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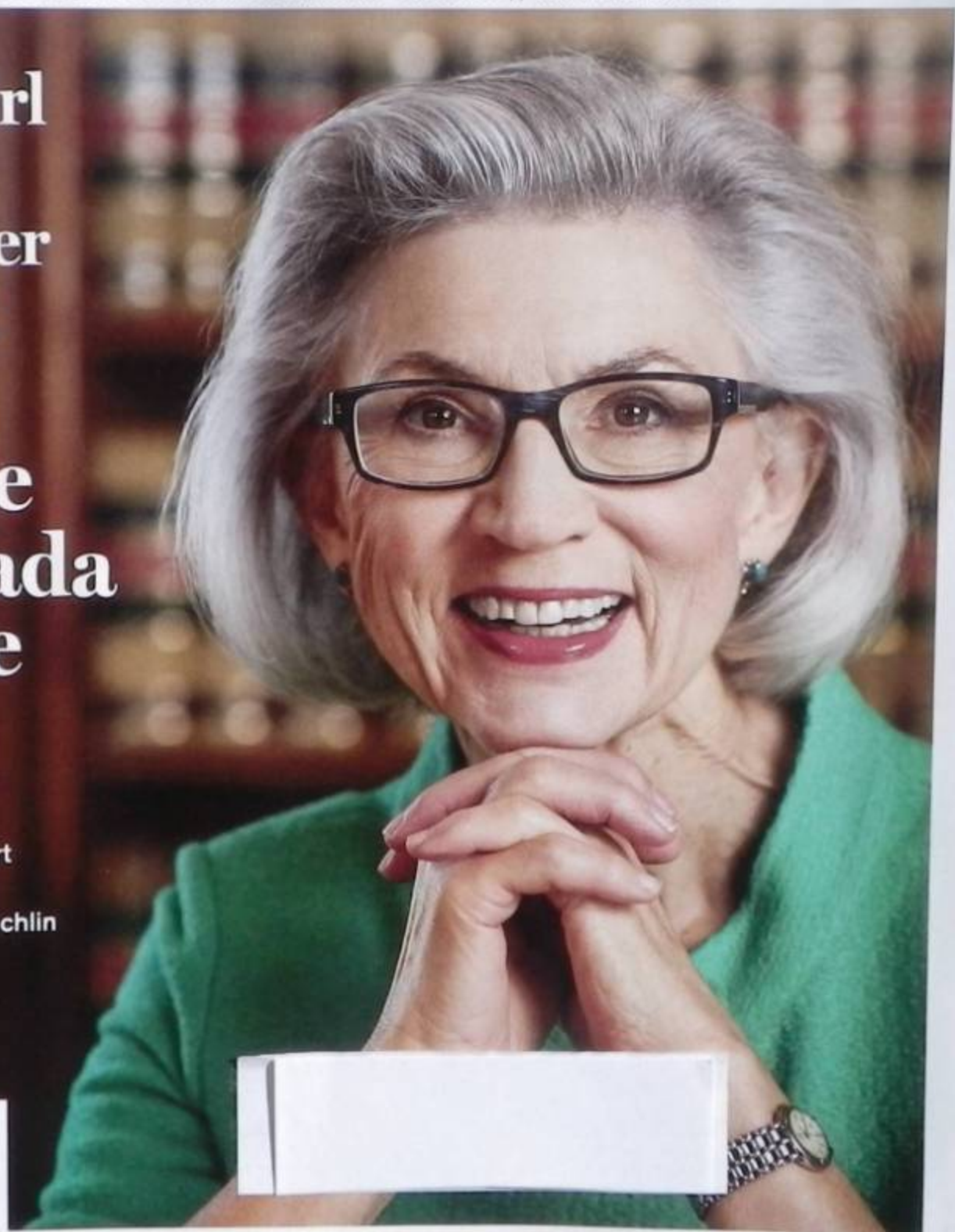
The girl
from
Pincher
Creek
who
made
Canada
more
just

Supreme Court
Chief Justice
Beverley McLachlin

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Canada's Top JUDGE

Chief Justice Beverley McLachlin's remarkable service

By KATHERINE ASHENBURG

THE GRAND Entrance Hall of the Supreme Court in Ottawa is beautiful in an imposing, not to say forbidding, way. Lined with three kinds of marble in chaste tones of beige and gold, punctuated by 12-metre columns, it's dominated by a monumental double staircase. But once you ascend the staircase to the main courtroom, things become warmer and more matter-of-fact.

After a security check, anyone can enter this room and watch the Supreme Court of Canada at work. Nine chairs upholstered in red leather stand on a dais, against walnut panelling the colour of dark chocolate. Behind its traditional look, this is a modern courtroom, with display monitors, wireless Internet, laptops on the judges' bench and a wheelchair-accessible lectern. At 9:30 a.m. the doors behind the dais open and the court attendant announces: "The court. *La cour.*" The courtroom stands while the judges—four women and five men—take their seats. A small woman who has enlivened her black gown with a striking lace collar makes an informal, smiling entrance and sits in the middle.

Chief Justice Beverley McLachlin introduces the lawyers to her fellow justices. They're arguing a gnarly case involving the construction manager and owners of an Edmonton building, and an insurance company. The manager and owners claim their insurance contract covers the replacement of windows damaged during cleaning; the insurance

Some of her admirers consider her the only thing that stood between Prime Minister Harper and absolute power.

company disagrees, citing a clause excluding coverage for "making good faulty workmanship." The case seems to bring out the inner handyman in several of the justices: the hypothetical questions are full of plumber's elbows and other tools. McLachlin listens keenly, at times amused at the back-and-forth between judges and lawyers, occasionally asking a question herself. She exchanges some *sotto voce* conversation with Justice Rosalie Abella, who sits to her right. At one point she stifles a yawn and smooths her silvery hair.

Like the building in which she has worked since 1989, Beverley McLachlin mixes elegant impressiveness with a sturdy practicality. Her judicial and leadership skills, her respect for the law and her sense of responsibility to Canadians are grounded in an unpretentious, even self-deprecating, common sense. She likes to laugh, and often at her own expense. Both the ideals and the pragmatism owe much to her upbringing near Pincher Creek, Alberta.

Except for the fact she is very much alive, the first female chief justice of a Commonwealth high court and the longest-serving chief justice in Canada would be an obvious choice when Canadians go looking for the image of a (dead) woman to put on their money. McLachlin is now in the home stretch of her career, framed by the work of two Trudeaus, *père et fils*. Although Pierre Trudeau had left office by the time she joined the Supreme Court, the Charter of Rights and Freedoms he championed has profoundly informed her

JEREMY DODD

Robert McInnis's painting "Pincher Creek" hangs where McLachlin—born in Pincher Creek—can see it from her Ottawa desk.

time on the bench. Having weathered the resentment which Stephen Harper's administration felt for the Supreme Court, she now faces a prime minister with a more conciliatory stance. It is Justin Trudeau who will see McLachlin out when she reaches the obligatory retirement age of 75 in 2018.

AFTER HEARING THE LAWYERS' arguments in the insurance case, the justices adjourn to their conference room for discussion. By 2:30 p.m., McLachlin, dressed in a navy suit with a pin-striped effect and a ruffled white blouse, is working in her office. She has a reputation for guardedness, and it's true that she is cautious and well-rehearsed on subjects having to do with the court. But she can also be casual and spontaneous. Spotting me across the hall, before I've had a chance to introduce myself, she calls out, "You were in court this morning!" When I remark on the dryness of the window-washing case, she laughs delightedly. "There's nothing like a good tax case or a good insurance case to bring joy to a judge's heart!" Then, patiently, she explains how the court's interpretation of a few standard clauses in insurance contracts will provide needed certainty to builders, owners and insurers across the country.

She shows me Robert McInnis's painting "Pincher Creek," hung where she can see it from her desk. A road unfurls through grasslands towards a tiny settlement, with foothills in the background. The road is a bit bigger now, she says, appraising the scene where the prairie meets the Rockies, but otherwise it's the same.

In some ways McLachlin's mid-20th-century childhood sounds like a more distant time, even like an adventure in a *Girl's Own Annual* volume. The first-born of Eleanor Kruschell and Ernest Gietz's five children, Beverley grew up on her parents' ranch at the headwaters of Mill Creek, about 30 km along the foothills from Waterton Lakes National Park. The Gietzes were of modest means and supplemented their income with paying guests. But the beauty of their ranch and the spectacular views looking west into a canyon on the eastern slopes of the Rockies gave their eldest a rare sense of privilege. She rode her own saddle horse, hiked the nearby hills and enjoyed the ranch animals. Her parents were devout Pentecostal Christians, with strong ethical views, and that too left its mark on their daughter.

Warren Winkler, a former chief justice of Ontario, also grew up in Pincher Creek. When I asked him if there was something in the local water that produced distinguished judges, he answered without hesitation, "It's the wind. It's the windiest place in the world, and it makes your mind work quicker." I try out this dubious theory

During her first decade on the Supreme Court, McLachlin dissented from the majority in more than half the cases.

on McLachlin and she says, "Absolutely! I concur in that—and the wind makes you resilient. You learn to stand up against adversity."

One of the adversities of the Gietz ranch was its isolation: too remote for school bus service. So Beverley boarded in town during the week while attending the local high school. Fifteen or so girls lived in a big house with three or four bedrooms, a roster of chores and a den mother named Mrs. Hegel who kept order and saw to the meals. The teenage Beverley was a mystery to her teachers, with a baffling combination of extraordinary reading ability and an equally high lack of attention. One teacher dismissed her reading retention rates—"a girl can't do much with that"—and advised her to avoid jobs as a telephone operator or a waitress because of her attentional problems. She took that advice at least, enrolling at the University of Alberta in 1960.

By then, Pincher Creek had taught her a lot. A big family in a remote place provided abundant amounts of solitude and companionship: the former taught her self-reliance and the latter compromise and communication skills. "People amused and entertained themselves by talking," she remembers, and often the talk was about the wide world outside Pincher Creek. Her public school education was similarly broad-ranging, including a memorable social studies teacher who led them in discussions of world affairs large and small. Pincher Creek itself, with fewer than 4,000 inhabitants, included First Nations people, the descendants of English remittance men, Hutterites, Mennonites, Catholics and other immigrants. "It would be hard to grow up in such a setting and think there's only one right way to live or one religion or one way of doing things that's exclusively correct or even greatly superior to other ways," McLachlin says. "When you grow up in a small but very diverse community, it inculcates a certain breadth of acceptance."

She had planned to study modern languages at university, but finding her 18-year-old brain "very muddled," she switched to philosophy. "It helped me learn to order my ideas better," she once told Susan Harada in an interview. "You have to be able to defend or analytically attack a position,

and you have to be able to set out either process in clear terms that other people can understand." When she finished her degree, she considered graduate school in philosophy. Pincher Creek had one lawyer, Garth Turcott (who in 1966 won the NDP's first-ever seat in the Alberta legislature, in Pincher Creek-Crowsnest), but it never occurred to her to follow in his footsteps. It was her boyfriend Rory McLachlin, whom she would marry in 1967, who suggested that the law would let her apply her logical skills to real problems rather than academic ones. Plus he thought she'd be good at it. Intrigued, she wrote to the dean



Chief Justice Beverley McLachlin (second from right) takes part in a ceremony at the Supreme Court, Ottawa, February 10, 2015.

of law at the U of A for information about applying, and he responded, "You're accepted."

Her reaction was measured: "So I thought, I'll try it. And I've been there ever since."

RORY MCLACHLIN WAS ONE OF THE FIRST OF a series of men who had an idea, or a place in law school, or a seat on a court for her. Sometimes, as Beverley McLachlin talks about a career she sees as a string of fortuitous, unlooked-for advancements ("I've always lived my life without any grand plan. There was no conception of being a lawyer, much less a justice, and at each stage I had no conception of what would come after"), you could almost see her as the Accidental Chief Justice. That would be a mistake.

Once she took up the law, there was no stopping her. Graduating first in her law class (she also earned an M.A. in legal philosophy), she practised law in Alberta and BC and taught in the University of British Columbia's law school. At 37, in 1981, she became a judge at the County Court of Vancouver. In 1988 Rory McLachlin died of throat cancer, leaving her with their 12-year-old son, Angus. That same year, she became the Chief Justice of the Supreme Court of BC. Brian Mulroney appointed her to the Supreme Court of Canada in 1989, only the third woman to sit on the Supreme Court. Jean Chrétien chose her as Chief Justice in 2000. Her rise was so swift that an officer of the Law Society of BC joked that she'd progressed through the court system "faster than it takes most litigation."

McLachlin's career, of course, is the Canadian Dream: a girl raised on an isolated ranch, without money or powerful friends, ascends to one of the country's most exalted positions. She succeeds, according to Warren Winkler, because of her formidable intelligence and work ethic, the speed with which she absorbs and analyzes material, and something he calls natural leadership. He stresses the "natural" because he claims she couldn't have learned it in Pincher Creek—"there was no one to lead there." Whether it was the Supreme Court or the Canadian Judicial Council, on whose executive she and Winkler served, she seemed to know by instinct how to produce the desired effect from her colleagues. Comparing her to an orchestra conductor, Winkler remembers, "She had such a light touch and she'd have everyone going in the direction she wanted, and they would hardly be aware that they were going there. Yet they'd all have smiles and everyone would get to the destination, and there would be no static along the way."

The only leg up McLachlin had was via the women's movement. Speaking about the 1980s, and her rapid journey from Vancouver's County Court to the Supreme Court, she says, "I think I got carried along in this huge *crise de conscience*—We have no women judges. What are we going to do about it? And there was one that looked not too bad so they pushed me up very quickly."

The "one that looked not too bad" has been a judge for almost half her life. Thinking over McLachlin's Supreme Court record, Mayo Moran, a former dean of the University

of Toronto's law school, says her decisions are "not easy to call." Unlike judges who generally fall to the right or the left, she seems to decide each case on its own merits. She says she tries hard "not to be too strategic," and just to listen. Some of her early judgments, such as her dissent in the 1990 *Keegstra* case (she found the hate-speech criminal offences unconstitutional) or the 1992 *Zandl* case (where the crime of spreading false news was struck down), seemed to characterize her as a libertarian. She enraged many feminists in the 1991 *Seaboyer* case, where the rape shield law was struck down.

During her first decade on the Supreme Court, she dissented from the majority in more than half the cases. Sometimes the court eventually came to see things her way; she dissented from the majority who disallowed assisted suicide in *Rodriguez* (1993), and 22 years later, in the *Carter* case (2015), her view prevailed.

WHEN SHE BECAME CHIEF JUSTICE, MCLACHLIN surprised people by calling a press conference and announcing her priorities. The first was a greater transparency: the Supreme Court, she often says, belongs to Canadians and they deserve to know as much about it as possible. Her tenure has seen webcasts of court proceedings, greater media access, including lock-ups for journalists, and a heavy speaking schedule in which McLachlin tries to demystify the doings of the court.

The second priority was consensus. Her predecessor, Antonio Lamer, ran a contentious court with many split votes, and McLachlin was keenly conscious that more unanimous or nearly unanimous judgments would clarify the law. Unanimous decisions have risen sharply during her tenure. Her method is age-old and simple: "We get together, we conference, we talk, we send memos to each other. Dissents are an important part of our system, and if it truly is on an important point we welcome dissents—this is how the law grows and adapts—but we do have more consensus."

Her third priority concerned the power given to the court by the 1982 Charter to strike down laws they considered unconstitutional. Saying that the courts did not seek to be "a surrogate Parliament," she insisted on their responsibility to be courageous as well as prudent. During her tenure, Stephen Harper's Conservative government chafed more and more at her court's willingness to strike down legislation on mandatory minimum gun-crime sentences, assisted suicide and Senate reform, among other issues.

The government's touchiness was expressed most dramatically over the appointment of Marc Nadon to the Supreme Court in 2013. A Quebec appointee to the court must be a sitting

judge on the Quebec Court of Appeal or Superior Court or a current member of the Barreau du Québec. Nadon, however, was on the Federal Court of Appeal. During the consultation process, in July 2013, McLachlin advised the government of the problem with his eligibility. In September, Harper announced Nadon's appointment, which the Supreme Court found unconstitutional in March 2014, by a vote of six to one. When the Prime Minister's Office accused McLachlin of lobbying against Nadon's appointment, the Supreme Court issued a rare press release, saying that McLachlin had followed normal procedure and "did not express any views on the merits of the issue." The outrage at Harper's knuckle-rapping extended to Switzerland, where the International Commission of Jurists declared that McLachlin deserved an apology from the prime minister. (None came.)

"That incident kind of took the country's breath away," Mayo Moran says, "because this is not how Canada's institutions have operated. They have always operated with respect, and the incident with Harper was so highly aberrant. The legal community, which is never unanimous about anything, was very, very united behind her, because she was such an unlikely political hero. It was shocking to see Beverley McLachlin in that role! She's a consensus builder, she's not controversial, she is thoughtful, legal, incremental, not a radical."

In retrospect it looks like a tempest in a teapot, a frustrated prime minister bursting into a hissy fit that says much more about him than about the chief justice. It's not a moment McLachlin will discuss, other than to snort derisively when I mention that some of her admirers consider her the only thing that stood between Harper and absolute power. She never comments on political matters but it's easy enough to imagine her response: The court neither supports nor opposes any one party. Before, during and after the Harper government, it did and does its job by ruling on the constitutionality of laws. Period.

In recent years, McLachlin's interest in the rights of Aboriginal people has become prominent, first with the unanimous 2014 Supreme Court decision in favour of the

Tsilhqot'in Nation of BC. In what has been hailed as one of Canada's most important Aboriginal rights decisions, the court recognized the Tsilhqot'in claim to the 1,750 km² they had occupied for centuries. The following year, McLachlin gave a controversial speech at the Global Centre for Pluralism in which she described Canada's behaviour toward Aboriginal people as "cultural genocide."

The legal rights of Aboriginals, people with mental illness and the poor have stirred McLachlin. Philip Slayton, a former dean of law at the University of Western Ontario and the author of *Almighty Judgment*, a book about the



A girl raised on an isolated ranch, without money or powerful friends, ascended to one of the country's most exalted positions.

Supreme Court, awards her full marks for "having spoken out eloquently and forcefully about problems of access in this country. It's a big problem and one the legal profession seems to turn away from. We can't use [the justice system] because we can't afford it, and it's a horrible blot on the Canadian legal system."

McLachlin herself shrinks from thinking about her proudest achievement ("I hate these 'What is the best or the most or the proudest; I find them so difficult') but admits that her speeches and work bringing like-minded people together to promote access is high on the list. "It's a passion for me that every person of whatever background or means should have access to the Canadian justice system. It shouldn't be for the wealthy or the elite or the government, it should be there for everyone." But the mull of the judicial system grind slowly. McLachlin acknowledges more work is needed: "Achievement" puts it too strongly; it's a work in progress. But if I've been able to make [accessibility] more prominent or to serve as a catalyst, then I'm gratified."

Other than diehard anti-Charter forces, it's difficult to find people who'll say McLachlin has been anything but an excellent chief justice. Some observers complained to Slayton that McLachlin is too cautious, that she seeks "consensus at the expense of principle," but they insisted on anonymity. Slayton himself regrets that McLachlin hasn't put her stamp on the court, although he admits that some would find this a good thing. Unlike the big, candid personalities on the US Supreme Court, he says, McLachlin is "like a professional judge, almost in the European style."

IN SOME WAYS MCLACHLIN HAS LED a narrow life—educated in Alberta, she's never lived outside Canada for any appreciable period, and has worked at the same job for 36 years. But her early years taught her she could experience the world imaginatively, through reading, talk and art. She plays the piano, with Bach as a particular favourite. Her voracious reading began at the Pincher Creek Library and it continues. (She mentions *The Great Karoo* by Fred Stenson, also from Pincher Creek, as a novel she admires.) Her mother had always wanted to be a writer, but was never able to pursue it. "If you have a mother who expresses that dream with such longing and yearning," McLachlin says, "it has an influence on you as her daughter to think, 'I'd better not squander my chances.'" McLachlin herself has written two unpublished novels, one a detective story about a woman lawyer and one a historical novel set in Alberta.

At first she downplays her writing: "This is just a self-indulgent thing I've done at 2:00 a.m. when I can't sleep. If I write something it's just for myself and in my spare time." As we talk about the similarities between the work of the novelist and the judge, and the importance of imagination in both, she warms to the topic. Just as the novelist has to inhabit the psyche of each of her characters, McLachlin the judge tries to put herself in the shoes of the accused as well as the police or the prosecution. "Sometimes they may not be very nice shoes and you may not feel very good in them, but you try to dissociate yourself from those strong emotions and put yourself in their position, as an actor would."

We move from high art to the applied arts, and knitting, which she learned as a little girl. Although McLachlin doesn't have the time to finish many projects these days, she finds knitting contemplative as well as creative. Just as she wanted more to hear about the novel I'm writing than talk about her own, she'd rather ask what I'm knitting than discuss her own projects. She's charmed that Margrethe Vestager, the Danish politician currently serving as competition commissioner for the EU, knits toy elephants during high-level meetings in Brussels. And she's taken with the idea that knitting is an apt metaphor "for what I hope to do in my job"—knitting the justices' various opinions into a consensus, knitting the judicial and legislative sides of the government into a healthy whole, knitting Canadians together with their justice system. "It's very zen," she says thoughtfully and laughs. "I'll have to take it up again."

Once McLachlin steps down from the court in 2018, she hopes to travel more with her second husband, Frank McArdle, a lawyer she married in 1992. She wants to keep contributing to the legal landscape, and it would be nice to see those novels emerge from her drawer, as well as some finished pieces of knitting. But meanwhile—in keeping with her habit of not planning the future—she's happy to have two more years of deliberation on the court in the service of a more just Canada. ■

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"Longest-serving chief justice" would be an obvious choice for the image of a woman to put on our currency.