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# Chief Justice McLachlin and the Division of Powers

Mahmud Jamal\*

## I. INTRODUCTION

These brief remarks offer a few reflections on Chief Justice McLachlin's contributions to the Supreme Court of Canada's jurisprudence on the division of powers, based on cases where she authored or co-authored reasons for judgment.<sup>1</sup> It is obviously daunting to try to comment on the

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\* Osler, Hoskin & Harcourt LLP, Toronto. I would like to thank Jennifer Horton, an Osler articling student, for her excellent research assistance and for reviewing an earlier draft of these remarks.

<sup>1</sup> *MacKeigan v. Hickman*, [1989] S.C.J. No. 99, [1989] 2 S.C.R. 796, at 834-35 (S.C.C.) (province can inquire into wrongful conviction — here, of Donald Marshall, Jr. — as part of administration of justice within the province); *Westcoast Energy v. Canada (National Energy Board)*, [1998] S.C.J. No. 27, [1998] 1 S.C.R. 322, at paras. 108-168 (S.C.C.) [hereinafter “*Westcoast*”], dissenting (whether gas processing plants and related gathering facilities form part of a single interprovincial gas transportation undertaking); *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, [2002] 1 S.C.R. 569 (S.C.C.) [hereinafter “*Ward*”] (federal regulations prohibiting the sale of young hooded and harp seals supportable under federal fisheries power but not under the criminal law power); *R. v. Morris*, [2006] S.C.J. No. 59, [2006] 2 S.C.R. 915, at paras. 82-139 (S.C.C.), McLachlin C.J.C. and Fish J., dissenting (whether valid provincial law prohibiting hunting at night with an illuminating device impinges upon Aboriginal treaty right to hunt); *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, [2010] 3 S.C.R. 457 (S.C.C.) [hereinafter “*Reference re Assisted Human Reproduction Act*”] (federal regulations relating to assisted human reproduction upheld as criminal law); *NIL/TU,O Child and Family Services Society v. B.C. Government Service Employees' Union*, [2010] S.C.J. No. 45, [2010] 2 S.C.R. 696, at paras. 48-81 (S.C.C.) [hereinafter “*NIL/TU,O Child and Family Services Society*”], McLachlin C.J.C. and Fish J., concurring with the majority in the result (provincial labour relations law applies to First Nations child welfare agency); *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] S.C.J. No. 46, [2010] 2 S.C.R. 737, at para. 13 (S.C.C.) [hereinafter “*Communications, Energy and Paperworkers Union of Canada*”], McLachlin C.J.C. and Fish J., concurring in the result (provincial labour relations law applies to First Nations child welfare agency); *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”] (municipal zoning by-law prohibiting the construction of aerodromes on a lake *ultra vires*); *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536 (S.C.C.) [hereinafter “*COPA*”] (provincial legislation limiting non-agricultural land uses constitutionally inapplicable to prohibit aerodromes in agricultural zones); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at paras. 45-73 (S.C.C.) [hereinafter “*PHS Community Services*”]

jurisprudence of the longest-serving Chief Justice in Canadian history. But the task certainly repays the effort and only deepens one's admiration for her many important contributions to Canadian law. In that spirit, these notes provide a few comments on Chief Justice McLachlin's judicial philosophy and her contributions to legal federalism and legal education. I will argue that Chief Justice McLachlin's federalism jurisprudence fairly reflects her self-described judicial philosophy as being scrupulously non-partisan and impartial. I will further suggest that her contributions to the doctrines of legal federalism, as seen in her interjurisdictional immunity rulings by way of example, brought greater stability, certainty, and clarity to the law. I will close by suggesting that the rigour and lucidity of her judicial writing have contributed significantly to legal education in Canada.

## II. JUDICIAL PHILOSOPHY

One might begin by asking what Chief Justice McLachlin's division of powers rulings reveal about her philosophy of the proper balance between the federal and provincial legislative powers. If, as Professor Wayne MacKay has observed, "[t]he Court's federalism jurisprudence over the past 125 years [has been] marked by huge pendulum swings, sometimes favouring the federal government and other times favouring the provinces",<sup>2</sup> then surely it is fair to ask where Chief Justice McLachlin sat on the federalism spectrum. Did she tend to favour federal or provincial power?

The question might be rejected out of hand as being antithetical to the judicial role. The Chief Justice herself described that role in traditional terms, as being an "independent arbiter", one who must determine "what falls to the federal government under section 91 and what falls to the

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*Society*" or "Insite") (federal criminal law constitutionally applicable to provincial safe injection site); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, [2013] 1 S.C.R. 623, at paras. 129-132 (S.C.C.), McLachlin C.J.C. and Karakatsanis J. (declining to consider as moot whether Manitoba statutes related to the implementation of the *Manitoba Act* were *ultra vires*); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, at paras. 128-152 (S.C.C.) [hereinafter "*Tsilhqot'in*"] (s. 35 framework displaces interjurisdictional immunity in evaluating provincial encroachments on land held under Aboriginal title); and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] S.C.J. No. 48, [2014] 2 S.C.R. 447, at para. 53 (S.C.C.) (interjurisdictional immunity does not preclude a province from justifiably infringing Aboriginal treaty rights).

<sup>2</sup> A. Wayne MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001) 80 Can. Bar Rev. 241, at 253.

provinces under section 92” of the *Constitution Act, 1867*.<sup>3</sup> Such a determination must be made, she noted, “fairly and impartially in a nonpartisan fashion; on the basis of the law, the materials and the pleadings before [the court].”<sup>4</sup> Not surprisingly, the Chief Justice emphasized that, “[u]nlike politicians, judges do not have agendas. They take the law and the cases as they find them and apply their interpretive skills to them as the constitution requires.” This, she added, “is a legal task; indeed, it is judging of the highest level.”<sup>5</sup> Thus, as a judge, Chief Justice McLachlin says that she has tried “not to think about things in too strategic a manner” — her job has been “simply to listen to what the parties have to say, and to do my best to understand the position, the ramifications of deciding one way or the other, to think about what’s best for Canadian society on this particular problem that’s before us ....”<sup>6</sup>

But if the question of where Chief Justice McLachlin sat on the federalism spectrum may be asked, what do her decisions show? Did they tend to favour federal or provincial power? On examination, her decisions reveal no consistent pattern — except, perhaps, to confirm her self-described approach to judging: deciding one case at a time, without a larger agenda or strategy. To quote Joseph Brean, writing in the *National Post*, “for every grasp at an ideological decryption of her work, a counter-example announces itself”.<sup>7</sup> Thus, McLachlin C.J.C.’s decisions include rulings:

- that took an expansive view of the federal criminal law power, to support regulations for assisted human reproduction,<sup>8</sup> but that also adopted a much narrower view of the same power, to not support regulations prohibiting the sale of baby seals;<sup>9</sup>

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<sup>3</sup> (U.K.), 30 & 31 Vict., c. 3 [hereinafter “*Constitution Act, 1867*”]. Chief Justice Beverley McLachlin, “The judiciary’s distinctive role in our constitutional democracy” *Policy Options* (September 1, 2003), online: <<http://policyoptions.irpp.org/magazines/canadian-universities/the-judiciarys-distinctive-role-in-our-constitutional-democracy/>>.

<sup>4</sup> *Id.*

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

<sup>6</sup> Joseph Brean, “‘Conscious objectivity’: That’s how the chief justice defines the top court’s role. Harper might beg to differ” *National Post* (May 23, 2015), online: <<http://nationalpost.com/news/conscious-objectivity-thats-how-the-chief-justice-defines-the-top-courts-role-harper-might-beg-to-differ>>.

<sup>7</sup> *Id.*

<sup>8</sup> *Reference re Assisted Human Reproduction Act*, *supra*, note 1.

<sup>9</sup> *Ward*, *supra*, note 1.

- that permitted provinces to regulate what was claimed to be a single integrated federal transportation undertaking,<sup>10</sup> but that also resisted a municipality's attempt to do so, in declaring *ultra vires* a municipal prohibition of aerial transportation facilities within the municipality;<sup>11</sup> and
- that applied the interjurisdictional immunity doctrine, in holding that a province could not regulate the location of aerodromes within the province,<sup>12</sup> but also refused to apply that doctrine, in holding that provincial labour relations law applied to a First Nations child welfare agency,<sup>13</sup> and in finding federal criminal law applied to a health care facility.<sup>14</sup>

Similar examples abound. In this realm, as in so many others, Chief Justice McLachlin's decisions resist being pigeonholed. Instead, they fairly reflect her self-described judicial philosophy as being scrupulously non-partisan and impartial, deciding one case at a time.

### III. CONTRIBUTIONS TO THE DOCTRINES OF LEGAL FEDERALISM

What, then, might be said of the Chief Justice's substantive contributions to the jurisprudence? In his insightful analysis of the first decade of the McLachlin Court's contributions to federalism, Professor Peter Oliver observed that the last quarter-century or so has seen a "stabilization in the interpretation of the federal heads of powers" — leading him to ask, somewhat provocatively, whether "legal federalism is the constitutional equivalent of medieval history, in which new discoveries and new developments are few and far between?"<sup>15</sup> In Professor Oliver's view, "despite the relative stability in the interpretation

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<sup>10</sup> *Westcoast*, *supra*, note 1, at paras. 108-168, dissenting.

<sup>11</sup> *Lacombe*, *supra*, note 1 (municipal zoning by-law prohibiting the construction of aerodromes on a lake within the municipality *ultra vires*).

<sup>12</sup> *COPA*, *supra*, note 1 (provincial legislation limiting non-agricultural land uses constitutionally inapplicable to prohibit aerodromes in agricultural zones).

<sup>13</sup> *NIL/TU, O Child and Family Services Society*, *supra*, note 1, at paras. 48-81, McLachlin C.J.C. and Fish J., concurring with the majority in the result; *Communications, Energy and Paperworkers Union of Canada*, *supra*, note 1, at para. 13, McLachlin C.J.C. and Fish J., concurring in the result.

<sup>14</sup> *PHS Community Services Society*, *supra*, note 1, at paras. 45-73.

<sup>15</sup> Peter C. Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court" in David A. Wright & Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), 167-200, at 169.

of the division of power, there is still a good deal of important activity in the field of legal federalism”, in revisions, clarifications, and refinements of the various *doctrines* of legal federalism. These include the pith and substance analysis, as well as the doctrines of double aspect, ancillary powers, paramountcy, and interjurisdictional immunity — all of which are aimed at “the encouragement of cooperative federalism”, in which “legislation is generally upheld and disputes allocated to the intergovernmental process”.<sup>16</sup>

While Chief Justice McLachlin made many important contributions to the doctrines of legal federalism, I’d like to address, by way of example, three relating to the doctrine of interjurisdictional immunity — the doctrine under which a valid law of general application enacted by one level of government is “read down” as constitutionally inapplicable where it “impairs” the protected core of jurisdiction of the other level of government. They are: first, the proper test for “impairment” under interjurisdictional immunity; second, the recognition that interjurisdictional immunity is “reciprocal”, in that not just the federal government but also the provinces can claim immunity from the laws of the other level of government; and lastly, the relationship between interjurisdictional immunity and Aboriginal rights protected under section 35 of the *Constitution Act, 1982*.

Shortly after the Court’s decision in *Canadian Western Bank*,<sup>17</sup> the Chief Justice clarified the proper test for impairment. As is well known, in 2007 the Court in *Canadian Western Bank* elevated the test for interjurisdictional immunity from a relatively low threshold of merely “affecting” a protected “core” of the jurisdiction of the other level of government, to one that insisted upon a higher standard of “impairment”. But there remained uncertainty as to how impairment was to be established. That issue came before the Court just three years later, in *Lacombe* and *COPA*, where the Court had to decide whether a provincial

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<sup>16</sup> *Id.*, at 169, 199. See also P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Scarborough, ON: Thomson Carswell, 2007), at 5-46 [hereinafter “Hogg”], cited in *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] S.C.J. No. 14, [2015] 1 S.C.R. 693, at para. 17 (S.C.C.), referring to cooperative federalism as a “descriptive concept” that describes the “network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts”; Kate Glover, “Structural Cooperative Federalism” (2016) 76 S.C.L.R. (2d) 45-66, at 47, 53 (cooperative federalism as a legal or interpretative principle); and Eric M. Adams, “Judging the Limits of Cooperative Federalism” (2016) 76 S.C.L.R. (2d) 27-43, at 30 (cooperative federalism as a constitutional metaphor).

<sup>17</sup> *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter “*Canadian Western Bank*”].

law could regulate the location of aerodromes within a province.<sup>18</sup> In finding the provincial law to be constitutionally inapplicable, McLachlin C.J.C. for the majority held that the focus of the impairment inquiry “must be on the power itself”;<sup>19</sup> that is, on “whether the core of the legislative *power* has been impaired, not whether or how Parliament has, in fact chosen to exercise that power.”<sup>20</sup> Put another way, as McLachlin C.J.C. noted, the issue is whether the impugned law would result “in an unacceptable narrowing of Parliament’s legislative options.”<sup>21</sup> By focusing on the legislative power, rather than the impact of the provincial law on particular federal activities, McLachlin C.J.C. emphasized that impairment is primarily a legal test — one that examines a law’s impact on the legislative powers of the other level of government — and not primarily a factual or evidentiary test.

This focus of the impairment analysis has significant legal and practical implications for the stability of the division of powers and legal certainty. If the focus is the particular evidence before a given court, then the same legislation could be constitutionally applicable one day, based on a particular factual record, but inapplicable another day, based on different evidence. This is exactly the concern identified 30 years ago in *Bell Canada*, where Beetz J. remarked that “I think it is clear that the courts could not be asked to decide on a case by case basis at what point there is impairment.”<sup>22</sup>

Stability and legal certainty were also promoted in *PHS Community Services Society* — the *Insite* safe injection clinic case — which confirmed that interjurisdictional immunity is reciprocal and can be invoked by either level of government. In this instance, however, McLachlin C.J.C. resisted a province’s call to exempt this health clinic from federal criminal laws relating to controlled substances.<sup>23</sup> While the case was ultimately decided under section 7 of the Charter, the Court also considered whether the federal measures impaired the core of the

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<sup>18</sup> *Lacombe*, above, note 1; *COPA*, above, note 1.

<sup>19</sup> *COPA*, *supra*, note 1, at para. 48.

<sup>20</sup> *Id.*, at para. 52 (emphasis in original).

<sup>21</sup> *Lacombe*, *supra*, note 1, at para. 66.

<sup>22</sup> *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail du Québec)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at 864 (S.C.C.). See, however, the later decision of *Rogers Communications Inc. v. Châteauguay (City)*, [2016] S.C.J. No. 23, [2016] 1 S.C.R. 467, at para. 71 (S.C.C.) (Wagner and Côté JJ. for the majority), at para. 121 (Gascon J. concurring in the result), where the Court appears to have placed greater emphasis on evidence of the actual impact of an impugned provincial law on a federal telecommunications undertaking and its activities than on the impact on Parliament’s exclusive legislative power to regulate telecommunications.

<sup>23</sup> *PHS Community Services Society*, *supra*, note 1.

provincial power over health care — an argument that had been accepted by a majority of the British Columbia Court of Appeal. Chief Justice McLachlin rejected this view, instead urging a cautious, limited recourse to interjurisdictional immunity. While she recognized that the doctrine had recently fallen out of favour, she underscored that “[p]redictability, important to the proper functioning of the division of powers, requires recognition of previously established cores of power.”<sup>24</sup> But McLachlin C.J.C. noted that as the courts had never identified a core of the “broad and extensive” provincial health power — which “extends to thousands of activities and to a host of different venues” — she reasoned that such a “vast core” would “sit ill with the restrained application of the doctrine called for by the jurisprudence.”<sup>25</sup> Preventing criminal law from applying to provincial health care facilities would, McLachlin C.J.C. concluded, “disturb settled competencies and introduce uncertainties for new ones.”<sup>26</sup>

*Insite* will likely remain an important division of powers case because it was the first time a province had invoked interjurisdictional immunity against a federal law<sup>27</sup> — which perhaps also underscores how asymmetrical the doctrine had become.<sup>28</sup> Chief Justice McLachlin seemed willing to apply the doctrine in a province’s favour in an appropriate case, despite the absence of precedent. And, even though some viewed the doctrine as largely moribund after *Canadian Western Bank*, *Insite* underscores that it will inevitably survive, albeit restrained in application.

Lastly, the Chief Justice’s ground-breaking reasons in *Tsilhqot’in* clarified the relationship between interjurisdictional immunity and Aboriginal rights protected under section 35 of the *Constitution Act, 1982*.<sup>29</sup> The Court held that federal or provincial attempts to regulate lands held under Aboriginal title must not be evaluated under interjurisdictional immunity, but rather, under the *Sparrow* justification framework in section 35.<sup>30</sup> This issue arose because interjurisdictional immunity and section 35 provide incompatible ways for evaluating legislative infringements of Aboriginal rights. Interjurisdictional immunity

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<sup>24</sup> *Id.*, at para. 65.

<sup>25</sup> *Id.*, at para. 68.

<sup>26</sup> *Id.*, at para. 70.

<sup>27</sup> See Hogg, *supra*, note 16, at 15-38.7.

<sup>28</sup> *Canadian Western Bank*, *supra*, note 17, at para. 35.

<sup>29</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>30</sup> *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.). The *Sparrow* test asks whether the infringement is reasonable, imposes an undue hardship, and denies the holders of the right their preferred means of exercising the right.



assumes that an Aboriginal right is at the core of federal jurisdiction over “Indians, and Lands reserved for the Indians”,<sup>31</sup> and then renders inapplicable any legislative encroachment, however reasonable or justified it might otherwise be. In contrast, the *Sparrow* framework focuses on the reasonableness of the legislative encroachment. The result, McLachlin C.J.C. noted, is “dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?”<sup>32</sup> Chief Justice McLachlin solved this conundrum by clarifying that, like rights guaranteed under the Charter, Aboriginal rights protected under section 35 are “held *against* government — they operate to *prohibit* certain types of regulation which government could otherwise impose.” As she explained, “[t]hese limits have nothing to do with whether something lies at the core of the federal government’s powers.”<sup>33</sup>

In short, *Tsilhqot’in* established, for the first time, that the interjurisdictional immunity paradigm simply does not apply where section 35 rights are at issue. By affirming the role of the *Sparrow* test, the result, McLachlin C.J.C. noted, is “to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society”<sup>34</sup>

Thus, in each of these three very different rulings, Chief Justice McLachlin’s reasons brought greater stability, certainty, and clarity to the doctrines of legal federalism.

#### IV. CONTRIBUTIONS TO LEGAL EDUCATION

While Chief Justice McLachlin made many important contributions to division of powers doctrines, it may be that her most important and durable one in this realm has been to legal education — by teaching this important area of Canadian law to the innumerable readers of her decisions, whether they be law students, lawyers, judges or members of the public. The Chief Justice is rightly revered as an exceptional jurist in part because of the clarity of her writing and her ability to expose complex ideas in accessible terms. She is well-known for distilling tangled areas of the law in a few paragraphs, leaving for posterity a

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<sup>31</sup> *Constitution Act, 1867*, *supra*, note 3, s. 91(24), cited in *Tsilhqot’in*, *supra*, note 1, at paras. 103 and 129.

<sup>32</sup> *Tsilhqot’in*, *id.*, at para. 146.

<sup>33</sup> *Id.*, at para. 142 (emphasis in original).

<sup>34</sup> *Id.*, at paras. 138-139.

succinct guide for traversing a thicket of often inconsistent cases. Her reasons can be counted on to bring coherence and order to the law. Her students — and we are all her students — always leave with a clearer and more principled understanding of the law.

Undoubtedly, the rigour and clarity of Chief Justice McLachlin's judicial writing have contributed significantly to legal education in Canada.

## V. CONCLUSION

Inevitably these brief remarks have only scratched the surface of Chief Justice McLachlin's many contributions to the division of powers. These include her non-partisan and impartial judicial philosophy, her substantive clarifications to the doctrines of legal federalism, and her important and lasting contributions to Canadian legal education. A deep store of learning and thinking resides in this part of her work, a rich jurisprudence that will continue to provide guidance in this important field of Canadian constitutional law.

