

**JUSTICE BERTHA WILSON: ONE WOMAN'S DIFFERENCE, KIM BROOKS, ED  
(VANCOUVER: UBC PRESS, 2009)**

In March 1982, Justice Bertha Wilson was the first woman appointed to the Supreme Court of Canada. She replaced the Honourable Justice Ronald Martland. As I had been hired by Justice Martland to be his law clerk, I became Justice Wilson's clerk. Although our time working together was brief (six months), we maintained a friendship throughout her life. She took a keen interest in the professional development and personal lives of all of her law clerks. I am honoured to have been asked to review this book.

*Justice Bertha Wilson: One Woman's Difference* is a collection of 16 essays which reflect upon Wilson's contributions as jurist, speaker, chair of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, mentor, and role model to a generation of lawyers and judges. The authors are all women; fifteen of the essays are written by academics (and a student) from law faculties across Canada, and one essay is authored by a barrister. For the most part the authors write from the perspective of their own considerable expertise in a particular area of law. Their critical analysis of several of Wilson's judgments from both the Ontario Court of Appeal and the Supreme Court of Canada caused me to reflect upon those judgments in novel ways. Some of the authors tackle the tricky issue of whether Wilson was a "feminist" judge.

This is not a biography of Bertha Wilson and the authors take care to give credit, where due, to Wilson's official biography written by Ellen Anderson.<sup>1</sup> However, the preface, written by Wilson's colleague and friend Justice Claire L'Heureux-Dubé provides some biographical information about this woman of "firsts." Justice L'Heureux-Dubé reminds us that Wilson spoke in two voices, at times strident and at others as a balanced incrementalist, and it was her ability to alternate between these two voices that made Wilson such an important player in the Canadian legal landscape.<sup>2</sup>

The book is divided into three themes: foundations, controversy, and reflections. The thorough introduction by editor Kim Brooks describes the themes and each of the essays within the theme. It is not my intention to discuss each essay but rather to highlight some of those chapters which I found particularly engaging. I suggest that one chapter might have been better placed at the beginning of the collection. Chapter 12, "I Agree/Disagree for the Following Reasons: Convergence, Divergence, and Justice Wilson's 'Modest Degree of Creativity'" by Marie-Claire Belleau, Rebecca Johnson, and Christina Vinters, is an empirical study of judgments in which Wilson participated during her nine years on the Supreme Court. Perhaps because I enjoy statistics and graphs, particularly where they relate to judicial work product, I found this extremely interesting, not only for the sheer volume of judgments authored by Wilson, but also for the solid empirical evidence of Wilson's independence, as demonstrated by the number of concurring judgments she wrote. Many of her concurring or dissenting reasons, for example, her decision in *Frame v Smith*,<sup>3</sup> became

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<sup>1</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2001).

<sup>2</sup> Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) at ix.

<sup>3</sup> [1987] 2 SCR 99.

the basis for significant jurisprudence in the area of fiduciary relationships. It would have been useful for me to have this framework prior to reading the other essays.

In Part One, “Foundations,” there are three particularly notable essays. “Power, Discretion, and Vulnerability: Justice Wilson and Fiduciary Duty in the Corporate/Commercial Context” considers Wilson’s contribution to two quite distinct areas: the development of fiduciary duty in corporate commercial law and her recognition that through the Court’s leave process, the Supreme Court could play a greater role in the development of corporate commercial law. Author Janis Sarra traces the development of the law of fiduciary duty from Wilson’s dissenting judgment in *Frame v Smith*, a family law case, through to the Court’s endorsement of that judgment in the commercial context in *Lac Minerals Ltd v International Corona Resources Ltd*<sup>4</sup> and in *Hunter Engineering v Syncrude Canada Ltd*.<sup>5</sup> I liked the author’s emphasis on the ability of a judge to use principles from one area of the law to resolve disputes in another area, perhaps because of my own belief that judges ought to continue to be generalists.

In her well-known speech, “Will Women Judges Really Make a Difference?” Bertha Wilson urged judges to “enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge.”<sup>6</sup> In “A Few More Spokes to the Wheel: Reasonableness, Fairness, and Justice in Justice Bertha Wilson’s Approach to Contract Law,” Moira McConnell demonstrates how Wilson attempted to enter into the skin of the litigant in cases involving the law of contract. The author analyzes several of Wilson’s leading decisions in contract law through the lense of three adages, “chickens come home to roost,” “having their cake and eating it too,” and “the proof of the pudding is in the eating.”<sup>7</sup> The adages lend themselves wonderfully to contract law and the author is able to expand upon Wilson’s careful approach to contract law and her respect for certainty in the law of contract and the primacy of private ordering. In “Giving Emotions Their Due: Justice Bertha Wilson’s Response to Intangible Loss in Contract,” Shannon O’Byrne addresses the difficult area of the role of damages for emotional distress in contract law. She argues that Wilson’s partial dissent in *Vorvis v Insurance Corp of British Columbia*<sup>8</sup> led the process of giving emotions their due, thereby launching the modern approach to recovery for mental distress damages.<sup>9</sup> I appreciated this essay’s historical analysis of “hysteria” and the wrongly presumed inferiority of women and their inability to fully reason.

Part Two, “Controversy,” contains five essays examining Wilson’s more controversial decisions in the areas of tort law (discrimination), criminal law, and family law.

I have always thought that Wilson’s most well-known judgment is *R v Lavallee*<sup>10</sup> which not only recognized that self-defence could be available to an abused spouse, but also taught

<sup>4</sup> [1989] 2 SCR 574.

<sup>5</sup> [1989] 1 SCR 426.

<sup>6</sup> Madam Justice Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28:3 Osgoode Hall LJ 507 at 521.

<sup>7</sup> Moira L. McConnell, “A Few More Spokes to the Wheel: Reasonableness, Fairness, and Justice in Justice Bertha’s Approach to Contract Law” in Brooks, *supra* note 2, 74 at 75.

<sup>8</sup> [1989] 1 SCR 1085.

<sup>9</sup> Shannon Kathleen O’Byrne, “Giving Emotions Their Due: Justice Bertha Wilson’s Response to Intangible Loss in Contract” in Brooks, *supra* note 2, 92 at 101.

<sup>10</sup> [1990] 1 SCR 852 [*Lavallee*].

us the importance of context. "Contextualizing Criminal Defences: Exploring the Contribution of Justice Bertha Wilson" by Isabel Grant and Debra Parkes also discusses Wilson's effort to enter into the skin of the litigant. The article focuses on Wilson's decisions in *R v Perka*<sup>11</sup> (the defence of necessity), *R v Hill*<sup>12</sup> (the defence of provocation) and *Lavallee*. The authors emphasize that although the decisions were groundbreaking, Wilson's analysis was firmly rooted in legal doctrine.

One of the most thoughtful essays in this collection is "'Finally I Know Where I Am Going to Be From': Culture, Context and Time in a Look Back at *Racine v. Woods*" by Gillian Calder. She discusses a case with which I was not familiar — the Supreme Court's decision in *Racine v Woods*<sup>13</sup> which concerned a problem that is all too familiar, the removal of a child by social services and the ultimate adoption of that child. The dispute in *Racine* was between the biological mother, an Aboriginal, and the adoptive parents. Wilson's decision resulted in the child staying with the adoptive parents, having found that relationship to be in the best interests of the child. The author asks us whether we look at Aboriginal child welfare cases in too narrow a time frame, the immediate past and present circumstances, rather than the "deep past, the future, and generations beyond the moment."<sup>14</sup> I will not forget this essay.

Part Three, "Reflections," contains six essays which reflect upon Wilson's significant contribution to the law and to the profession. The first essay tackles an old debate regarding Bertha Wilson. In "But Was She a Feminist Judge?" author Beverley Baines chooses not to focus the debate upon whether Wilson identified herself as a feminist, but rather to answer the question by reviewing three of Wilson's more controversial judgments to situate them within two theories: dominance theory and contemporary gender theory. Wilson's judgments in *Pelech v Pelech*,<sup>15</sup> *R v Morgentaler*,<sup>16</sup> and *R v Hess/R v Nguyen*<sup>17</sup> have been much criticized by feminist scholars for Wilson's failure to find that the impugned provisions infringed substantive equality. In my view the author's careful critical analysis very convincingly demonstrates that Wilson's judgments indeed promoted substantive equality, particularly as the law had developed during her time on the Court.

Lorna Turnbull's essay "A Way of Being in the World" made me smile and ponder my good fortune at having had the opportunity to work with Bertha Wilson. The author describes her decision to enter law school after reading a Saturday Night Magazine interview with Wilson as well as several encounters with Wilson during Turnbull's law school years. The article is about mentors and role models. It reminded me of the importance of having mentors and role models, but more importantly of the obligation to mentor those entering the profession.

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<sup>11</sup> [1984] 2 SCR 232.

<sup>12</sup> [1986] 1 SCR 313.

<sup>13</sup> [1983] 2 SCR 173.

<sup>14</sup> Gillian Calder, "'Finally I Know Where I Am Going to Be From': Culture, Context, and Time in a Look Back at *Racine v. Woods*" in Brooks, *supra* note 2, 173 at 184.

<sup>15</sup> [1987] 1 SCR 801 [*Pelech*].

<sup>16</sup> [1988] 1 SCR 30.

<sup>17</sup> [1990] 2 SCR 906.

As a judge who was appointed in the early years of judicial education on “social context,” I eagerly read the essay “Taking a Stand on Equality: Bertha Wilson and the Evolution of Judicial Education in Canada” by Rosemary Way and Brettel Dawson. The authors trace the history of judicial education leading up to the establishment of the National Judicial Institute. They describe Wilson’s role in the expansion of legal education with her observation that “[i]t is so much easier to come up with a black and white answer if you are unencumbered by a broader context.”<sup>18</sup> The authors discuss the conclusions and recommendations from the Canadian Bar Association report regarding gender bias in the judiciary.<sup>19</sup> In reading this essay I was struck by how fortunate I am to have been the beneficiary of judicial education and to have so many talented female judicial colleagues.

In the concluding chapter, Mary Jane Mossman offers her reflections on the relationship between gender and law in Bertha Wilson’s life. She does so, in part, through an analysis of three of Wilson’s judgments; *Re Rynard*,<sup>20</sup> *Becker v Pettkus*,<sup>21</sup> and *Pelech*. In “Bertha Wilson: ‘Silences’ in a Woman’s Life Story,” the author explores the manner in which gender was sometimes present, and at other times absent in Wilson’s judgments. The choice of judgments is interesting. They are not the public law judgments for which Wilson is perhaps better known. The author also reflects upon the isolation that Wilson must have felt as one of very few women in the profession, and the first woman on the Supreme Court. This essay is an apt conclusion to the book. It brings together aspects of both Wilson the jurist and Wilson the person, and leaves the reader in awe of all that one woman accomplished.

In her introduction to the book editor Kim Brooks hopes that this collection of essays will lead readers to speculate not only about the questions raised by Wilson’s astonishing record of work, but also about the questions we cannot answer from the record about who this pioneering, influential, and extraordinary woman was. I believe the book fulfilled the authors’ hopes and I heartily recommend it. I learned new things about Bertha Wilson. I was inspired to think about Wilson and the law in new ways and to reconsider her significant contribution to the law and to the public she served. Lawyers and judges now take for granted the contextual approach to a legal problem. It was Bertha Wilson and her colleagues on the Supreme Court in the 1980s who articulated this approach. For me she was, and is, a mentor and a role model. She was a judge who used her “modest degree of creativity”<sup>22</sup> while at the same time remaining true to the rule of law. She exemplified the two qualities so essential to a good jurist: judicial independence and impartiality.

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<sup>18</sup> Rosemary Cairns Way & T Brettel Dawson, “Taking a Stand on Equality: Bertha Wilson and the Evolution of Judicial Education in Canada” in Brooks, *supra* note 2, 278 at 281, citing Wilson, *supra* note 6 at 520.

<sup>19</sup> Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

<sup>20</sup> (1980), 31 OR (2d) 257 (CA).

<sup>21</sup> (1978), 20 OR (2d) 105 (CA).

<sup>22</sup> Wilson, *supra* note 6 at 516.