

2019 OHS AGM Keynote Address Transcript

Rt. Hon. Beverley McLachlin, Chief Justice of the Supreme Court of Canada (2000-2017)
“The History of the Supreme Court and the Importance of Heritage Preservation in Canada”

Caroline Di Cocco: Today for our keynote address, we are very fortunate to have with us the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada from 2000 to 2017. She’s come down specially from Ottawa to be with us.

Justice McLachlin currently works as an arbitrator and mediator in Canada and internationally. Like the Ontario Historical Society, she works in service of the public of all races and religions.

Originally from Alberta, Justice McLachlin’s judicial career began in 1981 when she was appointed to the Supreme Court of British Columbia. She was appointed Chief Justice of the Supreme Court of BC in 1988 before being appointed to the Supreme Court of Canada less than a year later.

Throughout her judicial career, Justice McLachlin has been involved with countless areas of the Canadian legal system, both common law and civil law, and both private and public law, in English and French. She's participated in over 2,000 Supreme Court of Canada judgments, of which she herself wrote 442.

Not only is she an author of numerous legal articles and publications, but she's also written a mystery novel called “Full Disclosure,” which was published in 2018.

One year ago, in June, for her tenure as the first female and longest-serving Canadian Chief Justice, Justice McLachlin was appointed to the Order of Canada as a recipient of its highest accolade: Companion of the Order of Canada.

So please join me in welcoming the Right Honourable Beverley McLachlin.

Beverley McLachlin: Bienvenue tout le monde. Thank You, Caroline, for that warm introduction. It's a pleasure to be here among so many people who care about their community, their province, and their country's history.

And it is a special pleasure to be here on your hundred and thirty first annual meeting. That's a very long time for most organizations in Canada, and a pretty long time for organizations anywhere. And I think you are probably the second oldest, not in terms of your years but in terms of your organization's longevity, the second oldest organization I've ever addressed. It may be that the oldest was the Supreme Court of Canada where I sat for many years, which was created in 1870, three years after Confederation.

I want to begin by congratulating you in the Society for the excellent work you do in preserving historical memories and sites within Ontario. Preservation of our sites, of our historical

monuments, is most important. But so is preservation of our stories and the stories of those who came before.

And so, I read with interest your bulletin, the last one, and it was full of interesting materials. My favorite was a review of Patrick Brode's book on, and it's entitled (I have to get the book, maybe you can tell me how) "How a Prohibition Preacher Got Away with Murder," which appears from the review to be a very, very interesting story, exemplifying something that I observed sometimes happens in the justice world, which is that you can do a terrible thing, but if you're associated with a cause that people think is righteous or good, you may get away literally with murder or something else like it.

So these stories tell us something about ourselves and they go back a long way. I was also very interested and a little depressed to read a piece by Rob Levery who was talking about the fact that since the financial collapse of 2008, there's been an unprecedented divestment of priceless heritage resources into the not-for-profit sector, as governments and developers seem to be ignoring more and more the value of our cultural heritage.

Like I think probably Mr. Levery, if I can divine his opinion, I am of the school that believes that while we must go forward, we need to do it historically and with respect for our historic past, and to preserve what has gone and been built before.

And these are things that provoke public debate right now in Ottawa. There's been considerable debate about a certain addition to the city's iconic hotel, the Château Laurier, and there are those who are very disappointed that the addition will be a modern addition, rather than a reproduction of Victorian curlicues and arches. But there is something in my opinion to be said for respectful modern architecture that combines both our current time and what has gone before.

All that I found in your bulletin and it provoked me to a lot of thoughts. So I know that you are doing good work.

Well, when I was invited to speak today, I thought, well, what about the history of the institution I've been most importantly involved with, which was the Supreme Court of Canada where I sat for almost 28 years. And so I thought I would, if you would indulge me, I'd share a bit of historic trivia which you may or may not know about the court.

Many Canadians just assume the Supreme Court of Canada has always been there, it's a basic fixture to our country, and couldn't contemplate a Canada without it. But that wasn't the way things were in the beginning. The 1867 Constitution did not provide for the Supreme Court of Canada. All it provided for were the provincial courts of inherent jurisdiction, what we would now say would be the trial court and the appellate court, Superior Court of Ontario.

And you have to think about Canada coming together, four colonies very much seeing themselves as individual colonies, and they had their own court systems. And that was all that

was needed, because first of all they were bound and saw themselves duty-bound to apply the British law. And if they went too far astray, you could always appeal to London, to the Judicial Committee of the Privy Council.

So the original conception of Confederation did not include a Supreme Court. So how many of you know about this? Am I boring you? Because this is the story of how the Supreme Court came to be, and I thought as people who like history trivia, I could share it with you. It's not trivia, it's pretty important, actually.

Anyway, so John A. Macdonald had a vision for the country that went well beyond railroads. And he was the Prime Minister, and he said this is a defect in our constitution. Unlike the United States constitution, we don't have a provision for a Supreme Court. So we need to remedy it. And he got busy and he got an act together and it was called a Supreme Court Act, and it was passed in 1870.

Now it wasn't easy because the opposition Liberals said look, we don't need a Supreme Court. We have the Judicial Committee of the Privy Council in London and we have our provincial courts and that's all we need.

So you're going to create this useless institution with judges that get paid. You'll have to house them somewhere -- they ultimately found a place over the stables just west of West block -- but it's going to be expensive, and why do a useless thing and an expensive thing? But the Conservatives had the majority and they got the bill passed.

But there was something to be said for the opposition's arguments. So the court came, five justices, they came to Ottawa to sit, and there was no work. The first record of the court's first sitting said the justices convened. There being no business, the court was adjourned. That's it for 1870.

There was very little work in the years that followed. So two or three years later, political tides had changed, a little anyway, the opposition brought a bill to abolish the court. They said this was obviously a mistake. We were right. It's useless. It's just costing this poor country money and we're going to abolish it.

And it was a closely run thing -- you can find the debates in Hansard -- and against the arguments of useless, expensive, Sir John A. Macdonald once again mounted a formidable attack on the opposition, a formidable case for the court. And ultimately, he did prevail and the court remained, which is a good thing for me because I would never have been on the court if that hadn't happened. So it's very personal to me.

But Sir John A. argued that even though Canada at the time appeared to be a collection of small provinces, and even though those justices were fine and doing their work, and even though there was an appeal to the Privy Council, he said Canada will be a great important and

independent nation. And he said history shows you can't be an independent and successful nation without your own court to create your own brand of jurisprudence.

So we had two visions: a very colonial vision -- colonies sort of getting together for various economic and other reasons, but still being very much colonies content with the British vision -- and another vision of Canada that it should have, as an independent country, its own court.

Now it took a long time for the court, the Supreme Court of Canada, to actually become very important because the appeals to the Judicial Committee of the Privy Council lasted until 1949. So it was 79 years later before it became the supreme and final court, and it took a while after that for it to develop its own independent jurisprudence. British precedents were cited almost all the time, but in the 70s that started to change.

And we had a real seminal Canadian jurisprudence developing, and then we had the Charter of Rights and Freedoms, and then recognition of Indigenous rights, and now Canada has its own jurisprudence, which is distinctive. It shouts "we are different, we are Canadian," and we have walked our own walk and developed our own rights jurisprudence and Indigenous law jurisprudence and much else.

And now, over the last 20 years, our court has become important internationally because we stand for a vision. And perhaps abroad more than anything else when people think about Canada, they think about our jurisprudence, our rights record, and so on because it is very distinctive.

Well, I've taken you a ways off perhaps what you wanted to hear, but I thought you might be interested in that bit of historic trivia about how the court got going and the lessons it shows, I think, for history.

Because, as I said, I think that the proponents of the court really didn't have an economic or financial or practical leg to stand on. But they knew that if the country was going to be successful, as they hoped, it would need its own court. And they based that on their understanding of history.

So, my ruminations on the role of history in the creation of the Supreme Court of Canada got me thinking about other things, provoked ruminations on (I'm not a historian but I love history), and I began thinking about the importance of history in national decision-making and what it means for us today.

We all know that we live in a fast-changing era where the very speed of events and discoveries threatens to make history irrelevant, or so some say. They argue that, and many people just simply assume without thinking about it, that the history of the past really doesn't have much to tell us about the big decisions we need to make for the future. And they say why waste time talking about the past when the future presses on us so urgently? What is the use of history?

Well, history has always had its skeptics, those who contend that while it may be interesting it is irrelevant to our well-being in our future. The skeptics' theory is captured in former British Prime Minister Harold Macmillan's statement that, and I quote, "History is just one damned thing after another."

Now, this view suggests that we really can't make much sense of history. It's a waste of time to look for grand historical arcs in history. It is what it is or rather what it was. I think of this as the non-agency view of history. History happens, we can't do much to shape it, and we can't learn much from it.

The skeptics' view of history may be contrasted with the utilitarian theory of history. This view is captured by a statement attributed to Sir Winston Churchill, among others, that, and I quote, "Those who do not know history are compelled to repeat it." I call this the agency theory of history. It asserts we need to know our history so we can make intelligent decisions about the future. Histories of progression onward and upward, and if we heed its lessons we will move onward and upward. If we don't, we will be condemned to a never-ending circle of misery.

Of course, there's a problem with the utilitarian theory of history that you would all be familiar with. Even people who know history keep making the same or similar mistakes. And we see this now, where for example, having resisted in many parts of the world, isolationism, racism, tribalism, people are moving back into those things and back toward the mistakes of the past.

And furthermore, the world keeps changing so it's hard to take lessons from one era and just use them as a manual for how you should improve things in the future. We all learned that World War One was caused by a complex interrelationship of European alliances and treaties that kind of clicked into place in machine-like fashion and produced a war of world dimension.

But what good is that today when people ignore treaties, break treaties, don't take them very seriously? What are we going to learn from World War One, the critic might say?

To me it seems that while neither of these two views is conclusive, each has some truth in it. History is just one damned thing after another, and circumstances change and we can't predict or fully control the future. But at the same time, history can offer lessons for those who care to heed them about how to approach contemporary problems and what to avoid. At the very least, it tells us there's some paths that should not be taken, like the path of war or racial discrimination.

People can and will argue over whose view of history is better, Macmillan's or Churchill's, but I suspect there is one proposition about history on which everyone would agree, and that is this. History is our identity. It helps us understand who we are as individuals, communities, and nations. We may be the product of one damned thing after another, but understanding who we are as a result of those damned things helps us decide how best to move forward.

Just think of it from a personal perspective. Our individual histories, who we are, is what makes us what we are. Who our parents were, where they live, what kind of place we grew up in, the buildings we inhabited, and the stories we were told. All this and much more determine who we are as individuals. These things fuse in a narrative that becomes our individual identity.

I recently experienced this truth in the course of writing my memoir, which will be released in September. I had always resolved never to attempt an autobiography or memoir. I had a predecessor on the Supreme Court who had been asked to do his autobiography. He said, "Well, let me think about it. I want to think about it over the weekend." He came back on Monday and he said, "The answer's no. Living it once was enough."

Well, I had always been of that philosophy and I thought I wouldn't write anything about myself. But in the end, my publisher persuaded me that the stories might be important to people and something good might come of it and so I did agree to do it.

And you know, what followed surprised me. I found that living it twice was a unique process, and that I helped understand better who I was, going over those experiences, from childhood, adolescence, university, the people I come in contact with, how I'd reacted to different situations, helped me understand who I was as a person.

And I think we probably all feel the same way. Psychologists and psychiatrists have understood this from Freud and before. If you want to understand yourself, you have to look to your own history.

Just as our individual histories make us who we are as individuals, so our collective histories make our institutions and our country what they are. A community's history, this community, is part of what that community is. An institution's history defines the identity of the institution.

You came into being 131 years ago, and every year of that has defined you and made you what you are.

A country's history tells us what it is. If you want to understand what your community, your institution, or your country are, I think you have to look to their history. Individuals shape communities. Communities shape institutions. Institutions shape our province and our country. Our stories mingle and intermingle to create a complex amalgamation that tells us who we are.

The converse position of this proposition is that when we forget about our individual and collective histories, we don't understand who we are, and that's dangerous. We don't understand ourselves as individuals. We don't understand our institutions and their importance. We don't understand our country. We literally lose our identities, individual and collective.

And that is why the work you do is so important. You're helping preserve those identities.

I think people have understood that history is identity from humankind's earliest days. Why did our ancient forebears paint people and animals on the cave walls at Lascaux, France. Why did the Inuit people of Canada, from ancient times, carve figures and erect stone cairns? Why did the Greeks sculpt statues and the Romans write history?

The answer, a big part of it, is simple. They were trying to state who they were, understand who they were, and leave a testament for future generations as to who they were. In a word, to preserve, to understand and preserve their identities.

Now this has come home to me in the law where I spent my professional life. The life of the law is history. The law, actually the common law, is history.

What happened is that people brought problems to the judges. The judges found solutions to these problems and worked out rules. Usually it was a case-by-case thing, but gradually the cases accumulated and judges followed cases that had been decided before, and out of this emerged what we call the common law.

And so it is a creation of history, like any institution or accomplishment, an amalgam of the thoughts and decisions of many, many people. And we create something important which is fundamental to our governance, and we call it the law.

And similarly, particular areas of the law are dictated by historical circumstances. And the genius of the law, and particularly the common law, but laws passed through statutes too, is that it can adapt to different circumstances. So we have many, many examples of this.

One example which I found interesting recently relates to transportation. In the late 19th century, mid 19th century, the railroad was invented and changed society. Rail lines were laid everywhere, England, United States, America, other places in the world. Suddenly people who'd lived in little tiny benighted sheltered communities were traveling, so social things changed.

And what happened economically? A few people got awfully rich, and we've heard about the railroad moguls of the late 19th century, the Rockefellers and the Morgans and all of that.

So then there was a terrible depression in the late 19th century and people sat back and said this was bad. We had too much gap between the poor and the rich. Are you thinking it might be happening again? We had too much power accumulated in too few hands.

And so what did they do in the United States, and they were followed all over the world? They passed competition legislation, anti-combines legislation, forcing big entrepreneurs into smaller units. And that model proved enormously successful and sustained us for a long time. But surprise surprise, now over a century later, we're seeing the same patterns evolve. We have the Zuckerbergs now. Now what are we going to do about it? That's one of the problems we face.

We found that since the 1970s in the United States, Chicago School of Economics says all that anti-competition stuff was nonsense. It was the wrong thing to do. And so we have been living, for the past almost 50 years, in a world where competition law has become less and less important, and what have we seen? Again, the pattern of accumulation.

I just mentioned it because it shows how laws respond to history. In that case, competition. What will the new laws be that will address what we're facing now, I don't know. I don't even know whether we have figured out how to bring the law to bear on the accumulation of wealth and power in the hands of a few in the digital world.

But there are many other stories. For example, when mass marketing and automobiles became ubiquitous in the 1920s and 30s, the whole law of negligence had to change. Before that, a person couldn't sue unless the person they were suing actually knew them. Well, that makes no sense in the age of mass marketing or automobile accidents, so the law had to change. And a new principle of foreseeability, reasonable foreseeability, was introduced.

So the law, and I could give you many many, many other examples, the law responds to history and in so doing the law creates history. And so it is, I think with every area of our existence.

One of the good stories on Canadian history is the resurgence of Indigenous history. This is a very interesting thing that is happening in Canada and elsewhere, and it is very important.

When I went to school in the middle of the 20th century, I was taught that history started with Samuel de Champlain coming to the eastern shores of what is now Canada. And I studied various explorers and Prime Ministers and so on. Canada started, sort of back then, became a country in 1867, that was Canadian history. I even studied history in university for a course or two. Nobody talked about Indigenous history. Canadian history was European "history."

And then suddenly we realized that our country's history goes back much, much further. It goes back tens of thousands of years. And just because that history wasn't written down doesn't mean it's not history. Indigenous people had oral traditions and they passed the history down to knowledge keepers.

And as a person who sat in court and looked at this evidence, it is pretty precise. They can tell you where their people were living 300 years before, how they lived, what valleys they occupied. And all of this is coming out as we have to deal with land claims and traditional resource claims and cultural claims.

And now, at our universities, almost every university has prominent Indigenous scholars. Indigenous history is being studied and taught. Indigenous law is being studied and taught. I think this is a very, very exciting, exciting thing.

There was a case in Supreme Court of Canada in 1996, *Delgamuukw*, where the issue was is oral history, as told by a knowledge keeper, admissible as evidence in court. And the trial judge for

British Columbia, a wonderful man, but he said no, you have to have it written down to know that it's really history.

So you can imagine if that decision had stood, it would have been impossible for Indigenous people to talk about their history in court, impossible for them to raise their claims.

And Supreme Court of Canada reversed that decision, and we said oral history is admissible. Of course, it must be established that what is going to be told has a high degree of accuracy. And you do that by setting out the way the knowledge was passed from one generation to another, usually through a man or a woman -- usually a man, but in some cases it was a woman -- who was from youth taught that their job was to take on all the knowledge before, all the stories before.

And with the help of totem poles and things to put them in linear chronology, chronology of generations and lives. So you have a complete history there, but it's not written down. So when you can show that, then that evidence is presented, and it is routinely presented in court now.

So respect for history requires that we keep an open mind, that we don't say history is just what I learned at school, or what I find between the covers of a book.

History is people telling their stories in a reliable way. And I think we can be very proud in Canada that we have done that, and in so doing, we have opened up -- returning to my theme of history as identity -- we have opened up a new identity for ourselves as Canadians. Not just sort of Europeanized people, descendants of Europeans who came here, but as Canadians who have shared this land since time immemorial and who have lived off it in different ways.

And when we acknowledge that that's all part of our history, then the project of reconciliation becomes pretty easy, because we're not putting priorities on this group for that group. We're saying that's our country's story. We're all here as the concluding words in that decision I told you about, Delgamuukw, say. Let's face it. We are all here to stay.

So where does that bring us? I think history as identity is important for two reasons. First, it tells us who we are and then doing that, it helps us make good decisions, because we can't make a good decision unless we know who we are. We can't marry the right person unless we have some idea of who we are.

Similarly, how can we make good decisions for the future of our community or our country if we don't understand what drives us. What are our values? What's important to us? What do we reject? What do we accept?

So I do believe that history can help us make better decisions, precisely because it tells us who we are. And over and above that, I think there is a tremendous value in just understanding who we are because it provides meaning for our lives, for our institutions, for the big things we do and the small. That in itself is important.

Now, as I mentioned, I think today we need history more than ever before because we live in a time of exponential change. The digital revolution has fundamentally changed the way human beings learn, communicate, and think. Radical changes in climate and the earth's ecosystem are changing where and how we live and producing great stressors on our interactions, nationally and internationally.

The values and institutions we've built up and relied on in the 70 years since World War Two, like human rights, democracy, and so on, seem to be challenged, in some cases weakening and unraveling.

Democracy and human rights are under siege in many parts of the world. So we need history. We need to understand where we've been and what was good about that so we can perpetuate it into the future.

And then there's a brighter side. I don't know if any of you have read Yuval Noah Hariri's book "Homo Deus" which came out in 2015, but he points out that the accomplishments of the 20th century, science, etc., have given us the means to conquer the unsolvable problems that have preoccupied human beings since the earliest times. The problem of getting enough food or famine, the problem of plague, huge plagues that would decimate populations, and the problems of war.

So he says, if we wanted, a very bright future is there for the taking. But we need a sense of who we are and where we're coming from to decide, given all these radical options that are open to us, which ones should we take.

We face new and complex choices, whether the subject is digital technology, artificial intelligence, mass migration, climate change, or what's the best form of governments, democracy or something else.

We will not arrive at the answers unless we understand where we have been and who we are. If history is our identity, it is also our future.

I conclude with the story with which I began, the decision to create the Supreme Court of Canada and retain it in the face of fierce opposition. Judged by the immediate concerns at the time, those parliamentarians who were against the court had some powerful arguments. They were on solid ground, you know, arguing that the country didn't really need a national court, a Supreme Court, when it had the Judicial Council. That there was too little work. It was gonna cost a lot of money.

But Sir John A. Macdonald countered with a vision of a unified independent country and, relying on history, argued that a unified independent country required its own Supreme Court.

Sir John knew his history and understood that a Canadian vision of the law would help create a unique Canadian identity. Not just one damned thing after the other. Not just a useful tool to avoid repeating the mistakes of the past. History as the new country's identity.

So I applaud you, who care about our history, for working to preserve the memories of the past and through this for helping us understand who we are as individuals, as Canadians, and as citizens of the world. Thank you so much for listening.

Michel Beaulieu: So on behalf of all of us present, I'd like to thank you for your thought-provoking and stimulating discussion. It's also a poignant reminder, I think, of the OHS's mission of preserving, promoting and protecting, that it's still relevant today and perhaps even more important than ever before. So once again, on behalf of everyone present, I hope you will please accept this on behalf of us, and I thank you very much for your presentation again.

Beverley McLachlin: Thank you, thank you.