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Justice in Her Own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms

Jamie Cameron*

I. AN INSTITUTION LENGTHENED BY THE SHADOW OF ONE WOMAN

Upon being sworn in at the Supreme Court of Canada, Bertha Wilson declared herself “a true servant of the law” and expressed her trust that “within the collegial structure of this national Court I can be a faithful steward of the best of our legal heritage”.¹ Her appointment marked the confluence of two landmark events: the near simultaneous arrival of the Supreme Court of Canada’s first woman judge and Canada’s newly enacted constitutional rights.² Her tenure on the Court, from 1982 to 1990, was a momentous — and a poignant — time in Bertha Wilson’s life. In extra-judicial speeches she processed her doubts, fears, and anxieties about the “awesome responsibility” of decision-making, admitting that, for her, each judgment would “always be a lonely decision”.³ Nor did the collegial bonds she yearned for develop at the Court.⁴ Inveterate loner that she was, Wilson turned — as she had at other times in her life — to her own resources. One wonders whether she found comfort, or courage, in the determined words of Edward Everett

* Professor of Law, Osgoode Hall Law School.

¹ “Response of Madame Justice Wilson”, Swearing-in at the Supreme Court of Canada (March 30, 1982), in *Speeches Delivered by the Honourable Bertha Wilson* [hereinafter “*Wilson Speeches*”] [unpublished volume, available at the Supreme Court of Canada Library] 15, at 18.

² Bertha Wilson was appointed to the Supreme Court of Canada in March 1982 and sworn in on March 30, 1982; the *Constitution Act, 1982* and *Charter of Rights and Freedoms* were enacted on April 17, 1982; see *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

³ “One Woman’s Way to the Supreme Court”, Remarks Made at the Women Lawyers’ Dinner, 22nd Australian Legal Convention (July 1983), *Wilson Speeches*, *supra*, note 1, at 132.

⁴ Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 152 [hereinafter “*Judging Bertha Wilson*”] (stating that “Wilson was prepared to pay her dues from the beginning”, but “although she had anticipated that it would be difficult establishing herself in the previously all-male enclave of the Supreme Court, in some ways it turned out to be harder than she had expected”).

Hale, who famously pronounced: “I am only one man but I am one man. I can’t do everything but I can do something. And what I can do”, he continued, “I ought to do. And what I ought to do, by the grace of God I will do.” It would be difficult to find a quotation that more aptly described her decision-making years at the Court.⁵

At her retirement ceremony, Justice Wilson admitted to being “an unabashed and enthusiastic supporter of the *Charter*”.⁶ Her extra-judicial speeches show that she was in the Charter’s thrall, as intrigued as she was intimidated by its myriad challenges and promises.⁷ It mattered immensely to Justice Wilson that the Court create a solid foundation for the Charter’s guarantees in its earliest and most critical decisions.⁸ She pondered the problem of judicial activism, and wondered whether the Court could fulfil its mandate without overreaching its powers.⁹ Wilson’s speeches also reminded listeners how difficult it was for the Court to find its bearings when each case sent the judges headlong into unfamiliar, untested ground, knowing full well that whatever was decided would form part of the Charter’s bedrock.¹⁰ She predicted that it would not be easy for the Court to administer justice to individuals and at the same time create a framework of principle to guide the Charter’s interpretation.

⁵ She used this quote from Edward Everett Hale twice in her speeches: see “Respecting the Law and our Democratic Institutions”, The Fifth R.W.B. Jackson Lecture (April 15, 1985), *Wilson Speeches*, *supra*, note 1, 356, at 373; and “Remarks Made at the University of Alberta Convocation upon Acceptance of an Honorary Degree (May 31, 1975), *id.*, 374, at 381.

⁶ Retirement Ceremony of the Honourable Bertha Wilson, Supreme Court of Canada (December 4, 1990), *Wilson Speeches*, *id.*, 690, at 715.

⁷ “Remarks Made at the University of Western Ontario Convocation upon Acceptance of an Honorary Degree” (June 8, 1984), *Wilson Speeches*, *id.*, 184, at 196 (stating that “[a] tremendous responsibility has been placed upon the legal profession and the judiciary” and adding that “[i]t [*i.e.*, the Charter] will take all our energy, all our skill, all our sensitivity and all our courage to meet the expectations of those who have laid this burden on us”).

⁸ *Id.*, at 195 (declaring that “[t]hese early cases ... are of crucial importance” and that “we must, for starters, lay a base of jurisprudence under the individual rights and freedoms”).

⁹ See, *e.g.*, “Guaranteed Freedoms in a Free and Democratic Society — A New Role for the Courts?”, Address to the 22nd Australian Legal Convention (July 1983), *Wilson Speeches*, *id.*, 100, at 113 (stating that “there is no ideal balance between political considerations which may weigh heavily in favour of judicial restraint and moral considerations that may impel judges into a more active law-making role” but that the Charter “will bring into sharp relief the predisposition of judges to one approach or the other”).

¹⁰ See, *e.g.*, “Remarks Made at the Superior Court Judges’ Seminar” (August 1987), *Wilson Speeches*, *id.*, 500, at 506 (stating that “[w]e are somewhat in the position of space travellers leaving the gravitational comfort of earth; we have to learn new ways to cope with unfamiliar and uncharted horizons”).

At times the strain of decision-making showed. In 1987, after five years of experience with the Charter, Justice Wilson spoke candidly of the “blow to one’s self-confidence” that the Charter had dealt, and invited the audience to agree with her that the experience to that point had been “somewhat demoralizing”.¹¹ After noting that the road “may be a little rocky to start” and stating that “there is now, a period of panic”, she predicted that — as had happened with equity — “ultimately the bumps will get straightened out and an integrity [will] develop around the whole”.¹² In 1988, not long after the Court’s momentous decision in *R. v. Morgentaler*, she informed her listeners that “your Supreme Court is fully aware of its awesome responsibility”, then added that “[n]one of us wanted this role” and “[n]one of us particularly enjoys it.”¹³

Only later would it come to light that Justice Wilson experienced moments of bleakness at the Court. Through her biographer she explained how it felt to be excluded from informal processes of decision-making that took place in cliques that had developed at the Court.¹⁴ She complained about ego and competition between judges,¹⁵ as well as “lobbying” by unnamed colleagues who, she thought, shamelessly sought support for their opinions.¹⁶ In frustration she lodged a formal complaint with the Chief Justice when other judges were unwilling or unable to respond to her draft opinions or to complete their own work.¹⁷

¹¹ *Id.*, at 503-504.

¹² *Id.*

¹³ “After Luncheon Remarks to the Essex County Law Association” (April 13, 1988), *Wilson Speeches*, *id.*, 542, at 547. In the same speech she said that “[t]he judiciary realizes that its role has changed — and changed in a rather frightening way — a way which will undoubtedly expose us to public criticism from which traditionally we have been sheltered”. *Id.* See *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

¹⁴ *Judging Bertha Wilson*, *supra*, note 4, at 164.

¹⁵ *Id.* (stating that “[m]uch more ego came into play in the post-Charter era of constitutional cases when, Wilson noted, a strong element of competition emerged, with judges jostling to write majority opinions and make legal history”).

¹⁶ “But in Wilson’s opinion, the main problem [for collegiality] was a certain divisiveness arising out of an escalating tendency during her later years on the Court for judges to lobby for support for their own reasons, something which she herself found repugnant.” *Id.*, at 162. Anderson wrote that Wilson was steadfastly opposed to lobbying because the Court became “increasingly politicized”. By lobbying their colleagues or being lobbied by them, judges “were serving an agenda to which they had made an ideological commitment rather than meeting their individual responsibility to decide”. *Id.*, at 164-65.

¹⁷ Robert Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003) [hereinafter “*A Judge’s Journey*”], at 372 (disclosing that Wilson sent Dickson a “stinging memorandum” in February 1985, fuming that she had “no fewer than 6 judgments that still awaited the attention of her colleagues” and providing excerpts from her communication which showed the extent of her exasperation).

If these experiences represented a breakdown in collegiality, the decision-making process was more serious because it marked a troubling departure, in her view, from standards of principled decision-making. In the face of dynamics that left her feeling isolated and marginalized, she was indefatigable just the same.

In service terms Bertha Wilson remained the faithful steward throughout. She addressed decision-making with trepidation and a healthy sense of humility,¹⁸ and though some would accuse her of arrogance, she never wavered from her firm belief that the judicial office she held was the highest form of public service.¹⁹ Bertha Wilson stood out from her colleagues, but not only because she was the first and only woman judge at the highest Court at the time, or because she emerged as an uncompromising advocate of the Charter. She was unlike her co-judges in another, critical way: she would not sign an opinion that did not reflect her view of the law, whether she agreed with the result or not. To do so would violate her conception of judicial duty and she would not — and perhaps could not — agree for collegial reasons when to do so would compromise principle.²⁰

Justice Wilson's style of decision-making was distinctive and to some extent inflexible. She was especially fastidious about her views in Charter cases where the Court's work was exploratory, but foundational. For those or other reasons, she did not write the majority opinion in many Charter cases and in fact authored a larger number of dissents; perhaps more intriguing than Wilson's willingness to dissent was her penchant for concurring reasons.²¹ Even when she agreed with the majority's disposition of the case, she often found fault with the reasons and wrote separately, on her own. By standing up for rights — and often standing alone in doing so — she gained a reputation as an advocate of

¹⁸ “The office is always greater than the individual and it is the function and the office which lay claim upon our respect”: “Respecting the Law and Our Democratic Institutions”, The Fifth R.W.B. Jackson Lecture (April 15, 1985), *Wilson Speeches*, *supra*, note 1, at 371.

¹⁹ “One Woman's Way to the Supreme Court”, Remarks Made at the Women Lawyers' Dinner, 22nd Australian Legal Convention (July 1983), *Wilson Speeches*, *supra*, note 1, 130, at 132 (describing being a judge as “a hard and demanding life” which can be characterized “as being not so much the peak of a career but rather the ultimate form of public service”).

²⁰ According to Anderson, Wilson believed that “[i]n harmonizing their individual voices into majority judgments when possible or in preparing dissents and diverging concurrences when their analysis dictates that it has to be so, judges ought never to lose sight of their individual duty to decide”; *Judging Bertha Wilson*, *supra*, note 4, at 166.

²¹ See Marie-Claire Belleau, Rebecca Johnson & Christine Vinters, “Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson” (2008) 41 S.C.L.R. (2d) 53 (providing statistical information about Wilson's voting patterns).

rights, a feminist judge, a judicial activist and a great rebel.²² By the time she retired, Bertha Wilson's iconoclasm was iconic.

In many ways her legacy has been sensationalized, with the unfortunate result that "[p]ositions have been taken" and "myths have been made."²³ Too often the discussion is fraught with hyperbole which tends either to lionize or to demonize her work as a judge. Some have enlarged and magnified her, assigning heroic and transformative qualities to her which place Justice Wilson beyond criticism.²⁴ Yet she has also been portrayed as a destructive force in Canadian democracy, as a prototype of the evil incarnate in American-style judicial activism.²⁵ Whether in the form of pure adulation or unremitting condemnation, these myths diminish Justice Wilson's legacy by trapping her contributions in ideological compartments. If she placed her authority behind feminist positions at critical junctures in her judicial,²⁶ extra-judicial²⁷ and post-judicial life,²⁸ it is a different question whether she can, should or must be characterized as a feminist or a feminist judge. Data also show that she was the most activist in the complement of judges at the Supreme Court who first undertook to interpret the Charter, and the one who most fiercely defended its rights and freedoms.²⁹ Here, as well, her work was not monolithic.

²² See, e.g., Peter Calamai, "Bertha Wilson: Odd judge out in Supreme Court" *The Ottawa Citizen*, November 30, 1985, at B7 (describing Wilson as "the closest thing to a rebel that this current Supreme Court can boast" and describing the "rebel judge" as blunt). Justice Wilson wrote a Letter to the Editor, which was published on December 5, 1985, protesting the distortion of her remarks and stating, specifically, that "I am not a 'rebel' judge nor do I aspire to be one."

²³ The quote is from Hermione Lee, *Virginia Woolf* (Great Britain: Vintage, 1997), at 3 [hereinafter "Woolf"].

²⁴ See *Judging Bertha Wilson*, *supra*, note 4.

²⁵ See, e.g., Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1, at 19 and 58 (stating that "Justice Wilson's view of the courts' role under the *Charter* sounds the death knell for the doctrine of separation of powers" and stating, in conclusion, that "[t]he subjective nature of her decisions ... did real damage to the democratic choices of our elected representatives").

²⁶ See *R. v. Morgentaler*, *supra*, note 13 (upholding a constitutional right to seek an abortion) and *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.) (incorporating the "battered wife syndrome" into the law of self-defence).

²⁷ See "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507 (her most famous speech and one which at the time was seen as a feminist judge's manifesto).

²⁸ Report of the Canadian Bar Association on Gender Equality in the Legal Profession: *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) [hereinafter "*Touchstones Report*"].

²⁹ F. Morton, Peter Russell & Michael Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1.

As one of the Court's more literate judges, Justice Wilson turned easily to quotations and references in her speeches. She once juxtaposed Hale's "one man" quotation with Ralph Waldo Emerson's thought that "an institution is lengthened by the shadow of *one* person."³⁰ Though the "full, immense extent of her life's work" may only reveal itself gradually, this article takes a modest and initial step toward a more analytical understanding of her jurisprudence.³¹ In particular, it considers how the Supreme Court's early Charter jurisprudence was lengthened by the shadow of one woman: that of Bertha Wilson, the Court's and the Charter's first woman judge. It begins, in the next section, by showing how her concurrence in *R. v. Morgentaler* altered the course of section 7.³² The second part of the article draws on counterexamples to discuss Wilson's legacy as a feminist judge and a Charter activist. The third part briefly examines her most important contribution to the Charter: the contextual approach.³³ The conclusion poses the three questions Bertha Wilson liked asking others — what is the chief end we serve? what new vision have we to offer our sons and daughters? what will *we* write at the top of our ledgers? — and then suggests how they might be answered in her case.³⁴

II. WILL CONCURRING OPINIONS REALLY MAKE A DIFFERENCE?

At least under the Charter, Bertha Wilson was a decision-making outsider; with only a few majority opinions in significant cases she was left to write, predominantly, from the minority position.³⁵ Though she would voice objections to the way decisions were reached, she had principled reasons for setting her own views out in separate reasons,

³⁰ "Remarks Made at the University of Alberta Convocation upon Acceptance of an Honorary Degree" (May 31, 1985) quoting "Essay on Self-Reliance", *Wilson Speeches, supra*, note 1, 374, at 381 (her emphasis; Wilson also changed "one man" to "one person").

³¹ *Woolf, supra*, note 23, at 4.

³² *Supra*, note 13.

³³ *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) (concurring opinion).

³⁴ See, e.g., "Remarks Made at the University of Calgary Convocation upon Acceptance of an Honorary Degree" (November 18, 1983), *Wilson Speeches, supra*, note 1, 150, at 154 (her emphasis).

³⁵ Her majority opinions include *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] S.C.J. No. 44, [1987] 1 S.C.R. 1148 (S.C.C.); *R. v. Wigglesworth*, [1987] S.C.J. No. 71, [1987] 2 S.C.R. 541 (S.C.C.); *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595 (S.C.C.); *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296; and *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.).

whether concurring or dissenting.³⁶ Justice Wilson believed that judges have a duty to decide each case as individually and independently as possible, and that diverse reasons enrich the Court's work.³⁷ Even so, she must have wondered whether the Herculean effort she invested in concurring opinions would *really* make a difference.³⁸

To this day her concurrence in *R. v. Morgentaler* remains singular.³⁹ After granting section 7 a substantive interpretation in the *Motor Vehicle Reference*,⁴⁰ the Court went on in *Morgentaler* to invalidate the *Criminal Code*'s⁴¹ scheme for therapeutic abortions. Plurality opinions by Dickson C.J.C. and Beetz J. found the scheme procedurally unfair without addressing the constitutional status of abortion, and indicated that Parliament could pass legislation curing the defects and re-introducing limits on abortion. That decision on narrow enough grounds, without more, sent shock waves across the country. Writing alone, Wilson J. pressed the boundaries of review to the outer edge. She cited the U.S. Supreme Court's toxic abortion decision in *Roe v. Wade* with approval,⁴² and then found that section 7 of the Charter protects a woman's right to seek an abortion. In doing so she proposed an all-encompassing definition of liberty which would protect "individual decision-making in

³⁶ In addition to the concerns discussed above, she found it objectionable that colleagues signed on to reasons that were in circulation, before waiting to hear from others who had indicated their intention to write separately in concurrence or dissent. She thought that the judges should wait for all reasons to circulate, and then make a principled choice between the alternatives: *Judging Bertha Wilson*, *supra*, note 4, at 162-63. See also Jim Phillips, Letters to the Editor, *The Lawyers Weekly*, April 19, 2002 (responding to the report of an interview with retired Chief Justice Lamer, (Cristin Schmitz, "Former Chief Justice Lamer reflects on his brightest, darkest moments as Canada's top jurist", *The Lawyers Weekly*, March 29, 2002), confirming that at least in *Edmonton Journal*, *supra*, note 33, by the time her decision had been prepared there was no one left uncommitted among her colleagues to join her opinion).

³⁷ Justice Wilson believed that "diverging concurrences were also valuable because they created alternative pathways for the future development of the common law": Anderson, *Judging Bertha Wilson*, *id.*, at 154.

³⁸ See "Will Women Judges Really Make a Difference?", *supra*, note 27.

³⁹ *Supra*, note 13.

⁴⁰ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*Motor Vehicle Reference*" or "*MVR*"]. Section 7 of the Charter states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice."

⁴¹ R.S.C. 1985, c. C-46.

⁴² 410 U.S. 113 (1973) (establishing a woman's right to seek an abortion under the U.S. Constitution). Section 7 is the rough functional equivalent of the due process clause in the fifth and fourteenth amendments of the U.S. Constitution, which guarantees the right not to be denied life, liberty or property without due process of law.

matters of fundamental personal importance” from interference by the state.⁴³

For a variety of reasons, section 7 places the legitimacy of review especially at risk. The guarantee’s two clauses raise difficult questions about the scope of entitlement and the relationship between different parts of the Charter’s text, as well as about the role of the judiciary and limits on judicial review. Rather than shy from the challenge, Bertha Wilson described the guarantee — in aspirational and even inviting terms — as “the crucible in which the destiny of the Charter and the courts as its constitutional interpreters will be forged”.⁴⁴ She positioned herself to play a leading role in the guarantee’s interpretation by writing key opinions in *Singh v. Canada (Minister of Employment and Immigration)*⁴⁵ and *Operation Dismantle Inc. v. Canada*.⁴⁶ That was before Antonio Lamer proposed a novel theory which purported to give section 7 a substantive interpretation and also avoid the legitimacy question. His opinion in the *Motor Vehicle Reference* set the stage for a contest between alternative interpretations of the guarantee — his and Bertha Wilson’s.

The *MVR* epitomized the high hopes many had for the Charter as an agent of change, as well as the worst fears others harboured about its demoralizing and negative consequences for democratic governance. There, Lamer J. (as he then was) announced that, despite what the drafters intended, the Court had decided to grant section 7 a substantive interpretation. He dismissed the evidence that the guarantee was aimed at procedural matters and explained that the relationship between section 7 and sections 8 to 14 made it imperative for the guarantee to be given substantive content.⁴⁷ He maintained, in addition, that his interpretation of section 7 was sound because it placed institutional constraints on the

⁴³ *R. v. Morgentaler*, *supra*, note 13, at 171.

⁴⁴ “Constitutional Law — Section 7: Lecture to Second and Third Year Students, College of Law, University of Saskatchewan” (March 1987), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 448, at 449.

⁴⁵ [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.). Justice Wilson’s plurality opinion invalidating provisions of the *Immigration Act, 1976*, S.C. 1976-77, c. 52 under s. 7 of the Charter had the same impact that a majority opinion would have had in the circumstances.

⁴⁶ [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.). Justice Wilson’s concurrence in this case provided an exegesis on various points of interpretation as well as a detailed analysis of the “political questions” doctrine.

⁴⁷ Justice Lamer characterized the guarantees set out in ss. 8 to 14 as specific illustrations of the kinds of deprivations s. 7 addresses in its general prohibition on interferences with liberty or security of the person that violate principles of fundamental justice. For that reason, he said that it would be “incongruous” to interpret s. 7 more narrowly — and in procedural terms — than the rights set out in ss. 8 to 14. *Motor Vehicle Reference*, *supra*, note 40, at 502.

scope of review.⁴⁸ Justice Lamer declared that lingering doubts about the legitimacy of review had been put to rest, not only by the Charter's text and history but also by his interpretation of section 7. Because substantive review would be limited to matters arising in the administration of justice, the courts would remain focused on questions of justice and not stray into the policy domain of the legislature.⁴⁹

The Court took an enormous step in granting this provision a substantive interpretation. Some were dismayed by the Court's failure to exercise greater caution and others welcomed its decision to give the guarantee an unexpected and generous reading. Somewhat enigmatically, the *MVR* suggested that section 7 would play a special role in the criminal justice system without limiting the guarantee, in any conclusive way, to that purpose.⁵⁰ Neither of the Court's previous landmarks, in *Singh* and *Operation Dismantle*, intimated that section 7 had special — much less exclusive — significance for the criminal justice system. In the circumstances, the *Motor Vehicle Reference* opened new frontiers which threw section 7 and Charter review more generally into a state of excited uncertainty.

Justice Wilson wrote separately, and alone in the *MVR*. Rather than pose a frontal challenge to the majority opinion she wrote an aloof concurrence in which she proposed, most notably, that a breach of fundamental justice cannot be saved by section 1.⁵¹ In addition, she placed important asterisks beside Lamer J.'s conception of the guarantee. First, Wilson J. rejected the suggestion that section 7's content should be

⁴⁸ *Id.*, at 503 (claiming that s. 7's principles of fundamental justice do not "lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system").

⁴⁹ The distinction between "justice" and "policy" would provide meaningful content for s. 7, "all the while avoiding adjudication of policy matters"; *id.*

⁵⁰ As Lamer J. explained, "it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there can still be ... a violation of one's rights to life, liberty and security of the person": *id.*, at 500. He also indicated that because imprisonment unquestionably deprives a person of liberty, he would not attempt to give any further content to the entitlements protected by s. 7's first clause.

⁵¹ *Id.*, at 523-24. Justice Wilson gave s. 7 an interpretation that created a hierarchy between its two clauses. In her view, a breach of the entitlements clause which did not violate fundamental justice could be saved by s. 1, but a limit which violates fundamental justice could not be considered a reasonable limit in any circumstances.

informed or determined by the legal rights set out in sections 8 to 14.⁵² Second, she disagreed with Lamer J.'s view of fundamental justice as a "qualifier" on the entitlement clause's guarantees of life, liberty and security of the person.⁵³ In stating these points of difference Justice Wilson signalled that she was neither ready nor willing to approve a restrictive conception of this vital, "crucible" guarantee.

Nor did she wait long to offer an alternative conception of section 7 which rejected the parameters of the *Motor Vehicle Reference*. Dissenting alone, she stated in *R. v. Jones* that a definition which tied section 7's conception of liberty to a guarantee against physical restraint was "too niggardly".⁵⁴ She ignored Lamer J.'s admonition in the *MVR* that the American due process jurisprudence was of no relevance⁵⁵ and cited cases that gave "liberty" in the due process clause a broad substantive interpretation.⁵⁶ Not only did she conclude that section 7 protects a "parent's right to educate his children in accordance with his conscientious beliefs",⁵⁷ she stated, in the broadest terms imaginable, that the entitlement includes "the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic, and even eccentric".⁵⁸ Rather than engage the question of

⁵² As she explained, "I do not think that ss. 8 to 14 of the *Charter* shed much light on the interpretation of the phrase 'in accordance with the principles of fundamental justice' as used in section 7"; *id.*, at 530. Equating s. 7 and the other legal rights was problematic under her interpretation: though a violation of s. 7's principles of fundamental justice could not be saved by s. 1, infringements of the other legal rights were subject to s. 1. Section 7 was a stand-alone guarantee and it was preferable, in her view, to treat the other legal rights "as self-standing provisions, as indeed they are"; *id.*

⁵³ She disagreed with Lamer J.'s suggestion that the guarantee's principles of fundamental justice act as a "qualifier" of the entitlements protected by the first clause; as she explained, "I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person *in the sense that it limits or modifies that right or defines its parameters.*" To the contrary, she said, "[i]ts purpose seems to me to be the very opposite, namely to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice". *Id.*, at 523 (emphasis added).

⁵⁴ [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at 317 (S.C.C.).

⁵⁵ *Motor Vehicle Reference*, *supra*, note 40 (stating, in particular, that the substance/procedure distinction is "largely bound up in the American experience with substantive and procedural due process" and that to allow that debate to define the issue for the Charter would "do our own Constitution a disservice" and import into the Canadian context "American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution").

⁵⁶ *R. v. Jones*, *supra*, note 54, at 317 and 319-20.

⁵⁷ *Id.*, at 320.

⁵⁸ *Id.*, at 318.

interpretation, the rest of the Court acquiesced in her dissent without commenting one way or the other.⁵⁹

The *Motor Vehicle Reference* invited the constitutionalization of the criminal law without deterring litigants from testing the limits of section 7 in other settings. And though she normally did not comment on the Court's decisions, Wilson J. delivered a speech on section 7 which explained why she did not join the majority in the *MVR*. She did not accept Lamer J.'s theory of the relationship between section 7 and sections 8 to 14, and worried that by referring to the other legal rights as "examples of what was covered by s. 7" his approach might "restrict s. 7 to the criminal law field".⁶⁰ In stating that she was anxious to avoid that result Wilson J. made it clear that she did not regard the *MVR* as determinative of the guarantee's interpretation.⁶¹

R. v. Morgentaler was the case that would alter the fate of section 7. Not only was abortion a politically divisive issue, recognizing a woman's right to seek an abortion would take the Court well beyond the *MVR*'s definition of liberty as a constraint on physical freedom. Given those dynamics it is not surprising that the Court had difficulty with the claim. Plurality opinions by Dickson C.J.C. and Beetz J. dodged the most controversial issues by shifting attention to security of the person and reverting — ironically, following the *Motor Vehicle Reference* — to a procedural interpretation of the guarantee. Each found, as a result, that the manifest unfairness of the *Criminal Code*'s scheme violated the Charter. Meanwhile, and though it led them in opposite directions, Wilson J. and McIntyre J. both held that the scheme's procedural defects were irrelevant unless the right to seek an abortion was constitutionally protected.⁶² Citing the negative example of American due process law, McIntyre J. wrote forcefully, in dissent, that "the courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the *Charter*."⁶³ He found that

⁵⁹ Justice La Forest's majority opinion simply stated that it was unnecessary to determine whether liberty includes the right of parents to educate children as they see fit: *id.*, at 302.

⁶⁰ "Constitutional Law — Section 7", *Wilson Speeches, supra*, note 44, 449, at 454.

⁶¹ *Id.*

⁶² *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 142 (S.C.C.) (*per* McIntyre J., stating that a woman's security of the person cannot be infringed by state action unless she has a right to an abortion), and at 161-62 (*per* Wilson J., holding that the Court must tackle the primary issue first and determine whether a woman can be compelled to carry a foetus to term against her will, before considering any procedural unfairnesses in the scheme).

⁶³ *Id.*, at 136.

“no right of abortion can be found in Canadian law, custom or tradition and that the *Charter*, including section 7, creates no further right”.⁶⁴

Justice Wilson’s concurrence stands in sharp relief against the backdrop of a guarantee which was intended to be procedural in nature and the daring but constrained substantive approach of the *MVR*, as well as the procedural focus of the plurality opinions and the McIntyre J. dissent. Not only did she disregard repeated warnings about the dangers of relying on American substantive due process doctrine and reprise her dissent in *Jones*, she went further and approvingly cited the U.S. Supreme Court’s abortion decision in *Roe v. Wade*.⁶⁵ In addition, while other members of the Court steered clear of it, Wilson J. gravitated toward the liberty entitlement and positively embraced it.⁶⁶ After decreeing that section 7 “guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives”, she instructed her male colleagues that “[i]t is probably impossible for a man to respond, even imaginatively” to the dilemma women face in dealing with an unwanted pregnancy.⁶⁷ Not only is this dilemma “outside the realm of his personal experience”, she continued, a man can only relate to the decision to have an abortion “by objectifying it” and “thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma”.⁶⁸ In conclusion she found that Parliament’s scheme violated principles of fundamental justice because it interfered with section 2(a) of the Charter, which guarantees freedom of conscience.

By writing this time in concurrence, Justice Wilson gave her interpretation of section 7 a stronger foothold in the jurisprudence. Even though it was fundamentally at odds with the *Motor Vehicle Reference*, other members of the Court chose — in the circumstances of the abortion debate — neither to endorse nor reject her view of the guarantee.⁶⁹ Yet she had been clear about not accepting limits on the

⁶⁴ *Id.*, at 148.

⁶⁵ *Id.*, at 167-71 (*per* Wilson J., discussing U.S. jurisprudence, including *Roe v. Wade*’s (410 U.S. 113 (1973)) trimester framework for the regulation of abortion).

⁶⁶ *Id.*, at 163 (stating that to address security of the person without considering liberty of the person “begs the central issue in the case”).

⁶⁷ *Id.*, at 171.

⁶⁸ *Id.*

⁶⁹ Justice McIntyre dissented in *R. v. Morgentaler, id.*, and in other cases following the *Motor Vehicle Reference*, *supra*, note 40, such as *R. v. Vaillancourt*, [1987] S.C.J. No. 1, [1987] 2 S.C.R. 636 (S.C.C.). He did so, not because he had a preference between Justice Lamer and Justice Wilson’s interpretation of the guarantee, but to oppose any conception of s. 7 which involved judicial review of legislative policy.

entitlements — and liberty in particular — which would tie those guarantees to the criminal justice system. Significantly, the proposition that section 7 protects individual autonomy from fundamental interference from the state had the potential to engage the Court in review of social and economic policy. Moreover, by incorporating section 2(a) into section 7 to find a breach of fundamental justice in *Morgentaler*, Wilson J. rejected the *MVR*'s suggestion that the clause was limited to, or required, a connection with the justice system.⁷⁰

Some of Justice Wilson's ideas about section 7 were plainly unworkable.⁷¹ Yet in challenging Lamer J.'s justice-based conception of the guarantee, she identified the *MVR*'s fatal flaw: the idea that section 7 could have substantive content, so long as the guarantee was selectively limited to matters arising in the justice system. Though the Court might have rejected this conception of the guarantee in due course, Lamer J. wrote forceful opinions in this period which were aimed at preventing Wilson J.'s alternative from gaining acceptance. In the *Solicitation Reference* he aggressively defended his theory with a pre-emptive strike against any enlargement of section 7 beyond a strict construction of the *Motor Vehicle Reference*.⁷² In particular, he insisted that the liberty entitlement be limited to a guarantee of freedom from interference with physical liberty.⁷³ Such a definition excluded social and economic entitlements — including the right to earn a living by prostitution — as well as Wilson J.'s freedom in matters of fundamentally personal decision-making. Justice Lamer claimed that any other approach would plunge the Court into an American style of review which would compromise the legitimacy of section 7 and of review under the Charter

⁷⁰ Specifically, she found that legislation which violates freedom of conscience cannot be in accordance with principles of fundamental justice and would be invalid for that reason, but would also be invalid under the majority's approach, which would test violations of fundamental justice under s. 1 of the Charter.

⁷¹ She struggled with the relationship between s. 7's two clauses, as well as with the relationship between s. 7 and the Charter's other provisions. She proposed a double standard within s. 7 itself — whereby breaches of the entitlements clause, but not the fundamental justice clause, could be saved by s. 1 — which did not make sense. Likewise, the suggestion that an infringement of another guarantee — such as s. 2(a) — would automatically infringe fundamental justice was also unworkable, and inconsistent with her view that infringements of ss. 8 to 14 could be saved by s. 1. Finally, the proposition that a violation of fundamental justice cannot be saved by s. 1 — a kind of s. 7 absolutism — may have backfired by making it very difficult to establish a breach of the guarantee.

⁷² *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Solicitation Reference*"].

⁷³ *Id.*, at 1177.

more generally.⁷⁴ His urgent, almost alarmist, concurrence in the *Solicitation Reference* contended that the only legitimate interpretation of section 7 was the one he had proposed in the *MVR*.⁷⁵

The Court responded to his plea, essentially, by ignoring it. The other judges may have been uncomfortable with both interpretations: while Lamer J.'s selective focus on physical liberty and the justice system was narrow and perhaps too constraining, Wilson J.'s was open and boldly indeterminate in its conception of entitlement.⁷⁶ In any case it was unnecessary, for the time being, to decide between the two. A focus on criminal justice and the substantive criminal law during this period tended to reinforce the *Motor Vehicle Reference*'s conception of section 7.⁷⁷ Then, a few years after Justice Wilson retired, the Court was asked to choose in a case which pushed the guarantee outside the criminal justice system and a definition of entitlement based on freedom from physical restraint. The question in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* was whether section 7 protects a parent's right to make decisions about a child's welfare, including the decision to refuse a blood transfusion, without interference from the state.⁷⁸ Chief Justice Lamer valiantly defended the *MVR*'s theory of section 7 but wrote once again in isolation and, this time, in near futility.⁷⁹ For a plurality, La Forest J. returned to the due process case law first spurned in the *MVR*, endorsed the *Jones* dissent and *Morgentaler* concurrence, and adopted a

⁷⁴ *Id.*, at 1176.

⁷⁵ Justice Lamer was clearly concerned about a line of lower court cases discussing s. 7's application to economic entitlements. See, e.g., *Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 30 B.C.L.R. (2d) 1 (B.C.C.A.) (granting s. 7 a substantive interpretation outside the justice system which rejected "pure economic rights" but embraced the right to choose one's occupation and where to pursue it, in the context of provisions restricting the right to practise medicine).

⁷⁶ See Robert Yalden, "Working with Bertha Wilson: Perspectives on Liberty, Judicial Decision-Making and a Judge's Role" (2008) 41 S.C.L.R. (2d) 297 [hereinafter "'Working with Bertha Wilson'"] (describing Justice Wilson's deliberative process in this case and her decision not to address s. 7 and its application to social or economic entitlements).

⁷⁷ See generally J. Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105 (analyzing the evolution of s. 7 and its gradual shift from an exclusive focus on the criminal justice system).

⁷⁸ [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

⁷⁹ The most revealing parts of his opinion expose his fears about the consequences of departing from the *Motor Vehicle Reference*'s constraints on review. In particular, he claimed that a Wilsonian approach to s. 7 would confer constitutional protection on "all eccentricities expressed by members of our society" and inevitably lead to a situation where we would have government by judges". *Id.*, at 248.

Wilsonian definition of liberty.⁸⁰ Despite or because the stakes were so high, the other members of the Court declined once more to choose between alternative conceptions of section 7. Even so, it would only take two more turns for a majority of the Court to adopt Justice Wilson's conception of liberty.⁸¹

Twenty years after the *Morgentaler* concurrence the jurisprudence supports an interpretation of section 7 that protects individuals from arbitrary action by the state which interferes with their liberty or security of the person — broadly understood — wherever and however it arises.⁸² That said, lingering doubts about the legitimacy of a broad conception of section 7 have not been dispelled and the status of the guarantee remains as uncertain now as it was when the *B.C. Motor Vehicle Reference* was decided.

The section 7 jurisprudence might look quite different today, had Justice Wilson not written at all in *Morgentaler* but joined one of the plurality opinions, or had the Court upheld the legislation and transformed her opinion into a dissent. Justice Lamer advocated the *MVR*'s conception of section 7 vigorously, and for as long as he could; his approach has unquestionably been dominant in the jurisprudence and counts many supporters. In the circumstances it is difficult to imagine how section 7 would have evolved if Justice Wilson had not proposed an alternative to Justice Lamer's approach. Though the Court might have adopted a similar definition of liberty at the initiative of another judge, the introduction of an entirely new interpretation — especially one as

⁸⁰ With L'Heureux-Dubé, Gonthier and McLachlin JJ. concurring, he held that s. 7 guaranteed parents the right to make certain decisions about their children's health and welfare, and found more generally that "the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance": *id.*, at 368. Justices Iacobucci and Major wrote separately, and Sopinka J. agreed with La Forest J.'s disposition of the appeal without commenting the latter's interpretation of s. 7.

⁸¹ See *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.) (holding, though only in a plurality opinion, that a residence requirement as a condition of employment violated s. 7's liberty guarantee); and *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307 (S.C.C.) (endorsing, by majority opinion, a definition of liberty under s. 7 that would protect inherently personal decision-making on issues of fundamental importance to the individual).

⁸² See *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) (dissenting opinion of Arbour J., adopting an openly substantive interpretation of s. 7 which would include social and economic entitlements); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) (plurality opinion of McLachlin C.J.C. and Major J., holding a provision in health care legislation unconstitutional under a substantive interpretation of s. 7).

far-reaching as hers — would be less likely over time.⁸³ By creating space for a different approach, Justice Wilson’s *Morgentaler* concurrence — with an important assist from the *Jones* dissent — really made a difference in the evolution of the section 7 jurisprudence.

Morgentaler was not the only concurrence of Justice Wilson’s that made a difference, but it is the opinion that earned her high praise and fierce criticism for presenting as a “feminist” judge. Her Charter legacy cannot be broached without addressing the most persistent myths about Bertha Wilson’s decision-making — that she was a biased and unapologetically feminist judge as well as an unremitting Charter activist.

III. “BUT IT JUST ISN’T THAT SIMPLE”⁸⁴

Bertha Wilson was the Supreme Court’s first woman judge at the moment constitutional rights arrived, and the times were ripe for myth-making about both historic events. By 1982 the women’s movement had attained strong momentum as a political force and as an agent for change to the law. With the Charter’s encouragement, activists turned to the courts for assistance in realizing the movement’s goals of equality and rights for women. It was not surprising that so many looked for leadership in their cause and a voice on the Court in its sole woman judge,⁸⁵ or that efforts to establish entitlements for women and others encountered resistance, even backlash, in these years. No matter what she did, as the Court’s first and only woman judge, Justice Wilson would have been conspicuous.⁸⁶ In the event, some of the polarization which

⁸³ But see *Gosselin v. Quebec (Attorney General)*, *id.* (per Arbour J., proposing a novel and radical interpretation of the guarantee, years after most assumed the authoritative status of the *Motor Vehicle Reference*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.)).

⁸⁴ Bertha Wilson, “The Making of a Constitution”, Public Lecture on the *Charter of Rights and Freedoms* delivered at the University of Windsor Law School (April 1988), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 528, at 537.

⁸⁵ Bertha Wilson acknowledged being fretful about the expectations generated by her appointment. As she explained, she came to the realization that “no one could live up to the expectations” of the well-wishers who had written to congratulate her and to rejoice that, at last, a woman would sit on the Supreme Court of Canada. As well, Justice Wilson “had the sense of being doomed to failure, not because of any excess of humility ... or any desire to shirk the responsibility of the office, but because [she] knew from hard experience that ... [c]hange in the law comes slowly and incrementally. ...”: Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28 *Osgoode Hall L.J.* 507.

⁸⁶ Justice Wilson was joined at the Court by Claire L’Heureux-Dubé, who was appointed on April 15, 1987 (two days before the Charter’s fifth anniversary), and by Beverley McLachlin, who would later become the first woman to hold office as Chief Justice of Canada, on March 30, 1989. Bertha Wilson retired on January 4, 1991.

formed in contests taking place outside the courts attached to her. She attained a reputation for being anything but moderate, for eagerly embracing feminist causes, and for compromising her neutrality as a judge. Her interventions were seen as a form of advocacy — and inappropriate advocacy, in some quarters — on her part. To this day perceptions of Justice Wilson focus on her relationship with feminism. Whether viewed as a good or a bad judge she has been regarded, invariably, as a feminist judge.

The *Morgentaler* concurrence was her point of entry to feminist decision-making.⁸⁷ There, as discussed above, she not only found that the Charter protects a woman's right to an abortion, in doing so she pointedly — and confrontationally — also noted that men are incapable of understanding the dilemma women faced.⁸⁸ Critics remarked that her reasons read “more like a feminist tract than an interpretation of law”⁸⁹ and stated that she might as well have stated that “men are too ignorant of women to ever understand something as personal as abortion”.⁹⁰ Her reasons looked so much like a “straightforward feminist polemic”,⁹¹ one commentator maintained, that it was doubtful whether any radical feminist could have “put the case for free abortion more strongly than did Madam Justice Bertha Wilson”.⁹²

The strongest challenge to Justice Wilson's integrity came from REAL Women, an organization which promotes equality for all women, including homemakers — by espousing a traditional conception of women's role — and styles itself as “Canada's Alternative Women's Movement”.⁹³ At a time of rapidly shifting ground on questions related to gender relations, REAL Women was not alone in attacking the feminism that was associated with Justice Wilson's Supreme Court decision-making. Nonetheless, poised at all times to lambaste her as vocally as possible in the press, REAL Women was a constant irritant. Accordingly, President Gwen Landolt responded to *Morgentaler* with an “*ad feminem*”, which dismissed Wilson as a “prime example of

⁸⁷ *Supra*, note 62.

⁸⁸ See text accompanying notes 67 and 68, *supra*.

⁸⁹ Letter to the Editor, *The Globe & Mail*, February 15, 1988, at A6.

⁹⁰ *Id.*

⁹¹ Letter to the Editor, *The Lawyers Weekly*, Vol. 17, No. 44 (April 3, 1998).

⁹² William Johnson, Editorial Op-ed, “Abortion ruling could colour decisions on porn, Bill 101”, *Montreal Gazette*, January 30, 1988, at B3.

⁹³ REAL is an acronym for Realistic, Equal, Active, for Life.

affirmative action” and as “nothing more than a voice for the feminist National Action Committee on the Status of Women”.⁹⁴

The *Morgentaler* concurrence in 1988 was followed by Justice Wilson’s landmark speech, delivered at Osgoode Hall Law School in 1990, not long before she retired from the Court. Titled “Will Women Judges Really Make a Difference?”, the speech proved controversial because its central claim, which exposed the assumption of judicial impartiality to skepticism, was seen as a feminist manifesto.⁹⁵ Not only did Justice Wilson question the law’s impartiality, she exposed key areas which — in her view — were deeply gendered, and then made suggestions for reform. REAL Women filed a complaint with the Canadian Judicial Council which called for her removal from office. The organization issued press releases which maintained that “those who do not support Madam Justice Wilson’s acceptance of the feminist interpretation of the law cannot enjoy the confidence in her impartiality but rather have been put at a grave disadvantage by her bias.”⁹⁶

Justice Wilson’s second “feminist” decision, *R. v. Lavallee*,⁹⁷ followed the “Making a Difference” speech by a matter of months. There, the Supreme Court allowed a woman to plead battered wife syndrome and claim self-defence after shooting her abusive, live-in partner. Though Wilson J. had persuaded her reluctant male colleagues at the Court to adopt a feminist interpretation of the defence, criticism of the decision was aimed at her.⁹⁸ Those who thought that Lavallee had acted in anger or revenge were prompted to ask why “Judge Wilson think[s] that she has the right to impose her own feminist biases on the

⁹⁴ Quoted in David Vienneau, “Group attacks ‘childless’ judge on abortion ruling”, *The Toronto Star*, April 23, 1989, at A2. The mean-spirited temper of the times is revealed in Landolt’s suggestion that the same reasoning that prevented a man from understanding the decision to have an abortion applied to Bertha Wilson, who was childless. “How can she possibly understand anything about childbirth?” Landolt asked.

⁹⁵ *Supra*, note 85.

⁹⁶ Cited in “Justice and gender: REAL Women calls for the ouster of Supreme Court Justice Bertha Wilson”, *Alberta Report*, February 26, 1990, at 34. REAL Women first filed a complaint about Justice Wilson in 1983; both complaints were dismissed by the Canadian Judicial Council.

⁹⁷ [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.).

⁹⁸ Robert Sharpe and Kent Roach report that *R. v. Lavallee, id.*, demonstrated Dickson J.’s “growing attachment to Wilson’s equality views and his receptivity to her feminist perspective, which re-examined traditional legal doctrines in light of their effect on women”: Robert Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003), at 406.

rest of us”.⁹⁹ The ever-present REAL Women commented that “[a]ny attempt to blindly accept the feminist analysis of law and life and ignore others, is both demeaning and unjust — not only to all other Canadian women but to men as well.”¹⁰⁰ To some, Wilson J. had simply included women’s perspectives and experiences in determining how the law of self-defence should apply in a context of domestic violence. To others, it looked like bias: a feminist agenda pushing special rules for women.

When Justice Wilson retired at the end of 1990, she was described as “the much revered feminist icon who took the opportunity to use her considerable judicial power to push a radical feminist agenda”.¹⁰¹ That was before the woman who was also described as “a hero to feminist lawyers” produced a Canadian Bar Association Task Force Report on Gender Equality in the Profession.¹⁰² When it was released in 1994, the *Touchstones Report* was dismissed as “just another example of ‘feminist male-bashing’”, and was described variously as a “radical feminist rant”¹⁰³ and as a “costly feminist harangue” which tabled “an unflinchingly feminist wishlist of recommendations”.¹⁰⁴ Ms Landolt of REAL Women weighed in with the remark that the Canadian Bar Association had only voted unanimously to accept a motion on inequality because the profession was cowed by “fear of the venomous wrath of feminism”.¹⁰⁵

Bertha Wilson died several years later on April 28, 2007, following an illness — Alzheimer’s Disease — which rendered her inaccessible and unable, in recent years, to confirm, deny or discuss her relationship with feminism. Before falling ill she communicated through her

⁹⁹ Letter to the Editor, *The Toronto Star*, September 25, 1990. The author added: “Judge Wilson’s application of feminist theories to cases she hears, while on the bench, has undermined my confidence in the court.”

¹⁰⁰ Gwendolyn Landolt, “Feminism has no place in Supreme Court decisions”, Editorial Opinion, *The Vancouver Sun*, May 1, 1990. She added that “[t]o permit judges to involve themselves in a particular political philosophy by giving feminist theories priority in the court, can only undermine the integrity of the Court. No court can provide true justice when the views of only one special group are afforded full weight and the views of all others are dismissed or ignored.” *Id.*

¹⁰¹ Claire Hoy, “Judges without review: Godlike court charts Canada’s future”, Editorial Opinion, *The Province*, February 12, 1991.

¹⁰² David Vienneau, “Lawyers set to tackle controversial study”, *The Toronto Star*, February 20, 1994. See Report of the Canadian Bar Association on Gender Equality in the Legal Profession: *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

¹⁰³ David Vienneau, “Lawyers, judges refuse to hold racism inquiry into their profession”, *The Montreal Gazette*, February 21, 1994.

¹⁰⁴ “Cowed by Bertha’s legal feminism”, *British Columbia Report*, March 14, 1994, at 33.

¹⁰⁵ *Id.*

biographer that she did not regard herself as a feminist.¹⁰⁶ This revelation surprised and dismayed a generation of women scholars, lawyers and activists who had been inspired by her leadership.¹⁰⁷ Many years earlier, when she was interviewed for the first time since being appointed to the Supreme Court, Wilson described herself as a “moderate feminist”.¹⁰⁸ Yet at that time she also expressed “little patience with feminists who demand that she use her position on the court to battle for women’s rights” and added that “[i]f I went around making speeches and displaying a bias it would make me totally useless as a judge.”¹⁰⁹

Justice Wilson’s death has generated fresh commentary about her relationship to feminism, and raised questions about who is a feminist judge and what role self-identification plays in the answer.¹¹⁰ Whether she was a feminist judge depends on how feminism is defined, what it means to be a feminist judge, and who — as between the supporters and detractors of feminism — is asking. Without engaging the scholarship on these issues, the discussion that follows offers a couple of examples from her jurisprudence to show that Justice Wilson cannot be easily typecast — whether as a feminist or as an activist judge, for that matter. Her approach to decision-making required her to decide each case independently and on its own merits. Sometimes, as in the case of abortion, it led her to support feminist causes, and other times it did

¹⁰⁶ It was astonishing to many that such a negative view of feminism would figure prominently in the biography of a woman who had been celebrated as a feminist judge. Most disturbing, perhaps, was the way Ellen Anderson presented Justice Wilson: as a judge who was above feminists and their aggressive pursuit of results. It was not simply that Justice Wilson rejected feminist outcomes or a feminist account of particular decisions. More fundamentally, the point was that Wilson was “avowedly not a feminist”, and “*most emphatically* does not consider herself to be a feminist”: Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 134 and 135-36 (emphasis added). See also Preface, *id.*, at xiv (stating that “confrontation has never been Wilson’s style and despite the labels attached to her judgments and to her scholarly writings by other commentators, she declines to identify herself as a feminist”).

¹⁰⁷ Constance Backhouse, for one, lamented that the woman who had contributed so much to the advancement of equality would not embrace feminism “with heart and soul”. If Ellen Anderson is indeed correct, and Justice Wilson is “avowedly not a feminist”, Backhouse added, “that is perhaps saddest of all”. “How misconceived the movement that has contributed so much to the advancement of equality must be if women such as Bertha Wilson seek to separate themselves from it”: Constance Backhouse, “Book Review of Anderson” (*supra*, note 106), in *Labour/Le Travail*, v. 51 (Spring 2003), at 295-97.

¹⁰⁸ Sandra Gwyn, “Sense and Sensibility”, *Saturday Night*, July 1985, at 19.

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Constance Backhouse, “Justice Bertha Wilson and the Politics of Feminism” (2008) 41 S.C.L.R. (2d) 33, and Colleen Sheppard, “Feminist Pragmatism in the Work of Justice Bertha Wilson” (2008) 41 S.C.L.R. (2d) 83; see also Beverley Baines, “But Was She a Feminist Judge?” in Kimberley Brooks, ed., *One Woman’s Difference: The Contributions of Justice Bertha Wilson* [forthcoming, UBC Press].

not.¹¹¹ For instance, and though it is not usually included in a list of her significant contributions, Wilson J.'s concurring opinion in *R. v. Bernard* is significant because it led directly to one of the Court's most vilified and least feminist Charter decisions.¹¹² In *R. v. Daviault* Cory J. adopted Wilson J.'s flexible approach from *Bernard* and concluded that, at least in cases of extreme drunkenness, the defence of intoxication is constitutionally protected.¹¹³ The suggestion that the more intoxicated a person is, the greater the chance of an acquittal, deeply offended public sensibilities. The reaction was immediate and visceral.

There was more at stake in *Daviault* than the commission of a simple assault. The facts involved a chronic alcoholic who committed a sexual assault on an older and disabled woman. Those circumstances brought conflict between the rights of victims and those of the accused to the forefront. Feminist voices across the country rose quickly and in unison to throttle the Court, condemn the decision, and demand Parliament's intervention.¹¹⁴ The decision was such a debacle that the federal government took the then unprecedented step of overruling the Court's decision by statutory amendment, without invoking section 33 of the Charter.¹¹⁵

The majority judges in *Daviault* who had simply chosen a middle position between two extremes were blindsided by the criticism. Justice Sopinka's dissent found that self-induced intoxication is blameworthy in and of itself, and was sufficient to ground a conviction, whether or not the accused was too intoxicated to know what he or she was doing at the time the offence was committed. As a matter of principle, Cory J. was unwilling to substitute the accused's fault in becoming intoxicated for the *mens rea* to commit sexual assault. At the same time he was

¹¹¹ See the *Pelech* Trilogy: *Pelech v. Pelech*, [1987] S.C.J. No. 31, [1987] 1 S.C.R. 801 (S.C.C.); *Richardson v. Richardson*, [1987] S.C.J. No. 30, [1987] 1 S.C.R. 857 (S.C.C.); and *Caron v. Caron*, [1987] S.C.J. No. 32, [1987] 1 S.C.R. 892 (S.C.C.) (family law decisions which have been criticized by feminist scholars); see also Robert Leckey, "What Is Left of *Pelech*?" (2008) 41 S.C.L.R. (2d) 103.

¹¹² [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833 (S.C.C.).

¹¹³ [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.).

¹¹⁴ See, e.g., David Vienneau, "Drinking ruled a rape defence; Feminists outraged at Supreme Court decision", *The Toronto Star*, October 1, 1994, at A1 (reporting that the National Action Committee on the Status of Women had called the ruling "absurd"); Stephen Bindman, "Criminal law rewritten; Drunkenness defence endorsed by high court" (reporting that NAC had dismissed the decision as "totally, totally unacceptable").

¹¹⁵ R.S.C. 1985, c. C-46, s. 33.1(1), as am. by *An Act to Amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1. Parliament would do so a second time following the Court's decision in *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.).

unwilling to adopt a position which would allow the accused to plead the defence in all cases.¹¹⁶ He found the solution in a limited defence which would grant the plea, but only where the accused's intoxication resulted in a state of mind akin to automatism.¹¹⁷ Even so, he imposed the burden on the accused to establish the defence on a balance of probabilities and stressed repeatedly, albeit in vain, that under his criteria intoxication would only succeed as an answer to a charge in the rarest of cases.¹¹⁸

The *Daviault* doctrine was drawn straight from Bertha Wilson's concurring opinion in *R. v. Bernard*.¹¹⁹ There, the Court fractured badly and failed to reach a majority position on the status of intoxication under section 7 of the Charter. Chief Justice Dickson argued gamely, but without success, that the law of intoxication had been altered by the Charter and that his *Leary* dissent should be adopted.¹²⁰ In concluding, to the contrary, that the Charter does not require a defence of intoxication for general intent offences, McIntyre J. held that the *mens rea* element is satisfied — for crimes committed during a state of intoxication — by the accused's voluntary act in becoming intoxicated.¹²¹

With La Forest J. waffling on the *mens rea* issue — and agreeing with Dickson C.J.C. and McIntyre J. — the balance of power on the panel fell to Justice Wilson.¹²² The Dickson and McIntyre positions were both too uncompromising for her. On one hand her views on *mens rea* and the rights of the accused made it difficult for her to agree with McIntyre J. that the act of becoming intoxicated could supply the mental element for an entirely different act, committed in a state of intoxication. On the other, Dickson C.J.C.'s proposal that the defence of intoxication

¹¹⁶ See *R. v. Leary*, [1978] S.C.J. No. 39, [1978] 1 S.C.R. 29 (S.C.C.) (dissenting opinion) and *R. v. Bernard*, *supra*, note 112 (dissenting opinion).

¹¹⁷ As he explained, "it is only those who can demonstrate that they were in such an extreme degree of intoxication that they were in a state akin to automatism or insanity that they might expect to raise a reasonable doubt as to their intent to form the minimal mental element The phrase refers to a person so drunk he is an automaton." *Daviault*, *supra*, note 113, at 99-100.

¹¹⁸ *Id.*, at 100 (stating that "[i]t is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful").

¹¹⁹ *Supra*, note 112.

¹²⁰ In *R. v. Leary*, *supra*, note 116, Dickson J. wrote a forceful dissent which argued that the distinction between special and general intent offences be abandoned and that intoxication be available as a defence to a charge. Justice Lamer joined his dissent in *R. v. Bernard*, *supra*, note 112, which argued that the Court was required, by virtue of ss. 7 and 11(d) of the Charter, to reverse its pre-Charter *Leary* decision.

¹²¹ Justice Beetz concurred in McIntyre J.'s opinion in *R. v. Bernard*, *id.*

¹²² Justice La Forest agreed in principle with Dickson C.J.C. but found, in the result, that Bernard could be convicted under the no-miscarriage-of-justice rule.

be generally available was unacceptable. Justice Wilson wrote a resourceful concurring opinion which found a middle position between the two in the concept of intoxication akin to automatism. Under her solution the defence would only be allowed when the accused was too drunk to form the minimal intent necessary to commit a general intent offence, and would require “evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism”.¹²³ Though she upheld the conviction, her *Bernard* concurrence really mattered because it created an exception to the harshness of the *Leary* rule.¹²⁴ In adopting that exception, *Daviault* created a new defence for a man who had consumed copious amounts of brandy and sexually assaulted an elderly and disabled woman.

The legal rights guarantees were heavily litigated in the early years of the Charter, and Justice Wilson keenly supported the rights of the accused in developing the substantive law as well as in addressing questions of procedural entitlement.¹²⁵ Though there were other distinctions, the key difference between *Bernard* and *Daviault* was that the Charter rights of victims came into focus in the interim between the two, and dramatically changed the dynamics of adjudication.¹²⁶ Even so, it is probable that her concurrences in *Bernard* and *Penno* would have led Justice Wilson to the same conclusion as Cory J. in *Daviault*.¹²⁷ It is the kind of decision she might have wanted to write, but for her to do so would surely have disappointed — if not betrayed — her feminist supporters.¹²⁸

Some of the Court’s most contentious decisions in the 1990s revolved around sexual assault, and the contest between the privacy and

¹²³ *R. v. Bernard, id.*, at 887.

¹²⁴ Justice Wilson otherwise reserved the question whether McIntyre J.’s concept of a substituted *mens rea* would be unconstitutional under ss. 7 and 11(d) of the Charter; *id.*, at 889.

¹²⁵ See generally Benjamin Berger, “A Due Measure of Fear in Criminal Judgment” (2008) 41 S.C.L.R. (2d) 161, and Kent Roach, “Justice Bertha Wilson: A Classically Liberal Judge” (2008) 41 S.C.L.R. (2d) 193.

¹²⁶ Though *Bernard* was convicted, *Daviault* was not; also, Wilson J. noted the sexual assault in *R. v. Bernard, supra*, note 112 but the facts in *R. v. Daviault, supra*, note 113 were egregious and received extensive publicity.

¹²⁷ In *R. v. Penno*, [1990] S.C.J. No. 96, [1990] 2 S.C.R. 865 (S.C.C.), Wilson J. confirmed her view that denying an accused access to a defence of intoxication would violate the Charter, but only in cases of extreme intoxication.

¹²⁸ There were no intervenors in *R. v. Daviault, supra*, note 113 and the case did not appear to raise feminist issues until after the decision was released; the Court’s two women judges, L’Heureux-Dubé and McLachlin JJ. — perhaps on the strength of the flexible Wilson approach and by virtue of L’Heureux-Dubé J.’s concurrences in *Bernard, supra*, note 112, and *Penno, id.* — both concurred in Cory J.’s majority opinion.

equality rights of complainants and the legal rights of the accused which emerged in that setting. Decisions which vindicated the rights of the accused provoked strong reactions from feminist quarters in this period.¹²⁹ Though Justice Wilson retired before being called upon to choose, her strong commitment to the Charter's legal rights — including and especially full answer and defence — makes it uncertain that she would have favoured the feminist position in cases like *R. v. Seaboyer*,¹³⁰ *R. v. Osolin*,¹³¹ or *R. v. O'Connor*.¹³² Justice Wilson was an individualist, a non-conformist and a free thinker. She was not deterred, as a judge, from standing firm on a point of principle, even when doing so isolated her from other members of the Court and provoked controversy. She became iconic, in large part because she fearlessly and willingly stood alone. Rather than meet feminist expectations she would have applied her own principles to determine how the tension between the rights of the accused and those of complainants should be resolved.

Bertha Wilson may have been less of a feminist than her admirers would like her to be or than her harshest critics claimed that she was. She may also have been more of a feminist than she and her biographer cared to admit — a reluctant feminist, an occasional feminist or a moderate feminist as she said in 1985, but a feminist in certain ways and on certain issues just the same. At all times she aspired to a methodology of principled decision-making and often rehearsed a favourite anecdote to illustrate the point. She recounted the story of an intern who asked the brain surgeon how he could perform an arduous operation so calmly, skillfully and heartlessly. The surgeon replied, “[y]oung man years ago I learned to lose my sympathy as an emotion — and to gain it as a principle”.¹³³ And that, in short, was how Justice Wilson saw herself as a judge. She did not like to be called a feminist or an activist because these labels called her judicial integrity into question, and she was quick to defend the Court from criticism for its so-called activism. She pointed out that “we didn’t volunteer”, that Canada’s democratic institutions had imposed the Charter on the courts, and that the judges had a duty to

¹²⁹ See, e.g., *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.), and *R. v. O'Connor*, *supra*, note 115.

¹³⁰ *Id.*

¹³¹ [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.).

¹³² *Supra*, note 115.

¹³³ See, e.g., “Remarks Made at the University of Western Ontario Convocation upon Acceptance of an Honorary Degree (June 8, 1984), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume available at the Supreme Court of Canada Library] 184, at 186.

exercise the powers that had been granted.¹³⁴ She also thought that principled decision-making — and a sound methodology of interpretation — were important checks on activism.

From that vantage, the section 2(d) jurisprudence sheds light on the nature of her activism under the Charter. There, Justice Wilson eagerly enforced freedom of association in all the cases she heard, but one.¹³⁵ She wrote and voted in favour of union interests in every case that came before the Court, joining Dickson C.J.C.'s dissent in the *Alberta Reference* and then refusing to dilute the *Oakes* test in *Retail, Wholesale and Department Store Union v. Saskatchewan* and the *PSAC* case.¹³⁶ Her solo dissents in the latter two cases are consistent with her reputation as an *Oakes* test stickler in most section 1 cases.¹³⁷

In *R. v. Skinner* she also held that the Charter protects the right to negotiate an act of prostitution.¹³⁸ Her dissent in this case maintained that when two individuals associate to arrange a transaction or activity, the associational act must be separated from the underlying activity and given near-absolute protection under the Charter.¹³⁹ The fact that the purpose of soliciting is to negotiate a sexual transaction was irrelevant, in her view, because “[o]nly the coming together is protected.”¹⁴⁰ She thought that Dickson C.J.C. erred in rejecting the challenge to the *Criminal Code*'s solicitation provision because he focused on the “proposed sexual activity” rather than “the association of the parties to discuss the possibility of providing or obtaining a sexual service”.¹⁴¹ Nor was she hesitant, in the companion case to *Skinner*, to grant

¹³⁴ See “We Didn’t Volunteer” (April 1999) Policy Options 8 (claiming that judges did not seize powers under the Charter, but simply exercised powers that were given to them by the people).

¹³⁵ She found in favour of the s. 2(d) claimant in the following cases: *Reference re Public Service Employee Relations Act (Alta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.) [hereinafter “*Alberta Reference*”] (joining Dickson C.J.C.'s dissent); *Public Service Assn. of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.) (writing in solo dissent); and *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.) (writing in solo dissent) (together known as the *Labour Trilogy*); *R. v. Skinner*, [1990] S.C.J. No. 51, [1990] 1 S.C.R. 1235 (S.C.C.) (dissenting opinion); and *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 (S.C.C.) (joining Cory J.'s dissent). The exception is *Lavigne v. Ontario Public Service Employees Union*, [1990] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.) (concurring opinion).

¹³⁶ *Id.*

¹³⁷ See Adam M. Dodek, “The Dutiful Conscript: An Originalist View of Justice Wilson’s Conception of Charter Rights and Their Limits” (2008) 41 S.C.L.R. (2d) 331.

¹³⁸ [1990] S.C.J. No. 51, [1990] 1 S.C.R. 1235 (S.C.C.).

¹³⁹ *Id.*

¹⁴⁰ *Id.*, at 1249.

¹⁴¹ *Id.*, at 1248 (emphasis added).

constitutional protection to economic claims under section 2(b); as she explained, these choices are protected, “whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter”.¹⁴² Together, the two dissents show how unwilling she was to place internal limits on the Charter’s rights.

She also persisted in the effort to secure Charter status for labour union activities in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*.¹⁴³ Though the Court could not agree on a definition of associational freedom in the *Labour Trilogy*, a majority concluded that section 2(d) does not protect collective bargaining or the right to strike. The next time the issue came up, Dickson C.J.C. and Wilson J. were the only *Trilogy* judges who remained on the Court. The Chief Justice wrote an apologetic concurring opinion in *Professional Institute* which explained that he considered himself bound by the *Trilogy* and had no choice but to reject the claim.¹⁴⁴ Meanwhile, Wilson J. took a different view of the *Trilogy*’s authority and joined Cory J.’s dissent, which insisted that those cases left the constitutional status of collective bargaining open.¹⁴⁵ It is significant that once again — and with perfect consistency — Wilson J. chose a position which gave freedom of association maximum scope under the Charter.

*Lavigne v. Ontario Public Service Employees Union*¹⁴⁶ is the outlier in her section 2(d) jurisprudence. There, and for the first time, she found against the claim in a case that asked whether the guarantee includes a right of non-association. In two of its most significant early decisions, the Court had emphasized freedom from coercion of the state in its discussion of section 2, and concluded that Sunday closing laws violated the religion guarantee because they violated the right to be free from compulsory observance.¹⁴⁷ In *Lavigne*, Wilson J. wrote a concurring

¹⁴² *Solicitation Reference*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1206 (in reference to s. 2(b)’s guarantee of expressive freedom).

¹⁴³ *Supra*, note 135.

¹⁴⁴ *Id.*, at 374 (stating that he did not reach his decision “without considerable hesitation” but “reluctantly” could not agree with Cory J. because, “short of overruling the reasons of the majority of the Court in the trilogy” the claim would have to be denied).

¹⁴⁵ The claim was that McIntyre J.’s comments in *PSAC*, *supra*, note 135, left the question open. There, he stated that his conclusion that s. 2(d) does not include the right to strike did not preclude “the possibility that other aspects of collective bargaining may receive *Charter* protection”.

¹⁴⁶ *Supra*, note 135.

¹⁴⁷ See *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) and *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.) (in which Wilson J. dissented, in part, from the majority opinion finding a breach but upholding Ontario’s Sunday closing legislation under s. 1).

opinion which absolutely rejected the proposition that section 2(d) protects individuals from compelled association by the state. In doing so she broke her record of support for associational freedom and departed from her practice of reading Charter entitlements generously.

The Rand formula requires workers who do not belong to unions to pay dues where the union serves as the employee's representative on collective bargaining and workplace issues. The question in *Lavigne* was whether the state can compel non-union members to pay dues which support causes outside the workplace that they find politically, socially, ideologically or culturally objectionable. By a four-to-three vote, the Court held that mandatory dues for non-workplace matters do not violate section 2(d).¹⁴⁸ Justice Wilson forcefully argued that non-association is the opposite of association and that to recognize a freedom from association would imperil and defeat section 2(d)'s collective aspirations.

Her hostility to the claim — which she perceived as a threat to unions — is palpable in the reasons. After relying on the *Alberta Reference* to support an *individualistic* conception of associational freedom in *Skinner*, she argued in *Lavigne* that all members of the Court in the *Alberta Reference* had agreed with the Chief Justice's view, in dissent, that section 2(d) is meant to protect the “*collective* pursuit of common goals”.¹⁴⁹ Moreover, though it was inconsistent with her previous views, including her refusal to be bound by the Labour Trilogy in *Professional Institute*, she cited the majority opinion in *Skinner* — which had rejected the claim over her dissent — to support a restrictive view of the guarantee in *Lavigne*. In contrast to her position under section 7, where she had ignored Lamer J.'s warning and embraced controversial substantive due process doctrine, she rejected first amendment doctrine in *Lavigne* because “the Court must exercise caution in adopting any decision ... of a foreign jurisdiction”.¹⁵⁰ Justice Wilson also claimed that to recognize non-association would place the Court “in the impossible position of having to

¹⁴⁸ *Supra*, note 135. Justice Wilson wrote for herself, as well as L'Heureux-Dubé and Cory JJ., in concluding that s. 2(d) does not include a right of non-association; McLachlin J. wrote separate reasons which concluded that s. 2(d) includes a negative entitlement but that compelling non-union members to support non-workplace causes did not violate the guarantee. The other members of the Court, led by La Forest J., found that mandatory dues for non-workplace objects violated s. 2(d) but were justifiable under s. 1.

¹⁴⁹ *Lavigne*, *supra*, note 135, at 252; see also at 258 (relying again on the majority opinion in *R. v. Skinner*, *supra*, note 135 to support a restrictive view of the entitlement in the compelled association context) (emphasis added).

¹⁵⁰ *Id.*, at 257.

choose whose rights should prevail” and would make “a mockery of the right contained in section 2(d)”.¹⁵¹ But never before had she supported limits of this kind on the scope of the entitlement. Never before had she telegraphed such overt resistance to the nature and content of the claim. In *Skinner* she had emphasized, to the contrary, that the bare act of associating must be divorced from any disapproval of the activity or purpose of the association. *Lavigne* was a decision of utmost importance to her; there she worked hard to explain why non-association should not be recognized, and denied the existence of the claim absolutely, and in all circumstances.¹⁵²

One measure of activism is a judge’s willingness to enforce rights against the state, and in that regard Justice Wilson led the “activist wing” in the Court’s first 100 Charter decisions.¹⁵³ Yet she rejected the claim in some important cases, including *Lavigne*.¹⁵⁴ From that perspective, she may not have been as activist as some have claimed but, at the same time, she was more activist than she was willing to admit. Her reasons in *Lavigne* were convoluted, formalistic and, to be frank, transparently result-oriented; there, she advanced her subjective preferences at the expense of principle, and that is also a form of activism.¹⁵⁵ That said, she would not have seen it that way, and might have responded, “it just isn’t that simple.”¹⁵⁶ The *Labour Trilogy* was such a disappointment to her

¹⁵¹ *Id.*, at 260.

¹⁵² In *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833 (S.C.C.), for example, she supported a middle position that was controversial in *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.), for balancing the scales too far in the accused’s direction.

¹⁵³ F. Morton, Peter Russell & Michael Withey, “The Supreme Court’s First One Hundred Charter of Rights Decisions: A Statistical Analysis” (1992) 30 Osgoode Hall L.J. 1, at 44. Though the rest of the Court, in combination, supported the Charter claim 35 per cent of the time, Wilson J.’s numbers, at 53 per cent, were significantly higher. Justice Lamer, who had the next highest rate, supported the claim 47 per cent of the time, and Dickson C.J.C. — who is remembered for his leadership of the Court in the early Charter years — supported the claim at a much lower rate of 37 per cent. *Id.*, at 40 (see Table 13).

¹⁵⁴ See, e.g., *Irwin Toy v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) (upholding a limit on children’s advertising); *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.) (rejecting an equality challenge in the context of an election for trial by judge and jury); and *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) (upholding the *Criminal Code*’s hate propaganda provision).

¹⁵⁵ Rather than reject non-association in unequivocal terms, she could have found that s. 2(d) did not protect freedom from non-association in these circumstances, as McLachlin J. did, or justified the infringement under s. 1, as La Forest J. did.

¹⁵⁶ Bertha Wilson, “The Making of a Constitution”, Public Lecture on the *Charter of Rights and Freedoms* delivered at the University of Windsor Law School (April 1988), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 528, at 537.

that it not only set up her other section 2(d) decisions but prompted her most influential opinion, in *Edmonton Journal v. Alberta*, and her most innovative idea — the contextual approach. The methodology she proposed quickly became, and remains today, the definitive approach to Charter interpretation. Though she did not have the opportunity to develop it before retiring, Justice Wilson forged a link in her extra-judicial writings between the contextual approach and an aspirational conception of the Charter. Specifically, the concept of context allowed Wilson — and those who followed in her path — to draw distinctions between valid claims and others, such as Lavigne’s, which would trivialize or undercut the Charter’s broader purposes.

IV. THE MANDATE AND THE METHODOLOGY

Justice Wilson explained her approach to the challenge of Charter interpretation this way: “[w]e have the mandate”, she declared, and “[n]ow we have to develop the methodology for carrying it out.”¹⁵⁷ Her attention to methodological questions made a critical difference in at least two concurrences: one was *Morgentaler*, as discussed above, and the other was *Edmonton Journal*.¹⁵⁸ In each instance she wrote separately, and each time she proposed an approach that would subsequently be adopted by a majority of the Court. Her definition of liberty in *Morgentaler* freed section 7 from the shackles of an interpretation which might have confined the guarantee to the criminal justice system. In *Edmonton Journal* she proposed a methodology which she dubbed “the contextual approach”. What initially took the form of a counterweight to what Justice Wilson regarded as an unacceptably abstract approach to the definition of Charter rights soon became an article of faith, and then the dogma of Charter interpretation.

Justice Wilson agreed with Cory J.’s conclusion that the legislative provision unjustifiably limited section 2(b), but wrote separately in *Edmonton Journal* to address a key point of Charter methodology.¹⁵⁹ She juxtaposed two approaches to Charter interpretation — the abstract and

¹⁵⁷ The David B. Goodman Memorial Lectures, Delivered at the University of Toronto (November 26-27, 1985), *Wilson Speeches, id.*, 394, at 418.

¹⁵⁸ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.); *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.).

¹⁵⁹ For an insider’s account of Justice Wilson’s decision to introduce the contextual approach in this case, see Robert Yalden, “Working with Bertha Wilson” (2008) 41 S.C.L.R. (2d) 297.

the contextual — and explained why it was backward for the Court to privilege the abstract at the expense of the contextual. It is clear from her reasons — as well as her extra-judicial remarks — that she spoke out in *Edmonton Journal* because she profoundly disagreed with the Court's decision in the *Alberta Reference*.¹⁶⁰ Rather than consider whether “the special kind of associational activities forming the subject of the dispute” were constitutionally protected, the majority in that case had enlarged the question and asked whether section 2(d) protects associational activity of all descriptions — generally, at large, and in the abstract.¹⁶¹ Under that approach, once golf and curling were not protected, it followed that union activities like collective bargaining and the right to strike were also excluded from the Charter.¹⁶²

Justice Wilson intervened in *Edmonton Journal* to explain why that approach was misguided. She observed that a right or freedom may have a “different value depending on the context”¹⁶³ and suggested, as a result, that the “importance of the right or freedom must be assessed in context rather than in the abstract”.¹⁶⁴ Only in this way would the right or freedom be given “a generous interpretation aimed at fulfilling that purpose and securing for the individual the full benefit of the guarantee”.¹⁶⁵ She said that a “combined purposive and contextual approach” would “be more sensitive to the reality of the dilemma posed by the particular facts” than abstract thinking.¹⁶⁶ In her view, this methodology would also make it more conducive “to finding a fair and just compromise between the two competing values under section 1”.¹⁶⁷

Justice Wilson wrote in *Edmonton Journal* to show how an abstract conception of entitlement could defeat the objective of giving Charter rights a generous and purposive interpretation, and to discourage the Court from drawing on abstract generalizations to decide the merits of

¹⁶⁰ *Edmonton Journal*, *supra*, note 158, at 1354-55; see also “The Making of a Constitution: Approaches to Judicial Interpretation”, University of Edinburgh (May 1988), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 550, at 564-67 (stating, pointedly, that “the Chief Justice’s approach [in the *Alberta Reference*] may be contrasted with that of the majority”, which “applied neither a contextual nor a purposive approach”; *id.*, at 566).

¹⁶¹ *Edmonton Journal*, *id.*, at 1355.

¹⁶² *Id.*

¹⁶³ *Id.*, at 1355.

¹⁶⁴ *Id.*, at 1356.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

particular cases. Once having made that point she said little else in *Edmonton Journal* about what the contextual approach meant, or how she thought it might apply in other cases or to other questions of Charter interpretation. While its contours remained unexplored, the contextual approach hit a responsive chord with members of the Court who were struggling, at the time, with the relationship between abstract concepts and concrete decision-making. The abstract and demanding structure of the *Oakes* test, in combination with an abstract definition of the Charter's rights and freedoms, left little room for the weighing of facts and balancing of competing interests. First and foremost, Justice Wilson's contextual approach provided the opportunity — and a rationale — for the Court to retreat from the rigours of *R. v. Oakes*.¹⁶⁸

The contextual approach shifted almost immediately from its origins in a comment on abstract conceptions of entitlement to a doctrinal mainstay in the section 1 analysis of section 2(b) claims.¹⁶⁹ There, it took the form of a supplement to the *Oakes* test which enabled the Court to dilute the standard of justification in cases where the expressive activity was deemed to be valueless, of low value or distant from the core of section 2(b)'s ideals.¹⁷⁰ Instead of providing a means for securing the full benefit of the guarantee, the contextual approach played the role of the spoiler. As such, it provided a solution to abstract thinking which was seen as problematic because it granted too much, rather than too little, Charter protection. The court's assumption that all expression — including and especially objectionable expression — is *prima facie* protected by the Charter would prove especially difficult.¹⁷¹

By creating a device that facilitated evaluation of the content of expression and downward adjustments to *Oakes*, the contextual approach

¹⁶⁸ [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

¹⁶⁹ See *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.) [hereinafter "*Rocket v. Royal College*"] (adopting the contextual approach in the context of commercial expression and invalidating restrictions on professional advertising).

¹⁷⁰ The contextual approach was applied, with negative consequences for s. 2(b), in *R. v. Keegstra*, *supra*, note 154; *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.) (dissenting opinion); *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter "*RJR-MacDonald*"] (dissenting opinion); *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.); and *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.). For a critique on the contextual approach in s. 2(b) cases, see J. Cameron, "The Past, Present, and Future of Expressive Freedom under the Charter" (1997) 35 Osgoode Hall L.J. 1 [hereinafter "*The Past, Present and Future of Expressive Freedom*"].

¹⁷¹ *Irwin Toy v. Quebec (Attorney General)*, *supra*, note 154 (granting the guarantee a broad interpretation).

enabled the Court to avoid the consequences of *Irwin Toy*'s principle of content neutrality.¹⁷² This version of the contextual approach was dominant in the section 2(b) jurisprudence and resulted in almost every limit on objectionable expression being upheld during the 1990s.¹⁷³ Though the doctrine has since been modified, it continues to provide a rationale for deferential section 1 review in section 2(b) cases.¹⁷⁴

The contextual approach has also had a dampening effect on the scope of entitlement under section 15 of the Charter. There, the Court was only able to agree on a definition of equality after much difficulty. Under its standard for breach in *Law v. Canada*, the concept of context provides the framework for a structured and complex — but flexible — series of doctrinal obstacles that claimants must overcome to establish a *prima facie* breach of equality.¹⁷⁵ The test is so onerous that few claims in recent years have proceeded from section 15 to section 1.¹⁷⁶

The paradox of the contextual approach is this: Justice Wilson's *Edmonton Journal* concurrence had its origins in a complaint that abstract thinking caused the Court to exclude labour union activities from the Charter. In that setting her preferred methodology would have expanded the scope of entitlement under section 2(d) and led the Court to a different conclusion. Yet following *Edmonton Journal*, the contextual approach became a device for constraining constitutional rights, both on the initial question of entitlement — as in the case of section 15 — as well as on the issue of justification, as occurred in the section 2(b) jurisprudence.

¹⁷² In this setting the contextual approach allowed the Court to measure expressive activity against s. 2(b)'s core values and to relax the standard of review under s. 1 in cases where the content of the expression wandered from those values.

¹⁷³ But see *Rocket v. Royal College*, *supra*, note 169, *R. v. Zundel* and *RJR-MacDonald*, *supra*, note 170. In *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.), the Court invalidated a provision that essentially placed a complete ban on third party advertising but indicated that third party limits were reasonable in principle.

¹⁷⁴ See *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) (applying a modified version of the contextual approach and invalidating an opinion poll blackout); *Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58, [2000] 2 S.C.R. 764 (S.C.C.) (upholding limits on third party spending); and *Bryan v. Canada (Attorney General)*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) (upholding a legislative provision which prohibits election results from being divulged).

¹⁷⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.).

¹⁷⁶ There is a considerable commentary on the *Law* test and its implications for s. 1. See, e.g., Christopher Bredt & Adam Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003) 20 S.C.L.R. (2d) 33; and Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of *Charter* Equality Rights Decisions" (2004) 24 S.C.L.R. (2d) 103.

The contextual approach may have evolved in unexpected directions, in part, because it was unclear exactly what Justice Wilson meant by it. In certain ways it was a gift that enabled the Court to avoid the consequences of abstract and open-ended definitions of entitlement, coupled with an abstract and strict standard of justification under section 1. By juxtaposing the competing values at stake and bringing the balancing exercise into the open, this approach allowed the Court to choose between values in ways that were either obscured or prohibited by the value-neutral standards of formal equality, the Court's definition of expressive freedom, or *Oakes*. The unanswered question is whether Justice Wilson would have endorsed the rights-constraining consequences of her approach. Though she resisted internal limits on the Charter's rights and freedoms, there were exceptions to that principle, in *R. v. Turpin* as well as in *Lavigne*.¹⁷⁷ In general, she also refused to dilute the *Oakes* test, though there are exceptions to that principle as well.¹⁷⁸ It is revealing that Justice Wilson had been reflecting on the role of context in Charter interpretation for some time before proposing it as a distinct methodology in *Edmonton Journal*. Though she did not explain it in such terms, for her, context was the key to the "true test" of rights.

At the outset of the Charter, Justice Wilson viewed constitutional rights as an invisible fence which set boundaries on the state's authority to interfere with individual freedom. This conception is found in her *Jones* and *Morgentaler* opinions, in the *Skinner* and *Solicitation Reference* dissents, in her advocacy of strict review in "singular antagonist" settings, and more generally in her approach to section 1 and the application of *Oakes*.¹⁷⁹ An alternative conception, which was more aspirational in nature, began to appear in her thought. The true test, she stated in various ways and on various occasions, was "how well [rights]

¹⁷⁷ But see also *R. v. Turpin*, *supra*, note 154 (repeating that each right, including s. 15, must be given its full independent content divorced from any of s. 1's justificatory criteria and stating, at the same time, that the equality guarantee's internal limitation that the differential treatment be "without discrimination" is determinative on the question of breach). *R. v. Lavigne*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.).

¹⁷⁸ Compare *Irwin Toy v. Quebec (Attorney General)*, *supra*, note 154, and *R. v. Keegstra*, *supra*, note 170 (applying a lower standard of review to uphold limits on expressive freedom) and *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.) (retaining a stricter form of scrutiny under s. 1 in this and the Court's companion decisions on mandatory retirement).

¹⁷⁹ *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.); *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.); *R. v. Skinner*, [1990] S.C.J. No. 51, [1990] 1 S.C.R. 1235 (S.C.C.); *Solicitation Reference*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.); *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 102 (S.C.C.).

serve the less privileged and least popular segments of society” and “how well [a] particular rendering on a right will work to make society better, more tolerant and more civilized”.¹⁸⁰ Those questions, in her view, could only be answered through an approach which “demands the continuing re-assessment of the scope of the right in light of changing circumstances and in light of contemporary social theory”.¹⁸¹ As she would explain, that inquiry is inescapably contextual.¹⁸² In other words, it was never as simple as asking how much liberty a person should have under section 7, or how much expressive freedom under section 2(b), because “[w]e are not concerned with the definition of these concepts in the abstract” but “with what they mean and how they apply in the context of real life situations presented to us by the litigants”.¹⁸³ From this perspective, the contextual approach was not a device for watering down constitutional rights; rather, it offered a methodology which would promote a conception of the Charter as an instrument for the amelioration of those who are disadvantaged or powerless in Canadian society. That conception placed an important qualification on an abstract or formal view of the Charter as a fence, or border, against the state.

Her *Edmonton Journal* concurrence was an initiative which introduced the contextual approach without fully exploring the deeper meaning it held for her. Though she had only just begun to explain her concept of context, Justice Wilson’s methodology set the standard for Charter interpretation, and today it infuses the jurisprudence across the full spectrum of issues. A critical examination of its underlying assumptions and its influence on the Charter’s development is beyond the scope of this article.¹⁸⁴ In concluding, it should be noted that Wilson

¹⁸⁰ “The Making of a Constitution”, Address to the Ninth Annual Conference of the National Association of Women Judges (October 1987), *Wilson Speeches, supra*, note 156, 512, at 524.

¹⁸¹ “The Making of a Constitution”, Public Lecture on the *Charter of Rights and Freedoms* delivered at Windsor Law School (April 1988), *Wilson Speeches, supra*, note 156, 528, at 540.

¹⁸² Hawkins and Martin also claim that it is inescapably subjective: Hawkins & Martin, “Democracy, Judging and Bertha Wilson” (1995) 41 McGill L.J. 1, at 41 (stating that “[i]n the Wilsonian sense, context frees the judge to further his or her personal political agenda by making the meaning of words infinitely flexible”).

¹⁸³ *Supra*, note 181, at 537.

¹⁸⁴ The contextual approach and its role in Charter jurisprudence has not yet been fully probed, but is generally praised rather than criticized; see generally Ruth Colker, “Section 1, Contextuality, and the Anti-Disadvantage Principle” (1992) 42 U.T.L.J. 77; Shalin M. Sugunasiri, “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability” (1999) 22 Dalhousie L.J. 126; and Timothy Macklem, “Making the Justification Fit the Breach” (2000) 11 S.C.L.R. (2d) 575. For a different view, see J. Cameron, “The Past, Present and Future of Expressive Freedom”, *supra*, note 170; and Hawkins & Martin, “Judging, Democracy and Bertha

J.'s approach was strongly endorsed by the Court in *B.C. Health Services*.¹⁸⁵ There, the Court vindicated Wilson J.'s dissenting votes and opinions in the section 2(d) labour cases by overruling the *Labour Trilogy* and *Professional Institute*.¹⁸⁶ Not only that, *B.C. Health Services* explicitly vindicated her critique of the Court's abstract methodology in those cases, declared that the "decontextualized approach" to defining associational freedom stood "in contrast to the purposive approach taken to other *Charter* guarantees", and found that it should not be followed.¹⁸⁷ In addition to concluding that collective bargaining is protected by section 2(d) in at least some circumstances, the Court validated Wilson J.'s *Charter* methodology.¹⁸⁸

The contextual approach evolved in directions Bertha Wilson might neither have foreseen nor fully approved, but has had an enormous impact on *Charter* interpretation. Of that there can be no doubt and it is, as a result, a central feature, if not the defining contribution, of her *Charter* legacy.

V. JUSTICE WILSON'S LEDGER

Bertha Wilson spoke many times at convocation ceremonies and when she did, she invited graduates to address three questions during the course of their professional careers. "What is the chief end we serve?" was the first, and "what new vision have we to offer our sons and daughters?" the second. Her third and final question asked, "what will we write at the top of our ledgers?"¹⁸⁹

A ledger of Justice Wilson's milestone achievements, including her most important *Charter* decisions, could be drawn up without too much

Wilson, *supra*, note 182, at 49 (stating that textual and abstract approaches make objective judging possible and arguing that by "substituting a contextual approach, which makes the outcome of the case entirely dependent upon what a given judge thinks is just and fair ... Justice Wilson created an entirely subjective theory of interpretation").

¹⁸⁵ *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.).

¹⁸⁶ *Id.*, at 419 (concluding that the holdings in those cases "can no longer stand").

¹⁸⁷ *Id.*, at 417.

¹⁸⁸ The right to engage in collective bargaining is a limited right which is governed by a two-step inquiry: see *id.*, at 441-45. See also J. Cameron, "Due Process, Collective Bargaining, and s. 2(d) of the *Charter*: A Comment on *B.C. Health Services*" (2006-2007) 13 C.L.E.L.J. 323 (discussing, among other things, the Court's application of the contextual approach).

¹⁸⁹ See, e.g., "Remarks Made at the University of Calgary Convocation" (November 18, 1983), in *Speeches Delivered by the Honourable Bertha Wilson* [unpublished volume, available at the Supreme Court of Canada Library] 150, at 154.

difficulty at this stage. But there would be problems with that exercise. One is that the purpose of a ledger is to tally credits and debits in order to determine a net position. Yet an explicit goal of this article has been to avoid the credit and debit thinking that has characterized much of the discussion of Justice Wilson's legacy. A second, and related, difficulty is that this article never undertook to evaluate her Charter jurisprudence. She believed that the judges have a duty to enforce the Charter and that they should not be deterred by institutional constraints from discharging that duty. If it was a fearless view of the Charter, it was one that unavoidably provokes questions about the legitimacy of review. It is possible to admire Justice Wilson's approach to decision-making without supporting or endorsing the substance of her interpretations.

There is another way to consider her ledger. This article has shown that Bertha Wilson lengthened the shadow of the institution — the Court, the law, the Charter — in many ways, but especially in being able to “act singly”. Where others might have bowed to the pressures and demands of collegiality — or public opinion — she believed strongly that Charter interpretation required all the determination, energy and courage she could bring to bear on it. Some may have found her insistence on writing separate reasons to express a different perspective annoying, needless, obstinate or contrarian.¹⁹⁰ But whatever one may think of her Charter jurisprudence, she did not flinch in the face of the awesome responsibility she took so seriously. Justice Wilson thought deeply about the meaning of rights and was the most faithful of judicial stewards in discharging her duty of review. By challenging herself in all tasks of Charter interpretation she encouraged those around her — her colleagues, the legal community and the broader community of Canadians — to stand up for their principles as she did for hers.

In his “Essay on Self-Reliance” Ralph Waldo Emerson idealized those who act singly, claiming that “what you have already done singly will justify you now.”¹⁹¹ He also pronounced on greatness, declaring that “all history resolves itself very easily into the biography of a few stout

¹⁹⁰ See Cristin Schmitz, “Former chief justice Lamer reflects on his brightest, darkest moments as Canada's top jurist”, *The Lawyers Weekly*, March 29, 2002 (disputing Justice Wilson's account of collegiality within the Court and commenting, specifically, that there was no clique or “gang” that excluded her; that like-minded people tended to congregate and that there was little point including Justice Wilson, who was not going to change her mind; and that if she felt isolated it was not because the other judges did anything to isolate her).

¹⁹¹ Ralph Waldo Emerson, “Self Reliance”, in *Emerson's Essays* (Washington: National Home Library Foundation, 1932) 27, at 35.

and earnest persons,”¹⁹² and stating that “[g]reatness always appeals to the future.”¹⁹³ This article makes no claim either that Bertha Wilson was or was not a great judge, but it regards her with admiration as a “stout and earnest” pioneer of Charter interpretation. She was a woman who — to recall the words of Edward Everett Hale — would not let what she could not do interfere with what she could do, and would not refuse to do something she could do.¹⁹⁴ Bertha Wilson will be remembered as the Supreme Court’s first woman judge, as a feminist, and as a champion of the Charter. She is remembered here because she was one woman, and if she never forgot that she was only one woman — and almost always the sole woman — she did not allow it to defeat her aspirations. That is why this article writes “justice in her own right” at the top of Bertha Wilson’s ledger.¹⁹⁵

¹⁹² *Id.*, at 36.

¹⁹³ *Id.*, at 35.

¹⁹⁴ This is a variation on the quotation Bertha Wilson cited herself. See note 5.

¹⁹⁵ “Justice in Her Own Right” was the title Benjamin Berger suggested for this book; I thank him for the suggestion and for allowing me to use it for my article.

