sup>

There are many ways to lead, to make a difference, and to exercise the formidable powers of a Supreme Court judge. One of those ways is to serve truly and in truth to one’s humility and integrity. From that perspective, imposing a sense of order on Beverley McLachlin’s jurisprudence does not take the measure of this judge. Somewhat artificial and even a disservice to her, this approach misses the mark. The best answers she found to complex issues over 28 years do not conform to a singular conception of rights, of the Charter, or of justice. The measure of this judge is as simple as it is grand: it consists in her sensibility of office and integrity in holding herself accountable, in every case, to her own conception — grounded in methodology — of judicial conscience.

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<sup>192</sup> Transcript, “Objectivity and Hagiography in Judicial Biography” (1995) 70 N.Y.U.L. Rev. 556, at 568, *per* Mark Tushnet.