Leader and Representative: The Legacy of Beverley McLachlin Inside and Outside of Court

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I. INTRODUCTION

Many interesting and important factors arise when considering Beverley McLachlin's legacy. As Canada's longest-serving Chief Justice, and third longest-serving Supreme Court justice, one is tempted to focus on longevity itself as a key variable, for in many ways McLachlin became an institution unto herself. Temporality is also significant: the public importance of the Court is dramatically different in the period since the *Canadian Charter of Rights and Freedoms*[1] than it was, for example, before 1949, when it was not the final appellate court of the land and dealt largely with cases of comparatively little public importance. Never has the Court, nor its Chief Justice, wielded this much influence and policy-making power. McLachlin's status as Canada's first woman to be appointed Chief Justice is also an interesting frame for analysis of a legacy, when the force of personality and leadership skills are so deeply relevant to the dynamics of a multi-member body like the Supreme Court.

Yet the legacy of a Chief Justice is much more than a set of benchmarks. It is also more than the body of jurisprudence that developed during McLachlin's tenure, or the specific areas of law that she helped to shape, although these are all things that warrant extensive examination. In the analysis that follows, I instead focus on two core aspects of the Chief Justice's leadership within and beyond the Court: her influence in developing and increasing consensus on the Court, and her role as the foremost voice of the judicial branch outside of the Court.

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

Part II analyzes McLachlin's record as thought leader on the Court, drawing on past research to describe the formal and informal modes of influence a Chief Justice enjoys at various stages of the decision-making process. McLachlin stands out among her predecessors for a collegial style that has led to increased consensus and a consolidation of disagreement. The Court has occasionally sought to achieve unanimity in major constitutional cases — something reflected, in part, by a significant increase in "By the Court" decisions during McLachlin's tenure — and Part II examines the consequences of this, noting that it can sometimes lead to increased ambiguity and issue-avoidance. The degree to which McLachlin helped marshal the Court to speak with one voice is a product of her own leadership skills as well as the willingness of the other eight justices, something that may not always happen in the future.

In Part III, I explore McLachlin's record as representative of the Court and of the judicial branch more broadly. Building on her predecessors, McLachlin increased the transparency of the Court itself, engaged more frequently and substantively with the media, and used her voice to speak out on a litany of issues related to the justice system, including judicial independence and access to justice. She is the most visible and engaged Chief Justice in Canadian history, and her activity in this vein was not without occasional controversy, including a public spat with the Conservative government over a failed appointment to the Court itself.

I conclude in Part IV with some brief thoughts on the position of the Court, and the role of a Chief Justice, in the wake of Beverley McLachlin's retirement.

II. MCLACHLIN AS THOUGHT LEADER

In academic[2] and media circles,[3] Beverley McLachlin is widely recognized as having had a pronounced influence on the Supreme Court's decision-making, especially as it relates to achieving greater consensus. The role of Chief Justice is generally viewed as "first among

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[2] See Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver and Toronto: UBC Press, 2013) [hereinafter "Macfarlane"].

[3] See Christopher Guly, "The Top 100: Beverley McLachlin, the Supreme Court's Consensus-Builder", *The Hill Times* (February 8, 2017), online: <https://www.hilltimes.com/2017/02/08/top-100-supreme-courts-consensus-builder/95520>; Janice Tibbetts, "Building Consensus", *Canadian Lawyer* (July 2, 2013), online: <http://www.canadianlawyermag.com/author/sandra-shutt/building-consensus-2100/>.

equals" *vis-à-vis* the Puisne Justices,[4] a function of the independence each individual member of the Court enjoys to vote and write as they wish. Nevertheless, a number of the Court's institutional features provide the Chief Justice with opportunities to exercise considerable influence, both in terms of task management and in fostering an environment within which it is possible for a Chief with leadership skills to practice the art of persuasion. The Chief Justice's institutional authority is conditioned by norms of consensus and collegiality that have developed over time and that have been shaped by successive Chief Justices themselves.

In this section, I examine the ways in which Chief Justice McLachlin exercised leadership within the Court. As noted, her general demeanour and attitude as Chief Justice receives praise as congenial and largely successful at improving consensus. Broadly, her approach contrasts with that of her immediate three predecessors, whose leadership styles I have previously described as follows:

> According to his biographer, Laskin CJ (chief justice from 1973-1984) displayed a "top-down management" style with regard to the organization of the purely judicial work of the Court and with respect to important events, such as the Court's centenary. The other justices often felt his approach was disrespectful, particularly given the controversial nature of his promotion to chief justice. Laskin CJ was much less attentive or controlling with respect to the day-to-day management of the Court. … Dickson CJ's tenure as chief justice (1984-90) came at a time of considerable backlog and division on the Court. Despite implementing important procedural changes in response to the backlog, administrative work was secondary to Dickson CJ. Dickson CJ's former colleagues described him as congenial (Interviews). His efforts to achieve consensus on the Court's approach to the new *Canadian Charter of Rights and Freedoms*, though initially successful, ultimately did not produce a higher degree of unanimity. Nevertheless, his style, personality and willingness to listen to his colleagues instead of dictating the Court's jurisprudential direction were met with appreciation from the other justices. Lamer CJ (1990-2000) spent considerable time dealing with the Court's efficiency and administration (Interviews). His general approach was professional, but … divisions on the Court during his time as chief justice occasionally resulted in near-animosity with particular colleagues.[5]

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[4] This, despite the fact that "puisne" is derived from the old French term for "junior" or "inferior in rank".

[5] Macfarlane, *supra*, note 2, at 72, citing Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society for Canadian Legal History, 2005), at 431.

For McLachlin, increasing consensus on the Court was a publicly-stated goal when she took up the position of Chief Justice.[6] Studies of consensus and unanimity on the Court during McLachlin's tenure confirm that the rate of unanimity increased relative to the Lamer Court.[7] For example, one analysis finds that during the first decade of McLachlin's tenure as Chief Justice the unanimity rate was 62.8 per cent, in contrast with the 58.4 per cent unanimity rate under the Lamer decade.[8]

This difference may seem modest at first glance. Yet, McLachlin achieved a higher unanimity rate while simultaneously assigning larger panels than her predecessors. Indeed, the rate at which panels of all nine justices (*en banc*) were assigned grew from 9.8 per cent under Dickson to 30.4 per cent under Lamer to 51.7 per cent under McLachlin.[9] The more people on a given panel, the more difficult it is to achieve consensus. McLachlin established a practice of assigning *en banc* panels for most of the important cases the Court hears, often reserving smaller panels for appeals as of right, or cases involving Quebec civil law.[10] Panel assignment activity by previous Chief Justices appears to be more discretionary and haphazard, although given the workload concerns at certain points in the Court's history, it is probable that smaller panels were frequently assigned as an efficiency measure. One recent study exploring whether a Chief Justice can use the power to assign panels in a strategic manner found that while there may be some evidence of such behaviour, the practical impact it has is usually negligible.[11] A reduction in the Court's annual caseload is likely to have made it easier for McLachlin to establish a practice that essentially defaults to hearing major cases *en banc*, but the approach is also likely conducive to enhancing collegiality given that individual justices are not left off panels for important cases they might want to take part in.

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[6] See Cristin Schmitz, "Communication, Consensus Among McLachlin's Targets", *Lawyer's Weekly* 19:27 (November 19, 1999) [hereinafter "Schmitz"].

[7] See Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osgoode Hall L.J. 99-138 [hereinafter "McCormick, 'Blocs'"]; Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 S.C.L.R. (2d) 379-410.

[8] Macfarlane, *supra*, note 2, at 123. Where the Court's statistics categorize unanimity as decisions that do not produce a dissenting opinion, this study applied a rate that also considered concurrences. In the result, the definition of unanimous here considers not only unanimity with respect to outcomes but also with respect to reasons.

[9] See Donald R. Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008), at 116 [hereinafter "Songer"].

[10] So as to ensure a majority of civil law judges on the panel.

[11] See Benjamin Alarie, Andrew Green & Edward M. Iacobucci, "Panel Selection on High Courts" (Fall, 2015) 65 Univ. of Toronto L.J. 335.

Another aspect of McLachlin's consensus-building approach is a significant reduction in the number of extra written reasons when the Court does split on an outcome. In other words, McLachlin was successful at consolidating points of disagreement on the Court, largely via a reduction in the number of concurring opinions.[12] Former Justice Michel Bastarache described the McLachlin Court's approach as follows:

> There is more place for discussion and dialogue in the sense that we strive more to discover each other's reasons and opinions, and try to determine ways in which we can reduce the number of dissents, or reduce the number of published reasons in a case. I don't mean to say that there wasn't discussion before. There was always a conference and a meaningful discussion. But I think we've tried different approaches to reduce the number of written reasons and try to produce decisions that are more useful to the courts of appeal.[13]

This is a process that relies on the cooperation and collegiality of all of the justices on the Court.

The Chief Justice also enjoys authority over decision assignment. After a case is heard, the justices retire to the conference room where the justices indicate where they stand on the case outcome and their basic rationale. This practice of conferencing was established in the late 1960s under Chief Justice John Cartwright.[14] Traditionally, the justices speak in reverse order of seniority (by contrast, on the Supreme Court of the United States the Chief Justice speaks first and discussion proceeds on the basis of seniority). Once a majority view is gleaned the Chief Justice will seek volunteers to draft an initial decision. If multiple justices volunteer to write, seniority is a leading factor in the assignment of opinions; however, the justices are often deferential to each other's areas of expertise in this regard. While "jostling" between justices for the first stab at writing a draft decision has been reported, particularly in the early years of the Charter, such competition was apparently rare during the McLachlin period.[15] If no volunteer is forthcoming, the Chief Justice will assign writing duties, usually with an eye to workload and specialization. These two factors were particularly important during the McLachlin

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[12] See McCormick, "Blocs", *supra*, note 7, at 130.

[13] Macfarlane, *supra*, note 2, at 123-24, citing Cristin Schmitz, "The Bastarache Interview: 'Overall, This is Not a Frustrating Job'", *Lawyer's Weekly* 20:36 (February 2, 2001).

[14] For an in-depth description of conferencing on the Court, see Macfarlane, *supra*, note 2, at 102-105.

[15] *Id.*, at 105.

years.[16] In addition to these considerations, there also appears to be an acclimation period, such that junior members of the Court write fewer decisions in their first five years on the bench.[17]

The combined effect of the Chief Justice's assignment authority and norms around seniority would suggest that Chief Justices have a disproportionate opportunity to take the lead on drafting the most important decisions. The behaviour of Chief Justices of the U.S. Supreme Court has been well studied in this regard, with evidence that some Chief Justices have exercised strategic decision-making to ensure control over writing authority.[18] Chief Justice Warren Burger reportedly changed his votes at conference in order to ensure he maintained control of decision assignment.[19] There has been no evidence in the Canadian context of that degree of Machiavellian behaviour on decision assignment, where collegiality appears to reign on the modern Court. Nevertheless, as would seem obvious to even casual observers of the Court, the Chief Justice tends to be among the more prolific writers on the bench. One recent study confirms this intuitive hypothesis, finding that McLachlin was regularly among the dominant players on the Court in exercising this form of influence.[20] Seniority and areas of specialization were significant factors in determining influence among the Puisne Justices. One conclusion drawn from decision assignment patterns under McLachlin is that while the Chief Justice was a team player, she had the capacity to "enjoy a much greater pre-eminence in some focused subset of law if she chooses."[21] The evidence suggests that McLachlin took on a significant pre-eminence in Charter cases.

It would be a mistake to assume that control over decision assignment and the ability to author important judgments is solely about prestige. Most pertinent to the present analysis is the fact that the initial draft sets the stage for ensuring a consensus-based drafting process. Evidence from the U.S. Court suggests that decisions authored by the Chief Justice are

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[16] *Id*.

[17] See Peter McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993" (1994) 5 S.C.L.R. (2d) 499, at 514.

[18] See, *e.g.*, Pamela C. Corley, Amy Steigerwalt & Artemus Ward, *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford: Stanford University Press, 2013) [hereinafter "Corley *et al*."].

[19] *Id.*, at 84, citing Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), at 66.

[20] See Peter McCormick, "Judgment and Opportunity: Decision Assignment on the McLachlin Court" (Spring, 2015) 38 Dalhousie L.J. 271, at 308.

[21] *Id*.

more likely to be unanimous or highly consensual.[22] It is possible that the Chief Justice has a stronger institutional interest in having the Court speak with one voice in order to bring a greater authority to its statements on the law and a greater degree of clarity and legitimacy for lower courts and other actors. Given McLachlin's stated goals, findings that she wrote a disproportionate share of important decisions should not be surprising.

The most comprehensive account of the consensual style of the decision drafting process on the Court appears via interview research in *Governing from the Bench*.[23] Some justices rely a great deal on their law clerks in the initial drafting stage, providing them with instructions and allowing a clerk to do a fair bit of writing of the first draft, while other justices use clerks largely as research assistants. In either case, the justice is deeply involved and responsible for whatever ultimately appears. Once a full draft is finalized, it is circulated to the other justices for comments and suggestions. There are inevitably cases where the draft fits what was outlined at conference and only minor changes are made. In other cases, however, revisions and further discussion over the draft judgment are much more intense. In cases that spark disagreement, a degree of lobbying or attempts at persuasion can enter into the process. In especially difficult contexts, the Court might reconvene as a group for another conference, a practice that was rare under Lamer but that increased under McLachlin. This process has been cited by justices as helping to reduce friction between majority and minority factions or to clear up complexity and to see if multiple reasons could be combined in some fashion.[24]

There is also agreement among justices that the Chief Justice can be influential in ensuring consensus in this process. As one justice says, "there is no doubt that the whole environment of decision making is influenced at an important level on the Court by the chief justice."[25] This unsurprisingly depends on the collegiality of the other eight justices. There is anecdotal evidence supporting McLachlin's skill at persuasion, even in very difficult contexts. Only several months after her appointment as a Puisne Justice in 1989, the Court was confronted with the case of Chantal Daigle, whose former partner, Jean Tremblay, applied for an injunction to prevent her from obtaining an abortion. The injunction was granted by a Quebec Superior Court and upheld by the

22 See Corley *et al.*, *supra*, note 18, at 98.
23 Macfarlane, *supra*, note 2, at 106-21.
24 *Id.*, at 121.
25 *Id.*, at 125.

Quebec Court of Appeal. The Supreme Court expedited the appeal and reconvened during summer recess. As recounted in Sharpe and Roach's biography of Dickson C.J.C., when it was announced during oral arguments that Daigle had defied the injunction and obtained an abortion in the United States, Dickson was furious and initially thought to immediately end the case (as it was technically moot).[26] McLachlin intervened and apparently changed Dickson's mind by arguing from a point of empathy, asking her colleagues to consider that, given the advanced stage of Daigle's pregnancy, she was "a desperate young woman".[27] The Court unanimously set aside the injunction on the basis that the foetus does not enjoy status as a "human being" under the Quebec *Charter of human rights and freedoms*[28] and that a potential father does not have a right to interfere with the autonomy of a woman in making a decision about the termination of a pregnancy.[29]

If Sharpe and Roach's behind-the-scenes account is accurate, then McLachlin, even as a junior justice, engaged in an intervention that had a relatively remarkable impact. The point of persuasion she relied on was not necessarily a point of law but fundamentally about trying to provide her colleagues with a different perspective on Daigle's actions and in deciding whether to decide the case on the merits. As Hausegger *et al.* note, McLachlin herself acknowledges that gender may also play a role, and she reflects on the need to have "a different variety of perspectives on the Court … in this case a woman's point of view. Not that a man couldn't have seen it that way — ultimately they did, but it wasn't the way it immediately hit them."[30]

A number of studies of judicial decision-making note that women judges do decide cases differently than their male counterparts across a number of areas of law,[31] confirming the general sentiment expressed by Bertha Wilson J. in her famous "Will Women Judges Really Make a

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[26] See Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: Toronto University Press, 2003), at 393 [hereinafter "Sharpe & Roach"].

[27] *Id*.

[28] CQLR, c. C-12.

[29] See *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.).

[30] Lori Hausegger, Matthew Hennigar & Troy Riddell, *Canadian Courts: Law, Politics, and Process*, 2d ed. (Don Mills, ON: Oxford University Press, 2015), at 97 [hereinafter "Hausegger *et al.*"], citing Sharpe & Roach, *supra*, note 26, at 394.

[31] See Songer, *supra*, note 9, at 206-209 (finding women judges are more likely to find in favour of the prosecution in criminal cases, and more likely to find in favour of claimants in civil liberties cases); C.L. Ostberg & Matthew Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007), at 134-39 (finding women are more likely to favour discrimination claimants in equality rights cases).

Difference?" address.[32] McLachlin was only the third woman appointed to the Supreme Court, and its first female Chief Justice. The Court has since approached relative gender balance, having four women on the bench for most of the period since 2004, and this may have contributed to the sense that collegiality and consensus have increased. It is beyond the scope of this chapter to assess the broader impact of gender on the Court, and it is impossible to say how much of McLachlin's own leadership style might be influenced by her sex or gender. Nonetheless, it is worth noting that McLachlin herself has suggested that female justices could make for "happier courts".[33] The example of the behind-the-scenes discussion during Daigle's case serves to demonstrate the ways in which this sort of experiential wisdom can serve the Court, and that McLachlin has been willing to use extra-legal considerations to push for collegial decision-making from the moment she was appointed.

Thus far, this section has discussed influential aspects of McLachlin's leadership, particularly in the area of consensus-building. But what is the impact of consensus as a goal? There has been some debate, even among the Court's justices, about whether it is always normatively desirable to aim for consensus or unanimity in highly salient or complex cases. Bastarache has argued that consensus can occasionally "muddy the legal waters", a phenomenon that occurs when the Court fails to produce clear results because of an excess of compromise.[34] A decrease in clarity was something that also concerned Wilson, who felt that the sort of "calculated ambiguity" required to reach unanimity in some cases was less preferable than "a range of judgments offering options, including a dissent and a diverging concurrence if necessary, as long as each judgment was written with crystal clarity."[35]

To outside observers, it can be difficult to assess which unanimous decisions were a result of the Court striving for unanimity as a goal and which happened as a matter of course or easy agreement. Interview-based research and judicial biographies have helped to identify a handful of cases that were the product of a concerted effort by the Court to reach

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[32] Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (Fourth Annual Barbara Betcherman Memorial Lecture delivered at Osgoode Hall Law School, February 8, 1990), (1990) 28 Osgoode Hall L.J. 507.

[33] Macfarlane, *supra*, note 2, at 64, citing Tracey Tyler, "The Legal 'Sticky Floor'" in *Toronto Star* (August 15, 2006) A09.

[34] Schmitz, *supra*, note 6.

[35] Macfarlane, *supra*, note 2, at 125-26, citing Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 164.

unanimity.[36] Analysis of these cases confirms two potential effects relating to judicial efforts to reach unanimity through compromise. The first is a particular kind of judicial minimalism, as issues get dropped or avoided so that the justices can maintain agreement. The second is an element of ambiguity introduced into the reasoning, either at a conceptual level or in the wording of the decision.

The most prominent of these cases is *Reference re Secession of Quebec*.[37] Famously, the Court addressed the legality of unilateral secession by Quebec with a unanimous opinion that reads like a political essay, finding that while Quebec could not secede unilaterally, the rest of Canada has a duty to negotiate in the event that a "clear majority" indicates a wish to secede when answering a "clear question" on secession.[38] Most notably, the Court left it "for the political actors to determine what constitutes 'a clear majority on a clear question'", as well as the content and process for any negotiations.[39] While there is an obvious wisdom to leaving it to political actors to determine how to proceed in the event that some future circumstances instigate negotiations over secession, the Court's lack of clarity on what constitutes "a clear majority", particularly given that the Court seems to invoke this phrase to mean something more than a simple majority, adds uncertainty to the outcome.[40] As a result, the Court's opinion in the *Secession Reference* has been criticized by some commentators as having "actually resolved almost nothing."[41]

Where the Court may have achieved unanimity in the *Secession Reference* by avoiding a number of core issues, it may have achieved unanimity in *Law v. Canada*[42] by introducing into its equality rights jurisprudence the complex and amorphous concept of human dignity. The Court had disagreed over a basic approach to identifying discrimination under section 15 of the Charter[43] and *Law* served as an opportunity to come to a consensus. The introduction of human dignity as part of the analysis, however, proved tricky, with the Court identifying four

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[36] Macfarlane, *id.*, at 125-31; Sharpe & Roach, *supra*, note 26, at 394-95.

[37] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Secession Reference*"].

[38] *Id.*, at para. 153.

[39] *Id.*

[40] This is, of course, a point of contention for which the Court's opinion provides little guidance.

[41] Peter Leslie, "Canada: The Supreme Court Sets Rules for the Secession of Quebec" (1999) 29:2 *Publius* 135, at 149-50.

[42] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].

[43] Charter, *supra*, note 1.

"contextual factors" to guide analysis rather than a strict legal test.[44] The human dignity concept was widely criticized as unworkable,[45] something the Court itself essentially acknowledged when it abandoned the approach less than a decade later, noting that "human dignity is an abstract and subjective notion" and one that is "confusing and difficult to apply".[46]

This brief discussion of these cases illustrates the two ways unanimity as a goal can affect outcomes and the Court's reasoning, either by leaving certain issues unaddressed or by introducing a degree of ambiguity to ensure consensus. These factors are arguably present in some unanimous cases during McLachlin's tenure as Chief. Beyond the aforementioned interview research and biographies, another way of identifying cases where unanimity appears to have been a goal are the "By the Court" judgments. "By the Court" judgments are judgments where the institution itself is identified as the author, rather than the common practice of having a specific justice or pair of justices named as author. In the modern era, "By the Court" judgments, while generally rare, tend to be among the most important cases, and there appears to be a motivation on the part of the bench to speak with one authoritative and unattributed voice.

Most notable for the present analysis is that the use of "By the Court" judgments increased significantly during McLachlin's tenure as Chief Justice.[47] Some of these cases reflect a similar ambiguity in the concepts employed or evidence of issue-avoidance. *Reference re Senate Reform*,[48] which McLachlin herself likely had a hand in writing,[49] is illustrative. The Court determined that proposals to establish "consultative elections" for appointments to the Senate and term limits for senators require formal amendment to the Constitution. The opinion stated that Parliament does not have the ability to enact these reforms by itself under the amending formula, but instead requires provincial consent under section 42(1)(b), which pertains to "the powers of the Senate and the method of selecting

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[44] *Law*, *supra*, note 42, at paras. 62-75.

[45] See Debra M. McAllister, "Section 15: The Unpredictability of the *Law* Test" (2003) 15 *National Journal of Constitutional Law* 35.

[46] *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483, at para. 22 (S.C.C.).

[47] See Peter McCormick, "*Nom de Plume*: Who Writes the Supreme Court's 'By the Court' Judgments?" (Spring, 2016) Dalhousie L.J. 77, at 79 [hereinafter "McCormick, '*Nom de Plume*'"]. See also Peter McCormick & Marc Zanoni, "The First 'By the Court' Decisions: The Emergence of a Practice of the Supreme Court of Canada" (2015) 38:1 Man. L.J. 159-190.

[48] [2014] S.C.J. No. 32, 2014 SCC 32 (S.C.C.) [hereinafter "*Senate Reform Reference*"].

[49] See McCormick, "*Nom de Plume*", *supra*, note 47, at 121. McCormick employs text analysis software to identify potential authors of the Court's recent "By the Court" decisions.

Senators".[50] In making its determination, the Court went beyond its analysis of the text of the various amending procedures. It relied on the "constitutional architecture" concept, which includes both written and unwritten elements of the constitutional text, its various institutions, and even the "assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another...".[51]

The constitutional architecture concept has been criticized for introducing significant ambiguity into the dividing line between the amending formula's various procedures and, in relation to Senate reform, whether other changes to the appointments process are possible.[52] In effect, the Court determined that consultative elections and term limits could change the role of the Senate itself, potentially transforming it from a complementary body of sober second thought to a competitive one. By employing the architecture concept, however, the Court raises considerable uncertainty about what changes might affect "core" aspects of central institutions and therefore require provincial consent, and what changes it might be permissible for Parliament to make alone under section 44, which otherwise permits changes relating to the federal executive, the House of Commons, and the Senate.[53] The architecture concept gives judges considerable discretion to frame and define specific issues depending on how they view the broader structure of the Constitution. Much like the concept of human dignity, however, the concept does not appear to provide much guidance for future cases.

The Court also engaged in issue-avoidance in the *Senate Reform Reference*. In addressing whether the imposition of term limits might change the fundamental nature or role of the Senate, the Court concluded that "security of tenure is intended to allow Senators to function with independence in conducting legislative review."[54] A significant change in tenure via term limits could thus constitute a change in the Senate's fundamental nature and role. However, the Court had previously

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[50] In both instances the "7/50 rule" would apply, requiring the support of at least two-thirds of the provinces representing at least 50 per cent of the population: see Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Part V of the *Constitution Act, 1982*"].

[51] *Senate Reform Reference*, *supra*, note 48, at para. 26.

[52] See Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883-903; Dennis Baker and Mark D. Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185, at 200.

[53] Part V of the *Constitution Act, 1982*, *supra*, note 50.

[54] *Senate Reform Reference*, *supra*, note 48, at para. 79.

recognized Parliament's authority to implement a retirement age for senators.[55] The Court refused to address evidence that lengthy, non-renewable term limits would be consistent with existing patterns of senatorial tenure and retirement. It even acknowledges this, noting:

> It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure.[56]

The Court's refusal to engage in a line-drawing exercise, despite that being what was asked of it,[57] is indicative that the justices could not agree on this fundamental point.

None of this analysis is to suggest that the general goal of consensus inevitably has negative effects. Nevertheless, in particular cases an explicit effort to get the Court to speak with one voice may reduce clarity or lead to uncertainty in a manner that reflects concerns articulated by Bastarache and Wilson. The differing views some justices have on the desirability of striving for unanimity in certain contexts also suggests that consensus on the Court might ebb and flow over time based on the composition of the bench. McLachlin had an undeniable impact during her tenure as Chief that may not be so easy to replicate in the future, not only because future Chief Justices may put a different emphasis on the balance between

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[55] See *Reference Re Legislative Authority of the Parliament of Canada in Relation to the Upper House*, [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54, at 76 (S.C.C.).

[56] *Senate Reform Reference*, *supra*, note 48, at para. 81.

[57] The wording of the reference question on term limits effectively begs the Court to engage in line-drawing (*id.*, at para. 5):

> 1. In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the *Constitution Act, 1982,* to make amendments to section 29 of the *Constitution Act, 1867* providing for
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> (*a*) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the *Senate Reform Act*;
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> (*b*) a fixed term of ten years or more for Senators;
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> (*c*) a fixed term of eight years or less for Senators;
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> (*d*) a fixed term of the life of two or three Parliaments for Senators;
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> (*e*) a renewable term for Senators, as set out in clause 2 of Bill S-4, *Constitution Act, 2006 (Senate tenure)*;
>
> (*f*) limits to the terms for Senators appointed after October 14, 2008 as set out in subclause 4(1) of Bill C-7, the *Senate Reform Act*; and
>
> (*g*) retrospective limits to the terms for Senators appointed before October 14, 2008?

speaking with institutional authority and individual justices writing separate reasons, but also because general turnover on the Court may affect how collegiality operates in relation to decision writing.

III. McLachlin as Chief Representative

The Chief Justice has considerable responsibilities external to the Court itself. As Chief Justice of Canada, McLachlin in an important sense also represented the entire judicial branch. She chaired both the Board of Governors of the National Judicial Institute, which promotes judicial education, and the Canadian Judicial Council, which reviews complaints against superior court judges and exists to promote efficiency, uniformity, and judicial accountability in the judicial system broadly. The Chief Justice also serves as Deputy Governor General of Canada, and can thus fill in for the Governor General to give royal assent to parliamentary bills or meet foreign dignitaries. The Chief Justice also represents the Court in the context of its relationship with the political branches. For example, the Minister of Justice or Prime Minister traditionally consults the Chief Justice on new appointments to the Court.

The Chief Justice is also, in many ways, the key figurehead for the Court, a position that has continued to gain prominence in the modern era. The Court itself has grown increasingly powerful in the post-Second World War period, first becoming Canada's final court of appeal in 1949, then via changes granting it more power over its own caseload in the 1970s, and finally with the entrenchment of the Charter in 1982. As the Court became increasingly transparent over the last several decades, successive Chief Justices have been more willing to give public speeches and media interviews (something that really started as a regular practice under Brian Dickson).

In this respect, McLachlin was undeniably the most visible Chief Justice in the Court's history. She has been outspoken in public addresses and interviews about the role of the Court and in relation to issues such as access to justice and judicial independence.[58] Under her predecessors, the Court established increasingly formalized and regular relations with the media, and decided to allow for televised broadcast of hearings on the Cable Public Affairs Channel (CPAC). McLachlin expanded these endeavours during her tenure, beginning the tradition of media lock-ups

[58] A list of just some of McLachlin's speeches are published on the Court's website, online: <https://www.scc-csc.ca/judges-juges/spe-dis/index-eng.aspx>.

for notable cases (where journalists receive briefings from the Court's executive legal officer) and live webcasts of hearings.[59]

McLachlin has also been vocal on government policies with implications for the Court or the justice system. In 2006, she expressed concerns about the Conservative Government's changes to the process of appointments to section 96 courts which added police representation to the judicial advisory committees and reduced the committee rankings to just "recommend" or not, eliminating the option for committees to "highly recommend".[60] Importantly, members of the judiciary were not consulted on the changes. McLachlin similarly expressed concern when the Government proposed public hearings before a committee of parliamentarians for the Supreme Court appointments process.[61]

Public remarks in other contexts have generated controversy. McLachlin's comments that Canada was guilty of "cultural genocide" in relation to its Indigenous population, months before the release of the Truth and Reconciliation Commission's report, faced criticism from some commentators.[62] Where it might seem that McLachlin was simply pointing to historical record, some critics were concerned about her intervention given that the Court itself has not at this point drawn this conclusion in a formal judgment, and that future cases might be implicated by the question of whether Canada has engaged (or indeed, whether it continues to engage) in cultural genocide via ongoing policies.

By far the most significant public controversy during McLachlin's tenure concerned the appointments process leading up to the failed selection by former Prime Minister Stephen Harper of Marc Nadon, a supernumerary judge of the Federal Court of Appeal, for the Supreme Court. The attempted appointment resulted in a legal challenge, prompting the Government to submit a constitutional reference to the Court to assess whether eligibility requirements for the three "Quebec seats" under section 6 of the *Supreme Court Act*[63] limited candidates to people with active experience in civil law (*i.e.*, that Federal Court judges were ineligible). The reference would also require the Court to determine its own constitutional status and examine whether the *Supreme Court*

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[59] See Emmett Macfarlane, "Administration at the Supreme Court of Canada: Challenges and Change in the Charter Era" (2009) 52:1 *Canadian Public Administration* 1, at 16-17.

[60] Hausegger *et al.*, *supra*, note 30, at 201.

[61] *Id.*, at 160.

[62] See *CBC News*, "Beverley McLachlin on her controversies, activism, Supreme Court legacy", *CBC News* (December 17, 2017), online: <http://www.cbc.ca/news/thenational/beverley-mclachlin-supreme-court-chief-justice-interview-1.4446434>.

[63] R.S.C. 1985, c. S-26.

Act, or parts thereof, were constitutionally entrenched such that any changes to the eligibility criteria would require provincial consent under the amending formula. In a 6:1 opinion, the Court determined that Nadon was not eligible and that the eligibility requirements in the Act were part of the "composition of the Supreme Court" under section 41 of Part V of the *Constitution Act, 1982*,[64] and thus any changes to them require the unanimous consent of the provinces.[65]

Nearly six weeks after the Court's opinion became public, the Prime Minister's Office (PMO) released information that McLachlin had contacted the PMO and the Minister of Justice's office during the appointments process to warn them about potential eligibility issues. To the concern of many observers, the PMO statement implied that McLachlin had acted "inappropriately" by trying to intervene in the process.[66] The statement noted that then-Minister of Justice Peter MacKay advised the Prime Minister against taking a call from the Chief Justice because it would be "inadvisable and inappropriate. The Prime Minister agreed and did not take the call."[67] The statement added that "[n]either that prime minister nor the minister of justice would ever call a sitting judge on a matter that is or may be before the court."[68]

Within a day, and in unprecedented fashion, the Court issued its own statement to correct the record. The Court's Release was blunt:

> In response to recent media reports, the office of the Chief Justice of Canada, the Right Honourable Beverley McLachlin, P.C. is releasing the following statement.
>
> At no time was there any communication between Chief Justice McLachlin and the government regarding any case before the courts. The facts are as follows:
>
> On April 22, 2013, as a courtesy, the Chief Justice met with the Prime Minister to give him Justice Fish's retirement letter. As is customary, they briefly discussed the needs of the Supreme Court of Canada.
>
> On July 29, 2013, as part of the usual process the Chief Justice met with the Parliamentary committee regarding the appointment of Justice

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64 *Supra*, note 50.

65 *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.) [hereinafter "*Reference re Supreme Court Act*"].

66 Leslie MacKinnon, "Beverley McLachlin, PMO give dueling statements on Nadon appointment fight", *CBC News* (May 1, 2014), online: <http://www.cbc.ca/news/politics/beverley-mclachlin-pmo-give-duelling-statements-on-nadon-appointment-fight-1.2628563>.

67 *Id*.

68 *Id*.

> Fish's successor. She provided the committee with her views on the needs of the Supreme Court.
>
> On July 31, 2013, the Chief Justice's office called the Minister of Justice's office and the Prime Minister's Chief of Staff, Mr. Novak, to flag a potential issue regarding the eligibility of a judge of the federal courts to fill a Quebec seat on the Supreme Court. Later that day, the Chief Justice spoke with the Minister of Justice, Mr. MacKay, to flag the potential issue. The Chief Justice's office also made preliminary inquiries to set up a call or meeting with the Prime Minister, but ultimately the Chief Justice decided not to pursue a call or meeting.
>
> The Chief Justice had no other contact with the government on this issue.
>
> The Chief Justice provided the following statement: 'Given the potential impact on the Court, I wished to ensure that the government was aware of the eligibility issue. At no time did I express any opinion as to the merits of the eligibility issue. It is customary for Chief Justices to be consulted during the appointment process and there is nothing inappropriate in raising a potential issue affecting a future appointment.'[69]

Later that month it was reported that four of the six names on the PMO short list for the vacant Quebec seat were judges of the Federal Court.[70] This is likely what prompted the Chief Justice's intervention.

The Conservative Government was widely criticized for suggesting that the Chief Justice acted inappropriately. The Canadian legal community was universal in its condemnation of the PMO's statement, and the affair was largely viewed as an attempt to impugn the reputation of the Chief Justice in a context under which the Government had suffered a series of high-profile losses before the Supreme Court.[71] The spat even attracted international attention, with the International Commission of Jurists demanding the PMO apologize for impugning the Court's independence.[72]

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[69] Supreme Court of Canada, News Release (May 2, 2014), online: <https://scc-csc.lexum.com/scc-csc/news/en/item/4602/index.do>.

[70] See Sean Fine, "The secret short list that provoked the rift between Chief Justice and PMO", *Globe and Mail* (May 23, 2014), online: <https://www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823392/>.

[71] See Emmett Macfarlane, "'You Can't Always Get What You Want': Regime Politics, the Harper Government, and the Supreme Court of Canada" (2018) 51:1 *Canadian Journal of Political Science* 1.

[72] *Id.*, citing James Fitz-Morris, "Beverley McLachlin, Chief Justice, deserves apology from PM, international jurists say", *CBC News* (July 25, 2014), online: <http://www.cbc.ca/news/politics/beverley-mclachlin-chief-justice-deserves-apology-from-pm-international-jurists-say-1.2718342>.

The incident was undoubtedly a low point for the Government in terms of its relationship with the Court, and the PMO deserved the criticism it faced in the aftermath. But was McLachlin insufficiently cautious when reaching out to the PMO or the Justice Minister about the potential eligibility issue? And was the duelling press release an appropriate response to the PMO's revelation about her efforts to contact them, however unfairly it characterized her actions?

It is challenging to answer these questions precisely because in both instances McLachlin was in a difficult position. It is true that it has become the norm for the Executive to consult with the Chief Justice on appointments to the Court. Yet that consultation usually takes the form of discussing issues like the needs of the Court, such as whether it would be ideal to have someone with expertise in a particular area of law. It is unlikely McLachlin's predecessors faced a situation in which they had to decide whether to comment on the eligibility of particular candidates or on a perceived problem with the process the Executive was following in developing a short list. Moreover, we can imagine a different Chief Justice in her position declining to reach out on what was, at the time, a hypothetical legal issue, for better or for worse. This does not mean McLachlin acted inappropriately, and there was no cause for the suggestion that she "lobbied" the Government in an attempt to influence the process.[73]

The nature and limits of judicial independence are particularly relevant here. Much of the judicial and scholarly attention to judicial independence has focused on aspects that protect courts and individual judges from undue political interference, including protections for judicial tenure, salary issues, and the nature of judicial accountability.[74] Yet judicial independence is a two-way street, and the concept depends on judges refraining from engaging in the political sphere, be it publicly weighing in on political issues and controversies, or interfering with decision-making by the other branches of government outside of the context of their work. Historically, this has also meant that judges do not respond to public criticism, letting their written reasons speak for them. As with the initial decision to contact the PMO and the Minister, it is reasonable to think a different Chief Justice might not have responded to the allegations at all. Nevertheless, it is important to note that

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[73] *Id*.

[74] See Peter McCormick, "New Questions about an Old Concept: The Supreme Court of Canada's Judicial Independence Decisions" (2004) 37:4 *Canadian Journal of Political Science* 839.

McLachlin's decision to issue her own Press Release was perfectly reasonable given the context. Faced with an unprecedented accusation (from the sitting Government no less), one with very real implications for her reputation, an effort to clarify what happened can hardly be seen as a violation of the principles of independence on her part.

The flare-up between the PMO and the Court will inevitably be marked as a significant chapter in McLachlin's legacy, precisely because overt public tensions between the Court and a sitting government are so rare. There is no doubt that this was an episode McLachlin would have preferred never to have happened. Despite this, the incident reflects the manner in which McLachlin conducted herself outside of the Court during her tenure as Chief Justice: more vocal and visible than her predecessors; forthright in addressing the issues she felt warranted attention; and principled in her conduct.

IV. CONCLUSION

This essay has focused on two core institutional and representative aspects of McLachlin's tenure as Chief Justice. What should be clear from the discussion is the extent to which she exercised leadership in an influential way, both in developing a collegial style leading to greater consensus within the Court and in acting as a key voice representing the Court and the judicial branch as a whole. Leadership matters. This is especially true in the context of the highest court of the land. The Chief Justice enjoys formal and informal authority that, while limited by other norms — especially the individual judicial independence of her colleagues as well as the institutional judicial independence she defended in public — can be considerable when applied by capable hands.

The preceding analysis provides a critical examination of McLachlin's impact in these two areas, but it is indisputable that she leaves behind a Court even more confident in its role and more comfortable in its status than ever before. The Court of the 1980s and 1990s, while certainly popular relative to other public institutions, faced trenchant academic and media criticism, particularly in relation to "judicial activism", for its new role under the Charter.[75] While analysis and criticism of judicial power and the way it is exercised remains important, McLachlin's leadership has helped cement support for the

[75] See, *e.g.*, F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000).

Court's role in a way that has blunted those sorts of criticisms. That she succeeded in this even while the Court continued to issue decisions with marked policy effects relating to deeply controversial issues, ranging from prostitution[76] to medical aid in dying[77] to reform of central institutions of government,[78] is a testament to the relative success of her efforts within and outside of the Court.

This essay began with a discussion of the benchmarks set by McLachlin's career: longevity, temporality, and her status as the first woman appointed as Chief Justice. As important as these are, the preceding analysis has shed light on the way McLachlin herself established benchmarks for the role of Chief Justice. Although it is inevitable that her successors will continue to expand, restrict, or otherwise modify that role, McLachlin set an unparalleled example for how the Chief Justice can exercise leadership within and beyond the Court. Others in her position may not have been able to marshal the consensus she achieved on the Court. Similarly, others may not have been as vocal or forthright a representative of the institution, or responded to outside pressures in the same manner. The profits and pitfalls of her particular style in specific contexts will remain a matter for public and historical debate, but her overall success and the significance of her legacy are incontestable.

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[76] See *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.).

[77] See *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (S.C.C.).

[78] See *Senate Reform Reference*, *supra*, note 48; *Reference re Supreme Court Act*, *supra*, note 65.