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Working with Bertha Wilson: Perspectives on Liberty, Judicial Decision-Making and a Judge's Role

Robert Yalden*

I. INTRODUCTION

My first conversation with Bertha Wilson took place in the spring of 1989. The Supreme Court of Canada had just received authorization to increase its complement of law clerks from two to three per judge in order to assist it in dealing with a workload that had grown substantially since the advent of the *Canadian Charter of Rights and Freedoms*.¹ As candidates normally applied a year and a half before the start date, the justices were particularly anxious to secure a third clerk each for the rapidly approaching autumn 1989 session.

I remember very little about that first conversation: it was brief and not particularly substantive. But one thing has always stuck in my mind: my surprise at hearing a strong Scottish accent at the other end of the line. This was a revelation! I had studied Bertha Wilson's jurisprudence with enormous interest, seen photos of her and read articles praising and criticizing her. But I had never heard her give a speech or an interview. Bertha Wilson's judicial accomplishments were significant and she will also rightly be remembered as the first woman appointed to the Supreme Court of Canada. But my first conversation with her drove home in a very real way another dimension of her legacy that it is easy to forget: hers was also a remarkable story of a Scottish immigrant's extraordinary success in a new country.

* Partner, Osler, Hoskin & Harcourt LLP. I wish to thank Leslie-Anne Wood for her assistance with the preparation of this article.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

Bertha was quick to get to the point. Would I be ready to start that September? She need hardly have asked. And so began an extraordinary journey: from law student reading and analyzing her pronouncements, to law clerk working with her to craft judgments as she wrestled with some of the most challenging questions to come before the Court during what was, as it turned out, her last full year on the bench.

I mention this last point because she was by this stage one of the most senior judges on the Supreme Court of Canada, having joined the Court in 1982 as the Charter was first being tested. My good fortune, then, was to work with Bertha Wilson when she was at the peak of her judicial career — fully engaged, intellectually alert, remarkably disciplined and extremely hard working. More than this though, she was by this time very well versed in the ways of our highest Court. As a result, she had a finely developed understanding of how to make the most of the resources at her disposal in order to shape aspects of debates before and within the Court that she felt required careful consideration.

To this I should add that it was also a time when the Court was still putting in place foundational concepts and methodologies for Charter analysis. This presented unique challenges and required a heightened understanding of the Court's role in a democratic structure that had just undergone profound transformation. Indeed, one of the enduring lessons of my experience working with Justice Wilson was the extent to which the legitimacy of the Supreme Court of Canada rests on the shoulders of the individuals appointed to that Court and on their understanding of the Court's role in our parliamentary democracy.

Justice Wilson was of course a judge who provoked strong reactions in many quarters. This is no surprise: her reasoning was frequently forceful and she was a deeply principled person. All too often, however, commentators have allowed their disagreement over the outcome of a given case to colour their assessment of her understanding of the judge's role in our constitutional framework, suggesting that she was a "judicial activist". This is unfortunate. For surely the measure of whether a judge has properly grasped his or her constitutional role is not a function of whether one agrees or disagrees with a particular judgment in a particular case — or even in a series of cases. The issue that one must properly begin with is what approach a judge uses to reach a given conclusion and whether that approach reflects a full appreciation of the role and responsibilities that we expect judges to discharge.

My concern in this article is not to resolve, once and for all, whether Bertha Wilson was or was not a "judicial activist". While the article will

offer some observations with respect to this question, many will no doubt continue to debate the matter for years to come. In any event, it is not entirely obvious that the term “judicial activist” has anything approaching a widely accepted meaning. It is something of a normatively loaded term that is more likely to cloud issues than to assist in clarifying the contours of a particular judge’s understanding of their constitutional role. My goal is instead a more modest one: to provide the reader with some perspective on how, in practice, Bertha Wilson approached judicial decision-making and what this tells one about her understanding of a judge’s role. That will not resolve broader debates about whether her views on these matters were sound. But in my view it is an exercise that sheds valuable light on her understanding of the limits of the judge’s role and that offers the prospect of a more textured discussion about what it is appropriate for a judge to consider and to do when engaged in judicial decision-making.

Over the course of my year with Justice Wilson, I worked on a large number of cases that touched many different areas of law. These included cases involving criminal law, evidence, administrative law, the division of powers, language rights, family law, the law of torts, banking law, insurance, civil law — and the list goes on. Especially challenging and rewarding were a number of cases involving Aboriginal rights under different treaties and the first case in which the Supreme Court set out its approach to Aboriginal rights under section 35 of the Charter.² These allowed me to work closely with Justice Wilson on an area that we both cared about deeply and that would feed directly into her subsequent work as a member of the Royal Commission on Aboriginal Peoples. The Aboriginal rights cases also gave me particular insight into her strong sense of compassion and her view that courts in Canada had an important role to play in ensuring that rights that had all too often been completely ignored were given full recognition.³

For purposes of this article, however, I have selected a handful of significant Charter decisions concerning freedom of expression that seem to me to provide particular insight into her way of approaching

² These included *R. v. Sioui*, [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025 (S.C.C.); *R. v. Horseman*, [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.) and the first case in which the Supreme Court of Canada set out its approach to Aboriginal rights under the Charter: *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter “*Sparrow*”].

³ For a discussion of my work with Justice Wilson on these cases, see: Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 193-96.

hard cases and her view of a judge's role under our Constitution. What I hope to convey is that her very way of working through these cases tells one something about her understanding of the business of judging and about the limits of the Court's role in the development of the law. These are not points that she set out in a list of "dos and don'ts" — they are observations concerning both the strategies that she used to tackle difficult cases and what she saw as the boundaries within which she had to operate.

II. SETTING THE SCENE: PERSPECTIVES ON WILSON'S UNDERSTANDING OF THE JUDICIAL ROLE

As noted above, some have argued that Justice Wilson was a "judicial activist". For example, in a piece published in 1995 Robert Hawkins and Robert Martin argue that Justice Wilson failed to respect the limits which should constrain judicial review in a democratic society. They suggest that she had an expansive view of the role of the courts under the Charter that was at odds with the intentions that were those of the Charter's framers and that appropriated a quasi-legislative role for the judiciary. They claim that Justice Wilson developed strategies for Charter analysis that were divorced from principle and based on a subjective theory of interpretation. In their view, Justice Wilson used "judicial review as a vehicle for promoting her personal, ideological agenda. In so doing, she became the most political Supreme Court judge in Canadian history. She did not simply transgress the boundaries that restrain the behaviour of judges in a liberal democracy, she denied their existence".⁴

Others have suggested that if she was at times seen as a "heretic", it was because her judicial philosophy was anchored in a conception of liberty that led her to approach Charter interpretation from a perspective that was on occasion at odds with that of her colleagues.⁵ Justice McPherson argues that "[i]t is clear from the cases that Justice Wilson regards liberty as one of the most important values in a democratic society".⁶ He goes on to argue that he believes "that Justice Wilson's

⁴ R.E. Hawkins & R. Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1, at 13.

⁵ James MacPherson, "Canadian Constitutional Law and Madame Justice Bertha Wilson — Patriot, Visionary and Heretic" (1992) 15 Dalhousie L.J. 217, at 237 [hereinafter "'Canadian Constitutional Law and Justice Wilson'"].

⁶ *Id.*, at 237.

distinctive or heretical positions can be explained by the belief, shared with several of her colleagues but held by her in a more absolute fashion, that the *Charter* really was intended to impose new and important constraints on government”.⁷

There is no doubt that Justice Wilson was steeped in a particular conception of liberty that traces its roots to John Stuart Mill and that this had an impact on her thinking about the Charter. Indeed, she often referred to Mill in her reasons. For example, in her 1986 decision *R. v. Jones* she wrote:

I believe that the framers of the Constitution in guaranteeing “liberty” as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his character, to make his own choices for good or for ill, to be non-conformist, idiosyncratic and even eccentric — to be in today’s parlance, his own person and accountable as such. John Stuart Mill described it as pursuing our own good in our own way.⁸

This perspective would wind its way through other judgments, including ones that were the focus of considerable attention and controversy.⁹

One should not, however, assume that a distinctive approach is synonymous with an activist or heretical approach. Justice Wilson’s approach to many issues was rooted in a perspective on liberty that represents an essential strand in the way in which we think about Charter issues. It is difficult to view J.S. Mill as holding a perspective on liberty that we would today view as heretical or “opposed to official or established views or doctrines”.¹⁰ Indeed, in an article that I wrote two years prior to becoming a law clerk to Justice Wilson, I suggested that J.S. Mill’s view was instead part of a deeply rooted and rather classical tradition. I then examined the way in which the Court’s earliest Charter jurisprudence was wrestling with this classical vision of liberty and a vision of liberty that was shaped by, but moved beyond, this perspective.¹¹

⁷ *Id.*, at 239.

⁸ [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at 318 (S.C.C.).

⁹ See, for example, her observations on liberty in *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 164-67 (S.C.C.).

¹⁰ “Canadian Constitutional Law and Justice Wilson”, *supra*, note 5, at 237.

¹¹ R. Yalden, “Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty” (1988) 47(1) U.T. Fac. L. Rev. 132.

The article did, however, go on to note that while some judges such as Justice Lamer were deeply wedded to a vision of liberty that was limited to the classical vision of rights as existing to protect a form of negative liberty — that is, freedom from state intrusion in a person's life — other judges such as Justice Wilson and Chief Justice Dickson had showed openness to the proposition that “the public-private boundary is rather more artificial than those who speak the language of hard edged rights suggest”. I then noted that certain propositions found in Justice Wilson's early Charter jurisprudence suggested that Canadian constitutional thought might well be “able to accommodate a vision of individuals' relations with society that sees society as able to make a worthwhile contribution to an individual's self-realization, and not simply as an enemy to be kept as far away as possible from private spheres”.¹²

Little did I realize at the time I wrote this article that I would come to see in person just how hard Justice Wilson was wrestling with this evolving vision of liberty. For while she was acutely sensitive to the need to limit state intrusion in the private sphere, she was also aware that the public-private distinction had blurred as the role of the state had evolved and that, as a result, the state in our democracy was often called upon to establish background conditions essential to enabling individuals to realize their full potential. That said, I also had not realized prior to working with her that she felt strongly that her role on the Court constrained the extent to which she could move to embrace a vision of liberty that was rooted not solely in a conception of negative liberty, but that made space for the role of the state in fostering a more positive conception. As we will see, my thoughts as a young and rather idealistic law student about the potential for Charter jurisprudence to move toward a more expansive and textured vision of liberty would soon bump up against the complex reality of the institution of which Bertha Wilson was an essential part and, even more significantly, against Bertha Wilson's own understanding of the ways in which being part of that institution meant that she should approach the business of judging.

These constraints came into focus as I worked with her on a series of significant Charter decisions. First I was exposed to the care that she took to craft decisions that she felt gave rise to important methodological questions, a lesson I learned in spades working with her on *Edmonton*

¹² *Id.*, at 154.

Journal.¹³ Then I saw how this care led her to tread carefully when she felt that she was approaching terrain that would take the Court beyond long-established conceptions of liberty, be it in the *Prostitution Trilogy*¹⁴ or in cases such as *Keegstra*¹⁵ that dealt with hate speech. At the same time, I saw her concerned to ensure that the care shown not to get out ahead of our community's most deeply held values not blind the Court to the reality that these values necessarily evolve over time and that the role of the state has also evolved, a point that emerged clearly in cases concerning mandatory retirement. Let me turn, then, to each of these episodes.

III. WILSON'S DECISION-MAKING IN PRACTICE

1. Freedom of Expression — Round 1: *Edmonton Journal*

The first substantive case that I was called to work on with Justice Wilson was *Edmonton Journal*. The question at issue was whether section 30(1) of the *Alberta Judicature Act*¹⁶ (a provision enacted in 1935) contravened the right to freedom of the press found in section 2(b) of the Charter. The provision prohibited the publication of any detail relating to matrimonial proceedings other than the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences, counter-charges and legal submissions; and the summing-up of the judge, the findings of the jury and the judgment of the court.

Oral arguments had been heard in March 1989 and I had not been involved in any previous discussion of the case in Justice Wilson's chambers. Indeed, I had heard little about the case until I arrived at the Court in September of that year, only to have Justice Wilson hand me two sets of reasons: one that Justice Cory had circulated among the justices finding a breach of section 2(b) of the Charter that could not be

¹³ *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter "*Edmonton Journal*"].

¹⁴ *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.); *R. v. Skinner*, [1990] S.C.J. No. 51, [1990] 1 S.C.R. 1235 (S.C.C.); *R. v. Stagnitta*, [1990] S.C.J. No. 50, [1990] 1 S.C.R. 1226 (S.C.C.) [hereinafter "*Prostitution Trilogy*"].

¹⁵ *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"].

¹⁶ R.S.A. 1980, c. J-1 [now R.S.A. 2000, c. J-2].

justified under section 1 of the Charter; and another that Justice La Forest had circulated finding that while there was a breach of section 2(b), this could be justified under section 1. My task was to write a memorandum examining the nature of the values that the judgments addressed. I was given very little indication of what might be on Justice Wilson's mind, other than that she was not entirely certain that either judgment had adequately captured the way in which the values in issue came into play in this case. She had signalled that she saw merit in Justice Cory's decision, but was not certain that she was comfortable with how he had arrived at his conclusion.

Anxious not to disappoint, I set about reading, researching, analyzing and then writing a memo which I served up a little later that same month. The memo suggested that the first value at play was the need for open trials and that there were arguments over and above those that Justice Cory had set out that could be made in favour of this value (which he had linked principally to the desirability that the public know what is taking place in court), arguments that were related to the importance that the litigants themselves might place on a public trial. The memo also examined Justice La Forest's analysis of the right to privacy, suggesting that privacy arguments were not sufficiently compelling in this instance to justify as broad a prohibition on publicity as the one found in section 30(1) of the *Judicature Act* and that it was not difficult to envisage a more carefully tailored provision that would prohibit publicity when certain kinds of allegations (*e.g.*, sexual abuse of children) were involved. Finally, the memo took issue with Justice La Forest's view that a "reasonableness" test of the kind seen in *Irwin Toy*¹⁷ should be imported into the section 1 Charter analysis, such that the legislature would be afforded "reasonable leeway" when engaged in the kind of line drawing at play in this instance.¹⁸

On October 4, 1989 we met to discuss the case. She explained to me that she had been reflecting for some time about there being at least two possible approaches to Charter interpretation: one that looked at a value in a general way and then turned to the case; and a second that would look more carefully at the context in which the value was engaged before elaborating on the nature of that value. Her concern was that the rights and freedoms set out in the Charter were broad concepts. She wanted to

¹⁷ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

¹⁸ *Edmonton Journal*, *supra*, note 13, at 1380-81.

see whether it was possible to generate greater precision with respect to that aspect of a given right or freedom that was actually at play in a given case before embarking on an analysis of the significance of that right or freedom. She felt that this was important because it might then enable one to engage in a more finely calibrated weighing of the values or interests at play. Hers was a search for a method of Charter analysis that would result in greater precision and clarity regarding the reasons why, and the ways in which, values were engaged in any given case.

We then began to review the reasons that were circulating. Justice Wilson told me that she felt Justice Cory had used the first approach. As a result, one was provided with a lengthy discussion of the importance of freedom of the press that was rather abstract and that centred on a dimension of the Charter value (freedom of the press) that many might feel was not seriously affected by the legislation that was being challenged. In turn, Justice La Forest had embraced Justice Cory's abstract analysis of freedom of expression before turning to his own general discussion of the right to privacy, once again dealing with the concepts of autonomy and privacy interests at a level that was not firmly grounded in the context of the case.

Our discussion turned to the dimensions of the values engaged in this instance. We considered aspects of the privacy concern that the legislation was *not* intended to deal with: this was not a case about the invasion of a person's home or physical body or the dissemination of personal information without that person's consent. Rather, the concern we identified was one relating to the potential embarrassment that the person might feel if details of evidence were published. There was also a concern that third parties, such as children, might be hurt if certain evidence were published.

We then examined the values that the legislation might be thought to infringe. We discussed the desire that litigants themselves might have to see details on evidence published so that their story was made public, as well as the importance of being heard in an open setting accessible to the community. We considered the evidentiary process and arguments that writers such as Bentham and Wigmore had put forward to the effect that evidence was more likely to be truthful if the courtroom is open and susceptible to public scrutiny. Finally, we looked at the value of the public knowing about the details of evidence in given cases.

After the meeting, I made a point of summarizing our discussion so that we would have something in writing that captured the principal points we had covered and that we could use as we moved forward. The

task was now to turn all of this into a draft judgment. I hasten to add that at no point in our discussions had Justice Wilson allowed whatever views she might have had on what the outcome of the case should be to distract us from the task at hand. This was not the last time that I would be struck by her preoccupation with ensuring that what she believed to be the right approach or method of analysis was well articulated and clearly laid out before she turned her mind to the results that an application of that approach might yield.

With our conversation fresh in my mind, I prepared a first draft. Justice Wilson then took that draft and proceeded to rewrite it extensively. This was an iterative process: she used the draft as a way to decide what she did or did not want to say and to refine the concepts that had first been laid out while we had discussed the matter. The end product did not look much like what I had first written. At the time I no doubt thought that I had missed the mark and failed to understand what she was after. But as the year unfolded I would develop a much better appreciation of her approach to decision writing, coming to understand that I was there to prepare a draft that would get the ball rolling and that she would then use this as a way to test her own ideas — rolling up her sleeves and writing extensively as she reflected on what she liked or did not like about her clerk's efforts to articulate her thoughts. Sometimes her clerks did a good job of capturing where her reasoning was taking her and sometimes they did not. But this was not solely a function of her law clerks' skills; indeed, it was often a function of how well developed her own thoughts were. Very often, we were witness to and participated in her struggles to give structure and content to thoughts that had been bubbling away for some time but still lacked clear definition. Draft after draft of a judgment would serve to clarify matters slowly but surely.

She worked very hard on the opening section of the decision entitled "Methodology of *Charter* Application" — a section that had been entirely absent from the draft that I had prepared. As she wrote, her ideas came into greater focus. She characterized Justice Cory's approach as an abstract approach that determined the values in play at large. She felt that he had not adequately captured the fact that the values at stake in this case were the right of litigants to the protection of their privacy in matrimonial disputes and the right of the public to an open process.

Justice Wilson reached back to an earlier case that she thought had failed to balance particularized values — that is values identified in context — at times weighing two generalized values or a generalized value against a particularized value. In her mind, the challenge was to

ensure that all values or interests at stake in a case had been properly particularized. More particularly, she spoke of *Re Public Service Employee Relations Act (Alta.)*,¹⁹ where she felt that unlike the majority judgment Chief Justice Dickson's dissent had made use of a combined purposive and contextual approach to the issues in that case, asking himself what the purpose of freedom of association was in the context of labour relations. I realized now that her preoccupation with the methodological issue she was wrestling with dated back some time (in fact, it can be traced back to at least 1985)²⁰ and that the Chief Justice's analytic approach in that case had resonated with her. Indeed, in our conversations she had come back to this case repeatedly as something of a touchstone for her thoughts on the methodological issues she was now so keen to speak to. Building on her review of what had gone on in that case — a majority had in her view followed an abstract approach, while the Chief Justice had used a contextual approach — she went on to say that “[t]he contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it”.²¹

Her judgment then sought to apply the method that she had just laid out. She first discussed the importance of an open court process, drawing now more extensively on material that I had set out in the draft I had prepared — yet constantly refining and reworking sentences so that they came to reflect her style of writing and accurately expressed her ideas. She laid out a series of reasons why an open court process was important, noting that “not only is an open trial more likely to be a fair trial but it is also *seen to be* a fair trial and thereby contributes in a meaningful way to public confidence in the operation of the courts”.²² She concluded that the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in “the need 1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in

¹⁹ [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.).

²⁰ See Bertha Wilson's reference to, and discussion of, the “contextual approach” in her 1985 speech “Decision Making in the Supreme Court” (1986) 36 U.T.L.J. 227, at 245.

²¹ *Edmonton Journal*, *supra*, note 13, at 1355-56.

²² *Id.*, at 1360.

the courts affects them”.²³ She also noted that the litigants themselves might have an interest in a public airing of the injustices that they feel they have suffered alone and without any support in the community.²⁴ These were points that we had discussed, but she had now categorized and organized them in the way that she thought made the most sense.

The arguments in favour of an open court process were therefore strong. The question was what might justify putting restrictions in place. She agreed with Justice La Forest that concerns about privacy were at play, but it was “important to identify what aspect of the broad concept of privacy is actually engaged by the impugned legislation”.²⁵ In this instance, she was of the view that the legislation in question was an effort to “afford some protection against the embarrassment or grief or loss of face that may flow from the publication of the particulars of one’s intimate private life disclosed in the courtroom”.²⁶ But not everyone would be of interest to the press and in many instances matrimonial cases, although difficult for the parties concerned, would not necessarily attract much public attention. Ultimately, she was of the view that while “matrimonial litigation may well involve allegations of cruel, immoral and aberrant behaviour which may, as La Forest J. points out, adversely impact on the children of the marriage, I think that legislation seeking to address that concern should do so specifically or through the grant of judicial discretion and should be strictly confined to that narrow range of cases”.²⁷

With the values now more clearly defined or “particularized”, Justice Wilson set out to weigh these competing interests. She agreed with Justice Cory that while the protection of privacy was a legitimate objective and the impugned legislation was rationally connected to this objective, the legislation lacked the required degree of proportionality. Only a relatively limited percentage of matrimonial cases could be expected to involve evidence whose publication would cause severe emotional and psychological trauma and public humiliation for the parties and/or their children. While such cases might well justify bans on publications, the problem in this instance was that the legislation went further than that — sweeping in cases where no such concerns were at

²³ *Id.*, at 1361.

²⁴ *Supra*, note 13, at 1361.

²⁵ *Id.*, at 1362.

²⁶ *Id.*, at 1363-64.

²⁷ *Id.*, at 1367.

stake. As a result, she concluded that the legislative provision at issue could not be justified under section 1 of the Charter.

It is worth noting that Justice Wilson had chosen *not* to pick up a theme that I had first developed in my September memo to her, and again worked into several pages of the draft judgment that I had served up, concerning the way in which Justice La Forest had emphasized the need for the legislature to have reasonable leeway when line drawing. What was and remains striking to me about this aspect of her judgment was that she was at all times focused on the application of the methodology that she had developed and the need for careful balancing. She was not interested in getting into a debate with Justice La Forest about whether to inject an added layer of deference into section 1 analysis, choosing instead to apply the *Oakes* test²⁸ as initially conceived and to focus on the balancing exercise her approach had led her to. Often overlooked, it seems to me, was her commitment to respect foundational principles of Charter interpretation that the Court had recently put in place. She regularly eschewed others' efforts to revisit or qualify these foundational Charter decisions.

The month of November saw us exchanging memos and holding further discussions about her draft judgment. In the process, I did an exhaustive review of literature on the Charter to see if anyone had previously developed the concept of a contextual approach to Charter analysis. In a memo in early November, I noted that while the terms "context" and "contextual approach" had been used by others, the terminology had not been used in a consistent fashion and different authors had meant different things when they used the term. I ventured that she might want to consider making the methodological point that she wished to put forward without using the term "the contextual approach", lest it lead people to confuse the points she wished to make with what others had had to say when using the term. I heard nothing back on this and knew better than to push the point! In retrospect, however, I must confess that I have often wondered if the method she was elaborating would not have been more readily understood and consistently applied by others if the term "contextual approach" had not been used.

By mid-November we were refining the judgment and weaving in some final points. In response to concerns that she had about particular aspects of the draft, we reworked specific paragraphs. I provided her

²⁸ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

with a detailed memorandum raising questions about various points in the draft and she considered these observations, adjusting the judgment where she felt it appropriate to do so. One last memo went in on some minor points at the end of November. References and citations were double checked. The decision was then ready to go and promptly circulated to her colleagues.

The time that it had taken to work through the methodological points that Justice Wilson wished to make had resulted in others on the Court gravitating towards the reasons that Justice Cory and Justice La Forest had already circulated. Ultimately, the position that Justice Cory had put forward would garner support from the Chief Justice and Justice Lamer. Justice Wilson's reasons had come late in the piece. But she knew that she was writing with an eye to making what she felt was an important methodological point and was determined to work through that point carefully, regardless of any strategic considerations. Indeed, I do not recall her ever approaching the business of judging with an eye to trying to win a majority or persuade a given judge to support her. She simply focused on what she felt was the right approach and was quite prepared — indeed felt obliged — to write separate reasons when necessary in order to ensure that what she felt was the right method for tackling a problem was on the record.

2. Freedom of Expression — Round 2: The *Prostitution Trilogy*

The lessons that I had learned while working on *Edmonton Journal* were simultaneously being reinforced in a series of cases sometimes known as the *Prostitution Trilogy*:²⁹ three cases that also provide a fascinating window into the way in which Justice Wilson approached difficult cases and the way in which she would consider arguments carefully, yet avoid going down paths that seemed to her to push the envelope further than was appropriate given the constitutional role that the Court was called upon to play. The issue at the heart of these cases was whether a section of the *Criminal Code*³⁰ (section 195.1(1)(c)) which prohibited communicating in public for the purpose of prostitution and another section (section 193) which prohibited the keeping of a common bawdy-house infringed section 2(b) and section 7 of the Charter.

²⁹ *Supra*, note 14.

³⁰ R.S.C. 1985, c. C-46.

Oral arguments were heard in December, 1988. Upon my arrival in September 1989, and as had been the case with *Edmonton Journal*, I discovered both that I was walking into a process that had been unfolding for some time and, more intriguingly, that Justice Wilson's thoughts on the matter were still a work in progress. Justice Wilson's approach was interesting: she did not sit me down and say here is what I have decided about one aspect of the case, but here is where I am still trying to make up my mind, so help me with the following issue. Rather, she was still considering multiple points of view and evaluating different ways in which one might come at the very difficult issues in play. Nor did she ask me to run off and provide her with a memo giving her my thoughts on the "right answer" to the case. She asked me instead to give her my thoughts on how best to shape a method of analysis for dealing with cases in which it was argued that there had been a breach both of the right to freedom of expression found in section 2(b) of the Charter and of the right found in section 7 of the Charter not to be deprived of liberty except in accordance with the principles of fundamental justice. This was not the last time that I would discover that Justice Wilson had already been thinking for many months about an issue and that her asking me to produce a memo was really just a step in forcing herself to crystallize her thoughts on the matter. What I realized only in retrospect was that Justice Wilson saw this case as one that involved important issues of principle concerning the interaction between the concept of fundamental justice in section 7 and other Charter rights that might come into play in a case. But in September 1989, she was still reflecting on how best to approach this question.

Though it was not immediately obvious to me, Justice Wilson was also making use of one of her law clerks in a way that was of a piece with the approach that she would take time and time again throughout the year. She would ask us to develop positions that she would then weigh and assess, feeding the outcome of that analysis into a process of thinking that had already been underway for some time — always with an eye to seeing whether the position was one that might have merit and, just as importantly, whether it was one that it would be appropriate for her to embrace given the nature of the institution of which she was a part. Often she would leave our carefully considered analysis to one side. While it was no doubt disappointing at first to realize that one's efforts had not met with resounding approval, with time I came to see that the efforts were not without importance: Justice Wilson was a strong believer in the need to test positions, ensuring they had had a full

hearing. If she did not embrace a position, the exercise of having considered it fully would help her develop increased comfort with the alternate route that she was taking. For better or worse, we are generally unaware of the paths that judges consider but decide not to go down. Yet it has often seemed to me that these decisions — so rarely recorded — can shed much light on a judge's conception of her role and responsibilities.

Justice Lamer circulated his draft reasons first. They were lengthy, running some 74 pages. He was determined to make clear that in his view section 7 was there to protect liberty and security of the person in the sense that the criminal law had sought to protect these principles through the years and that there was no room for section 7 to protect so-called economic rights. This was certainly consistent with the vision of negative liberty that I had suggested Justice Lamer subscribed to in the article that I had written in 1987. Interestingly, Justice Lamer referred to the very passage from *R. v. Jones*³¹ in which Justice Wilson had cited John Stuart Mill. In a rather surprising twist, he then went on to suggest that a perspective of the kind Justice Wilson had set out in *R. v. Jones* was reflective of “several leading American decisions that have dealt with the definition of liberty in the context of the Fourteenth Amendment to the United States Constitution”³² and that were prepared to embrace a conception of economic liberty. He contrasted this with Canadian jurisprudence, which he suggested had decided that liberty “does not generally extend to commercial or economic interests”.³³ He then went on to state that if “liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive”.³⁴ Moreover, he asserted that:

This Court has until now, save for certain comments of my colleague Wilson J., taken an exclusionary approach to defining liberty and security of the person. While it is not essential to the disposition of this ground of appeal, I feel, having regard to some of the pronouncements of Courts of Appeal on the subject, that I should to some extent

³¹ *Supra*, note 8.

³² *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, note 14, at 1163.

³³ *Id.*, at 1166.

³⁴ *Id.*, at 1170.

disclose my views as to the nature of the liberty and security of the person s. 7 is protecting.³⁵

Moving well beyond what was required in order to deal with the case at hand, Justice Lamer engaged in something of a pre-emptive manoeuvre designed to constrain the direction in which future thinking about section 7 would go.

Justice Lamer went on to point out that the guarantees of life, liberty and security of the person “are placed together with a set of provisions (ss. 8-14) which are mainly concerned with criminal and penal proceedings”.³⁶ It followed, in his view, that “the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual’s interaction with the justice system, and its administration”.³⁷ That is,

the confinement of individuals against their will, or the restriction of control over their own minds and bodies, are precisely the kinds of activities that fall within the domain of the judiciary as guardian of the justice system. By contrast, once we move beyond the “judicial domain”, we are into the realm of general public policy where the principles of fundamental justice, as they have been developed primarily through the common law, are significantly irrelevant.³⁸

He concluded:

Put shortly, I am of the view that s. 7 is implicated when the State, by resorting to the justice system, restricts an individual’s physical liberty in any circumstances. Section 7 is also implicated when the state restricts individuals’ security of the person by interfering with, or removing from them, control over their physical and mental integrity.³⁹

Not surprisingly, he was of the view that the rights under section 7 did not extend to the right to exercise one’s chosen profession.

Justice Lamer finished up his reasons by concluding that while section 195.1(1)(c) of the *Criminal Code* violated section 2(b)’s protection of freedom of expression, it was a justifiable and proportionate restriction under section 1. He noted:

³⁵ *Id.*, at 1171.

³⁶ *Id.*, at 1171.

³⁷ *Id.*, at 1173.

³⁸ *Id.*, at 1176.

³⁹ *Id.*, at 1177.

One of the primary objectives of s. 195.1(1)(c) is to curb the nuisances caused by the public or “street” solicitation of prostitutes and their customers. These nuisances include impediments to pedestrian and vehicular traffic, as well as the general confusion and congestion that is accompanied by an increase in related criminal activity such as possession and trafficking of drugs, violence and pimping. The nuisance aspect of the law, as it relates to traffic problems, is not, however, its only objective.⁴⁰

He was of the view that

the legislative objectives of the section go beyond merely preventing the nuisance of traffic congestion and general street disorder. There is the additional objective of minimizing the public exposure of an activity that is degrading to women with the hope that potential entrants in the trade can be deflected at an early stage and of restricting the blight that is associated with public solicitation for the purposes of prostitution.⁴¹

He concluded that the section impaired freedom of expression as little as reasonably possible in order to achieve the legislative objective.

Justice Wilson digested Justice Lamer’s draft reasons. She was not satisfied with them. But as I had seen in *Edmonton Journal* and continued to learn through the year, this did not mean that she was necessarily going to disagree with the conclusion. She was a great believer in the importance of developing an analytical approach that she felt had merit and only then seeing where it took her with respect to the conclusion.

My colleague Audrey Macklin and I, on the other hand, were quite troubled with the notion that Parliament had criminalized *communication* with respect to an activity — the performance of sexual acts in exchange for payment — that Parliament had not criminalized. It certainly seemed to me at the time that it was passing strange that Parliament was in effect saying that we will let people make money in this way, but we will send them to jail for engaging in communication designed to enable them to get clients. All the more so since those being sent to jail were so often the victims of pimps and clients — and in many respects were therefore least deserving of being penalized.

This led to more than one lively and protracted discussion with Justice Wilson in her chambers — a sign that the case was a difficult

⁴⁰ *Id.*, at 1193.

⁴¹ *Id.*, at 1194.

one. She knew the value of time and was disciplined in the way in which she interacted with her law clerks — most often preferring to deal with us in writing or through very short meetings. But this time Audrey and I found ourselves in long meetings with her as we wrestled with the issues at stake.

I can recall that during at least one of these meetings we looked long and hard at the proposition that section 7 must protect some aspect of a right to earn a living. Indeed, I recall clearly a strong sense of frustration at the time that Justice Wilson was not able to see her way to exploring whether section 7 might embody some such right. In retrospect, I was clearly influenced by the article I had written on liberty in 1987 and somewhat astonished at Justice Lamer's unabashed efforts to shut down any room to explore a more robust vision of liberty than the one he felt was at the heart of section 7. But Justice Wilson was not about to take the bait in order to engage in a sweeping debate of the conception of liberty at play in section 7.

I was greatly puzzled with this at the time. I for one had taken the bait and my lively discussions with Justice Wilson were fuelled by my perspective on the need to resist his efforts to close the door on a more textured vision of liberty. But it gradually became apparent that she felt it inappropriate to engage in sweeping pronouncements about section 7 of the kind Justice Lamer had just formulated. In her view, a judge's role was to look at the way in which a Charter right was engaged in a given case (just as she had done in *Edmonton Journal*). On more than one occasion during these discussions, she observed to us that however much she might think our views had merit, she simply did not feel that her role as a judge allowed her to go beyond what the case at hand called for.

Notwithstanding our repeated efforts to put the highest and best case to her for opening up the door to approaching her decision through the prism of a more robust conception of liberty than the one that Justice Lamer was positing, Justice Wilson made it clear that she was not prepared to go down that path in this case — no matter how well intentioned we might be. She was acutely conscious that Charter rights were anchored in our legal history and that great care had to be taken before pushing their content beyond boundaries that had been carefully worked out through decades, if not centuries.

That said, she saw no point in closing doors unless one had to. Moreover, she had wrestled for some time with the right way to come at the case and concluded that it made much more sense to start with an analysis of freedom of expression since the case involved a provision

that restricted communication, rather than head out of the gates as Justice Lamer had with an analysis of section 7. I was starting to see why she had been so preoccupied with the issue of how best to approach a case that engaged section 2(b) and section 7. Rather than embrace Justice Lamer's determined effort to limit section 7, she decided that the case really did not require one to deal with the question whether section 7 protected an economic right. This was because in her view the provision obviously engaged section 2(b)'s protection of freedom of expression.

She began her analysis with section 2(b) and noted that "this is a case where the government's purpose is to restrict the content of expression by singling out meanings that are not to be conveyed in the hope that this will deal with the physical consequences emanating from expressive activity that carries the prohibited meaning".⁴² But, in her view, "[w]here the state is concerned about the harmful consequences that flow from communicative activity with an economic purpose and where, rather than address those consequences directly, the content of communicative activity is proscribed, then the provision must, in my view, be justified as a reasonable limit under s. 1 of the *Charter* if it is to be upheld".⁴³

The challenge though was to identify the legislative objective. Here she felt uncertain about whether Justice Lamer had accurately captured the legislative objective. Once again, this conclusion came only after exhaustive analysis. At her request, November and December 1989 saw me write several memos in which I set out summaries of the submissions that the parties had made on the objective that the impugned legislation was seeking to address, as well as broader analysis of the legislation's objectives. Justice Wilson was slowly but surely trying to bring into focus the purpose of the legislation so that she could more effectively determine whether the legislation would withstand section 1 analysis.

Her judgment includes a detailed exposé of the different submissions made to the Court with respect to the legislative objective, which she grouped into categories ranging from the narrowest (nuisance in the streets) to a middle ground (social nuisance) to the widest (prostitution-related activities). She suggested that Justice Lamer had embraced the widest. But she noted that all of the parties and intervenors but one (Ontario's Attorney General) who had made submissions had in fact suggested that the objective was not to deal with prostitution *per se*, it

⁴² *Id.*, at 1205.

⁴³ *Id.*, at 1206.

was to deal with the public or social nuisance. In her view, it was this — “the social nuisance arising from the public display of the sale of sex”⁴⁴ — that was the fundamental concern that section 195(1)(c) of the *Criminal Code* was addressing.

She turned to section 1 of the Charter and concluded that given this more narrow objective, the measures adopted were not proportional to the objective sought to be achieved. The criminalization of communication regardless of whether it was taking place in areas where there was reason to believe it would cause a nuisance was not acceptable: “[i]t is not reasonable, in my view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance”.⁴⁵

With section 2(b) and section 1 of the Charter behind us, we still had to deal with section 7 and Justice Lamer’s efforts to circumscribe its scope. It was now January 1990 as we dug deeper into this question and as Justice Wilson’s views were now beginning to gel. My instructions were to provide a draft of the section 7 analysis that she would then work on that developed the proposition that if a statutory provision violates a Charter right, it cannot then be said to accord with the principles of fundamental justice in section 7. This was a subtle but compelling argument that spoke to the way in which one had to think of the interaction between different sections of our Charter.

This approach also had very little to do with issues relating to the extent to which section 7 embraced a positive vision of liberty. Indeed, Justice Wilson was quick to make clear she was *not* rising to the bait. She stated that “[m]y colleague Lamer J. approaches the s. 7 issue in this appeal as raising a question of ‘economic’ liberty. With the greatest of respect, I believe it is neither appropriate nor necessary in order to trigger the application of s. 7 to characterize the impugned legislation in this way.”⁴⁶ She noted that conviction under the section in question might result in the deprivation of the liberty of the person in question. As a result, the legislation had to accord with the principles of fundamental justice.

Here is where Justice Wilson’s judgment broke new ground, for she asserted that one had to take a purposive approach to interpreting the

⁴⁴ *Id.*, at 1211.

⁴⁵ *Id.*, at 1214 (emphasis added).

⁴⁶ *Id.*, at 1215.

principles of fundamental justice — something that Justice Lamer had himself asserted in the *Motor Vehicle Reference*.⁴⁷ And in her view the principles set out in other sections of the Charter were clearly now part of the basic tenets of our legal system. Indeed, they were part of the supreme law of the land. It followed “that a law that infringes the right to liberty under s. 7 in a way that also infringes another constitutional right (which infringement is not saved by s. 1) cannot be said to accord with the principles of fundamental justice”⁴⁸ and would therefore have to be justified under section 1 of the Charter.

She noted that section 1 analysis was required once more as a provision that violated one section of the Charter might be justified under section 1, but if the provision violated another section of the Charter that violation might not be justified. But once again she concluded that it was not reasonable and justifiable to deprive citizens of their liberty through imprisonment in order to deal with the nuisance caused by street solicitation.

After four difficult months of work, at long last Justice Wilson circulated her judgment. Justice L’Heureux-Dubé then signed on to Justice Wilson’s judgment. But the rest of the Court was not prepared to adopt either Justice Lamer or Justice Wilson’s reasons in their entirety. The Chief Justice decided to develop his own set of reasons upholding the legislation. By mid-April, 1990 these were circulated. While he found Justice Wilson’s characterization of the purpose of the legislation compelling and agreed with her that it violated section 2(b), he found that the legislation was saved under section 1. In his view, the communication that the legislation was out to sanction had an economic purpose and communication regarding an economic transaction of sex for money did not lie at, or even near, the core of the guarantee of freedom of expression. He found that the obtrusiveness linked to the enforcement of the provision, when weighed against the resulting decrease in the social nuisance associated with street solicitation, could be justified under section 1 of the Charter.

With respect to section 7 of the Charter, Chief Justice Dickson agreed there was a clear infringement of liberty. As with Justice Wilson, he found it unnecessary to address the question whether section 7 was

⁴⁷ *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.).

⁴⁸ *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, at 1221 (S.C.C.).

also violated in an “economic” way. In his view, the case did “not provide the appropriate forum for deciding whether ‘liberty’ or ‘security of the person’ could ever apply to any interest with an economic, commercial or property component”.⁴⁹

With respect to the principles of fundamental justice, he concluded that the legislation was not so unfair as to violate the principles of fundamental justice. In his view, the “fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society’s disapprobation of street solicitation”.⁵⁰ Since the principles of fundamental justice were not breached, there was no need to deal with section 1 of the Charter. Justices La Forest and Sopinka were quick to sign on to the Chief Justice’s reasons.

What to make of the outcome? While I might have been disappointed at the outset that the case was not going to be a vehicle for exploring whether the concept of liberty in section 7 of the Charter was more expansive than the classical view, I came to understand that Justice Wilson — and in turn Chief Justice Dickson — were acutely aware that a case focused on the sale of sex was not the right setting in which to discuss this issue. They had made clear that they were not prepared to endorse Justice Lamer’s narrow vision of section 7 since this case did not call for such a decision. But I had learned that Justice Wilson was acutely sensitive to her constitutional responsibilities and was not about to make determinations concerning whether a Charter section protected certain rights unless and until the case before the Court clearly called for such a determination.

I would come to work with Justice Wilson on other difficult cases, but the *Prostitution Trilogy* has long seemed to me to illustrate the enormous effort that she put into careful thought about fundamental issues concerning Charter interpretation. She realized that the methodological issues at play would shape Charter analysis for years to come and she had shown the same determination that I had witnessed in *Edmonton Journal* to ensure that she spelled out the approach that she thought most made sense. She had also made full use of her clerks, ensuring that they served as regular sounding board for her evolving thinking on the right way to approach the issues in question and the implications of that approach once applied to the cases at hand. She had

⁴⁹ *Id.*, at 1140-41 (emphasis added).

⁵⁰ *Id.*, at 1142.

also shown that it was she who was carrying the heavy burden of ensuring that she discharged her constitutional role in a manner that respected the constraints within which the judiciary must operate if it is to preserve its legitimacy.

3. Freedom of Expression — Round 3: *Taylor, Andrews and Keegstra*

Another series of cases that came before the court that year and that proved enormously challenging were ones involving what is sometimes described as “hate speech”. Once again, Justice Wilson made full use of her clerks: as the volume of material filed with the Court was enormous, Audrey Macklin and I had little choice but to divide the work in preparing memoranda summarizing and analyzing the arguments in issue (known as “bench memos”). Our bench memos went in at the very end of November 1989 and the cases were heard in December 1989.

The *Taylor*⁵¹ case raised the question of the constitutionality of section 13(1) of the *Canadian Human Rights Act*,⁵² which stated that it is a “discriminatory practice to communicate telephonically ... repeatedly ... any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination”. A human rights tribunal had found that Mr. Taylor and the Western Guard Party had engaged in discriminatory practices of the kind envisaged in section 13(1) and had issued a cease and desist order. The appellants continued to place messages similar to the ones they had placed over the previous two years to the effect, among other things, that Jews founded communism and that this conspiratorial movement was responsible for a wide array of evils in Canada. The Federal Court found the parties in question in contempt and the Federal Court of Appeal had found that section 13(1) of the Act was constitutional.

The *Keegstra*⁵³ case involved the question whether a section of the *Criminal Code* (section 319(2)) that prohibited the wilful promotion of hatred against identifiable groups was unconstitutional. The case was especially challenging as it also involved a section of the *Criminal Code*

⁵¹ *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) [hereinafter “*Taylor*”].

⁵² *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

⁵³ [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

(section 319(3)(a)) which afforded a defence of “truth” but required the accused to prove the truth of the statements in issue on a balance of probabilities. An Alberta high-school teacher had made anti-Semitic remarks to his students and was charged under the provision. He challenged the constitutionality of the section under which he had been convicted and the Alberta Court of Appeal found that section 319(2) violated section 2(b) of the Charter. It also found that the provision could not be saved under section 1 of the Charter. Similar charges had been laid in the *Andrews*⁵⁴ case against a white supremacist group.

Justice Wilson proceeded with great care. As I had had occasion to see in *Edmonton Journal* and the *Prostitution Trilogy*, she had a deep commitment to freedom of expression and so did not find the trilogy of hate speech cases easy. She repeatedly told us that she was uncomfortable with restrictions on people’s ability to communicate ideas publicly. Freedom of expression was in her mind a cornerstone of our democracy and she thought the Court had to proceed with great care before sanctioning restrictions of the kind that the statutory provisions in question had put in place. She therefore wanted to see draft reasons from Justice McLachlin (who had signalled she would be writing) before reaching any conclusions. While Audrey and I had stressed that the value of dignity and cultural identity also needed to be put at its highest, youthful idealism was once again bumping up against the realities of the Court as Bertha Wilson saw them.

Justice McLachlin circulated her reasons in May 1990 and Justice Wilson asked me to review them and to provide her with my thoughts. I prepared a lengthy memo analyzing the reasons and suggesting that there were a number of methodological issues that needed to be considered. I noted that regardless of one’s views of the appropriate disposition of these appeals, it was important that there be a finely tuned analysis of the nature of the values in conflict with freedom of expression. To my surprise, Justice Wilson not only did not rush to write reasons, she made it clear that she was still struggling with whether she agreed or disagreed with Justice McLachlin’s analysis. In the same way that she had resisted being rushed in the *Prostitution Trilogy* into embracing a vision of section 7 that she was concerned might be overly expansive, she was cautious about signing on to the idea that one should accept limitations on freedom of expression that resulted in criminal sanctions. Ultimately, it was the Chief Justice who signalled that he would be writing. Justice

⁵⁴ *R. v. Andrews*, [1990] S.C.J. No. 130, [1990] 3 S.C.R. 870 (S.C.C.).

Wilson decided that she would wait to see his reasons before making any decisions.

Chief Justice Dickson found that the section at issue in *Keegstra* and *Andrews*, as well as the provision of *Canadian Human Rights Act* at issue in *Taylor*, infringed section 2(b) of the Charter since all non-violent forms of expression were protected under this provision. Nevertheless, in his view the provisions were justifiable under section 1 because of the substantial and pressing objective of the legislation to prevent the harm caused by hate propaganda.

Justice Wilson decided to endorse the Chief Justice's reasons. All three cases split 4-3 in support of the Chief Justice's position. Knowing her enormous respect for Brian Dickson, I have no doubt that she was far more influenced by the fact that the Chief Justice had authored this decision than by the memos that Audrey and I had written.

Justice Wilson never did produce written reasons in these cases. Nevertheless, the caution that she exercised in coming to a conclusion is revealing and of a piece with the deliberation that had gone into each of the other freedom of expression cases with which I had been involved. Similarly, her willingness to listen to her clerks, yet unwillingness to rush to embrace the perspective they were advocating was also of a piece with the approach to judicial decision-making that I had witnessed in the *Prostitution Trilogy*. These cases have also long struck me as important because in the rush to focus on decisions where Justice Wilson found legislation unconstitutional, it is easy to overlook ones in which she upheld the legislature's decision concerning what the community's values called for in the way of restrictions on behaviour seen as unacceptable.

Hate speech cases continue to provoke intense discussion in Canada. Bertha Wilson was acutely aware that these cases were difficult precisely because it was not always clear that there was strong social consensus on the matters at the heart of the appeals and because the cases involved liberty, a value that had led her to conclude that the provisions at issue in *Edmonton Journal* and the *Prostitution Trilogy* were unconstitutional. While some might disagree with the conclusion that she reached, it was nevertheless once again the outcome of careful consideration of the views that Justice MacLachlin and Chief Justice Dickson had put forward in favour of each side of this debate.

4. Postscript: *McKinney* and Sections 15 and 32 of the Charter

I would be remiss if I did not also offer a few observations on Justice Wilson's reasons in *McKinney*.⁵⁵ The case involved a constitutional challenge to universities' policies concerning mandatory retirement and was heard with other cases concerning mandatory retirement provisions applicable to other professions. The matter not only raised difficult equality rights issues under section 15 of the Charter, it provided the Court with one of its earliest opportunities to provide detailed thoughts on the meaning of the term "government" in section 32 of the Charter. While my involvement began in May 1990, the case had been before the Court for over a year.

In May 1989 Audrey Macklin had prepared a very substantial and thoughtful bench memo analyzing the issues at play. On May 1, 1990 Justice La Forest circulated his reasons in the cases to his fellow justices. He concluded that universities were not a part of government and therefore were not subject to the Charter. As a result, the Charter did not apply to the universities' mandatory retirement policies. Even had the Charter applied, it was his view that while the policies violated the Charter's section 15 equality rights, they were justified under section 1. Mary Eaton had just begun her term as a law clerk to Justice Wilson and had in turn produced a detailed analysis of Justice La Forest's reasons.

Justice Wilson decided she had to write. This was no easy task. It had, after all, taken Justice La Forest almost a year to produce his reasons. With her now familiar determination, she mobilized the troops. On August 1, 1990 she sent a memo to Mary and myself in which she allocated responsibility for different portions of the analysis required. I was called upon to work on aspects of the judgment that dealt with the non-applicability of the Charter to private action and with the nature of government (sometimes referred to as the public-private distinction — a theme that I had touched on in passing in my 1987 article). I provided a draft of the section 32 analysis to Justice Wilson on August 20, 1990 — one of my final acts as a law clerk as my year with her was drawing to a close.

What struck me once again as I discussed this part of the judgment with Justice Wilson was her concern to set out a methodology for subsequent Charter analysis, this time for questions involving the need to ascertain whether one was dealing with government. We had worked

⁵⁵ *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229 (S.C.C.).

hard reviewing applicable jurisprudence and literature to develop three tests designed to assist in identifying whether one was dealing with government: (1) whether the legislative, executive or administrative branch of government exercised general control over the entity in question; (2) whether the entity performed a traditional government function or a function which in more modern times is recognized as a responsibility of the state; and (3) whether the entity is one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest.

But not only was Justice Wilson concerned to develop a series of practical questions that would assist with Charter analysis, she was also out to make a point about the role of government in our society. I had of course not got very far in my efforts to advance a conception of positive liberty in the context of the *Prostitution Trilogy*. But I realized in reading her draft's discussion of government that she had decided that this time the setting was an appropriate one in which to speak to this issue. She rejected the notion that government was purely restrictive of people's freedom. She examined the evolution of government in Canada and stressed that it had also played a beneficial role. Most significantly in this regard, she stressed that freedom was not co-extensive with the absence of government; rather freedom had often required the intervention and protection of government. Ultimately, she concluded that universities were part of government as they discharged an important public function which government had decided to have performed.

Her discussion of section 15 was equally compelling from my perspective, as she noted that the purpose of the equality guarantee was to promote human dignity — a concept that I had argued in my 1987 article was central to the Court developing a conception of positive liberty. She concluded that the university's mandatory retirement policies could not be justified under section 1 of the Charter.

Justice Wilson was joined by Justice L'Heureux-Dubé in what turned out to be a dissent. Be that as it may, the decision was once again the result of an enormous effort on Justice Wilson's part to plough through difficult intellectual terrain in order to provide a method for Charter analysis that would assist in the future. Once again, she had made full use of her law clerks to help her work through challenging issues, allocating different parts of the judgment to different clerks and supervising and then meticulously reworking their drafts. This time,

however, she had felt the context and the issues at play allowed for a statement about the role of government in promoting dignity and self-worth — essential components of a vision of positive liberty. It was a nice way to wrap up my year at Court.

IV. REFLECTIONS ON WILSON'S APPROACH TO DECISION-MAKING

After both Justice Wilson and Chief Justice Dickson had retired, I had the good fortune to spend time with the former Chief Justice on a regular basis over the course of several years. Bertha Wilson had suggested to him that I might be able to assist with the preparation of some of his articles and speeches, as he was looking for someone to play that role. The very first speech that I would work with him on was one that he gave shortly after his retirement in 1991 at a symposium in honour of Bertha Wilson — a piece on which we collaborated particularly closely and into which he poured a great deal of energy and attention.⁵⁶ With the benefit of hindsight, I can now more readily point to some of my own experiences with Bertha Wilson as evidencing parts of the thesis set out in Brian Dickson's article.

Dickson began by noting that Bertha Wilson was aware that judges are not completely independent from other actors in society. There is a degree of mutual dependence that sustains the legitimacy of the judiciary and affects the way it goes about its business. He pointed to a speech that Bertha Wilson had given in 1983,⁵⁷ in which she had observed that conflicts may arise between a judge's moral framework and the hard reality that judges do not operate in a vacuum. Judges obviously have consciences and are subject to a range of moral considerations. But she had stressed that judges are unelected and that the ongoing legitimacy of their decisions depends to a considerable extent on these decisions being widely accepted. The legitimacy of the judiciary therefore turns in no small measure on its accepting that some decisions are properly arrived at in a forum other than a court, a forum whose members are directly accountable to the public.

Brian Dickson went on to say that while Bertha Wilson was always profoundly attuned to what her moral framework demanded of her and

⁵⁶ Brian Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1 [hereinafter "'Trailblazer for Justice'"].

⁵⁷ Bertha Wilson, "Guaranteed Freedoms in a Democratic Society — A New Role for the Courts?" (Address to the Australian Legal Convention, Brisbane, Australia, July 1983), at 15 [unpublished].

sought to develop the law in a principled matter, she was at all times operating with a refined sense of the realities of the context in which a judge operates. He noted:

Some have at times complained about the direction in which she sought to take the law, suggesting that her work illustrates the dangers of unrestrained judicial activism. But in my view, in their rush to label her a judicial activist, these critics quite simply ignored that she was in fact profoundly sensitive both to the limits of the law and to the constraints that these limits placed on the way in which she could shape the law.⁵⁸

Certainly this had been my experience working with her on the *Prostitution Trilogy*. She had understood that the very real constraints that she was working within meant that there were certain lines of reasoning that it was not appropriate to embark on. Hence her unwillingness in that case to engage in an analysis of whether the Charter protected economic rights.

Chief Justice Dickson observed that Bertha Wilson had reflected carefully about the limits of courts and the extent to which it was acceptable to push the law forward within those limits. While it was easy to track the way in which she redrew boundaries or incorporated new ideas into existing methods of analysis, the less obvious and more difficult exercise was to understand why she stopped at any given point and why in some instances she chose not to realign particular frontiers. This is a passage of the article that has long struck me as particularly significant because it points to an aspect of judicial decision-making that we often have difficulty discerning: namely, the lines of reasoning that judges decide *not* to follow and the reasons for those decisions. Frequently, judges simply do not explain the paths they have decided it would be inappropriate to venture down. My objective in this article has been, in part, to build on that observation and to show that in several of the most important constitutional cases of the 1989-90 term, Justice Wilson avoided paths that her clerks were certainly encouraging her to travel down because she felt it inappropriate to do so given the constitutional constraints within which a judge must operate.⁵⁹

⁵⁸ “Trailblazer for Justice”, *supra*, note 56, at 8.

⁵⁹ As one commentator has noted, she had a “deep sensitivity to the appropriate limits of the law” and was “deeply aware of the importance of maintaining a deep consciousness of the judiciary’s appropriate role within the particularities of the Canadian constitutional framework”. See Elizabeth Halka, “Madam Justice Bertha Wilson: A ‘Different Voice’ in the Supreme Court of Canada” (1996) 35(1) *Alta. L. Rev.* 242, at 246 and 247.

Brian Dickson went on to stress that Justice Wilson understood that a judge could not simply bring his or her own moral intuitions to bear on a given problem. There is a deeper challenge: a judge must understand the community's moral fabric and bring an understanding of that morality to bear on a given issue. She knew this was no easy task: disentangling one's own views from those of the community with a view to better applying the latter was not a simple matter. "Indeed, she felt that in many ways the greatest challenge for a judge was to resolve the problem of how to integrate contemporary values and notions of justice into decision-making without allowing those decisions to become completely subjective."⁶⁰ I had seen her wrestle with just this challenge in the hate speech cases: she had had to grapple with her deep commitment to the value of free speech and to develop an equally refined understanding of the way in which the value of human dignity came into play in understanding why the legislature had enacted the laws being challenged.

Brian Dickson described her as having a "democratic frame of reference".⁶¹ He noted that she felt strongly that if the Charter and the courts, as interpreters of that document, are to have a meaningful place in society, one that is accepted by its citizens as legitimate and worthy of respect, then judicial analysis of the Charter's provisions must reflect that community's most fundamental norms. This was a dynamic interpretive exercise, not a static one: that is, one had to be alert to the fact that these norms evolve with time as new social problems arise and as a society's understanding of itself evolves. It therefore required that judges continually assess the application of the Charter in light of new facts, contemporary social theory and the context in which the right was called into play (an implicit reference to the decision in *Edmonton Journal*).

The former Chief Justice concluded that Justice Wilson had struck a finely tuned balance that elegantly sidestepped the increasingly sterile debate between advocates of judicial restraint and advocates of judicial activism. The courts could hardly pretend, with the enactment of the Charter, that they did not have a mandate to effect change in the law when legislators had given them this very mandate. But this mandate did

⁶⁰ "Trailblazer for Justice", *supra*, note 56, at 10. For some of Bertha Wilson's thoughts on this point and the question of judicial activism, see Bertha Wilson, "We Didn't Volunteer" (April (1999) Policy Options 8.

⁶¹ "Trailblazer for Justice", *id.*, at 17.

not mean that the courts could ignore the way in which they fit into our democratic system and the limits that their position in that system places, both on the kind of change they can realistically hope to effect and on the way in which they should seek to bring about that change. Nor could courts ignore the ongoing obligation to sustain the link between the Charter and our society's values. In her view the legal standards set out in the Charter were expressed in broad and general terms precisely so that they might accommodate society's changing values.⁶²

I can hardly claim to have a dispassionate perspective with respect to Brian Dickson's observations. But I might perhaps be forgiven for observing that they were as true from my vantage point as they were from the much more expansive perspective that Brian Dickson brought to bear on Justice Wilson's judicial career. Having worked on cases like the *Prostitution Trilogy* or the hate speech cases, my experience was that she did indeed combine great sensitivity to the limits of the judiciary's role with an awareness that when it was appropriate to intervene, it was also important to ensure that one was in tune with the community's values and to properly describe and weigh the aspects of those values that were engaged in a given case.

The *Prostitution Trilogy* had therefore taught me that Justice Wilson was acutely sensitive to her constitutional responsibilities.⁶³ She was also deeply aware that many of the Charter cases that she was dealing with involved methodological issues that would continue to shape Charter analysis. *Edmonton Journal*, the *Prostitution Trilogy* and *McKinney* were all examples of the extraordinary pressure that she put on herself and her law clerks to prepare judgments that set out analytic tools that would provide useful guidance for subsequent Charter analysis. Even

⁶² Dickson concluded with the following observation:

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

Id., at 21-22.

⁶³ One need not go much further than Bertha Wilson's fascinating discussion of this issue in her 1985 speech delivered at the University of Toronto Law School to see that she had thought a great deal about this point. "Decision Making in the Supreme Court" (1986) 36 U.T.L.J. 227, at 235-36.

when she was not writing, she showed great care to ensure that she had fully considered competing perspectives. As the hate speech cases illustrate, she was at all times engaged in active dialogue with her clerks and considered thought about competing perspectives on a case.

It was no accident, then, that her law clerks during the 1989-90 term were kept very busy indeed. Bertha Wilson shouldered a remarkably heavy load as a result of her deep commitment to the institution to which she had become so integral.⁶⁴ She expected her law clerks to work equally hard to help her carry that load. With those daunting expectations came the privilege of bringing new ideas and youthful enthusiasm to her chambers and serving as a constant sounding board for her thoughts on the right way to approach a given case. While some have suggested that she was an activist who systematically overstepped boundaries that judges should not cross,⁶⁵ this is certainly not the judge that I saw in action on a day-to-day basis. On the contrary, with each of the cases that I have described in this article I came to see even more clearly a judge who was deeply concerned to live up to her constitutional responsibilities. She knew well that the legitimacy of the Court depended not only on the result of the cases that came before it, but every bit as much on the approaches that the Court's members were seen to deploy in order to analyze these cases.

The demands of my professional relationship with Justice Wilson wound down as August 1990 came to a close and as I prepared to move on. I reflected on how I had been surprised in our first conversation by her Scottish brogue and how much I had enjoyed continuing to hear it through the year (no doubt it appealed to my own rather more distant Scottish roots). I had been a good deal less surprised by her Scottish work ethic, though it was one thing to have heard about it and another to be subject to it! As I went up to her office on my last day as her law clerk to say goodbye, I was about to be surprised again: the formalities of the professional relationship now melted away altogether as she gave me a big hug, thanking me for my contribution and wishing me well.

⁶⁴ In a conversation that I had with Ellen Anderson concerning her biography of Bertha Wilson (*Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001)), Ellen observed that she had identified some 50 of Justice Wilson's judgments as ones that she viewed as extremely important and that 22 of these were written during the 1989-90 term. I think it fair to say that each of the Wilson law clerks that I worked with that year (Audrey Macklin, Karen Thompson and Mary Eaton) felt as I did once the year working with Bertha Wilson was over: rather drained and somewhat in awe that Bertha had worked this hard year after year on the Court.

⁶⁵ R.E. Hawkins & R. Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.

And so began a new chapter in our relationship: a friendship with Bertha and her husband John — who was so integral to Bertha’s success and happiness — that saw us speak and meet regularly to discuss her experiences as a lawyer, her time as a judge, their shared passion for travel and literature, the challenges of serving on the Royal Commission on Aboriginal Peoples and political issues that she was now free to discuss. I had learned a great deal from Madame Justice Wilson about judicial decision-making and the role of a judge in my year with her at the Court. To that I was now fortunate to add many more lessons from Bertha Wilson about life beyond the law.