Public Law at the McLachlin Court

The First Decade

David A. Wright and Adam M. Dodek, Editors
Table of Contents

FOREWORD
The First Decade of the 21st Century: The Supreme Court of Canada in Context vii
THE RIGHT HONOURABLE CHIEF JUSTICE OF CANADA BEVERLEY McLACHLIN, P.C.

Introduction: The McLachlin Court’s First Decade—A Dynamic Time for Public Law 1
ADAM M. DODEK AND DAVID A. WRIGHT

PART ONE: Broad Perspectives 7

Changing Course or Trimming Sails? The Supreme Court Reconsiders 9
THOMSON IRVINE

Les décisions de la juge McLachlin à la Cour suprême du Canada : une analyse statistique comparative 39
MARIE-CLAIRE BELLEAU, ANIK LAMONTAGNE, ET REBECCA JOHNSON

The McLachlin Court and the Promise of Procedural Justice 55
LORNE SOSSIN

PART TWO: Administrative Law 77

The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem? 79
DAVID J. MULLAN

Procedural Fairness at the McLachlin Court 115
FREYA KRISTJANSON

In Search of Coherence: The Charter and Administrative Law under the McLachlin Court 145
SUSAN L. GRATTON AND LORNE SOSSIN 145
PART THREE: Federalism and Aboriginal Law  165

The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court  167
PETER C. OLIVER

The Reconciliation Doctrine in the McLachlin Court: From a “Final Legal Remedy” to a “Just and Lasting” Process  201
CONSTANCE MACINTOSH

The Duty to Consult Aboriginal Peoples: Government Approaches to Unresolved Issues  235
LORI STERLING AND PETER LANDMANN

PART FOUR: Equality and Fundamental Freedoms  257

Le poids de l’histoire : les années McLachlin et la liberté de religion  259
NATHALIE DES ROSIERS

L’arrêt Kapp : L’interprétation du paragraphe 15(1) de la Charte (enfin) recentrée sur son objet égalitaire de non-discrimination  277
DANIEL PROULX

Collective Bargaining and Freedom of Association: Pondering B.C. Health Services  303
THOMAS KUTTNER, Q.C.

PART FIVE: The Old and the New: Criminal Law and International Law  327

Criminal Justice in the McLachlin Court: Many More Kudos Than Brickbats  329
DON STUART

International Law in the Jurisprudence of the McLachlin Court  391
JOHN H. CURRIE

LIST OF CONTRIBUTORS  429
When Beverley McLachlin was sworn in as the seventeenth chief justice of Canada on 7 January 2000, the Supreme Court was at somewhat of a crossroads. For several years, the Court had been accused of judicial activism, of being too eager to intervene in policy decisions that some felt were better left to governments than to courts. There were numerous blockbuster cases in the 1990s that garnered headlines, often negative, including Askov; Eldridge, and M. v. H. The Lamer Court was frequently divided, often producing fractured opinions rather than coherent statements of the law. Near the end of the decade, the Supreme Court came together to produce what many believed to be a Solomonic judgment in the Quebec Secession Reference.

Under such circumstances, it would have been easy for the members of the McLachlin Court to adopt a cautious or tentative approach. One commentator predicted that the principle of stare decisis would prevent the new chief justice from revisiting earlier court decisions. This has not been the case. In fact, as evident from many of the contributions in this volume, the McLachlin Court has shown a remarkable willingness to revisit earlier decisions across the spectrum of public law. In its first decade, the McLachlin Court was a Court on the move.

5 See Peter McCormick, Supreme at Last: The Evolution of the Supreme Court of Canada (Toronto: James Lorimer, 2000) at 158.
The McLachlin Court’s public law jurisprudence leads us to characterize the Court as “a dynamic court.” It was a court that was characterized by continuous change and activity. It has been a court that has reshaped existing doctrines and crafted new ones, such as the creation of the duty to consult in Aboriginal law. Elsewhere, the McLachlin Court has put the brakes on developments in other areas such as the unwritten constitutional principles, which, after the Secession Reference, held out the possibility of significantly refashioning constitutional law in Canada by adding a powerful weapon to the arsenal of constitutional litigators against government. However, with the McLachlin Court’s decision in Imperial Tobacco\(^6\) mid-way through its first decade, the Court poured cold water on the extent to which the unwritten constitutional principles could be used as an independent source of substantive rights.

La jurisprudence de la Cour McLachlin a attiré moins de publicité et moins de controverse dans les médias et auprès du grand public que celle de la Cour Lamer. Les jugements sont plus courts, et souvent contiennent moins d’élaboration de « grands principes » que certains jugements rendus par des Cours suprêmes précédentes. Les articles dans ce livre confirment que ce n’est pas à cause d’une réticence à prendre des décisions de grande portée ou à cause d’une absence de jurisprudence importante. Vingt-cinq ans après l’entrée en vigueur de la Charte et des arrêts qui ont révolutionné le droit public, tels que Nicholson,\(^7\) CUPE,\(^8\) Oakes,\(^9\) Sparrow,\(^10\) et Sault Ste. Marie,\(^11\) le rôle de la Cour est différent, mais encore significatif.

Many of the contributions to this volume, both about general developments and particular areas of law, take up the theme of the Court’s willingness to reconsider previous jurisprudence. This book had its origins in a CBA Conference on the McLachlin Court held in Ottawa in June 2009. We also issued a national call for papers and we were fortunate in the quality and the scope of the papers that we received. Each paper was subjected to a peer-review process and we thank the anonymous reviewers who were kind enough to contribute to this book through their work.

We each consider ourselves public law lawyers and scholars and we acknowledge the breadth of the field of public law. This book focuses on con-

---


stitutional and administrative law decisions of the McLachlin Court. Thus, it does not include contributions on many important areas of public law: environmental law, immigration law, child protection, municipal law, tax, copyright, and similar areas. Sanda Rogers and Sheila McIntyre have recently published a book focusing on social justice issues at the McLachlin Court, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*. For us to cover the span of public law would have filled several volumes and that project likely would not have been completed until the end of the McLachlin Court’s second decade. Instead, our goal was to focus on familiar and often debated areas of constitutional law and administrative law in which the Court was particularly active and provide a basis for continued discourse in these areas. We leave discussion of other important areas of public law to future conferences and future books.

We are fortunate that the chief justice permitted us to publish her keynote address that was delivered at the CBA Conference on her first decade as chief justice. Entitled “The First Decade of the 21st Century: The Supreme Court of Canada in Context,” the chief justice’s comments and insight provide the perfect framework for the consideration of her Court’s public law jurisprudence over that time.

The first section of the book addresses broader themes in the McLachlin Court’s public law jurisprudence that are then later taken up in relation to specific areas of law. Thomson Irvine examines ten key decisions where the McLachlin Court reconsidered earlier doctrine, asking whether the Court was changing course or simply “trimming its sails.” Marie-Claire Belleau, Anik Lamontagne, and Rebecca Johnson provide a statistical analysis of the McLachlin Court’s decisions. In “The McLachlin Court and the Promise of Procedural Justice,” Lorne Sossin demonstrates the Supreme Court’s propensity under McLachlin C.J. to focus on procedural frameworks when complex substantive issues are brought before it.

Our next section focuses squarely on administrative law. David Mullan analyzes the continually changing standard of review of administrative decisions, asking whether the McLachlin Court has soothed this major irritant or whether it persists as an ongoing problem. Freya Kristjanson addresses an issue that she argues, in contrast, has not received sufficient attention from the Court: procedural fairness. Susan Gratton and Lorne Sossin examine the intersection between the *Charter* and administrative law, searching

---

12 Sanda Rogers & Sheila McIntyre, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis, 2010).
for coherence in the analytical approach to the intersection of these overlapping areas of public law.

The next section focuses on issues that could be described as “non-
Charter constitutional law.” In his article on federalism, Peter Oliver argues that the McLachlin Court has continued the trend of its predecessors in encouraging flexible, co-operative federalism whereby legislation is generally upheld and disputes allocated to the intergovernmental process. It is another area in which the Court has been willing to reconsider previous jurisprudence, significantly narrowing the doctrine of interjurisdictional immunity in *Canadian Western Bank*\(^ {13} \) and *Lafarge*.\(^ {14} \) Our next two chapters address the most important developments in Aboriginal law at the McLachlin Court. Constance MacIntosh analyzes the transformation of the doctrine of reconciliation from a limit on Aboriginal rights in the jurisprudence of Lamer C.J., to an obligation for the Crown to consult and work with Aboriginal peoples in the jurisprudence of the present Court. Lori Sterling and Peter Landmann examine the practical implications of the development of the duty to consult, specifically from the perspective of government.

Turning to the Charter outside of the criminal context, Nathalie Des Rosiers examines the McLachlin Court’s freedom of religion jurisprudence. On equality, Daniel Proulx examines the landmark decision of *R. v. Kapp*\(^ {15} \) and how it recentred the section 15 inquiry on non-discrimination. Moving to another landmark decision, Thomas Kuttner reflects on the *B.C. Health Services*\(^ {16} \) decision and the right to freedom of association under the Charter.

In the last section of this volume, our contributors address the old and the new at the Supreme Court. Criminal law has always been a public law mainstay of the Supreme Court of Canada. It has remained a priority for the McLachlin Court and in Don Stuart’s comprehensive assessment of the McLachlin Court’s criminal justice jurisprudence, there are many more positive developments than negative ones. Over the past several decades, international law has played an increasingly important role at the Supreme Court of Canada. John Currie analyzes the use of international law in the jurisprudence of the McLachlin Court and its relationship with Canadian law. Currie concludes that the McLachlin Court has clarified certain issues

---

but there are others that remain open, it is hoped, to be addressed by the McLachlin Court in its second decade.

Les trois articles introductifs proposent des thèmes principaux qui reviennent au cours du volume. Comme l’indique Irvine, la Cour a changé de façon significative certains principes importants du droit administratif, du fédéralisme, du droit autochtone, de l’égalité, et de la liberté d’association. La plupart des auteurs sont d’avis que les modifications apportées à la jurisprudence dans ces domaines sont positives. L’étude de données statistiques par Belleau, Lamontagne et Johnson met lumière sur l’influence de la juge en chef elle-même; comme le souligne certains autres articles, l’importance évidente des jugements qu’elle a écrit elle-même confirme son rôle important dans le développement du droit public canadien. Sossin met l’emphase sur la tendance de la Cour à ordonner des procédures de discussion et négociation au lieu d’imposer des correctifs substantifs spécifiques. D’autres articles, surtout ceux qui concernent le droit administratif, le droit autochtone et la liberté d’association font une évaluation préliminaire de l’efficacité de cette approche dans des domaines de droit particuliers.

We are grateful for the work of our contributors, both for meeting tight deadlines and for their patience in dealing with a collective endeavour such as this one. We also thank Jeff Miller, president of Irwin Law, for his interest and support for this project. Irwin Law continues to expand and strengthen the field of legal scholarship in Canada. We had the assistance of a fabulous University of Ottawa law student, Samantha Newton, in the editing of this manuscript and our colleague and friend Michelle Flaherty assisted us with the editing of the French portions of the manuscripts with her usual combination of expertise, diligence, and good humour. Thank you so much, Michelle. Both of our families were patient with us as we poured over manuscripts, held conference calls, and coordinated emails. We appreciate their support in everything we do. Lastly, we are united by a strong public law force who brought us together and continues to inspire us. We each clerked for Claire L’Heureux-Dubé J. and her passion for public law and for justice was infectious. Madame, from each of us, thank you for everything. You often instructed us on the need to “frapper quand le fer est chaud” (“to strike while the iron is hot”). In compiling this collection, we have tried to do just that.

This volume attempts to capture the dynamism of the McLachlin Court. In many ways, this endeavour is like trying to describe the route travelled and the location of a vehicle that is still in motion. We leave it to the reader to judge the success of our endeavours. In any event, whether the second decade of the McLachlin Court will prove to be as dynamic as the first or
whether it will be a time of consolidation remains to be seen. Those judgments and that book remain to be written.
Public Law at the McLachlin Court: The First Decade

DAVID A. WRIGHT AND ADAM M. DODEK, EDITORS

Beverley McLachlin was sworn in as the seventeenth Chief Justice of Canada on 7 January 2000. This book focuses on constitutional and administrative law decisions rendered in the first decade of the McLachlin Court. It includes contributions in both English and French from leading scholars who examine the Court’s legacy in areas such as federalism, Aboriginal rights, Charter rights such as equality and freedom of association, criminal law, and public international law. The book provides authoritative insight into the many important judgments that helped to define or redefine the Canadian legal landscape in the first decade of the twenty-first century as well as a glimpse into what Canadians might expect from our highest Court in the years ahead.

ISBN 978-1-55221-214-1 • SOFTCOVER • 430 PAGES • OCTOBER 2011 • $85.00

ORDER FORM

<table>
<thead>
<tr>
<th>ISBN</th>
<th>Title</th>
<th>Price</th>
<th>Qty</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
<tr>
<td>978-1-55221-214-1</td>
<td>Public Law at the McLachlin Court: The First Decade</td>
<td>$85.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[Image of book]

We acknowledge the assistance of the OMDC Book Fund, an initiative of Ontario Media Development Corporation.