Peace in the family

Chief Justice Beverley McLachlin has built consensus, brought harmony and steered the top court away from controversy during her 10-year tenure. But make no mistake — The McLachlin Court is quietly reshaping the law.

By Yves Faguy

Photography by Mike Pinder

When asked why Supreme Court rulings generate less public outrage about the court's activism since her appointment as Chief Justice, Beverley McLachlin answers, with characteristic modesty, that it was under the leadership of her predecessors, Brian Dickson and Antonio Lamer, that the court settled the most controversial questions under the Canadian Charter of Rights and Freedoms.

"Other cases have since come along and we ironed out some of the wrinkles that may have been left behind," the Chief Justice told *National* in a recent interview. "But it may be that we are, with respect to Charter litigation, in a period now where there is more certainty and more acceptance of the general lines."

At first glance the numbers support that view. In the last 10 years, there has been a marked decline in the number of cases that have come before the court. Since 1999, it has rendered judgment in an average 78 cases a year, down from 111 under Lamer.

And yet upon closer inspection, the decisions themselves tell another story. Far from being idle, the court has quietly but decisively clarified and revised the law on a wide range of issues — from the exclusion of tainted evidence to freedom of expression in the digital age, from the legality of private medical insurance to religious accommodation and time-honoured principles surrounding Canadian federalism and the division of powers.

"We have a great court system and by international standards it's actually pretty speedy and not horribly expensive. But that's not good enough. We have to do more and we are doing more."

Chief Justice Beverley McLachlin
Ottawa

Taking a fresh look

In truth, even though Supreme Court decisions are expected to stand the test of time, it doesn't mean they always do. Precedent must be observed, of course, but decisions must also offer a clear direction for future cases. And that means adapting to the changing realities of our new century.

The McLachlin Court has not shied away from re-evaluating precedent, says Mahmud Jamal, a partner at Osler, Hoskin & Harcourt LLP. "And that's a good thing," he adds. "Over a certain period of time, it's necessary to do that [...]. A certain rigidity and uncertainty can develop in the law. And the court can take two approaches. It can either hunker down or it can look at the question afresh and try to improve the law. This court has been willing to do the latter."

For criminal law practitioners, last year's landmark decision, *R.* v. *Grant* — a case that barely registered a blip among the general public — was proof of that. When the court released its decision, in which it essentially rewrote its famous *Collins* test for excluding tainted evidence under s. 24(2) of the Charter, you could practically hear the legions of first-year law students across the country tossing their suddenly dated constitutional notes into the recycling bin.

The decision turned on the case of a Toronto man who claimed he had been arbitrarily detained prior to his arrest by three police officers on charges of possession of marijuana and a loaded gun. The court also had to decide whether the police had infringed the accused's right to counsel.

Until *Grant*, Canadian courts generally looked at the Charter remedy — which allows them to exclude tainted evidence whenever its use might bring the administration of justice into disrepute — from the defence's point of view. The test, developed by the court in the 1987 case *R.* v. *Collins* — later revisited in *R.* v. *Stillman* — aimed to curtail police misconduct when collecting evidence.

"I think they're very mindful of their proper institutional role. When McLachlin became Chief Justice, there was a lot of criticism about judicial activism. You don't hear that debate so much anymore."

– Mahmud Jamal, Osler, Hoskin & Harcourt LLP –

But over the years, the test drew increasing fire. The rules governing police searches were too complex and difficult to apply, critics said, and too often courts were throwing out tainted evidence for minor police violations of the Charter. A concern grew that people might lose faith in the justice system.

The majority in *Grant* candidly acknowledged the criticism. "Without undermining the principles that animate the jurisprudence to date," it wrote, "we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed for the resolution of these two issues."

In the end, the court turned the *Collins* test on its head. Though it ruled that the accused had been unlawfully detained, it also decided that courts must consider how the exclusion itself might bring the administration of justice into disrepute and weigh that against the severity of the Charter breach.

Regardless of how the new test will play out in the lower courts, the decision marks a clear pendulum shift away from more than a quarter century of jurisprudence.

The last few years are full of examples of the court's willingness to clarify the law and, as long-time court watcher, Henry Brown, QC, puts it "in some cases simply repudiate and walk away and say: "Look, these are just bad decisions and they just don't work. And I think that's good."

Oddly, some of the McLachlin Court's most far-reaching decisions have come in an area that constitutionalists thought was settled long ago: the distribution of power between Ottawa and the provinces. In 2007, it decided two cases (*British Columbia (Attorney General)* v. *Lafarge Canada Inc* and *Canadian Western Bank* v. *Alberta*), in which it promoted a more flexible form of federalism by discouraging, as much as possible, resort to "interjurisdictional immunities" — which prevents, for example, a provincial law from being applied to matters of federal jurisdiction.

"This isn't an avant-garde area of the law," says Jamal, who has acted as *pro bono* counsel to the Canadian Bar Association before the court. "It's lawyers' law but has tremendous practical implications. That's one area where they've been bold in re-evaluating principles."

In 2009, when deciding *Grant* v. *Torstar Corp*., involving two defamation suits launched against the Toronto Star and the Ottawa Citizen, the court drew inspiration from outside Canada and came up with a new responsible communication defence for journalists found out to be wrong when reporting on matters of public interest, provided best efforts were used to report accurately. And mindful of modern technology, the court made it clear that the new defence applies not just to mainstream journalists but to bloggers and social networkers too.

Context is everything

According to Gregory Fitch, the director of Criminal Appeals and Special Prosecutions in Vancouver, the challenge for the McLachlin Court has always been to devise answers not only for specific cases, but "tests that are resilient and provide practical guidance to law enforcement."

"At the end of the day, a police officer on the beat in Vancouver needs to understand the limits of his or her authority," he says. "That understanding must come from the guidance the court provides in its judgments."

"I see the McLachlin Court taking the foundational Charter principles developed under the Dickson and Lamer Courts and applying those principles in increasingly specific contexts and in a way that is designed to be productive of a workable system of justice."

To illustrate his point, Fitch cites the privacy implications of section 8 of the Charter, which protects everyone in Canada against unreasonable search and seizure from the state. The court first considered the issue in *Hunter* v. *Southam* in 1984, long before the World Wide Web turned the Internet into a public phenomenon. That year, in one of its first Charter decisions, the court ruled that section 8 guarantees a reasonable expectation of privacy against government intrusions — which must be balanced against the government's duty to enforce the law.

To legal minds, that might be reasonably sound. "It's quite another thing to take that broad test and apply it in a specific context," says Fitch. "In the area of search and seizure," he points out, "the court now has to consider not only interactions in the physical world but how privacy expectations are to be expressed and protected in electronic communications."

La paix dans la famille

La juge en chef, Beverley McLachlin, a su imposé une démarche plus consensuelle aux délibérations du plus haut tribunal du pays qui, depuis quelques années, suscite moins la controverse. Et pourtant, sous son leadership, la cour est en train de refaçonner des aspects essentiels de la loi.

Lorsqu'on lui demande pourquoi la Cour suprême du Canada s'est attirée moins de critiques d'activisme judiciaire depuis son arrivée au poste de juge en chef, il y a dix ans, Beverley McLachlin répond avec modestie que c'est sous la gouverne de ses prédécesseurs, Brian Dickson et Antonio Lamer, que la cour a réglé les questions les plus controversées en matière de Charte.

« D'autres dossiers sont venus par la suite, et nous avons repassé quelques plis qui pouvaient avoir été laissés », a lancé la juge lors d'une récente entrevue avec *National*. « Ça peut-être que nous sommes, quant à la Charte, dans une période où il y a une plus grande acceptation et une plus grande certitude par rapport aux orientations générales. »

À première vue, les chiffres semblent lui donner raison. Depuis 1999, la moyenne annuelle de décisions est passée de 111 sous le juge en chef Antonio Lamer, à 78 depuis 1999.

Mais un coup d'œil plus attentif permet de voir un autre côté de la médaille. Loin d'être oisive, la cour a discrètement clarifié et révisé le droit sur un ensemble de questions — de l'exclusion d'éléments de preuve obtenus en violation des droits constitutionnels à la liberté d'expression à l'ère digitale, en passant par les accommodements raisonnables et la séparation des pouvoirs au sein de la fédération canadienne.

Regard frais

Sous Beverley McLachlin, la Cour suprême ne s'est pas gênée pour réévaluer les précédents, estime Mahmud Jamal, associé chez Osler, Hoskin & Harcourt LLP. « Et c'est une bonne chose », dit-il, notant que le plus haut tribunal du pays ne peut se permettre d'être statique.

Pour les avocats criminalistes, la décision *R.* c. *Grant*, rendue l'an dernier, en est le meilleur exemple. Le jour où la cour a réécrit son traditionnel test de Collins pour déterminer l'admissibilité d'une preuve obtenue en violation des droits constitutionnels, on pouvait presque entendre les hordes d'étudiants en droit jeter leurs pages de notes dans le bac à recyclage.

Mais étonnamment, parmi les décisions les plus déterminantes rendues par la cour « McLachlin » l'ont été dans un domaine que l'on aurait pu croire figé depuis longtemps : la distribution des pouvoirs entre Ottawa et les provinces. En 2007, deux arrêts, *Colombie-Britannique (Procureur général)* c. *Lafarge Canada Inc.* et *Canadian Western Bank* c. *Alberta*, ont tranché en faveur d'une forme de fédéralisme plus flexible, décourageant le

plus possible le recours à l'immunité constitutionnelle pour écarter, par exemple, certaines lois provinciales.

Autre secteur de changements importants : les médias où, en 2009 dans *Grant* c. *Torstar Corp.*, la cour s'est inspirée du droit étranger dans deux causes de diffamation pour fournir une nouvelle défense aux journalistes, basée sur les précautions nécessaires prises pour rapporter les faits de manière exacte.

Équilibre et substance

Dans les dossiers de sécurité nationale post-11 septembre 2001, le défi de la cour reposait en bonne partie sur le fait de gérer les tensions inhérentes entre son rôle de protecteur des libertés civiles et le besoin de respecter la branche exécutive du gouvernement.

Et c'est mission accomplie, juge l'observateur de longue date de la Cour suprême, Henry Brown, c.r., qui donne l'exemple du dernier jugement sur Omar Khadr, où la cour a tranché que les droits du prisonnier canadien avaient été violés à Guantanamo Bay, mais qu'en même temps, les instances inférieures étaient allées trop loin en ordonnant son rapatriement.

« Ils vont jusqu'à la limite, note Me Brown, qui agit entre autres comme conseiller chez Gowling Lafleur Henderson LLP, à Ottawa. Ils établissent le droit et envoient un coup de semonce sur la proue du navire du gouvernement fédéral, en disant : "Écoutez-nous bien : vous vous en tirez cette fois-ci, mais ne pensez pas que c'est une question de juridiction." »

Ce qui ne veut pas dire que la Cour suprême du Canada s'est gênée pour attaquer de front certains dossiers difficiles. Dans l'affaire *Hutterian Brethren*, par exemple, elle n'a pas donné raison à une petite communauté qui invoquait la liberté de religion pour refuser d'avoir des photos sur leurs permis de conduire. Dans *Québec* c. *Nguyen*, elle a invalidé une disposition de la Charte de la langue française qui restreignait l'accès à l'éducation en langue anglaise au Québec.

Recherche du consensus

Si après 10 ans, Beverley McLachlin est parvenue à éviter bien des controverses, c'est en partie dû à sa personnalité, croit Me Brown. « Elle est une personne qui, par instinct, se tient au centre », note-t-il.

Et c'est peut-être aussi, en partie, attribuable à la discipline qu'elle est reconnue pour avoir inculqué à ses juges, tant sur le banc que derrière des portes closes. « L'impact de la juge en chef était de faire un effort pour emmener les gens à travailler ensemble de manière collégiale », se souvient Michel Bastarache, qui a récemment accroché sa toge de magistrat du plus haut tribunal du pays.

« Sa vision était que nous devions autant que possible éviter la dissidence et les décisions concurrentes pour créer des précédents plus forts. Elle encouragerait les gens à se réunir et à essayer d'en arriver à un compromis, lorsqu'elle voyait qu'il y aurait plusieurs décisions différentes. »

« De nature, c'est un individu axé sur le consensus, et qui souhaite trouver et conserver la paix dans la famille », conclut Henry Brown. **N**

Case in point, last March, the Supreme Court split 4-3 in overturning the conviction of Urbain Morelli, convicted of possessing child pornography on his personal computer. The court ruled that the RCMP had subjected Morelli to an "unreasonable" search and seizure, but the court split speaks eloquently to the tension between society's interest in privacy and its concern in protecting children.

More generally, says Fitch, the court also has to keep an eye to how the answer it provides "may impact on other areas of the law."

Technology, clearly, is posing new challenges for the court in this regard, says Jamal. "You can see that in criminal law. You can see that in e-commerce. You can see that in the law of defamation. Technology and the law is going to continue to be an area that poses interesting legal questions — some age-old legal questions — in new ways."

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But in reality, says Jamal, to reduce the work of the Supreme Court in the past decade to simply finding practical applications of the framework established before McLachlin assumed leadership "is far too simplistic."

"Because there have been many new questions that have come before the court for which there hasn't been an established framework," he says. "The whole question of the various security cases that came before the court — the *Charkaoui* case in 2007 and the *Khadr* cases. You could say, on the one hand, that they are applying the same framework to new situations, but they are fundamentally new legal phenomena. The whole threat of terrorism and how that impacts on section 7 is, in a sense, a totally new set of legal challenges. The courts have to balance the right of the individual with the broader social concerns arising from terrorism."

The substance of style

When the Supreme Court did manage to generate sustained interest in the media, it was generally with these high-profile national security judgments that followed in the wake of 9/11 —namely the *Khadr* and *Charkaoui* cases, and in *Suresh* v. *Canada*, when the court held that deportation to torture can deprive a refugee of his right to liberty, security and life protected under section 7 of the Charter.

In all these cases, the court's challenge, from an institutional point of view, was to manage the inherent tensions between acting as a protector of civil liberties and showing deference to the executive branch of government.

Because as an unelected institution where appearances — like it or not — play a big part, questions will always swirl about the court's role in deciding cases.

In the security cases, the court acquitted itself admirably on this front, says Brown, as when the Supreme Court found that Omar Khadr's rights had in fact been violated at Guantanamo Bay, but ruled at the same time that lower courts in Canada went too far in ordering the federal government to seek his return.

"They go to the edge," says Brown, who specializes in SCC agency and counsel work at Gowling Lafleur Henderson LLP in Ottawa. "They said: 'Well we can [determine a judicial remedy], but we're not going to do it now.' They settle the law and send a warning shot across the government's bow. 'Hear us out: You're getting away with it this time, but do not think it's a question of jurisdiction.'"

"I think they're very mindful of their proper institutional role," says Jamal. "When McLachlin became Chief Justice, there was a lot of criticism about judicial activism. You don't hear that debate so much anymore."

Even so, in spite of the fact that the Supreme Court of Canada found that Mr. Khadr's rights were violated under section 7, Ottawa has done very little to remedy his situation until now.

It illustrates why, if anything, criticism towards the court tends to come from those who complain that the court succumbs too often to political pressures. "Popularity cannot be the measure of good Supreme Court justice especially when it comes to fundamental rights and minority rights," says Sheila McIntyre, a professor of constitutional law at University of Ottawa.

McIntyre, who has been especially critical of the court's application of section 15 equality guarantees, worries about "a remarkable degree of deference" to legislatures and the government position in a wide range of issues from equality rights to criminal law. "I think the court has struck the wrong balance. This is a very timid court and it is unduly concerned with how people see it."

The Charter, she insists, "is the guarantor that your fundamental rights won't be violated." And in a context where, as she sees it, the current "government believes only in parliamentary

supremacy," it must be reminded from time to time that "we are in a constitutional supremacy order." And if the government isn't happy with a Charter ruling, she adds, then it can invoke the notwithstanding clause. "But the court sometimes acts as if there is no section 33," she says, referring to the provision which allows the federal and provincial governments to enact laws to override certain fundamental Charter rights.

Jamal, however, rejects the deference charge. "It's a court that deals with specific questions and specific cases and decides them. I don't see it as having an agenda."

Besides, the court has shown a willingness to take on some difficult cases — even some sacred cows. In *Hutterian Brethren*, it ruled against the claims of members of a small religious community that a law making photos mandatory for driver's licences infringed their religious rights under the Charter. In another case, *Québec* v. *Nguyen*, the court struck down a provision of Quebec's language laws that restricted access to English-language education. And in *Chaoulli* v. *Quebec*, another 4-3 split decision, the court agreed with the claimants position that that provincial prohibitions against private sector health insurance violated their rights under the Quebec Charter, by denying access to health care to patients on waiting lists for public care, but who could otherwise afford private care.

If, after 10 years serving as the country's top judge, Beverley McLachlin has somehow managed to steer the court clear from a lot of controversy, it stems in part from her personality, says Brown. "She's a middle of the road person by instinct. Over time, she's moved a little bit to the centre. And I think that's a good thing for the institution."

It is also well known that McLachlin has brought a unique form of soft power discipline to the hearings and the deliberations of the court.

"McLachlin has been very disciplined about achieving a consensus," says Brown. "She was on the court when consensus was not the order of the day." Indeed, the collegiality that has developed in the McLachlin Court is a marked change from some of the tensions that characterized the institution under Lamer.

"I don't think they were attributable to Lamer," says Brown. "But there were competing camps. In the reasons, you'd have one or more judges sniping at the others in sometimes fairly stark terms."

"The impact of the Chief Justice was to make a concentrated effort to have people act in a collegial way," explains former Supreme Court Justice Michel Bastarache, who sat on both the Lamer and McLachlin Courts. "Her view was that we should avoid dissent and concurring decisions when we can in order to create stronger precedents. She would encourage people to get together and try and compromise when she saw that there would be many concurring decisions."

Not that there aren't still strong independent voices on the court, including her own. But according to Brown, McLachlin "knows that there is another side to many issues. Some judges are smart and confident, but they forget that the other guy has a point too. Her empathy and understanding help her achieve compromises when they can be achieved."

"By nature she is a consensus-driven individual and one who wants to find and keep peace in the family," says Brown.

He might have added: both inside and outside the court. **N**

Yves Faguy is Senior Editor of *National*.

See McLachlin Q&A on the next page

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A conversation with the Chief Justice

Beverley McLachlin on judicial activism, access to justice, and how lawyers can put their best foot forward in the top court.

Q. *Looking back on the last ten years, has your perception of the role of the Chief Justice changed?*

A. A Chief Justice has actually very little power. As I was told when I was first appointed, they hand you the reins of power and it takes you about three days to discover that they aren't connected to anything. But what you can do is make sure that the judges have everything they need to do the job that they want to do, that they are happy, and try to promote a sense of collegiality and being there to serve your justices and serve the rule of law. I also had the view that the court should be open as much as is consistent with its role to the public and to the press.

Q. *Do you worry that in spite of all your efforts to reach out to the public that access to justice is an issue eroding people's confidence in the justice system?*

A. It's a very important part of retaining the confidence of people of Canada. We have a great court system and by international standards it's actually pretty speedy and not horribly expensive. But that's not good enough. We have to do more and we are doing more. What we've discovered is that it's very complex. The administration of justice is a provincial matter and it varies from province to province. And it has many faces. What works for family law may not work for corporate law. The justice system therefore has to deal with the problem of access to justice on multiple fronts at once. There's no magic bullet and that's really where this is going now. We have groups of people consisting of lawyers and judges and academics who are actively working on different aspects. Governments are involved. I think a lot of improvements have been made. Have we solved the problem? No and it's probably always going to be one of those problems you have to deal with.

Q. *How much does the practical implementation of law weigh in the court's decisions?*

A. It weighs heavily for all the justices of the court. It's our responsibilities to think things through. And our orders inevitably will have an impact, certainly on the parties, but also often beyond that, particularly when you're dealing with public questions of wide importance and constitutional questions, and so on. Not only do we have to look backward to where the precedents are but we have to ask ourselves if we make this order what will be the consequences. We get a lot of help in submissions and of course we can't see the whole future, but we try to make that one of our considerations. So if you are setting up rules for corporate governance as we did in the BCE case, you want to think about how they're going to work. And will people be able to apply them? Or will they be so complex that it would tie people up in a lot of red tape and they'd never get anywhere.

Q. *Speaking of the BCE case, do you expect the court will be handling more cases of real-time litigation in the future?*

A. That has happened ever since I have been a judge here, which is now almost 21 years. We've always had our urgent cases. Sometimes it might be a family case. The court's policy has always been to respond to those in a timely manner because we feel that's part of our responsibility as the highest court in the land, not only to get the law right and settle it, but if there is a time frame around a question for the litigants, then it's our job to do our best to comply with it.

Q. *Do you get a sense that there are fewer rumblings in the media and the public these days about the court's activism?*

A. I guess that's right and I don't know exactly why. It may be the nature of problems to some extent. The 80's and perhaps early 90's were periods when a great many of the rights were being fleshed out and there wasn't a lot of guidance for the court in doing that fleshing out. And sometimes what was said and done was thought to be controversial. Sometimes

the controversy has completely died down because the critics have been silenced by the fact that what the court proposed actually worked well. Other cases have since come along and we ironed out some of the wrinkles that may have been left behind. It may be that we are, with respect to Charter litigation, in a period now where there is more certainty and more acceptance of the general lines. There's perhaps less concern about it.

Q. *On the flipside, how do you respond to criticism that the court is now being too timid and sometimes too deferential to government?*

A. Well I don't think we have been. We call it as we see it. There were big cases in the 80's and 90's that said that, on social issues, you defer to government. So if we do that once in a while, it's simply because it's there in the jurisprudence. I don't think that's anything new. We are not deferential, but we are conscious of the limits of our powers, the role of Parliament, the role of the executive and the role of the courts in the good governance of this country. So we operate within what we think are the appropriate frameworks. But I do not think that there has been this radical shift to timidity or deference, or whatever the term is.

Q. *Do you see any emerging new question coming down to bear on the court?*

A. We've been doing a lot of division of powers work, which the court didn't do much of for a while. We are getting more cases on applications of traditional law to technology affected exercises. We recently looked at how search warrant law operates in the context of images on a computer — a very interesting and difficult question. What constitutes possession of material on a computer? Is it enough to just to have it on your screen or must you have downloaded it? These are important questions not only for issuing a search warrant, but also for defining offences. Another area is security and looking at laws that are designed to keep society safe. Courts will be asked to grapple with these issues as they arise, as we have been already with the *Charkaoui* and the two *Khadr* cases. A third area is what I call diversity litigation, involving different groups of people living side by side in the same communities, the conflicts that arise, and how they express their religious views .

Q. *What happens before a hearing? Do the judges discuss the case beforehand?*

A. Sometimes, but often we're spending so much time reading and preparing that there isn't extensive discussion at all. But we certainly don't have any rules against it, and if two judges or five are having lunch, they might talk about a case they're preparing and toss it around. But they certainly don't pre-judge it at all. We're at a fairly inchoate state when we go into the courtroom. And then your next question is going to be: 'Do oral submission really make a difference?' I can say, in my case, they have and will continue to do so.

Q. *When the court relies on its own research to come to a decision, should counsel have an opportunity to challenge that?*

A. If we think it's something that is going to be really pivotal, we'll ask counsel to comment on it. I remember a case where we thought we'd discovered the section of a statute that dealt with it. One of the clerks came up with it, and in fact it did prove to be on point and nobody had known about it. So we sent it out to counsel and got further submissions. But if it's just some sort of academic writing or a case that we've pulled up ourselves, we may not do that if it's not going to be critical. It's just bolstering an argument that can be made on other grounds for example. So it's a question of judgment and we hope that we're being fair.

Q. *If you were to give one piece of not-so-obvious advice to counsel that appear before you at a hearing, what would it be?*

A. Think about what the court will need, what it will be grappling with. We regard counsel as sources of assistance in deciding the case. Will spending 20 minutes on facts help the court? Not really. We've already read the briefs and know the facts. So how can you best help the court? Maybe it's by going to the most difficult issue you face. I'm not trying to give a prescription for how a case should be argued. It varies from case to case. But sometimes one gets the feeling that counsel are trying to bury the most difficult issue, or escape by it, and hope no one will notice. Well the chances are not good. In the spirit of being helpful to the judges, go to the most difficult part of the issue. Say 'Your honours, you will be grappling with this issue. It is a difficult issue. This is what I have to say about it, and this is why I believe you should decide that issue in favor of my client.' Give the judges the ammunition, the cases and the resources they need. **N**

— Yves Faguy

Un entretien avec la juge en chef

Beverley McLachlin se prononce sur l'activisme judiciaire, l'accès à la justice et donne quelques conseils aux avocats qui plaident devant sa cour.

Q. *Au cours des dix dernières années, votre perception du rôle de juge en chef a-t-elle changé?*

R. Un juge en chef dispose en fait d'assez peu de pouvoir. On me l'a dit quand j'ai été nommée : ils vous transmettent les rênes du pouvoir et vous mettez trois jours à découvrir qu'ils ne sont liés à rien. Vous pouvez cependant vous assurer que les juges ont tout ce dont ils ont besoin pour remplir le mandat qu'ils se sont fixé, qu'ils sont heureux, et tentent de promouvoir un climat de collégialité et de service envers les autres juges et envers la primauté du droit. J'étais aussi d'avis que la cour devrait — dans la mesure que lui permet

son rôle — s'ouvrir autant que possible au public et à la presse.

Q. *Vous inquiétez-vous, en dépit de vos efforts pour communiquer avec le public, de ce que la question de l'accès à la justice n'en soit une qui mine la confiance que le public porte au système juridique ?*

R. Cela joue en effet un rôle important dans le maintien de la confiance du peuple canadien. Nous avons un excellent système judiciaire. Si on le compare à d'autres pays, c'est un système assez rapide et pas horriblement dispendieux. Mais cela ne suffit pas. Nous devons faire plus et nous le faisons. Nous avons cependant appris que notre système est très complexe. L'administration de la justice est une compétence provinciale et varie d'une province à l'autre. En outre, elle a plusieurs visages. Ce qui fonctionne pour le droit de la famille peut ne pas convenir au droit des affaires. Le système de justice doit donc s'attaquer au problème d'accessibilité sur plusieurs fronts à la fois.

Q. *Quelle importance a l'application pratique des lois dans les décisions de la cour?*

R. Tous les juges de la cour y accordent une grande importance. Il nous incombe de penser à toutes les conséquences. Et nos ordonnances auront inévitablement des incidences, notamment pour les parties en cause. La portée de ces incidences est souvent plus importante encore, surtout lorsque vous traitez d'enjeux publics ayant une vaste portée, de questions constitutionnelles et ainsi de suite.

Q. *Avez-vous l'impression qu'il y a, ces jours-ci, moins de mécontentement des médias et du public au sujet de l'activisme de la cour?*

R. Oui, je crois, et je ne sais pas exactement pourquoi. Peut-être cela relève-t-il jusqu'à un certain point de la nature des problèmes. Durant les années 80 et peut-être aussi au début des années 90, nous étions en train de préciser la portée de nombreux droits et la cour n'avait que peu de repères pour ce faire. Parfois, ce que nous disions et faisions était perçu comme étant controversé. Dans certains dossiers, la controverse s'est éteinte et les critiques ont été réduits au silence parce que les propositions de la cour ont en fait bien fonctionné. D'autres dossiers sont venus par la suite, et nous avons repassé quelques plis qui pouvaient avoir été laissés. Ça peut-être que nous sommes, quant à la Charte, dans une période où il y a une plus grande acceptation et une plus grande certitude par rapport aux orientations générales.

Q. *À l'inverse, comment répondez-vous aux critiques qui affirment que la cour est maintenant trop timide et parfois trop respectueuse envers le gouvernement?*

R. Je ne crois pas que nous l'avons été. Nous traduisons la réalité telle que nous la percevons. De grandes causes dans les années 80 et 90 nous ont dit qu'en matière sociale, on devait s'en remettre au gouvernement. Si nous agissons ainsi de temps à autre, c'est simplement parce que c'est la jurisprudence qui l'établit. Je ne crois pas qu'il y ait du neuf là-dedans. Il ne s'agit pas de déférence, mais d'une conscience de la limite de nos pouvoirs, du rôle du Parlement, du rôle de l'Exécutif et du rôle des tribunaux dans la bonne gouvernance du pays.

Q. *Anticipez-vous de nouveaux enjeux qui influenceront la cour?*

R. Dernièrement, nous avons souvent traité de division des pouvoirs, domaine que nous n'avions pas beaucoup vu depuis un certain temps. On nous confie de plus en plus de causes sur l'application du droit traditionnel aux interventions ayant des composantes technologiques. Nous avons récemment étudié le fonctionnement d'un mandat de perquisition dans le contexte d'images sur un ordinateur — une question très difficile et intéressante. Comment définir la possession de données sur ordinateur? Nous examinons aussi la sécurité et les lois conçues pour assurer la sécurité de la société. Enfin, nous nous penchons sur un troisième domaine, sur ce que j'appelle les litiges de la diversité, qui mettent en cause différents groupes vivant côte à côte dans les mêmes communautés, les conflits qui surgissent et la manière dont ces groupes expriment leurs convictions religieuses.

Q. *Que se passe-t-il avant une audience? Les juges discutent-ils de la cause à l'avance?*

R. Quelquefois, mais souvent nous passons tellement de temps à lire et à nous préparer qu'il ne reste pas de temps pour une discussion élaborée. Aucune règle ne l'interdit cependant et, si deux juges ou cinq prennent le déjeuner ensemble, ils pourraient aborder une cause et échanger des points de vue. Mais ils ne la jugeront certainement pas à l'avance. Lorsque nous entrons dans la salle d'audience, nous n'en sommes encore qu'à un stade plutôt indéterminé. Votre prochaine question sera sans doute : « Les arguments oraux font-ils une différence? » En ce qui me concerne, la réponse est oui et continuera à être oui.

Q. *Si vous deviez donner, à un avocat qui doit plaider devant vous lors d'une audience, un conseil qui ne saute pas nécessairement aux yeux, que lui diriez-vous?*

R. Pensez à ce dont la cour aura besoin, ce avec quoi elle sera aux prises. Les avocats nous aident à rendre nos décisions; c'est ainsi que nous les voyons. Une discussion de 20 minutes des faits n'aidera pas vraiment la cour. Nous avons déjà lu les mémoires et connaissons déjà les faits. Alors, comment pouvez-vous mieux aider la cour? Peut-être en ciblant l'enjeu qui vous paraît le plus difficile. Je n'essaie pas de prescrire une certaine façon de plaider. Cela varie d'une cause à l'autre. Mais parfois nous avons l'impression que les avocats tentent de dissimuler l'enjeu le plus difficile ou de le passer sous silence en espérant que personne ne s'en aperçoive. Il y a peu de chance que cela se produise. Si vous voulez aider les juges, allez droit à la composante la plus difficile de la cause. **N**