Madame Justice Wilson: Trailblazer for Justice

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Mr. Dean, Mme Justice Wilson, Mrs. Read, other distinguished Guests, Ladies and Gentlemen:

May I say first of all that I am deeply honoured to have been invited to give the Horace E. Read Memorial Lecture for 1991, inaugurated in memory of the distinguished Dean of Dalhousie Law School who served in that capacity from 1950 to 1964. Dean Read's contribution to legal education and to legal scholarship in general was a massive one, encompassing as it did law reform, legislation and the legislative process, conflict of laws, labour law and legal education. Horace Read acquired an enviable international reputation and was renowned for his tireless efforts to maintain Dalhousie Law School's track record as a first rate academic institution. He followed the great tradition of Deans of Law at Dalhousie. His remarkable career is part of the reason that that tradition is so great.

I am especially pleased that you have asked me to pay tribute to Horace Read by honouring one of his former students and one of Canada's greatest jurists: Bertha Wilson, a colleague of mine for many years on the Supreme Court of this country and a person for whom I have the highest regard. Although we differed from time to time in the disposition of a particular case - that is in the nature of things - Bertha and I became, and remain, close friends.

But how did Bertha Wilson come to be one of Dean Read's students? Certainly, it would not have been obvious in the mid-1940s that a young Scottish woman of 21 years of age, having recently completed her undergraduate education at the University of Aberdeen, and having just married a student who was an equally recent graduate in Theology, would end up at Dalhousie Law School and go on to be the first woman appointed to the Supreme Court of Canada. Indeed, Bertha Wilson began her working career as a parish minister's wife in Macduff, a small town on the coast of Scotland - half-way between Aberdeen and Inverness. There, she and John Wilson tended to a small congregation made up mostly of fishermen and farmers. The intimate involvement with the drama of their daily lives provided her

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1. I would like to acknowledge the contribution of Robert Yalden (Faculty of Law, McGill University) in the preparation of this address.
with insights into people that stood her in good stead both at the bar and on the bench.\(^2\) If one wants to gain insights into Bertha Wilson’s remarkable compassion and sensitivity as a judge, I think it is there, in that small community in the Northern Highlands of Scotland, that one should begin to look.

Emigrating to Canada was of course the big event in the lives of Bertha and John Wilson. John took up a new ministry in Renfrew, Ontario. They loved Renfrew and served there for three years. But the Korean War was on and there was a need for a chaplain to go out to the Canadian flotilla of destroyers in Korea. John went to Halifax for basic training, while Bertha moved to the outskirts of Ottawa, taking a job as a receptionist to two dentists. An odd training ground for a future Supreme Court Justice, you might think! But the experience was an important one. Bertha describes it in this way:

The separation was rough and I was often very lonely but in a strange way it felt good to be doing something by myself. What I had done before, and done very happily, was through my marriage to a minister. The satisfaction I had was subtly different; it was direct and not derivative. I was my own centre of reference now. I had to look to my own resources only and it was a revelation and a joy to discover that I had them. I developed a new sense of confidence in myself and was intensely proud of every new hurdle that I crossed. I know now that this first experience on my own was a necessary prelude to my career in law.\(^3\)

These words not only describe a critical period in Bertha Wilson’s education, but it seems to me that in their own way they speak to the profound change in consciousness that so many women have experienced over the course of this century.

Bertha Wilson eventually joined John in Halifax, where he spent six years as a naval chaplain. But Bertha was not as busy as she had

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2. Bertha Wilson once described the experience in these terms:
   It was a hectic life and a hard one. But I think it was there that I started to get some insight into how people tick. I became intimately involved with the drama of the daily lives of these people, their joys and their sorrows and, at sea, their terrible tragedies. I realized despite the many years spent on my formal education in school, at university and at teacher training college, how little of life I knew. I discovered how complicated people are, how lonely proud people are, how dependent on the rest of us old people are. It was the beginning of my education for living.
been in the Ottawa valley. So she decided to continue her education by enrolling in law school. From there she went to an articling position in Halifax. And when she and John moved to Toronto in 1958 she went on to become the first woman practitioner, and subsequently the first woman partner, in the law firm of Osler, Hoskin and Harcourt. After seventeen years in active practice, she was appointed to the Court of Appeal of Ontario, serving on that court for six years; thence to the Supreme Court of Canada. From rural parish life in Scotland to service as a judge on the highest court in Canada was indeed a giant step. Bertha was appointed to the Supreme Court of Canada on March 4, 1982 and retired on January 4, 1991. Her *curriculum vitae* records 23 publications and 24 unpublished addresses and lectures. She is the holder of 19 honourary degrees and was recently honoured by fellowship in the Royal Society of Canada.

J'aimerais conclure ce bref exposé biographique avec quelques observations offertes par la Ministre de la Justice, Kim Campbell, à l'occasion de la retraite du Juge Wilson - des remarques qui resument bien la contribution de Bertha Wilson en tant que juge. Mme Campbell a dit:

Comme membre du barreau et comme première femme à avoir été nommé à la Cour D'appel de L'Ontario, vous avez contribué a rendre plus accessibles aux femmes du Canada la profession juridique et l'administration de la justice. Votre exemple a constitué une source d'inspiration pour toute une génération de femmes juristes.

Vous avez exprimé clairement, dans vos décisions et observations, les valeurs fondamentales de tous les Canadiens. Vous nous avez forçés à cerner les inégalités existant dans notre société et à les faire disparaître. Durant vos quinze années passées au sein de la magistrature, vous vous êtes honorablement acquittée de vos responsabilités. Vous avez contribué grandement et de façon partielle à l'évolution du droit, à l'exercice de la profession juridique et à l'administration de la justice au Canada.4

Je suis entièrement d'accord avec l'hommage que Mme Campbell a rendu au Juge Wilson.

A final story about Bertha is in order before I broach the heart of my talk to you this afternoon. In preparing this lecture, I could not help but note that there is a delicious irony surrounding the theme of this year's Read Lecture. An extract from a piece that Bertha wrote in

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1977, in which she reminisces about her interview with Dean Read regarding her application for admission to Dalhousie Law School, will give you a sense of what I mean. The extract reads as follows:

That preliminary interview with Dean Horace E. Read is indelibly imprinted on my mind. I think it was through it that I began to realize what lay behind those agitated murmurings on the "Women's Lib" movement. "Have you any appreciation", he asked, "of how tough a course the law is? This is not something you can do in your spare time. We have no room here for dilettantes. Why don't you just go home and take up crocheting?"

It was hard for me to persuade him that I was a serious student; that to me a knowledge of the law was an essential part of a liberal education and that while crocheting might be a very pleasant way to spend one's leisure hours, it could not be the be-all and end-all of one's productive years.

Well, for my part I must say that I am immensely relieved that I have not come all this way to pay tribute to Horace Read and Bertha Wilson by attending a symposium on crocheting!

Of course no one would have been more pleased at Bertha Wilson's success than Dean Read. He would, I think, have acknowledged that Bertha was indeed a serious student of the law, one who has forced people to do away with their prejudices concerning women and the law. As the papers we will hear over of the course of this Symposium will reveal, for all his initial scepticism, we are indeed fortunate that Dean Read had the good sense to admit Bertha to this fine University, one whose close historical links with Scotland provided an ideal setting in which to challenge a mind first shaped through the study of such subjects as moral philosophy, logic and psychology at the University of Aberdeen.

I say that we are fortunate that Dean Read saw the light because Bertha Wilson has made a most remarkable contribution to our legal


heritage. The sheer quality of her analysis and the depth of her thinking has ensured that her place in history will not only be secure by virtue of her having been the first woman appointed to the Supreme Court of Canada. Nor will it depend solely on the many ways in which her leadership has advanced the position of women in the law. In my view, her place in history is assured because her legal scholarship has been of the highest order.

Hers was an immense challenge. Indeed, just last year she spoke of the trepidation that she felt in being named as the first woman to the Supreme Court of Canada and in being saddled with expectations of so many women. But in rising to meet that challenge with remarkable intelligence, perseverance and eloquence she has succeeded brilliantly in shattering the myth that the law is not a domain for women. Through her contribution we have all come to see how much weaker our legal culture has been for the dearth of women lawyers and judges. That the quality of her contribution has made our previous failings in this respect so obvious is the ultimate measure of her success.

On a personal note, I think it important to take this opportunity to pay tribute to her as a colleague. Anyone who has had the pleasure of working with Bertha Wilson will know what an astonishing capacity she has for hard work and how profoundly the effectiveness of the Supreme Court of Canada as an institution mattered to her. Dean Read need not have worried: she was no dilettante! Far from it! For my part, I will always be grateful that in the most difficult moments during my tenure as Chief Justice, I could always turn to her for support. She was always prepared to take on far more than her fair share of our workload and to provide welcome words of advice. That I frequently relied on her heavily is, to say the least, understating the matter. Her integrity and professionalism were second to none.

I should add that no tribute to Bertha Wilson is complete without recognizing John Wilson’s tireless support of her efforts. I know that she draws great strength from his companionship and I have always viewed their relationship with admiration. We all owe John Wilson an immense debt of gratitude.

In the course of this Symposium others will canvass the many facets of Bertha Wilson’s legal scholarship. I do not intend to duplicate that process. What I do propose to do, however, is to offer some thoughts that stem both from the good fortune I have had to work with

her as a colleague on the bench and from the insights that this experience has given me into her understanding of what it is to be a judge.

A moment ago, I mentioned that Bertha Wilson was profoundly committed to the effectiveness of the Supreme Court of Canada as an institution. Bertha has, of course, made a formidable name for herself through her reflections on the role of the Charter, for example, Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, on Criminal Law, for example R v. Morgentaler, on Native Law, for example, Guerin v. The Queen, [1984] 2 S.C.R. 335, on Family Law, and the role of women in the law, to mention but a few areas that she has illuminated. But it has long seemed to me that one can only begin to appreciate her contribution fully if one recognizes that underlying her work is a sophisticated vision both of the role of the Supreme Court of Canada in our constitutional democracy and of the implications of that role for the constraints within which a judge must operate. If one wants to develop a true appreciation of the reasons why Bertha Wilson was frequently prepared to explore new territory in the distinctive way in which she did or why, on the other hand, occasionally she did not go as far as some might have desired, then it is essential to understand her vision of the role of a judge in our system of government.

An understanding of this broader vision not only sheds light on why she was so profoundly committed to the Supreme Court of Canada as an institution; it also sheds new light on her legal scholarship. To understand in what way Bertha was a "Trailblazer for Justice", and to come to terms with what the organizers of this Symposium have aptly called the "Democratic Intellect", one must first grapple with that intellect's conception of the implications of our democratic system for the role of a judge.


Part One: The Limits of Law

On a number of occasions, Bertha Wilson spoke about the unusual position in which a judge finds himself or herself. She emphasized something that we often acknowledge but usually fail to consider in any detail: namely, that courts play a special role in our system of government. This role is distinctive not only because judges are unelected but also because they must rely on other branches of Government to respect and to enforce their decisions. Fortunately, in our democratic system a court’s decisions are respected.

Nonetheless, Bertha quite rightly noted that this is not something that one can take for granted. Moreover, she stressed that while one rarely sees judges talking openly about their unelected status and the interdependence of courts and governmental institutions, these considerations form a very real political backdrop to the stage on which courts must fulfil their responsibilities. They help define both the limits of the law and the boundaries that circumscribe and thereby give shape to a judge’s role.

Particularly interesting was Bertha’s awareness that judges are not completely independent from other actors in society and her understanding of the way existing patterns of dependence sustain the legitimacy of the judiciary’s position and affect the way that it goes about its business. She observed that judges have consciences and that they are therefore subject to a wide range of moral considerations. But the fact that they are unelected, and that the ongoing legitimacy of their decisions depends to a considerable extent on these decisions being widely accepted, can give rise to conflict. In particular, a conflict may arise between, on the one hand, that which a judge’s moral framework may lead him or her to conclude about a given case and, on the other hand, the recognition that at some point he or she must draw a line and accept that judges do not operate in a vacuum: some decisions are properly arrived at in a forum other than a court, a forum whose key players are directly accountable to the public. On occasion a judge may simply have to accept that if a certain point of view is to gain acceptance in society, then courts may not be the most appropriate or the most legitimate institution through which to advance that view. In other words, a judge must be especially sensitive to the kinds of social issues that are appropriately tackled through courts.

These are important observations. Bertha Wilson was right to stress that judges do not operate in isolation and that they are small "P" political actors, in the sense that in applying and developing the law they are subject to conflicting pressures and expectations that emanate from the special position they occupy in our society. These pressures may not be the same as those that constrain elected officials, but they are just as real.

While Bertha was always profoundly attuned to what her moral framework demanded of her, and while few would disagree that she sought to develop the law in a principled manner, it has frequently gone unnoticed that she was at all times operating with a refined sense of the realities of the context in which a judge operates. Some have at times complained about the direction in which she sought to take the law, suggesting that her work illustrates the dangers of unrestrained judicial activism. But in my view, in their rush to label her a judicial activist, these critics quite simply ignored that she was in fact profoundly sensitive both to the limits of the law and to the constraints that these limits placed on the way in which she could shape the law.

This point is well illustrated in Bertha Wilson's recent discussion of the question whether women judges will make a difference. One of the less well publicized portions of that speech was her observation that change in the law is incremental and that the nature of the judicial office places very real constraints on the extent to which judges can effect change. Of course, she argued that there were many corners of the law that could only benefit from the injection of a new humanity and I for one endorse her view that the advent of women judges and lawyers is helping to bring this new humanity to bear on legal issues. At the same time though, she noted that the legislature was "the more effective instrument for rapid and radical change". In other words, she felt it important for people to realize that there are very real limits to the kind of social change that one can effect through the courts.

If one is to appreciate fully the significance of her decisions in cases that were true tests of the role of courts in our society, cases like Morgentaler or Lavallee, or if one wants to understand her approach to certain provisions in the Charter - for example, the equality

14. See: "Will Women Judges Really Make A Difference?" supra, note 7, p. 507: "Change in the law comes slowly and incrementally, that is its nature. It responds to changes in society, it seldom initiates them".
15. Ibid. at p. 516.
17. Supra, note 9.
guarantees, then one must in part remember that she had reflected carefully about the limits of the law and the extent to which it was acceptable to push the law forward within those limits. It is of course fairly easy to track the way in which Bertha Wilson redrew boundaries or incorporated new ideas into existing methods of analysis. But the less obvious and more difficult exercise, yet one that is equally important, is to understand why she stopped at any given point and why in some instances she chose not to realign particular frontiers.

We can begin to get some insight into her views on the limits of the law if we consider some of her more detailed thoughts about the tensions with which a judge must contend. In a lecture delivered in 1985 at the University of Toronto, Bertha noted that judges are subject to a number of considerations that affect their perception of the judicial role: for example, the tension between achieving a just result and the need for the rational development of the law, between the value of certainty in the law and the need for adaptability, between deciding what it is necessary to say in order to decide a case and the importance of overseeing the development of jurisprudence, and between judges as individual members of the court and the court as an institution.¹⁸

She went on to emphasize that how judges cope with these various tensions - which side of the ledger they come out on in any given case depends on their understanding of the constitutional constraints on their position. And she pointed out that constitutional considerations feature prominently in the debate between advocates of judicial restraint and advocates of judicial activism. She argued that those judges who advocate judicial restraint have a proper concern over their lack of accountability. At the same time, she recognized that moral considerations often impel judges in the opposite direction, leading them to adapt the law to respond more effectively to the challenges involved in a given case. She noted that no doubt all judges would like to think that their decisions, as well as constituting a proper application of legal principles, also reflect current notions of what is right and fair.¹⁹

Now I think it important that in laying out these observations, Bertha Wilson slides from one proposition to another, almost imperceptibly. Deciphering this move is critical to an understanding of her

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19. Ibid. p. 231. See also: B. Wilson, "Guaranteed Freedoms in a Free and Democratic Society - A New Role for the Courts?", Address to Carleton University Faculty Club, Ottawa, (February 2, 1984), pp. 3-4 [unpublished].
vision of the courts. For while she starts off by suggesting that moral considerations may well lead a judge to temper his or her belief in the importance of judicial restraint, she is quick to add that the challenge that a judge faces is to determine what constitute current notions of justice and fairness. In other words, a judge cannot simply bring his or her own moral intuitions to bear on a given problem. There is a deeper challenge that a judge must confront. His or her obligation is to ascertain the community's moral fabric and to bring an understanding of that morality to bear on a given issue.

Bertha Wilson was well aware that this was by no means an easy task. She understood that it would rarely be easy to disentangle one's own values from those of one's community with a view to better applying the latter. Indeed, she felt that in many ways the greatest challenge for a judge was to resolve the problem of how to integrate contemporary values and notions of justice into decision-making without allowing those decisions to become completely subjective. In this I think she was absolutely right: there is no greater challenge that a judge must confront than that of holding his or her intuitive moral response in check, ascertaining the community's values, deciding whether in a given case courts are the most appropriate vehicle through which to give expression to the community's values, and then ensuring that justice is done according to law - that is, through the process of reasoning that is peculiar to common law or to civil law.

When we look south of the border to the recent debate concerning the nomination of particular justices to the Supreme Court of the United States, and the relative merits of a method of interpretation that looks to the framers' intent or to "natural rights" or to some other standard for guidance in decision-making, I think we come to see how insightful Bertha's conception of the role of the judge really is. She does not suggest that judges would somehow attempt to apply a set of norms that are said to be objective and open to being grasped through an application of practical reason. Her point of reference is not an abstract ideal. It is instead the reality of a community's moral framework.

20. See B. Wilson, "Law and Policy in A Court of Last Resort", Cambridge Lectures, 1989. (Montreal: Les Editions Yvon Blais Inc., 1990), pp. 219-236, at p. 228, where she observes: "when existing doctrine is based on an obsolete image of society or fails to reflect the emergence of new social values, the judge must ask himself or herself whether the law is adequately serving its purpose."

21. "Decision Making in the Supreme Court", supra, note 19, p. 231. See also B. Wilson, "Decision Making in the Supreme Court of Canada", Address to the law school of the University of Western Ontario (September 1983), p. 17 [unpublished].

22. See "Guaranteed Freedoms in A Democratic Society", supra, note 20, p. 12, where she
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But what is the relevance of this understanding of the judge's role to the business of deciding cases? If we turn to some of Bertha's judgements, we can get some sense of the practical implications of her conception of the special role that the judiciary must play. I will limit myself to a handful of her decisions not because there are not other areas that we could look at. On the contrary, I think you will find that the perspective that I have just outlined shapes a wide range of Bertha Wilson's decisions. But my aim is simply to illustrate my general observations with a few particularly apt examples.

Let me begin with her contribution to family law. Most of us are of course familiar with the Supreme Court of Canada's decision in *Pettkus v. Becker.* Yet, equally important is the decision that was being appealed, namely, the Ontario Court of Appeal's unanimous judgement in *Becker v. Pettkus,* a judgement written by Bertha Wilson. For it is here, early in her judicial career, that we see a vivid illustration of Bertha Wilson's struggle to adapt the law, notably the so-called "constructive trust", to reflect changes in our community's values.

Bertha Wilson was well aware that the '60s and '70s had given rise to radical shifts in social attitudes towards marriage and divorce. With these shifts had come a growing recognition that in the event of marital breakdown, where the financial contribution or labour of one spouse had enabled the other to acquire a particular asset, ideally one should assess the contribution of each and strive for an equitable distribution of their property having regard to their respective contributions. The question was whether courts were in a position to effect this kind of equitable distribution. Could they alter existing legal observes: "We cannot placidly assume that by some mysterious process we, the judges, have been given access to the true answers to fundamental social and political dilemmas."

Bertha Wilson's views should not be confused with the school of thought that suggests that judges must look to a "social consensus" when engaged in judicial analysis - a position writers like John Hart Ely have criticized: see *Democracy and Distrust,* (Cambridge: Harvard University Press, 1980), pp. 53-69. Instead, her approach concentrates on a community's normative framework, its most integral values - independent of ongoing debates within that community with respect to particular issues, and then seeks to determine the implications of that framework in a given context. Of course, that is in the nature of things. But this perspective is nonetheless more stable than one that turns on "social consensus" or on values ascertained in the abstract. Moreover, Bertha Wilson's perspective has the virtue of being profoundly sensitive to the peculiarities of the Canadian constitutional context and to the proper role of courts in that system.

With respect to Bertha Wilson's views on the "original intent" school of thought, see *infra* text, accompanying note 42.

25. For a subsequent discussion on this point, see B. Wilson, "State Intervention in the Family", Canadian Institute for the Administration of Justice (October, 1984), at p. 10 [unpublished].
principles in a way that would accommodate important changes in the community’s values regarding marriage and divorce?

Gradually, courts had tried to effect change using common law concepts that they could legitimately adapt to suit the context. At first, they looked to the resulting trust as a potential instrument of progress. But this technique required one to impute a common intention that the beneficial interest in the property in question was not to belong solely to the person in whom the legal estate was vested. The result was that courts frequently struggled to find such an intention when none existed. Bertha Wilson appreciated the threat that artificial reasoning of this kind can pose to the legitimacy of a judgement. That is why she was determined to find a less tortuous mode of reasoning.

The advantage of the constructive trust as a tool capable of redressing unjust enrichment was apparent to her. It did not turn on common intentions. It was an age old equitable remedy that courts had imposed where a person holding title to property was subject to an equitable duty to convey it to another on the ground that the titleholder would be unjustly enriched if he or she were permitted to retain it. Moreover, the remedy offered courts a way of ensuring that the common law remained in tune with community values.

Needless to say, Bertha Wilson embraced the technique and put it to good use in Becker v. Pettkus. Sitting in my capacity as a justice of the Supreme Court of Canada, I had little trouble in endorsing her approach. In the result, Ms. Becker was awarded an equal interest in the business to which she had contributed nineteen years of unpaid labour. I should add that Bertha Wilson was also an astute appellate judge: she had relied on my reasons in Rathwell v. Rathwell, where I too had previously argued for an expanded use of the constructive trust. Little wonder that I found her reasoning congenial!

But it would be a mistake to conclude, based on her decision in Becker v. Pettkus, that insofar as family law was concerned, Bertha Wilson was always anxious to alter the legal landscape in order to achieve a result consistent with what one’s intuitions might suggest. She was aware of the limits constraining a judge’s position. For example, in a trilogy of cases concerning maintenance agreements that

26. See Palachik v. Kiss, supra, note 11, for another example of a case in which Bertha Wilson applied the constructive trust in a family law setting. And for yet another example of Bertha Wilson’s early efforts to adapt aspects of family law in light of changing social values, see her discussion of joint custody orders in Kruger v. Kruger (1979), 25 O.R. (2d) 673 (Ont. C.A.) at p. 674 (dissenting).
parties to a divorce had entered into, she was unwilling to open up these contracts in order to redistribute property.\footnote{28} It was her view that where the parties have negotiated their own agreement as to how their financial affairs should be settled on the breakdown of marriage, the agreement should be respected, even though one party might subsequently suffer hardship. Only where the agreement was unconscionable in a substantive law sense, or where a future misfortune had its genesis in the fact of the marriage, should the courts override that agreement.

Thus, it was her contention that it was generally inappropriate for the courts to interfere with consensual agreements. In other words, while Parliament might be competent to pass legislation permitting interference with consensual agreements, the courts were ill-positioned to engage in such a process absent clear authorization to this effect. While redistributing property might be legitimate judicial behaviour in the absence of a maintenance agreement — as was the case in \textit{Becker v. Pettkus}, in her view such behaviour was generally illegitimate in the face of maintenance agreements. One had, in effect, reached the limits of the judiciary's function.

In other areas of the law, she was equally quick to point to the limits of the court's role. For example, with respect to judicial review of an administrative tribunal's decisions, a setting in which constitutional constraints have a more obvious impact than in the realm of family law, she emphasized that deference to tribunals was generally appropriate. Courts were not elected bodies, whereas tribunals derived their authority directly from the legislature.\footnote{29} There were, therefore, real limits to the extent to which courts should seek to interfere with the decisions of those tribunals.

Let me refer to another example, this time taken from criminal law. Recently, in the \textit{Lavallee} case, the Supreme Court of Canada held that expert evidence relating to "battered wife syndrome" was admissible in connection with a defence of self-defence to a charge of murder. Bertha Wilson explained that expert testimony relating to why an accused remained in the battering relationship could be relevant in assessing the nature and extent of the alleged abuse. Moreover, by providing an explanation of why the accused did not flee when she perceived her life to be in danger, expert testimony might assist a jury...
in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

How does this judgement illustrate my general theme? Well, I think it important to note that Bertha Wilson emphasized in this case that in recent years the tragedy of domestic violence had received more and more attention. Society had come to recognize that family violence is a significant social problem and had asserted that it is unacceptable for men to abuse their wives.30 The challenge was to ensure that this perspective was fully integrated into our law of evidence and our criminal law. In other words, the challenge that Bertha Wilson set out to meet so effectively in *Lavallee* was to ensure that our law with respect to expert evidence was responsive to a profound shift in society's fundamental values, one that meant that our community refused to accept the notion that wives might somehow be a husband's property and that it was open to a man to chastise his wife as he saw fit. Once again, then, we see an attempt on Bertha's part to ensure that the community's moral fabric nourishes its legal principles, that the principles evolve in a way that is sensitive to changes in that fabric and that our legal structures continue to be accepted as legitimate precisely because they respond to evolutions in the context in which they are applied. If Bertha Wilson was a trailblazer for justice, then it was precisely because she had a particularly refined sense of legitimate ways in which to inject social justice into her decisions.

I now turn to Bertha's contribution to the development of *Charter* jurisprudence and to her views on constitutional interpretation.

**Part Two: The Limits of Constitutional Interpretation**

The appointment of Bertha Wilson to the Supreme Court of Canada some seventeen days before the *Charter* came into force was indeed a happy coincidence. No one was more aware of the significance of that document than she. As Bertha stated in her remarks at the retirement

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30. She observed, *supra*, note 9, at pp. 872-873:

"Fortunately, there has been a growing awareness in recent years that no man has a right to abuse a woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously. However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence."
ceremony held for her at the Court in December, 1990, she has always been “an unabashed and enthusiastic supporter of the Charter.”

In the same way that Bertha had thought at a general level about the obligations of judges as unelected officials with a special role to play in our constitutional democracy, so too she would set about unpacking the implications of their status for the process of interpreting constitutional rights. Moreover, she frequently emphasized that the advent of the Charter made it all that much more important that one think carefully about the role of the judiciary, since the Charter had given judges an even more onerous set of responsibilities.

On numerous occasions, she pointed out that the advent of the Charter had brought about a significant re-ordering of the political balance of power. She acknowledged that the court’s role under the Charter was, in certain respects, at odds with the notion of representative government since it challenged the right of government to enact laws that violate that Charter. Yet, she stressed that it was Parliament that had enacted the Charter — that had made this national political choice, and that it was, therefore, “Parliament itself which charged the judiciary with the solemn and awesome task of determining the constitutionality of the laws it passes.” Moreover, it was her view that judicial review was not designed to inhibit responsible government. Rather, its role was to facilitate it by ensuring that the objectives of government are achieved in a constitutionally permissible way, and she saw value in a charter both because it provides an explicit articulation of the community’s values, and because it is designed to ensure that laws and government action are consistent with society’s underlying moral framework.

Some might think that the reorganization of the political balance of power that Bertha Wilson referred to has in essence removed all constraints on judicial activism. Indeed, as I have already mentioned, some have argued that Bertha Wilson was a dyed in the wool judicial activist. But once again, it is my view that this rather facile exercise in labelling fails altogether to take into account her careful reflection on what it means to be a judge. More importantly, this categorization seems to me bound to ensure that one fails to appreciate what she considered to be the limits of constitutional interpretation.

Earlier, I stressed that no one was more aware than Bertha Wilson of the inappropriateness of judges simply bringing their own values to bear on a given problem. Indeed, she once observed that “There would be something deeply illegitimate about our forays into judicial review of legislation if all there was to them was a desire to substitute our own personal values for those of our duly elected representatives.” Moreover, I have emphasized that Bertha Wilson not only thought it important to avoid imposing her values on the law, but was constantly concerned to ascertain her community’s values. In my view, she was entirely faithful to this vision in her approach to constitutional interpretation.

Bertha Wilson recognized that the new role that the Charter gave the courts was of necessity an anti-majoritarian one, since it involved reviewing legislation enacted by a legislature elected by popular vote and accountable to the public. But she hastened to point out that Charter rights were by their very nature anti-majoritarian and that this fact provided valuable guidance to the courts in interpreting the constitution.

Now it is at this point that we hit another critical feature of Bertha Wilson’s thinking. For her work reflects a profound belief that it is precisely because rights are anti-majoritarian in nature that, in interpreting the Charter, judges should ask themselves which groups are disadvantaged and therefore likely to be ignored by the majority in the making of legislation. She asserted that it is because the poor, the oppressed, the powerless and racial minorities, among other disadvantaged groups, are typically shut out of the political process that in assessing the rights of individuals who belong to these groups, one had to be particularly vigilant. In her words, “The true test of rights is how well they serve the less privileged and least popular segments of society.” This is why she called for governments and courts to foster a constructive symbiotic relationship between themselves so that a climate might be created in which the quality of life of all Canadians was enhanced and their aspirations for self-fulfilment fully realized.

How does this perspective fit in with her views on the role of a judge and the work of the Supreme Court in interpreting the Charter? Well, these observations amount to saying that judges must be sensitive to the community’s motivation in enacting a charter and that they

37. Ibid. See also, “Retirement Ceremony”, supra, note 32, pp. 18-19.
must, in turn, constantly strive to remain sensitive to the underlying moral fabric of that community when interpreting the substance of this constitutional document. This is why Bertha Wilson endorsed the proposition that constitutional interpretation had to be purposive.\textsuperscript{38} She stressed that rights should be read in accordance with the general purpose of having rights: namely the protection of individuals against an overbearing collectivity. But more than this, judges had to strive to come up with what she called the "best modern theory" that could be devised to justify the existence of the right in question. And in her view, this exercise required that judges continually reassess the scope of the right in light of new facts, in light of contemporary social theory and in light of the context in which the right was called into play.\textsuperscript{39}

Thus, we see Bertha Wilson arguing that the judge must at all times be sensitive to the basic values of one's society. Her democratic frame of reference continues to guide her analysis. Indeed, the importance of this perspective increases exponentially under the Charter precisely because some of the traditional constitutional constraints that necessitate a measure of judicial restraint in a non-charter setting are no longer as obvious. The judge must, therefore, be that much more aware of the constraints imposed by the Charter itself, and by virtue of their mandate under the Charter to interpret their community's most fundamental values. If the Charter and the courts, as interpreters of that document, are to have a meaningful place in society, one that is accepted by its citizens as legitimate and worthy of respect, then judicial analysis of the Charter's provisions must reflect that community's most fundamental norms. The interpretive exercise must in turn be dynamic, not static. The challenge in this context is therefore to ensure that the community's values nourish its constitutional principles, that the "living tree" that is our Constitution evolves in a way that is sensitive to changes in this underlying moral framework and that the Charter continues to be accepted as a legitimate constraint on government action.\textsuperscript{40}

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\item \textsuperscript{40} Bertha Wilson explained the challenge this way:
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Having set out the basic elements of Bertha’s vision of the nature of constitutional interpretation, it is now quite easy to see why she was not a fan of that school of constitutional interpretation that calls for a strict adherence to the "framers’ intention" and why she supported the Supreme Court of Canada’s rejection of this approach to constitutional interpretation. In her view, the constantly changing nature of our social problems makes it literally impossible for the framers to have had an intent with respect to new social problems. Moreover, she stressed that it was far from obvious why the view of a handful of drafters should place future generations in a straitjacket. To allow this to happen would be no more appropriate than to allow a judge to impose his or her own moral agenda on the process of constitutional interpretation.

In making these points, Bertha Wilson struck a finely tuned balance that elegantly sidesteps the increasingly sterile debate between advocates of judicial restraint and advocates of judicial activism. In essence, her vision suggests that the polarization that this debate has given rise to creates a false dichotomy. The courts can hardly pretend that they have no mandate to effect change in the law when the legislature has itself given them this very mandate in enacting the Charter. And yet, this mandate does not mean that courts can ignore the way in which they fit into our democratic system and the limits that their position in that system places, both on the kind of change they can realistically hope to effect and on the way in which they should seek to bring about change. Nor can courts ignore the ongoing obligation that they have to sustain between the Charter and our society’s values. As Bertha pointed out, the legal standards set out in the Charter were expressed in broad and general terms precisely so that they might accommodate society’s changing values.

This is a distinctive and sophisticated approach to constitutional interpretation, one that emanates quite logically from her careful consideration of the role of judges in our constitutional democracy.

and certainty in a way that will accommodate and respond to social change. We must develop an interpretive approach that respects the Charter’s structure, that is sensitive to the broader social context in which the Charter is applied, and that ensures that the Court will proceed, not at a radical pace, but at a measured pace, because they have to leave themselves room to manoeuvre in the future.”
With this perspective in mind, we can gain new insights into her *Charter* jurisprudence. Once again, I want to look at a few choice cases designed simply to illustrate my general observations about her approach to constitutional interpretation. In particular, I think it useful to look at her work on the equality guarantees found in Section 15 of the *Charter*. Indeed, there is no better illustration of the points that I have been making this afternoon than her decisions in cases like *Andrews v. Law Society of British Columbia* — in which the Supreme Court of Canada found a requirement that one be a Canadian citizen in order to become a member of a provincial law society to be discriminatory,\(^43\) *R. v. Turpin* — where Bertha found the complainants were not discriminated against even though not all provinces had the same requirements regarding the choice to be tried by a judge alone,\(^44\) *R. v. Nguyen* — where she held that a statutory rape provision was not discriminatory,\(^45\) and *McKinney v. University of Guelph* — where she dissented and concluded that certain university retirement policies were discriminatory.\(^46\)

It has been suggested that these decisions have given Section 15 of the *Charter* a more restrictive interpretation than some first thought it would receive (and that others no doubt would have liked to see).\(^47\) Moreover, many will have been surprised at the approach that Bertha Wilson favoured. After all, had she not in a number of her public addresses called for comprehensive efforts to promote equality through all strata of society.\(^48\) What better vehicle could there be for a comprehensive solution to problems of inequality in our society than Section 15 of the *Charter*?

Yet Bertha did not allow her deeply felt convictions about the primary importance of equality to distort her understanding of the limits of law and the limits of constitutional interpretation. Courts can only hope to address part of the problem of inequality in our society. The challenge is to ascertain what part of that problem courts are suited to deal with.

You will recall that the first paragraph of Section 15 of the *Charter* states that:

\(^44\) *Supra*, note 8.
\(^45\) *Supra*, note 8.
\(^46\) *Supra*, note 8.
\(^48\) See, for example, B. Wilson, "Family Violence", B'Nai Brith Women of Canada, Toronto (May, 1991) [unpublished], and "Law in Society - The Principle of Sexual Equality", Winnipeg, Manitoba (April, 1983) [unpublished].
“[E]very individual is equal before and under the law and has the right to the equal protection and benefit of law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.”

In coming to terms with this provision, Bertha Wilson was always profoundly aware of the context in which it had been enacted. She was particularly sensitive to the history of human rights legislation in this country. In her view, Section 15 of the Charter had to be seen as building on this base as a document designed to enable courts to continue the work begun through human rights codes. Indeed, she suggested that Section 15 was designed to supplement these codes. This is why she placed such emphasis on the proposition that it is not enough to establish that there has been a violation of one of the four basic equality rights set out in Section 15 of the Charter: namely, the rights to be equal before the law, to be equal under the law, to have the equal protection of the law and to receive the equal benefit of the law. One also has to go on to demonstrate that the denial of one of these equality rights has resulted in discrimination before one can say that Section 15 of the Charter has been violated. Indeed, in Turpin she spoke to the limits of the court’s role in this context, when she observed that:

“[I]t is only when one of the four equality rights has been denied with discrimination that the values protected by Section 15 are threatened and that the court’s legitimate role as the protector of such values comes into play.”

In other words, the community, acting through Parliament, had chosen to enshrine a right not to have certain equality rights violated in a way that gives rise to discrimination. In Bertha’s words, Section 15 was designed to advance the purposes of “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society.” The court’s role was both to understand that it was in these terms that their community had defined their mandate and to respect the limits of that mandate. Bertha agreed with Justice McIntyre’s observation in Andrews that Section 15 is not a general guarantee of equality. The section does not provide for

50. Turpin, supra, note 8, at p. 1331 (my emphasis).
51. Ibid., p. 1333.
52. Andrews, supra, note 44, at p. 163. For Bertha Wilson's concurrence, see p. 151.
equality between individuals or groups within society in a general or
abstract sense and does not impose an obligation to accord equal
treatment to others. It is instead concerned with the application of the
law. That Bertha should hold this view of the proper interpretive
approach to Section 15, while at the same time in other settings calling
for actors other than the judiciary to advance a more general concep-
tion of equality, is, I believe, a perfect illustration of the impact that
her views about the constitutional constraints within which judges
must function had on her jurisprudence.

Conclusion

What, then, are we to conclude about Bertha Wilson’s judicial
philosophy? It seems to me that her vision embodies a distinctive and
profoundly democratic conception of the role of a judge in our consti-
tutional democracy. By virtue of a mature understanding of the
political context within which judges must operate, Bertha has enunci-
ated a perspective for judicial analysis that goes a long way toward
dealing with concerns that flow from the judiciary’s unelected status
and its relationship with other actors in our constitutional democracy.
Moreover, it does so in a way that avoids creating false dichotomies
between judicial activism and judicial restraint.

In her view, there are limits to the range of issues that courts can
address without undermining the legitimacy of their position. Even
when a judge is dealing with an issue that properly belongs before a
court, the constitutional context within which he or she is operating
demands that he or she remain sensitive at all times to the communi-
ity’s evolving moral fabric. But as this underlying fabric is reworked,
so too legal principles must evolve and it is a judge’s duty to ensure
that they do evolve. In my view, Bertha Wilson’s reputation as a
judge’s judge and as a trailblazer for justice was built both on her
fundamental insights concerning the constitutional constraints within
which a judge must function and on her particularly refined sense of

53. It is interesting to note that in McKinney, supra, note 8, Bertha Wilson explains that the term
“law” should nonetheless be given a very liberal interpretation.
54. Recently, for example, she observed in a speech delivered in Toronto:
“More fundamentally, I believe that ultimately we must give full effect in our society to
the principle of equality. Women will never have equal status in the home if they don’t
also have equal status with men in the world outside.”
what constitute legitimate ways in which to inject society’s concern to advance social justice into a court’s jurisprudence.

In 1959, some six years after deciding to admit Bertha Wilson to Dalhousie Law School, Dean Horace Read wrote that:

“A perusal of Canadian law reports not only verifies an absence of creative approach, but conveys the impression that most of the opinions reported there are those of English judges applying English laws in Canada, rather than those of Canadian judges developing Canadian law to meet Canadian needs with the guidance of English precedent.”

It is a fitting tribute to the law faculty at Dalhousie and to the curriculum that Dean Read worked so hard to build that one of Dalhousie’s most impressive alumna, Bertha Wilson, has done so much to bring to Canadian jurisprudence a truly distinctive approach. She has thereby helped to transform this jurisprudence from the rather arid affair that Dean Read described into a body of law that is genuinely dynamic and that is now looked to throughout the world’s legal communities as one of the foremost sources of inspiration.

We cannot afford to rest on our laurels. There is always more work to be done. As Bertha Wilson repeatedly emphasized, Canada’s legal community has an ongoing obligation to pursue that work vigorously and in a manner that is sensitive to our evolving democratic and pluralistic society.

But on occasion, it is right that we should look back with pride at the way in which our legal scholarship has matured. It is right that we should honour those who have made a contribution to the development of our jurisprudence. All the more so when that contribution has been as remarkable as that made by Bertha Wilson. That is why I take pleasure this afternoon in thanking her for her tireless efforts to advance legal scholarship in Canada. And it is why I have faith that in her new capacity as a Royal Commissioner inquiring into Aboriginal affairs in this country, she will continue to be a trailblazer for justice.