INTERVIEW WITH THE CHIEF JUSTICE OF CANADA

The Right Honourable Beverley McLachlin, P.C.

FOR TWENTY YEARS, THE SUPREME COURT OF CANADA HAS BEEN THE CENTRE OF ATTENTION IN THE STORY OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*. WHILE THE COURT'S LONG HISTORY DATES BACK TO THE 19TH CENTURY, THERE HAS LIKELY BEEN NO OTHER ERA WHEN THE FOCUS ON ITS NINE JUSTICES HAS BEEN SO STRONG.

THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, P.C. WAS APPOINTED TO THE SUPREME COURT OF BRITISH COLUMBIA IN SEPTEMBER OF 1981, ONLY MONTHS BEFORE THE *CHARTER* WAS SIGNED INTO LAW. HER JUDICIAL CAREER SOON MOVED HER TO THE COURT OF APPEAL OF BRITISH COLUMBIA, AND SHE WAS APPOINTED CHIEF JUSTICE OF THE SUPREME COURT OF BRITISH COLUMBIA IN 1988. SHE REACHED THE SUPREME COURT OF CANADA TWO YEARS LATER, AND ON JANUARY 7, 2000 WAS APPOINTED CHIEF JUSTICE OF CANADA.

IN ADVANCE OF THE 20TH ANNIVERSARY OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, CHIEF JUSTICE MCLACHLIN MET WITH THE EDITOR OF *CANADIAN ISSUES / THÈMES CANADIENS* IN HER CHAMBERS TO DISCUSS THE IMPACT THE *CHARTER* HAS HAD ON THE COUNTRY AND ON THE COURT.



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Q *You were appointed to the Supreme Court of British Columbia just months before the Charter was signed into law. What are your recollections of that time in Canadian legal history?*

A I remember as a newly-appointed judge going to a seminar aimed at trying to tell us something about this document and what the different rights meant and so on. I found it quite over-

whelming at the time. It was a period of uncertainty since no one was sure just how significant the Charter was going to be. But I think there was a feeling that it would be more significant than the Canadian Bill of Rights had been, since there had been such public participation into its formulation over quite a long period of time.

Q *Was there a sense at the time that this would confer something new on the Supreme Court?*

A I was just a lower court judge at the time so I didn't do too much thinking about the Supreme Court, but we recognized that there would be new responsibilities. We were going to find ourselves confronted with Charter arguments and we would have to decide on those in order to instruct a jury. So it became evident quite quickly that the courts were going to be implicated in a fairly major way.

Q *Do you remember the first Charter case you presided over? Was there a sense at the time that a new era of Canadian jurisprudence had been ushered in?*

A I can't be sure about the first case, but I do remember a jury trial in B.C. that was a criminal law case involving a particular section of the Criminal Code dealing with proof of a certain charge. For me, it was quite a new experience and one that I found just a tiny bit scary, but there was no alternative and so I instructed the jury accordingly. The verdict came back not guilty and it took a while for that case to work its way up the appeal courts. It finally got to the Supreme Court of Canada, and I was upheld. But certainly there was a sense of a trial judge having to make these rulings without other cases and you simply had to do your best with whatever you had at hand to do the right thing. There just wasn't anything there to help you, so you were left having to just work it out without the benefit of precedent. So that was a real challenge as a judge. I was moved to the Court of Appeals of British Columbia and there I worked on the Andrews case, the first big case on equality that eventually reached the Supreme Court of Canada. They did not accept my approach to section 15, but it was a very interesting process again to try to work this out.

One has the sense that Canadians are quite ready to avail themselves of the Charter to assert and protect their rights, and I think that's a very positive thing.

Q *A recent ACS poll reveals that 82% of Canadians believe that the Charter of Rights and Freedoms has had a major positive impact on the protection of their rights and freedoms. Do you believe that the rights and freedoms held by Canadians are significantly stronger under the Charter than they were previously?*

A I do.

Q *In the time you have spent with Canadians outside of the Supreme Court, do you sense that appreciation of the Charter?*

A Oh, I think so. One has the sense that Canadians are quite ready to avail themselves of the Charter to assert and protect their rights, and I think that's a very positive thing.

Q *Une éducation plus prononcée de la Charte devrait-elle être une priorité des institutions académiques?*

R Je préférerais ne pas entrer dans les politiques éducationnelles, mais en général cela serait une excellente idée que tous ceux et celles qui graduent de l'école secondaire aient eu un cours de base sur nos institutions et notre constitution, une sorte d'instruction civique, pour que les citoyens comprennent un peu mieux les détails de leur Charte et de leur constitution.

Q *Les médias ont-ils bien traiter les décisions sur la Charte?*

R Les médias ont réagi de manière très positive aux décisions générales et sur la Charte de la Cour suprême du Canada. Je pense que nous recevons une meilleure couverture médiatique qu'auparavant dans le sens de la couverture de nos procès, et l'image générale qui en ressort demeure assez précise. Par contre, cela serait désirable d'incorporer plus d'analyses d'arrière-plan dans la presse publique afin de rendre plus compréhensible l'histoire et le contexte d'un procès, la raison pour laquelle une telle décision a été prise et les implications que cette décision entraîne dans leur vie. Si j'avais une liste de vœux, j'aimerais peut-être voir un plus grand nombre d'articles introspectifs. Évidemment, l'on ne peut partir d'une culture où la loi n'était peut-être pas aussi importante et aboutir avec une culture où la loi est une importante composante du tissu social, et que ceci soit reflété dans la presse le temps d'une nuit. C'est un processus graduel, et nous procédons présentement.

Q *How has the legal profession responded to the Charter?*

A The response from the legal profession from the very beginning was very positive. They took it seriously, they presented the cases they saw emerging, looking to the rights of their clients. Some areas of the law may have become much more complex under the Charter, particularly with criminal law, and we have longer trials and certain practices have changed, but the Bar has acted very positively and if I may say so, the bench has as well, and people have worked very hard to educate themselves to think about the ramifications of the arguments they're presenting.

Q *How important is an understanding of the Charter for today's law students? Should legal education be altered in any way to properly reflect the importance of the Charter?*

A I don't have any particular criticisms. There are many things that need to be learned in law school and the Charter is a basic required course in virtually all the law schools, so you can't get through law school without understanding quite

a bit about the Charter, and that's the way it should be. In the reality of the practice of law, of course, the Charter is more important to some practices than others, and when you're trying to provide a good legal education, you have to provide knowledge in a wide range of areas.

Q *Has the existence of the Charter changed in any way the kind of judge required to sit on the Supreme Court of Canada?*

A There are considerations under Charter jurisprudence that didn't play a large role in judging before. Whether it requires a fundamentally different kind of person is an interesting question. I think good judges have always been able to look at new issues and examine all sides of them and gage where the law should be heading, and those are the same sorts of skills required in Charter interpretation. I think a case can be made that what we call 'purposive' interpretation – looking at the purpose of the Charter guarantee – is very important, but that was always the fundamental principle of statutory construction too. Values and balancing enter the Charter litigation because at the end of the day you have section 1 and you often have to determine whether something that impinges on a right is justified. That's a different kind of judging. So I think that judges have to be open to policy arguments, they have to consider the impact of what they are deciding and how it's gong to play out in the real world, as well as considering the doctrinal implications for what they're deciding. Fundamental philosophical questions more often come before the Court. I like to think that a good judge was always someone capable of handling philosophical concepts and purposive reasoning and so on, and so if I look at it from that perspective I would say 'no' the kind of judge has not changed. And yet, judging certainly has changed somewhat.

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Q *The legislative construction of the Charter attempted a balance of individual and collective rights. Has this balance been evident in the judicial interpretation of the Charter?*

A Our constitution generally has a lot of collective or group rights in it. Think of the 1867 document and the language rights and the religious protections for minorities; it is clear that this is something we have been living with, going back at least as far as the Quebec Act. We've said for special groups we do special things and this is how we have defined our democracy, so it's not something new with the Charter that we've done this. Of course, it's not an either/or situation. We've basically said that we want a country where we have individual liberties and freedoms, but we also recognize that sometimes individuals have special rights by reason of groups with which they are associated, be they linguistic, religious, aboriginal or otherwise. These two ideas are not necessarily always antithetical. We have to try to make them work out together.

Q *Ressentez-vous qu'il y a eu une "américanisation" de la manière dont on examine nos droits – qu'il y a une préoccupation grandissante sur nos droits individuels au dépens des droits collectifs?*

R Non, je n'ai pas ressenti cela. Nous avons plusieurs procès sur la langue, la religion, les politiques éducationnelles sous l'Acte ANB, ainsi que plusieurs procès autochtones qui reposent sur la section 35. Le multiculturalisme est un facteur important de la société canadienne. Je ne vois donc pas de diminution de l'un au dépens de l'autre.

Q *L'effet de la Charte sur les affaires criminelles est clair. La Charte a par contre été importante dans d'autres régions de la vie des Canadiens et Canadiennes. Pourriez-vous éclaircir justement dans quelles régions l'influence de la Charte a été la plus forte?*

R C'est difficile à choisir. Je pense que la garantie d'égalité est très importante. La liberté d'expression et les différentes libertés démocratiques sont aussi importantes. Elles sont tous importantes, mais celles-ci ont joué un rôle intégral dans plusieurs de nos procès, alors l'on pourrait déduire qu'elles sont plutôt centrales dans notre société.

Q *By most accounts, the Court has taken pains to avoid interpreting the Charter too broadly where such might interfere with the formation of government policy. In particular, many point to a reticence on the part of the Court to use the Charter to alter tax and economic policy. Has this been a particular concern of the justices?*

A Apart from granting leaves and cases that raise issues of national importance, we don't choose our agenda. We take what looks like a good question based on what is put before us. Once we take a case, arguments might be presented that reflect that this is an area where the legislature made a difficult choice, for example between competing policy objectives, and that the courts should be careful before they disrupt that choice. All goes into the mix of the argument. We have indicated that generally when Parliament or the legislature has passed a law and indicated their intentions, unless it is clearly unconstitutional, it is upheld. The

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democratic principle is very important in our society and we've recognized that in our decisions. Also there are many situations where legislatures are better places to make some of the policy choices than courts are. So we look at it from the point of view of whether the law or government action meets the basic requirement of the constitution in a manner consistent with the Charter, and we have indicated that, particularly in areas of competing social policies, the basic requirement is that Parliament or the legislature has chosen an alternative which is reasonable, but we will defer to some extent to those choices. In terms of remedies, we try to be very careful not to do anything too disruptive, that we're not going to require huge amounts of money to be spent, although sometimes a decision can entail that, and if it's necessary we won't back away from it just because of the expense.

Q *Yet there are some in the country who believe that the Charter has granted powers to an unelected judiciary better left in the legislative branch. Do you at all concur?*

A The same poll you referred to earlier also suggested that the majority of Canadians are very content to see judges deciding these questions as compared with the politically elected, and I think that reflects the fact that the public appreciates that the judges are deciding legal questions that are brought before them as required by the constitution and this does not hamstring Parliament or the legislature from doing their job. If anything, our Constitution allows a very major role for them; indeed we even have an override provision so that if Parliament or the legislatures were to say we don't like what the Court is doing, apart from the basic democratic rights, they could even use that. So I find it difficult to see the argument that judges are somehow taking power away from Parliament or the legislatures.

Q *La Charte a-t-elle rendu le consensus et l'anonymat plus difficile parmi les 9 juges de la Cour?*

R Je n'étais pas là avant la Charte, alors cette question est difficile pour moi de répondre. Mais les questions posées sur la Charte sont souvent très difficiles à répondre. Il y a beaucoup de débat, des conférences, des re-conférences et beaucoup d'allez-retour avec des notes, des conversations et des discussions, pour que l'on puisse avoir le point de vue de tout le monde en essayant de trouver la meilleur solution à un problème en particulier.

Q *Ressentez-vous un grand niveau de respect pour la Charte canadienne des droits et libertés dans d'autres pays?*

R Plusieurs personnes m'ont mentionné cela, et non seulement en ce qui concerne la Charte, mais pour le système judiciaire du Canada en son entier. D'après des études objectives, telles qu'effectuées par le Davos Group par exemple, nous avons un des meilleur système judiciaire du monde – un aspect qui est peut-être inconnu des Canadiens et Canadiennes. De plus, je pense que plusieurs personnes voient la Charte comme étant un excellent document et que plusieurs ont trouvé une assistance dans la jurisprudence de la Charte.

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Q *Section 1 of the Charter may be the true 'Canada Clause'. It has been interpreted by the Court as requiring the state to meet a high threshold to limit the breadth of the rights and freedoms held by Canadians. How has section 1 shaped the legal and social landscape of Canada?*

A I'm not necessarily sure that I would agree that we have set the bar very high. I think we have tried to set the bar sensitively having regard to what the problem at stake is, what proof is amenable, the difficulty of the political decisions, the balancing of interests an so on. I suppose where any democracy draws the lines between the public interest on the one hand and an individual's liberties on the other is one of its defining characteristics. Whether you state your rights in absolute terms like the United States does, or you state them in relative terms like section 1 does, in the end rights cannot be absolute. At some point, public interests have to come into play. Lines have to be drawn in every democracy. Section 1 provides a mechanism for drawing those lines, but it doesn't tell us precisely where they have to be drawn, apart from saying that there has to be justification. Our 'Oakes' test was pronounced early on in Charter jurisprudence and its considerations became central to the section 1 analysis. Judges in Canada understand this well, and if a judge is directed by the case law to apply the Oakes factors and works her way through them, she will have considered the things I feel a judge has to consider.

Q *When it comes to Charter appeals that reach the Supreme Court, every case seems to be an important one. What should we look for in the next twenty years?*

A Of course, I don't have a crystal ball and as a I said earlier, we take the cases as they come. So I don't know what Canadians will bring before the court. As an observation, because of the post-September 11 world we are clearly going to see issues that posit security and collective safety against individual rights. I am sure that is something that will come before the courts. Equality continues to be a challenging guarantee and we're seeing new kinds of cases in that area. It really depends on what the people of Canada, and to some extent the governments of Canada, want to make issues and bring before the courts, and that's very difficult to predict.