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Introduction

A couple of weeks ago the man who teaches a seminar in Soviet Law at Osgoode Hall Law School — a learned emigré from U.S.S.R. and a good and popular teacher — bemoaned the fact that his seminar had the lowest enrolment in the ten or so years he has taught it at Osgoode. Citing the exceptional excitement and high profile of recent developments in the U.S.S.R. and suggesting that legal questions and implications were central to these developments, I expressed genuine amazement at this news. My colleague, however, said that he was not at all surprised; holding up his course outline he said: "I am not sure that one word in these materials is an accurate description of Soviet legal institutions and law, especially constitutional law. I think that most students are waiting until things settle down so that they can take the seminar when there is some content".

My colleague's observation may say something interesting about student course selection psychology. However, it also made me think about the fragility of countries and their constitutions. The U.S.S.R., Yugoslavia, South Africa, all of Europe — the newspapers and television screens are filled with stories about profound and fundamental change, including constitutional change.

In Canada we view the world scene and probably think that we are not caught in this swift Fundy-like tide of change; that we are a firm undertow of stability. In the constitutional arena, most of the most important developments in recent years confirm this image of stability. Probably the most important constitutional development in the 1970s was the election in 1976 of the Parti Quebecois Government which posed the threat, perhaps more seriously than any time in our history, of the dissolution of the country. By 1980, after a relatively

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close referendum vote, this threat had receded (for a decade!). The constitutional status quo was preserved. And the 1990s were marked, again in the first year of a new decade, by the complete failure of both the process and the contents of the Meech Lake constitutional negotiations. The constitutional status quo was again preserved, however discredited it may be in the minds of Canadians in various parts of the country.

It would be wrong, however, to think that the Canadian Constitution is immutable, that it is immune from the tides of constitutional change that seem to wash against the shores of even the strongest of nations like the U.S.S.R. The history of Canada has been marked by regular and important constitutional change. The imagery of change has not been as dramatic as the recent magazine cover picture of an ordinary citizen standing on the face of the huge toppled statue of Vladimir Lenin in Vilnius. Nevertheless, constitutional change in Canada has been an important part of our history and it remains today (probably unfortunately) the centrepiece of public discourse in the country.

This point was illustrated historically in the early years of the country by what happened to some of the themes that the Fathers of Confederation, especially Sir John A. Macdonald, thought lay at the heart of the *Constitution Act, 1867*. Three of the most important themes were the dominance of the national government over the provinces (Macdonald: "We have given the General Legislature all the great subjects."[1]), the belief that there was no important conflict in the distribution of powers between the national and provincial governments (Macdonald: "We have avoided all conflict of jurisdiction and authority."[2]), and the assumption that if the occasional disagreement should arise, it could easily be resolved by invocation by the national government of its trump card, the disallowance power (hence, no need for courts to play a role in Canadian constitutional law). As every first year constitutional law student and every Supreme Court of Canada judge sitting here this afternoon know, none of these themes holds today; indeed they did not even survive Sir John A.'s second administration.

The reality of regular constitutional change in Canada is also illustrated by developments in recent years. In 1972 when I sat in this classroom and took constitutional law from Professor (now Justice)

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1. Parliamentary Debates on the Subject of Confederation, 3rd Session, 8th Parliament of Canada (1865), at p.33.
2. *Loc. cit.*

MacKay, the course was punctuated on a single occasion by Professor MacKay coming to class and happily announcing that the Supreme Court of Canada had handed down a decision in a constitutional case. The themes of Canadian constitutional law at that time were: the invisibility and lack of importance of constitutional law in political and legal affairs, the central (almost exclusive) place of federalism as the subject matter of constitutional law, and the absence of any meaningful role for the Supreme Court of Canada as umpire of the federal system because of the lingering dominance of the Pearsonian conception of negotiated, executive federalism.[3] In short, in 1972 constitutional law played only a marginal role in our national life, in the work of the Supreme Court of Canada and in Canadian legal education.

If the pages of the calendar are turned forward a decade to 1982, the year Bertha Wilson arrived at the Supreme Court, the picture has changed substantially. In the political arena, constitutional matters have been at the top of the national agenda for six years, since the election of the Parti Quebecois Government in Quebec in 1976. Moreover, as the Trudeau years rolled on through the 1970s they were marked by the almost complete dismemberment of Pearsonian federalism. The major federal-provincial disputes of the 1970s over language, communications, energy, offshore resources and many other subjects were not resolved in political councils. The importance of many of these issues to the provinces, the political strength and confidence of some of the Premiers (notably Blakeney, Lougheed and Peckford) and, perhaps most important, the intellectual conception of federalism and combativeness of Prime Minister Trudeau combined to shift many major federal-provincial issues from the political councils to the Supreme Court of Canada. All of these changes were complete when Bertha Wilson joined the Court in 1982. One other constitutional change was almost complete at that time, although it had meant nothing in real terms when Justice Wilson took her oath of office. I refer, of course, to the *Canadian Charter of Rights and Freedoms* which came into force almost simultaneously with the arrival of Justice Wilson in Ottawa. Although the Canadian Constitution had always had some individual and group rights content (e.g. the preamble of the *Constitution Act, 1867* as interpreted by a few judges and sections 93 and 133 of the same Act dealing with denominational school and language rights) it was intended and expected by the

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3. The term 'executive federalism' was coined by Professor Donald Smiley in *Canada In Question* (3rd ed. 1980), at p.94.

signatories to the *Constitution Act, 1982* which contained the Charter that this document would usher in a new era in Canadian constitutional history, one in which the relationship between all Canadian governments and all Canadians would be as important and prominent as the century-long attention to the relationship between the national and provincial governments.

If one turns the pages of the calendar one last time, again about a decade, to June 1991 when Justice Wilson retires, one sees clearly that Canadian constitutional law has changed again. This time the changes have been massive and transformative. First, many of the major political issues of our times, national and provincial, have been 'constitutionalized'. They have not been, as some have contended, removed from the political arena. Politicians and governments still must address and try to resolve them. However, the issues no longer stay or end in the political arena. They move from there to the courts, especially the Supreme Court of Canada, because the Charter gives people unhappy with a result in the political arena an opportunity to challenge that result in the judicial arena. Thus, virtually all of the important political issues of the 1980s — economic policy, labour relations, national defence and security, Sunday closing, abortion, mandatory retirement — have found their way to the Supreme Court of Canada. Public policy issues have never in our history been so firmly rooted in the legal context. And the Supreme Court of Canada has never before played such a prominent and significant role in the discussion and resolution of those issues. These conclusions are supported in an overwhelming way by an examination of the Court's workload during Justice Wilson's nine-year tenure. In 1982, her first year, the Court heard four constitutional cases; in 1985, the first year in which a normal stream of Charter cases came before the Court, the number was twenty-five; in 1990, Justice Wilson's final full year, the number is sixty-eight, including fifty-four Charter cases!

These statistics, coupled with the earlier list of subject matters that have come to the Court under the umbrella of the Charter, make obvious a point that practically all Canadians know, if only intuitively — namely, that the Charter has transformed, I believe irrevocably, Canadian public affairs. It has also transformed forever Canadian constitutional law and the institution of the Supreme Court of Canada.

I happen to believe that these Charter-induced transformations have been, by and large, beneficial. I can state my personal conclusions about ten years of experience in what Professor Peter Russell

calls Charter Land[4] in four propositions. First, the Charter has shifted the focus of law-makers from excessive attention to questions of jurisdiction (can we enact this law?) to beneficial attention to questions of merit (should we enact this law?). Second, if one believes that a Constitution can perform an important educative function, that it can, in the words of my old constitutional law professor, Archibald Cox, "remind us of our better selves",[5] then the Charter-induced attention, not only in the political and legal arenas but also in the minds of ordinary Canadians, to questions of democratic rights, fundamental freedoms, legal rights, equality rights, and minority language rights, is a laudable educational development. Thirdly, the actual results of Charter litigation have been, by and large, beneficial for major, and often neglected, groups in Canadian society — for example, refugees (*Singh*[6]), non-unionized workers (*Edwards Books*[7]) and women (*Morgentaler*[8]). Fourthly, the Supreme Court of Canada has become a fine Canadian institution which plays well its role on the constitutional stage.

In all of these constitutional developments — political, legal, judicial and educational — no one has played a larger or more important role than Justice Bertha Wilson. She has been central and crucial to both the process and results of Canadian constitutional law in the first decade of the Charter era. Through her judgments, and to a lesser extent through her speeches and articles, she has played the roles of thinker, decision-maker and educator.

In the remainder of this paper I will consider Justice Wilson's contribution to Canadian constitutional law. The paper has three parts. Each has a different theme, although the themes overlap in places. I have given these themes labels, each reflecting, I believe, a significant feature of Justice Wilson's constitutional thinking and writing. The labels are Justice Wilson as — Patriot, Visionary and Heretic. In the next three parts of this paper I will deal with each of these themes, with reference principally to her decisions in Charter cases but also with occasional references to her decisions in other categories of constitutional cases, her speeches and articles, and my impressions of her when, for almost three years, I had the privilege of watching her work on the second floor of the Supreme Court building.

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4. Russell, The First Two Years in Charter Land (June, 1984).
5. Cox, *The Role of the Supreme Court in American Government* (1976), at p.117.
6. *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.).
7. *Edwards Books and Art Ltd. et al.* v. *R.* (1986), 35 D.L.R. (4th) 1 (S.C.C.).
8. *Morgentaler, Smoling and Scott* v. *R.* (1988), 44 D.L.R. (4th) 385 (S.C.C.).

Before turning to these matters, however, I want to underline the magnitude of Justice Wilson's role in Canadian constitutional law by referring to a few statistics. During her nine years at the Supreme Court of Canada, the Court heard 217 constitutional cases. Justice Wilson participated in 188 or 85.7 per cent of these cases. Moreover, she wrote judgments in 69 or 36.5 per cent of the cases in which she participated. These participation and writing rates are even higher in Charter cases. She participated in 89 per cent of the Court's Charter cases and wrote judgments in 43.6 per cent of the cases in which she participated (65:149). These statistics support what all of us know by instinct — Justice Wilson had a deep interest in and commitment to the development of the Charter in its formative years and, of equal importance, she had the energy to follow through on her interest and commitment by writing a very large number of constitutional judgments during her career.

I. The Patriot Theme

Although Justice Wilson was born in Scotland she is now formally a Canadian citizen. She is, however, more than just a citizen. She is, in a very real and visible sense, a Canadian patriot. She loves her country and openly and zealously supports its authority and its interests. Her patriotism includes both her personal feelings about Canada and her articulation of the strength and distinctiveness of Canadian law and the Canadian legal system.

Justice Wilson gave voice to her personal feelings about Canada at her swearing-in ceremony at the Supreme Court of Canada:

> I am a Canadian by choice and by adoption —like so many who have come from other places to make Canada their home. We cherish the free and open society which has been built here with its rich mosaic of creeds, cultures and customs and we are proud and grateful to have been accepted into its fold. As part of that constituency I carry with me to this new task a proper pride and deep affection for my adopted country.[9]

She enlarged upon this theme in the address she delivered in 1987 entitled "The Scottish Enlightenment: The Third Schumiatcher Lecture in 'Law as Literature'":

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9. (1982), 16 Law Society of Upper Canada Gazette 172 at 179.

> I have never quite been able to understand the emotional springs that give rise to the love and pride I hold for both the land of my birth and the country of my adoption, how easy it has been for me to become a Canadian and feel completely at home in both French and English Canada.[10]

On the jurisprudential side, Justice Wilson was clearly of the view that the Constitution was imbued with Canadian history, values and aspirations. It is true that the *Constitution Act, 1867* enunciates a collective desire that the new country have "a Constitution similar in Principle to that of the United Kingdom".[11] It is also true that the *Constitution Act, 1982*, especially the *Charter of Rights and Freedoms*, draws substantial inspiration from the United States *Bill of Rights* and various international human rights instruments. To Justice Wilson and indeed to the entire Court in the last decade, however, the most important inspiration for the creation of the Charter and the most important touchstone for its interpretation are the distinctive features of the history and ambitions of Canadians.

When I read the Supreme Court's Charter decisions since 1982, including Justice Wilson's, I am reminded of the words of another person born in Aberdeen, Scotland and a prime mover behind the creation of Dalhousie Law School a century ago. Justice Robert Sedgewick, a respected Halifax lawyer, eventually became Deputy Minister of Justice for Canada and then a judge on the Supreme Court of Canada. He served at a time when the Privy Council often reversed the decisions of the Supreme Court, especially in major constitutional cases. Most of the decisions of the Privy Council were terse, dry and legalistic with no grounding in Canadian history or values. In the hands of the Privy Council the *Constitution Act, 1867* was just another municipal by-law to be interpreted by legalistically parsing its words.

Justice Sedgewick finally rebelled and wrote these memorable words:

> Another principle of construction in regard to the B.N.A. Act must be stated, viz., it being in effect a constitutional agreement or compact, or treaty, between three independent communities or commonwealths, each with its own parliamentary institutions and governments, effect must, as far as possible, be given to the intention of these communities, when entering into the compact, to the words used as they understood them, and to the objects they had in view when they asked the Imperial

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10. Wilson, "The Scottish Enlightenment: The Third Shumiatcher Lecture in The Law as Literature" (1987), 51 Sask. L.R. 251 at 269.
11. *Constitution Act, 1867*, 30 and 31 Victoria, c.3.

> Parliament to pass the Act. In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act, to interpret it correctly reference may be had to the phraseology and nomenclature of pre-Confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment and surroundings of the Canadian people at the time. In the B.N.A. Act it was in a technical sense only that the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.[12]

I believe that throughout the 1980s the Supreme Court of Canada conceived of and interpreted the Charter in much the same way as Justice Sedgewick articulated his vision of the *Constitution Act, 1867*. For me, a striking illustration of this was the oral argument in an early Charter case, *Reference Re Section 94(2) of the Motor Vehicle Act*.[13] The issue in that case was whether section 7 of the Charter, and in particular the phrase 'principles of fundamental justice', created a procedural right, a substantive right, or both. Counsel for all governments[14] waved the spectre of the economic due process decisions of the United States Supreme Court early in this century and argued for a narrow English-style 'natural justice' procedural interpretation of section 7. Counsel for the accused argued, more or less, for simple adoption of the American substantive/procedural interpretation. The oral argument had unfolded for only a few minutes when the questions of Justices Lamer and Wilson made it clear that they were thinking along a completely different, and quite original, line — namely, a distinctive Canadian interpretation of the phrase 'principles of fundamental justice', one that would incorporate the British natural justice procedural stream and then add on some substantive protections in areas in which the judiciary was particularly well-suited to understand and articulate those protections (e.g. criminal justice protections but not economic protections). When the Court handed down its judgment some months later the distinctive Canadian interpretation foreshadowed in Justice Lamer's and Justice Wilson's questions formed the centrepiece of the judgment. The whole process of argument and decision in that case served as a perfect illustration of the observation that Justice Wilson made in a speech in Edinburgh three years later:

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12. *Re Prohibitory Liquor Laws* (1895), 24 S.C.R. 170 at 231.
13. *Reference Re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.).
14. I was counsel for the Attorney General of Saskatchewan in this case.

> While some enlightenment can flow from comparative constitutional law, care must be taken to avoid a mechanical application of concepts developed in different cultural and constitutional contexts.[15]

There is, in my view, a second dimension to the patriotism theme in Justice Wilson's constitutional jurisprudence. Justice Wilson believed that the Charter was intended to be, and deserved to be, a strong thread binding Canadians together. In other words, one of the substantive components of Justice Wilson's patriotism was passionate attachment to the values enshrined in the Charter coupled with a belief that her passionate attachment was shared by most other Canadians. She referred to the adoption of the Charter as "a national political choice by Canadians".[16]

This view of the place of the Charter in Canadian life and affairs had important implications for Justice Wilson's interpretation of the Charter. It made her, I believe, bolder in her approach to the Charter and inclined to be very broad in her interpretation of the coverage of the Charter. A few examples will illustrate these observations.

First, it is a hoary proposition of the common law that judges should decide cases on the narrowest possible basis; they should go no farther, in terms of the enunciation of legal principles, than is necessary to decide the individual case before them. A sub-set of this general proposition is that cases raising constitutional issues should be decided, if possible, on non-constitutional grounds. Justice Wilson simply does not believe that this proposition should be followed in Charter cases; on the contrary, because she believes so strongly in the values of the Charter she never hesitates to use it as the basis for a decision if that is possible. The best example is *Singh* where the question was the validity of the statutory regime for refugee determination contained in the *Immigration Act*. The Court unanimously held that the regime was invalid. The six judges split evenly, however, on the basis for the decision. Three grounded their decision in the *Canadian Bill of Rights*; Justice Beetz said:

> Like my colleague, Madame Justice Wilson... I conclude that these appeals ought to be allowed. But I do so on the basis of the *Canadian Bill of Rights*. I refrain from expressing my views on the question whether the *Canadian Charter of Rights and Freedoms* is applicable at all to the circumstances of these cases and more particularly, on the

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15. Wilson, "The Making of a Constitution: Approaches to Judicial Interpretation" (Edinburgh, 1988), at p.6.
16. *Ibid.*, p.1.

> important question whether the Charter affords any protection against a deprivation or the threat of a deprivation of the right to life, liberty or security of the person by foreign governments.[17]

In contrast, Justice Wilson (speaking also for Chief Justice Dickson and Justice Lamer) said:

> In the written submissions presented in December, 1984, counsel considered whether the procedures for the adjudication of refugee status claims violated the *Canadian Bill of Rights*, in particular s.2(e). There can be no doubt that this statute continues in full force and effect and that the rights conferred in it are expressly preserved by s.26 of the Charter. However, since I believe that the present situation falls within the constitutional protection afforded by the *Canadian Charter of Rights and Freedoms*, I prefer to base my decision upon the Charter.[18]

A second illustration of Justice Wilson's desire to use the Charter to enunciate important and shared national values is her position on what I would call Charter 'coverage' issues. In virtually every case, if the question was 'Is this activity government conduct under section 32 of the Charter?' Justice Wilson's answer was 'Yes'. Thus, in *Operation Dismantle*[19] she held that *all* Cabinet decisions were subject, in appropriate cases, to Charter review. She tersely concluded:

> Since there is no reason in principle to distinguish between Cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.[20]

And, in the mandatory retirement quartet, Justice Wilson's position was that universities (*McKinney*[21] and *Harrison*,[22] dissent), hospitals (*Stoffman*,[23] dissent) and community colleges (*Douglas College*[24]) were all 'government' under section 32 of the Charter. She reached these conclusions because she has a broad conception of the role of government in Canadian society. As she expressed it in *McKinney*:

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17. *Supra*, note 6, pp.429-430.
18. *Ibid.*, p.443.
19. *Operation Dismantle Inc.* v. *The Queen et al.* (1985), 18 D.L.R. (4th) 481 (S.C.C.).
20. *Ibid.*, p.498.
21. *McKinney* v. *Board of Governors of the University of Guelph* (1990), 76 D.L.R. (4th) 55 (S.C.C.).
22. *University of British Columbia* v. *Harrison and Connell* (1990), 77 D.L.R. (4th) 55 (S.C.C.).
23. *Vancouver General Hospital et al.* v. *Stoffman et al.* (1990), 76 D.L.R. (4th) 700 (S.C.C.).
24. *Douglas College* v. *Douglas/Kwantlen Faculty Association* (1990), 77 D.L.R. (4th) 94 (S.C.C.).

> I believe that this historical review demonstrates that Canadians have a somewhat different attitude towards government and its role from our U.S. neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action....
>
> All of these observations lead, in my opinion, to the conclusion that a concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action". Governments act today through many different instrumentalities depending upon their suitability for attaining the objectives governments seek to attain. The realities of the modern state place government in many different roles vis-à-vis its citizens, some of which cannot be effected, or cannot be best and most efficiently effected, directly by the apparatus of government itself. We should not place form ahead of substance and permit the provisions of the Charter to be circumvented by the simple expedient of creating a separate entity and having it perform the role. We must, in my opinion, examine the nature of the relationship between that entity and government in order to decide whether when it acts it truly is "government" which is acting.[25]

A third illustration of Justice Wilson's belief that the Charter is central to discourse and progress on major public issues is her rejection of judicially constructed doctrines that would remove certain subjects from the judicial arena. The best example of this is, of course, her explicit rejection of the American 'political questions' doctrine in *Operation Dismantle.*

I turn finally, and briefly, to a third dimension of the patriotism theme in Justice Wilson's jurisprudence. In my view, Justice Wilson's patriotism is directed to Canada at a national rather than a regional or provincial level. In her eyes, the Charter articulates values that are shared by all Canadians irrespective of their province of residence or cultural, linguistic, racial and other factors. The Charter, as mentioned above, represents "a national political choice by Canadians".[26]

One sees this focus on the national perspective in Justice Wilson's decisions in other areas of constitutional or quasi-constitutional law.

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25. *Supra*, note 21, pp.582-583.
26. *Supra*, note 16.

For example, in *Towne Cinema*[27] she wrote that the community standard for obscenity was a national one:

> The standard we are concerned with, it seems to me, is the degree of exploitation of sex which the Canadian community at any given point of time is prepared to accept in its movies. This is sometimes referred to as the Canadian standard of tolerance.[28]

And in federalism cases Justice Wilson was probably the judge most supportive of national jurisdiction during her years on the Court. On the basis of the record, she does not appear to have been as interested in federalism issues as in Charter issues. She participated in 52 federalism cases but wrote only 14 judgments (27 per cent as opposed to her 44 per cent judgment-writing: case participation ratio in Charter cases). Moreover, many of her federalism judgments were written in rather minor cases. Finally, unlike some of her colleagues like Chief Justice Dickson and Justices Beetz and La Forest, and unlike herself in Charter cases, Justice Wilson did not attempt to develop and articulate a philosophy in federalism cases. In spite of these disclaimers and qualifications, the record establishes that in close cases Justice Wilson tended to side with the national government. For example, in her very first constitutional case on the Court she alone sided with Ottawa in the *Georgia Straits*[29] case. And in her last federalism case she wrote a lone dissent in favour of Ottawa in *Central Western Railway*.[30] It would be wrong, however, to conclude that Justice Wilson was a powerful and passionate centralist in the Sir John A. Macdonald/Chief Justice Laskin mold. However, her instincts were to support laws enacted by both levels of government and to uphold national laws in close cases. Her notion of the country, as reflected in her federalism jurisprudence, was one rooted in a strong central government. This is consistent with her very strongly held view that the Charter gives voice to shared national values.

II. The Visionary Theme

When I first thought of the word 'visionary' to describe Justice Wilson's constitutional jurisprudence, my thoughts were all complimentary — I

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27. *Towne Cinema Theatres Ltd.* v. *R.*, (1985), 18 D.L.R. (4th) 1 (S.C.C.).
28. *Ibid.*, p.22.
29. *Re Strait of Georgia* [1984] 1 S.C.R. 388.
30. *Central Western Railway Corporation* v. *United Transportation Union et al.* (1990), 76 D.L.R. (4th) 1 (S.C.C.).

was thinking of a person who combines imagination and strength, foresight and perseverance. Imagine my surprise when I looked in my dictionary and discovered that the adjective 'visionary' is defined as "characterized by impractical ideas or schemes ... not real; imaginary ... not capable of being carried out; merely speculative and impractical".[31] The noun is not any better: "a person who has impractical ideas or schemes".[32] Fortunately, I looked up the page at the word 'vision' and found: "a mental image; especially, an imaginative contemplation ... the ability to perceive something not actually visible, as through mental acuteness or keen foresight".[33] That is precisely what I had in mind when I first associated the word 'visionary' with Justice Wilson — namely, a judge who combined, especially in her Charter judgments, contemplation, intellect, imagination and foresight.

The foresight, or concentration on the future, in Justice Wilson's (and indeed the Court's) Charter jurisprudence is illustrated by her rejection of the framer's intent approach to interpretation. The most explicit rejection of this approach is contained in Justice Lamer's judgment in *Reference Re Section 94(2) of the Motor Vehicle Act.* Justice Wilson clearly agreed with this rejection. In a thoughtful speech entitled "The Making of a Constitution: Approaches to Judicial Interpretation" she talked about the limitations of the framer's intent approach:

> One very influential school of American scholars believes that the Constitution should be interpreted according to the intent of those who framed it. The framer's intent school holds that, for the constitutional enterprise to be legitimate, answers to constitutional problems must come from the text of the Constitution itself. Contemporary societal values are irrelevant to this enterprise. What is relevant are the values held by the framers at the time the Constitution was created. What the Constitution meant to the framers, this school concludes, is what the Constitution should mean for all time.
>
> This approach presented some serious problems for United States judges. How were they to know what the framers meant 200 years ago? Even if they could actually talk to the framers of their constitution, would the framers' intention emerge as uniform and clear? And what of modern constitutional problems that hinge on issues that didn't even exist two hundred years ago. How could the framers of the United States constitution have had an intent relating to desegregation of

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31. Webster's New World Dictionary (College Edition, 1968), p.1631.
32. *Loc. cit.*
33. *Loc. cit.*

> schools in an era before general public education? How could the framers, living at the dawn of the industrial revolution, have had any opinion about the validity of maximum hours of work legislation?
>
> There is, however, an even more fundamental question that the American judges had to pose to themselves. Why should a group of men (and I stress men) long since deceased be allowed to constrain the progressive development of the American constitution? Why should they put it into an 18th century straight jacket? While we often look to the distant past with nostalgia and occasionally for inspiration, we surely cannot avoid the conclusion that we are very fortunate indeed to be living in an age that is more tolerant, more democratic and more open than any preceding epoch in our history.
>
> My point here can be underlined by a simple thought experiment. Let us ask ourselves what the United States framers' intent was on the issue of the rights of women. We must keep in mind that we are talking about a period long before women had the right to vote; a period when married women had no legal existence separate from their husbands; a period when their entire lives were absorbed in Kirche, Küche and Kinder. Surely womens' rights were not high on the agenda of the framers of the American Constitution....
>
> Well, haven't times changed? Today's approach to women's rights is informed by an overall societal commitment to sexual equality. And yet, if we took the framers' intent school seriously, we would be forced to admit that [today's societal commitment does not reflect] an original constitutional truth....
>
> Thus, we can see that in certain cases it would be unthinkable to allow the framers' intent to govern constitutional interpretation.[34]

Turning from approach to substance, in my view Justice Wilson's most visionary, and ultimately lasting, contribution to Charter jurisprudence was her insistence that the focus of analysis should be on the effects of laws and government conduct on individuals. For more than one hundred years in federalism cases there has been a murky debate about whether the purpose or effects of a law are controlling in constitutional analysis. The federalism jurisprudence is repleat with the language of 'aims at' (purpose) and 'merely effects' or 'incidental effect' (effects). Fortunately, the Supreme Court of Canada decided not to pursue this line of analysis. In *Big M Drug Mart*, [35]the Court said, correctly in my view, that a law would violate the Charter if

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34. *Supra*, note 15, pp.9-12.
35. *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.).

either its purpose or effects were contrary to the rights and freedoms guaranteed by the Charter.

In a separate concurring judgment, Justice Wilson explicitly referred to "the distinction between the analysis demanded by the Charter and the analysis traditionally pursued in resolving division of powers litigation under ss.91 and 92 of the *Constitution Act, 1867*".[36] That distinction she articulated in these terms:

> In my view, the constitutional entrenchment of civil liberties in the *Canadian Charter of Rights and Freedoms* necessarily changes the analytic approach the courts must adopt in such cases ... While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the Legislature has acted within its constitutional authority in division of power terms, the Charter demands an evaluation of the impingement of even *intra vires* legislation on the fundamental rights and freedoms of the individual. It asks not whether the Legislature has acted for a purpose that is within the scope of the authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented document.[37]

In my view, Justice Wilson's and the Court's treatment of the Charter in 'an effects-oriented' context in *Big M Drug Mart* and in most of the subsequent Charter cases is the single most useful principle identified for Charter interpretation. It properly focuses judicial, and therefore governmental, attention on the intended beneficiaries of the Charter — individuals — and it compels them to recognize that what is central are the consequences of laws and government conduct to those individuals. The Charter will fulfil its fundamental role in Canadian society only if it results in actual, real world protection of individual rights and freedoms from government infringement, irrespective of the motives of governments in trying to abridge them.

A second substantive component of the visionary quality of Justice Wilson's constitutional jurisprudence was her forceful articulation that the Charter created a new regime for Canadian governments. The relevant questions in Canadian constitutional law were no longer just what has the majority done (the question flowing from Canadian democratic and parliamentary supremacy principles) and which level of government can do a certain thing (the question flowing from Canadian federalism). The Charter posed a whole new and different

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36. *Ibid.*, p.369.
37. *Ibid.*, pp.371-372.

question, namely whether the majority in either level of Canadian government could enact a particular law or engage in a particular course of conduct. Justice Wilson firmly grasped the new umbrella question posed by the Charter and recognized that it transformed both the realm of discourse in Canadian constitutional law and the role of the courts, especially the Supreme Court of Canada, in the constitutional process. As Justice Wilson herself expressed it:

> [T]he *Canadian Charter of Rights and Freedoms* represents a national political choice. Certain fundamental rights and freedoms are guaranteed to the citizens and the courts have been given the task of ensuring that governments respect them. This role is, of necessity, an anti-majoritarian one. The legislature is elected by popular vote and is accountable to the electorate. In general, it will pass legislation that it feels will be to the greater advantage of the nation as a whole. The courts must carefully scrutinize this legislation to ensure that it does not sacrifice the rights of the few simply to enhance the welfare of the many. For if the courts allowed rights to be overridden for merely utilitarian reasons the protection afforded to the individual would be illusory indeed. It is precisely when the majority have something to gain from violating our rights that our rights are most in jeopardy.[38]

A good illustration of this conception of the Charter in operation is Justice Wilson's interpretation of section 1 of the Charter. After some initial caution, in *Regina* v. *Oakes*[39] a unanimous Court, speaking through Chief Justice Dickson, boldly articulated a very demanding standard of justification for governments trying to rely on section 1. In later cases some of the judges appeared to move away from a uniformly rigorous application of *Oakes*. Justice Wilson, however, consistently held to *Oakes* because in her eyes any violation of a Charter right was so serious that it could be accepted by the courts only if the government's justification was overwhelming.

Moreover, Justice Wilson, perhaps more than any other judge on the Court, insisted that there be a strong evidentiary basis for assertions by governments that their limitations on the rights and freedoms protected by the Charter were reasonable and therefore justified under section 1. of the Charter. Thus, for example, in *Singh* she was not prepared to accept a government argument of administrative convenience: "I have considerable doubt that the type of utilitarian considera-

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38. *Supra*, note 15, pp.16-17.
39. *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.).

tion brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the Charter".[40]

Justice Wilson's insistence in Charter cases that governments openly justify their laws and conduct if these potentially violated the Charter was parallelled in consistent fashion in other areas of constitutional law. She attaches great importance to the values of openness and equality and believes that governments must respect and indeed exemplify these values. One sees this in a case like *Smallwood* v. *Sparling*[41] where the Supreme Court held that a former Premier had to appear before a federal inquiry and testify about various government matters. Justice Wilson said:

> Mr. Smallwood has no exemption from the universal testimonial duty to give evidence simply by virtue of his status as former Premier and Minister of the Province of Newfoundland. Nor does he enjoy either by statute or at common law any blanket immunity to give oral testimony or produce documents. His immunity in that regard is relative only and must wait upon the content of the proposed examination. Mr. Smallwood cannot be the arbiter of his own immunity.[42]

Justice Wilson was also prepared to restrict, albeit in only a limited way, the notion of judicial immunity. In *MacKeigan* v. *Hickman*[43] a provincial Royal Commission was established to inquire into all aspects of the wrongful conviction of Donald Marshall for murder. At one point in the long Marshall saga the Nova Scotia Court of Appeal rendered a reference judgment holding that Marshall's conviction was wrong but that any miscarriage of justice was more apparent than real. In the course of its hearings the Commission sought to compel the five members of the Court of Appeal who had sat on the reference to attend and testify concerning certain aspects of the reference. The three matters on which it sought to compel testimony were the inclusion of the former Attorney General on the panel hearing the reference (there was some evidence before the Commission that he had been involved as Attorney General in the original Marshall case), the contents of the record that was in fact before the Court of Appeal (the Court's judgment appeared to rely on affidavits that may not have been entered at the Reference hearing) and what factors in the opinion of the Court of

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40. *Supra*, note 6, p.469.
41. *Smallwood* v. *Sparling et al.* (1982), 141 D.L.R. (3rd) 395 (S.C.C.).
42. *Ibid.*, p.411.
43. *MacKeigan* v. *Hickman* (1989), 61 D.L.R. (4th) 688 (S.C.C.). I was counsel to the respondents, the Commissioners of the Royal Commission into the Donald Marshall Jr. Prosecution in this case.

Appeal constituted a miscarriage of justice. The judges of the Court of Appeal refused to attend, citing the principle of judicial immunity. A majority of the Supreme Court agreed with their position. Justice Wilson dissented in part, however, and would have permitted the Commission to compel testimony from the judges about the composition of the panel and the contents of the record before the Court. Justice Wilson drew a sharp line between adjudicative and administrative matters and would apply an absolute immunity to only the former. She wrote:

> I write in support of the judgment of my colleague, Justice Cory, on this appeal. I agree with him and with my other colleagues, that the judiciary enjoys an absolute immunity with respect to its adjudicative function. I also agree with him that the judiciary's immunity with respect to its administrative function is not absolute and that it must give way in circumstances where the administration of justice is itself under review by a body with the constitutional authority to undertake such a review. It would be anomalous indeed if in a case such as the present all aspects of the justice system leading up to the wrongful conviction of Mr. Marshall, his subsequent release and his receipt of compensation should be inquired into by the commission except the administrative decisions made by the judiciary.[44]

A third substantive component of the visionary aspect of Justice Wilson's constitutional jurisprudence was her deep commitment to the view that the Charter was intended to protect those members of Canadian society who are in special need of protection. All of the rights and freedoms in the Charter are worded in a neutral fashion, i.e. they are usually stated as being applicable to everyone. However, Justice Wilson clearly felt that the underlying purpose of the Charter was to provide special protection for disadvantaged persons or groups. As she expressed it in her Edinburgh lecture:

> The anti-majoritarian nature of rights provides valuable guidance to the courts in interpreting the Constitution. As judges we should ask ourselves which groups are most likely to be ignored in the making of legislation. The poor, the oppressed, the powerless, racial minorities, accused criminals — even in the healthiest of democracies these groups are typically shut out of the political process. When assessing the rights of individuals from these groups we must be particularly vigilant. I believe that the true test of rights is how well they serve the less privileged and least popular segments of the society.[45]

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44. *Ibid.*, p.695.
45. *Supra*, note 15, p.17.

Justice Wilson consistently held to this conception of the Charter in her judgments. Although she clearly believed that the rights and freedoms in the Charter should be available to everyone, anyone reading her judgments would have to conclude that those judgments were very influenced (and openly so) by the position of the litigants in the cases. Refugees (*Singh*), women (*Morgentaler*), children (*Irwin Toy*[46]), workers (the labour trilogy[47]) — in Justice Wilson's judgments there is a palpable sympathy for these groups and a genuine desire to interpret the Charter to provide them with greater protection. In the equality cases she explicitly enunciated "sterotyping, historical disadvantage or vulnerability to political and social prejudice" as touchstones for the interpretation of section 15 of the Charter.[48] And in *Irwin Toy* Justice Wilson (in a judgment co-authored with Chief Justice Dickson and Justice Lamer) rejected the argument that section 7 of the Charter protected the economic rights of corporations. At the same time, the three justices expressly left open the possibility that section 7 does protect some economic rights that would be particularly crucial to disadvantaged members of society. In a passage that for me represents the underlying philosophy of the Charter adhered to by these three justices they wrote:

> The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".
>
> There are several reasons why we are of the view that this argument can not succeed ... what is immediately striking about [section 7] is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provides that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s.7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect, First, it leads to a general inference that economic rights as generally encompassed by the term"property" are not within the perimeters of the s.7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that

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46. *A.G. Que.* v. *Irwin Toy Ltd.* (1989), 58 D.L.R. (4th) 577 (S.C.C.).
47. *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.); *Public Service Alliance of Canada et al.* v. *The Queen in Right of Canada* (1987), 38 D.L.R. (4th) 249 (S.C.C.); *Governmment of Saskatchewan et al.* v. *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al.* (1987), 38 D.L.R. (4th) 277 (S.C.C.).
48. *R.* v. *Turpin* (1989), 48 C.C.C. (3d) 8 (S.C.C.), at p.35.

> the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment choose to pronounce upon whether these economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the *person*" to be that a *corporation's* economic rights find no constitutional protection in that section.[49]
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> (emphasis in original)

III. The Heretic Theme

In American constitutional law Justice Oliver Wendell Holmes was sometimes called 'the great dissenter'. This was a misleading sobriquet because in fact Justice Holmes did not dissent in an especially high number of cases. However, the high profile of some of the cases, the pithy and passionate eloquence of his dissents and, importantly, the acceptance by later courts of many of his dissenting positions all combined to create a memory of Holmes, nearly a century later, as 'the great dissenter'.

Justice Wilson leaves the Court with a bit of a reputation, at least in the legal community, as another great dissenter. The perception would be that although she joined the majority, and indeed wrote for it, in many major Charter cases she also disagreed with the majority in many other Charter cases. As with Holmes, however, the perception is misleading. Justice Wilson participated in 149 Charter cases. She wrote a dissent in only 23, or 14.5 per cent, of these cases.

I suspect that some of Justice Wilson's reputation as a dissenter or heretic is based on a couple of other factors. One is that, like Holmes, Justice Wilson wrote some of her dissents in a particularly forceful and eloquent way in highly visible cases (e.g. *Edward Books* — Sunday closing). The other reason is that Justice Wilson also wrote 26 concurring opinions in Charter cases. Many of these opinions are based on quite different philosophical bases and legal principles from those enunciated by her colleagues (e.g. *Morgentaler*, *Operation Dismantle*, *Reference Re Section 94(2) of the Motor Vehicle Act*). Taken together, the dissenting and concurring judgments lend support to the

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49. *Supra*, note 46, pp.632-633.

perception that, even on a Court where at least several of the justices shared her basic views about how the Charter should be interpreted and the role of the Court in the interpretation process, Justice Wilson was nevertheless somewhat of a heretic — a judge who expressed opinions "opposed to official or established views or doctrines".[50]

Let me give just two examples of areas in which Justice Wilson swam outside the mainstream, through either or both her dissenting and concurring opinions. The first is Justice Wilson's consistent and always bold attempts to pour substantive content into the notion of 'liberty' in section 7 of the Charter. Whereas many of the judges on the Court would often try to decide cases under other sections of the Charter or even under other components of section 7 itself (perhaps out of a fear that they might open the Pandora's box of the economic liberty decisions of the United States Supreme Court at the turn of the century or perhaps because of a reluctance to loosen the word 'liberty' in section 7 from its Legal Rights anchor), Justice Wilson seemed actually to prefer thinking in terms of, and grounding her decisions in, the notion of liberty. Thus in *Jones*,[51] Justice Wilson alone talked about whether liberty included a parental right to educate a child in accordance with his or her conscientious beliefs while the rest of the Court preferred to resolve the cases by interpreting the phrase 'principles of fundamental justice' in section 7. And in *Morgentaler*, Justice Wilson alone spoke at length about the connection between the notion of liberty and a woman's decision whether or not to terminate a pregnancy whereas the other judges rested their decisions on an interpretation of phrases 'security of the person' and 'principles of fundamental justice'.

It is clear from the cases that Justice Wilson regards liberty as one of the most important values in a democratic society. Her reasons for this view are perhaps best and most eloquently stated in *Morgentaler* where she had the opportunity to expand on her earlier discussions of the meaning of liberty in *Singh* and *Jones*:

> The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity....
>
> The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express

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50. *Supra*, note 31, p.679 — definition of 'heresy'.
51. *Jones* v. *R.* (1986), 31 D.L.R. 94th) 569 (S.C.C.).

> themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely, that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
>
> Thus an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
>
> This view is consistent with the position I took in ... *Jones* ... One issue raised in that case was whether the right to liberty in s.7 of the Charter included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated ...:
>
> > "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 own character, to make his own choices for good or ill, to be nonconformist, 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'...."
>
> Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.[52]

My second example of Justice Wilson's heresy is her position on section 1 of the Charter. Although the Court was unanimous when it enunciated its section 1 test in *Oakes* there can be no doubt that in some recent cases the majority of the Court has abandoned the rigors of *Oakes* in favour of a more deferential, balancing test. This is particularly true for those judges who believe that the *Oakes* test may be fine in a criminal justice context but is simply too hard a test to impose on governments in the context of social and economic legislation. Justice Wilson, however, has not moved. She consistently applies *Oakes*, without qualification or dilution and in all categories of cases.[53]

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52. *Supra*, note 8, pp.485-487.
53. See, for example, her judgment in *McKinney*, *supra*, note 21.

I believe that Justice Wilson's distinctive or heretical positions can be explained by her 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 governments. She firmly believes that Canada is no longer just a democratic federation where all the constitutional issues are resolved on the basis of such principles as parliamentary supremacy and distribution of powers. Although these remain and continue to be important in the Canadian Constitution, they have now been joined by entrenched constitutional rights and freedoms which, Justice Wilson believes, must be protected in a particularly vigilant way by the courts.

Conclusion

Justice Bertha Wilson left large footprints in the sands of Canadian constitutional law, especially the *Canadian Charter of Rights and Freedoms*. She was a patriot — a judge who strove to identify and articulate a distinctive Canadian jurisprudence to reflect a very distinctive country. She was a visionary — a judge who understood the values emanating from the Charter and a judge who had the good fortune through position, skill and dedication to make those values come alive through her judgments. She was a heretic — a judge who went farther than her colleagues in using the Charter to change the way in which governments operate and to raise the expectations of many Canadians, especially disadvantaged Canadians.

Justice Wilson was, it is clear, a perfect judge for her time. Her career, especially as a judge, was wonderfully successful. And her legacy is substantial. I believe that she possessed many personal and professional characteristics which combined to make her so successful. I would highlight three of them. First, Justice Wilson has a formidable intellect. She is a scholarly woman with an active and inquiring mind who loves research and writing. She is exceptionally well-read and exhibits a great breadth of intellectual interests. Secondly, Justice Wilson is a woman and judge of great compassion — whether as a parson's wife in rural Scotland or a justice of the highest court in Canada (the bookends of her career) she strove mightily to make the lives of individual people, especially disadvantaged people, better. Thirdly, Justice Wilson possesses a passion and boldness which enabled her to think creatively, write powerfully and, through these, challenge governments and conventional wisdom. When I was working this summer on this paper my recreational reading for a few evenings was a book entitled *From Beirut to Jerusalem* written by

Thomas Friedman, the correspondent for the New York Times in first Beirut and then Jerusalem throughout the 1980s. Friedman tells of an interview he had with Prime Minister Shamir:

> Shortly after Yitzhak Shamir became Prime Minister in October 1986, I went to see him with A.M. Rosenthal, then the executive editor of the *New York Times*...
>
> As the interview drew to a close in the Prime Minister's office, Abe asked Shamir one of those cosmic questions reporters always ask heads of state. "Mr. Shamir ... when your term of office is up, what would you like people to say about you?"
>
> Shamir leaned forward, clasped his hands together, looked Abe in the eye, and said, "I want them to say that I kept things quiet".[54]

When I read that my mind leaped back to my Wilson paper. I thought to myself: of all the judges who have served on the Supreme Court of Canada Justice Wilson would be the least likely to think or say that. Constitutional law for her was not about keeping things quiet. She lived faithfully Dalhousie's Weldon Tradition of public service through her judgments, her lectures and her inspiration to the next generation. The tides of time will wash against her immense constitutional footprints. Like all footprints in the sand, some of hers will disappear, others will diminish. But many of her footprints will endure forever. And, perhaps of equal importance, she will have pointed the way forward so that succeeding generations of Canadians can make their constitutional footprints good, fair and just ones.

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54. Friedman, *From Beirut to Jerusalem* (New York: Farrar Strauss Giroux, 1989), at p.283.