

Canada – Courts

The Supreme Court Of Canada: Guardian Of A Constitutional Order And The Values That Underlie It

The Editor interviews *The Hon. Beverly McLachlin*, Chief Justice of Canada.

Editor: Madam Chief Justice, you began your career in Alberta and British Columbia. Will you tell our readers something about your background as a law firm lawyer?

McLachlin: Most of my experience was in civil litigation. In the early years much of this revolved around tort claims and insurance. There was also some contract work. In the later years, I focused on large scale litigation involving construction law, in the main, and on several large and complex tort claims. Over the course of my career as a law firm lawyer I moved from the situation where one or two lawyers would be handling a matter to one involving a team approach.

Editor: And your experience as an academic lawyer at the University of British Columbia?

McLachlin: I enjoyed that very much. I loved teaching and interacting with the students. Being an academic lawyer gave me an opportunity to reflect, to look at issues in some depth and to do some writing. I was there for five years before I was named to the courts, and it was a very pleasant period in my career.

Editor: Please tell us about your decision to leave the bar and accept an appointment to the bench in 1981.

McLachlin: I was quite conflicted about it because of my relative youth. This is a decision that, if you get to make it at all, usually comes later. I knew that once I went on the bench, it was for life. Being a judge was not something I had given much thought to, and when I was asked it came as a considerable surprise. As I thought it through, however, I considered whether the position might enable me to make a contribution that I might not otherwise be able to make. I decided to take the step, and I have never regretted it.

Editor: After serving as Chief Justice of the Supreme Court of British Columbia, you were appointed to the Supreme Court of Canada in 1989 and appointed Chief Justice of Canada in January of 2000. For starters, would you give our readers an overview of the Supreme Court of Canada and its place in the country's constitutional framework?

McLachlin: We are the final court of appeal for all issues. Any issue that arises in any court in Canada could, in theory, come up to the Supreme Court. Canada is a federation, but we do not have the kind of division between the federal government and the states that you have in the U.S. This means that our court has a total jurisdiction, in addition to being the court of final constitutional appeal, as is the U.S. Supreme Court.

In certain ways we are very much like the U.S. Supreme Court. We have nine members, and we operate mainly on a leave to appeal process, although there



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are some matters that we are obliged to hear. We accept references from the government. The government might ask for an opinion on whether a proposed law would be constitutional, which the U.S. Supreme Court does not do. These are not binding decisions, but in our legal tradition they are accepted as such. Very shortly we are going to hear an interesting reference on a draft bill that would legitimize same sex marriage. There is some thought that the Supreme Court of Canada is less political than that of the U.S. Our members do not go through a Senate confirmation process, as do appointees to the U.S. Supreme Court, for example. We are working towards a more transparent process in this regard.

Editor: Are the decisions of the Supreme Court of Canada influenced by those of the United States Supreme Court?

McLachlin: We are very open to comparative law. The U.S. figures prominently among the jurisdictions we look at because our countries face so many of the same problems and there is so much cultural overlap. If we have a particular problem, we are always interested in seeing whether it has been addressed in the U.S. and how. On the constitutional side, I should note that the Canadian constitution is more attuned to its European counterparts, which means that we must filter the American experience through our own unique structures. In doing so, we examine the American experience very carefully.

Editor: Your position as Chief Justice of Canada is one of extraordinary responsibility. Can you share with us some of the principal challenges of the position?

McLachlin: One of the principal challenges for the Chief Justice of Canada – and, indeed, for the chief justice of any court – is fostering collegiality and an atmosphere where each member works at his or her maximum potential. That is what I strive to do. The members bring different strengths and different personalities to the institution, and in order for it to function well, there must be a high degree of collegiality. This means, among other things, that a climate of

respect for different points of view must exist. In this way, I believe that we can meet our main challenge, which is to arrive at the best and wisest decisions on the difficult issues we are asked to address. We are not asked to rule on the easy issues, but rather on those that require deliberation, deep reflection and a consideration of all perspectives. If we are to serve the nation that has entrusted us with this responsibility, we must be absolutely certain to discharge it, not in a political manner, but in a way that reflects our constitutional order and the values that underlie it.

Editor: Would you give us some idea about the jurisdiction of the Supreme Court of Canada and its reach?

McLachlin: As I mentioned, the Supreme Court of Canada is the country's final court of appeal. Because Canada, like the U.S., is a federation, in each province we have trial courts that send appeals to a general court of appeal. That court of appeal is dealing mainly with the correction of errors below, but sometimes it settles difficult legal points as well. The Supreme Court of Canada receives appeals from, for the most part, these provincial courts of appeal. Our role is *not* to correct errors, but rather to settle difficult questions of national and public importance. Most of these cases come to us by way of leave application, which is similar to the U.S. writ of certiorari. Our main concern is whether the case raises an issue of national or public importance. If so, then provided the issue is going to arise on the facts of the case, we grant leave. We also hear a number of cases under our criminal code which come to us as of right, but they do not comprise a large part of our case load.

Anyone from any part of the country can appear before the Supreme Court of Canada. We do not have a specialized bar – “admitted to practice before the Supreme Court of Canada” – although in certain areas of the law we tend to see the same counsel on a regular basis. Nor do we have any special area of jurisdiction that is ours alone.

Editor: Our publication has an ongoing series on the rule of law and its progress in places that have known a somewhat different regime. In this connection, please tell us about the mission of the Supreme Court of Canada.

McLachlin: Promoting the rule of law is the major mission of every court. Courts exist to support the rule of law and to ensure both that it governs our society and is available to every citizen. We believe that the rule of law is the basis of everything we promote as essential to a fair and equitable society, including freedom, security and the rights guaranteed by our democratic institutions. The exercise of power through those institutions is bounded by the rule of law. A court like the Supreme Court of Canada or the U.S. Supreme Court has a fundamental concern with ensuring that the exercise of power at every level of the democratic structure is in accordance with the rule of

law. This is a fundamental challenge, and there are times when it is also a controversial one. It is the *idea* of the rule of law that serves as a foundation for the freedom, the security and the right to speak and write and assemble and carry on commercial activities that define a healthy society, and it is the most fundamental responsibility of our courts to defend and vindicate that idea.

Editor: Canada has an enviable reputation for impartiality, inclusion and tolerance in a world that seems to be losing ground on these values. This did not just happen. And the Canadian justice system must contribute greatly to this reputation. Can you comment on how this has come about?

McLachlin: It did not just happen. Our history has pointed us in a certain direction from the very beginning. Canada was founded by two different peoples coming together, Francophone Catholic and English-speaking Protestant, overlaid on a mosaic of First Nations. From the foundation of the country we have had to make compromises and to recognize that we would stay together only through mutual tolerance and respect for one another's culture, traditions and values. That has informed the country from its origins in Upper and Lower Canada, and it may differentiate us from other countries. We have been successful in building on those origins, as successive waves of immigrants have come to our shores, by confirming those values of tolerance and respect in each generation. This is not to say that bigotry and racism and the like have been absent from our history – that is not the case – but these things have been on the margins and not part of the mainstream of our development as a country and people. I believe that the vast majority of Canadians today recognize and, indeed, take pride in the inclusiveness of our society. It is not to be taken for granted, however, and I believe that ensuring tolerance and respect for people from different backgrounds is something that must be addressed on an ongoing basis. And, yes, I am proud to say that the Canadian justice system has made, and continues to make, a major contribution to this development.

Editor: You talked about the challenges of the Chief Justice's position a moment ago. Will you tell us about the rewards?

McLachlin: There is great satisfaction in having been an active participant in society and in having made a contribution. The opportunity to serve as Chief Justice of Canada has given me that satisfaction. I believe that democratic societies must be attentive to the institutions that guarantee their freedom, and that it is the courts that have the responsibility to guide society in this exercise. It is enormously gratifying to me that the Supreme Court of Canada is such a strong institution and serves as both guarantor of our freedom and guide in the carrying out of society's responsibilities. I have been very privileged.