Justice Bertha Wilson

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Edited by Kim Brooks

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One Woman's Difference

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This collection is dedicated to the many women who make a difference, including Inez Lillian Henrietta Reid Baines, Ruth Brooks, Marlène Cano, Isabel Grant, Cecilia Johnstone, Lee Lakeman, Claire L'Heureux-Dubé, Doris Milberry, Mary Jane Mossman, Joyce O'Byrne, Sr Pauline O'Regan, Clarissa Otto, Kim Pate, Leona F. Paterson, Toni Pickard, Lynn Smith, Jane Tice, Margaret Van De Pitte, Bertha Wilson, the women who worked together on the China-Canada Young Women's Project (1993-96), the women on the court, and the women on the Eaton's picket line.

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Preface

Justice Claire L'Heureux-Dubé

In a speech on gender equality given at the University of Ottawa Faculty of Law in 1994, Justice Bertha Wilson posed the following question: "[W]here would we be without the strident voice of extremists who have the pristine courage to call ugly things by their proper names? The stance of the moderate is so often polite, respectable, soft-voiced and, worse still, tamely accommodating. Just look at history – it is the vigour and energy of the extremist who paints issues in bold colours that has been the engine of historical change, whose voice has been a clarion call to action and who will brook no delay. They may walk a hard and rough road but their spirit rides in style."[1] Interpreting Bertha's contributions as a woman, lawyer, and judge involves determining whether she spoke more in a strident voice or as a balanced incrementalist. Indeed, as this collection reveals, one of the many qualities that made Bertha such an important player in the Canadian legal landscape was her ability to alternate between these two voices.

Bertha was a woman of "firsts," although she never thought of herself like that. She was one of the earliest female graduates from a Canadian law school. After immigrating to Canada from Kirkaldy, Scotland, in 1949, Bertha spent five years as a parish minister's wife before applying to Dalhousie Law School in 1954 at the age of thirty-one. Upon submitting her application, she was told by the Dean of Dalhousie Law School that perhaps she would prefer crocheting. Undeterred, Bertha later mused, "It was hard for me to persuade him that I was a serious student; that for me a knowledge of the law was an essential part of a liberal education and that while crocheting might be a very pleasant way to spend one's leisure hours, it could not be the be-all and end-all of one's productive years."[2]

Bertha's history of firsts continued upon her graduation from law school. She was the first woman lawyer at Osler, Hoskin & Harcourt, where she practised for seventeen years. She was the first woman to make partner at the firm. In 1975 she became the first woman to sit on the Ontario Court of Appeal (where some of her male colleagues lamented the "encroachment"

of a woman justice on their bench). Finally, in 1982, Bertha became the first woman to sit on the bench of the Supreme Court of Canada in the Court's 107-year history. There, she would have an incredible and direct impact for the next nine years.

In only nine years on the Supreme Court, Bertha seemed to shape a new century. On more instances than I can recall, the lights in the chamber hallways would be dimmed, and a heavy silence would have settled on the portraits of former Supreme Court justices. The building would be empty except for the spirits of those justices and a faint shaft of light creeping out from beneath Bertha's door. The majority judgment may have been written and her colleagues long departed, but Bertha would not quit until she had her concurrence or dissent penned. She had too much respect for the law and the Canadian people to give the decision anything but her most devoted efforts. I often thought that her quiet Scottish stubbornness drove her unrelenting work ethic; and it was an unrelenting work ethic indeed. In nine years, Bertha authored 179 judgments, 51 of which were formative *Charter* decisions. Between 1987 and 1990, she wrote more legal judgments than any other justice on the bench.

In each of her workplaces, Bertha brought a much needed voice, speaking for the protection and equality of women and minorities and advocating for human rights. Bertha's appointment to the Supreme Court coincided with the advent of the *Canadian Charter of Rights and Freedoms,* and her time on the bench was often defined by the strength and application of this incredible document. Her rulings in *Morgentaler,* in *Lavallee,* in *Andrews,* and in countless other cases helped shape not only Canada's legal landscape but also, indeed, our sense of who we are as Canadians. Bertha was a strong voice for the importance of a dialogue between legislature and judiciary. She saw herself as a servant of the law, of the *Charter,* and of the Canadian people. Although she was a true believer in the Canadian legal system, she nevertheless understood that it had yet to reach its full potential, and she was not prepared merely to settle for the status quo.

Bertha was not afraid to call ugly things by their proper names. She did not shy away from controversy when it was caused by standing up for social justice and equality. She recognized that the law is not a formal measuring stick to be strictly and blindly applied to each case. In short, Bertha brought judging into the twenty-first century. She believed that law is not a captive of the legal profession but rather a tool of the Canadian people. To Bertha, law was not an abstract positivist concept; nor was it removed from social context or judicial bias. By acknowledging these factors, Bertha produced judgments that were, in many cases, truly progressive and enlightened.

Bertha had an enormous influence on Canadian jurisprudence, as this collection reveals. Although she is best known for her judgments in cases such as *Operation Dismantle, Lavallee, Morgentaler,* and *Andrews,* she also had

an immense effect on the evolution of Canadian law in all its aspects – from constitutional, family, and criminal law to contract, commercial, and international law. Many of Bertha's dissents and concurrent judgments were followed in later cases.

The extent of Bertha's effect on Canadian law brings me back to this collection. The chapters that follow examine many aspects of her influence on the legal system, the legal profession, and Canadian society. Although her specific judgments, publications, and committee works have been examined on their own accord, a comprehensive collection that is accessible to a wide audience is more than timely and well deserved. Bertha's presence and legacy loom in the legal world, but her effect on the legal system has also had incredible ramifications for the ordinary Canadian citizen. I am among the fortunate few who were not only privy to Bertha's incredible wisdom, intellect, and strength of character, but were also able to count her as a dearest friend, a colleague, and a mentor. This compilation examines the many roles that Bertha played: Bertha as jurist, as public figure, and as friend and role model.

Bertha was rather shy in public and often avoided the press. Yet, this shyness was never evident in her willingness to confront difficult issues and controversial topics. I do not think that Bertha failed to see the irony in that, though she personally avoided the spotlight, her words and judgments often could not hide from it. During her time on the Ontario Court of Appeal and at the Supreme Court, she never backed down, never relented, and, with a constant humility before the rule of law, settled for nothing short of justice. She was not afraid to pick up the reins of the *Canadian Charter of Rights and Freedoms* or to weigh in on complex commercial issues. Often touted as a legal pioneer, Bertha was also one who carried us into the future. This book is a tribute to her legal mind. To the late Justice Bertha Wilson: may her spirit ride in style.

Acknowledgment

I wish to acknowledge Leah Jane Kutcher, McGill University Faculty of Law, for her assistance on this project.

Notes

1 Bertha Wilson, "Gender Equality: A Challenge for the Legal Profession" (Speech delivered at the Faculty of Law, University of Ottawa, no date) [unpublished, notes on file with Kim Brooks] 5-6.

2 Rebecca Mae Salokar and Mary Volcansek, "Bertha Wilson" in *Women in Law: A Bio-Bibliographical Sourcebook* (London: Greenwood Press, 1996) 338 at 339.

Acknowledgments

As with any book, this collection would not have been possible without the hard work and support of many people. Each of the authors in the collection was wonderful to work with: responding quickly to requests, agreeing at all stages in the project to work collaboratively, writing thoughtful and reflective chapters, and delivering everything for the deadlines suggested. I am indebted to the wisdom and advice of innumerable women but might especially note Susan B. Boyd, Hester Lessard, Mary Jane Mossman, and Elizabeth Sheehy, all of whom provided advice in the early stages of the project. Many of the authors in the collection relied on the indispensable biography on Wilson's life *Judging Bertha Wilson: Law as Large as Life* authored by Ellen Anderson, and we are grateful that Anderson was able to provide us with that material with which to work. Finally, my gratitude goes to four research students who worked indefatigably through drafts of the book, Chana Edelstein, Daniel Girlando, Leah Jane Kutcher, and Palma Paciocco, to Julie Fontaine, who undertook the ugly task of bringing the whole thing together into one document, and to Randy Schmidt at UBC Press, who has worked tirelessly to bring this project to publication.

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Introduction

Kim Brooks

Racine, Kamloops, Perka, Guerin, Singh, Big M Drug Mart, Operation Dismantle, Hill, Kosmopoulos, Pelech, Morgentaler, Crocker, Andrews, Vorvis, Tock, Lavallee, the Prostitution Reference, Hess/Nguyen, McKinney.

These names have undoubtedly been indelibly impressed upon the consciousness of all students enrolled in law school after 1992. A good number of them are widely known among the Canadian public. The cases they represent are regularly relied upon by practising lawyers and have been the subject of heated academic commentary and debate. Justice Wilson, the first woman to be appointed to the Supreme Court of Canada, sworn in on 30 March 1982, less than three weeks before the *Canadian Charter of Rights and Freedoms* became law, wrote memorable judgments in each of these leading cases. She was, as the chapters that follow demonstrate, a prolific writer, and by the time her tenure at the Supreme Court ended in 1991, she had left an enduring mark, authoring an opinion in 179 cases.[1]

On the one hand, Bertha Wilson might seem an unlikely person to have claimed such an important role in the Canadian legal imagination. She was something of an outsider, born in Kirkcaldy, Scotland, in 1923. She immigrated to Canada in 1949.[2] She came to law later in life, enrolling at Dalhousie Law School at thirty-one years of age. She faced a number of barriers because of her gender. In many of her career choices, she was one of the first women to occupy the position: she was one of the early women law students at Dalhousie; she was the first woman to be hired by the firm Osler, Hoskin & Harcourt (in 1959), the first lawyer to head that firm's research department, and the first woman to become a partner.[3] In 1975 she was the first woman to be appointed to the Ontario Court of Appeal.

On the other hand, her personal qualities foreshadowed success. She had an enormous capacity and enthusiasm for hard work and a wide-ranging

and irrepressible intellectual curiosity.[4] She was devoted to assisting in sustaining a flourishing community as reflected in her strong commitment to the legal profession, to public service,[5] and to a civil society.[6] She had a happy marriage, with a husband who both supported her career and was a partner in the work at home, without the demands of children.[7] Once on the bench, she had a high regard for those who preceded her[8] and a strong sense of the importance of the judge's role as the purveyor of incremental change.[9]

Bertha Wilson died on 28 April 2007. Her passing presented a moment for reflection on her contributions to law and legal practice and an impetus to situate her work in its current context. The chapters in this book reveal several dimensions, or themes, of Bertha Wilson's multi-faceted talents and career. First, many of them pay tribute to an aspect of her work that is sometimes overlooked: she was a marvellous legal technician. She had developed and refined her legal expertise significantly in the seventeen years that she worked at Osler. Several of the chapters draw out her ability to work with technical areas of the law in a way that reflects acuity, attention to detail, depth of understanding, and imagination. For example, she was able to translate her knowledge of fiduciary duties in family law to potential applications in commercial law,[10] and she exhibited inventiveness in building on prior common law judgments to articulate the potential for a new tort of discrimination.[11]

Second, despite, or perhaps because of, her technical facilities, Wilson was always willing to embrace controversy and challenge. Her early days in Toronto as the first woman articling student at the Osler firm presented numerous tests of her mettle.[12] Her time as the first woman on the Ontario Court of Appeal and later on the Supreme Court of Canada was no different. Her judgments in cases such as *Morgentaler,* which rendered unconstitutional Canada's criminalization of abortion, and *Lavallee,* in which the Court addressed the defence of self-defence in the context of male violence against women, brought her significant media and public notice. Other decisions garnered perhaps less media attention but have been characterized by academic commentators as controversial.[13] Any review of Wilson's judgments or other writing confirms that she did not shy away from controversy. She authored forty-one dissents, thirty-five concurrences, ten partial dissents, and thirty concurrences in plurality during her tenure on the Supreme Court.[14] Her speeches, including perhaps most notably her 1990 Barbara Betcherman Memorial Lecture "Will Women Judges Really Make a Difference?" given at Osgoode Hall Law School, also garnered a good deal of public and media attention, including a complaint to the Canadian Judicial Council on the basis that she was biased. Her articles are unabashed in taking issue with critics with whom she disagreed.[15] On the announcement of her retirement, the Montreal *Gazette* labelled her the Supreme Court's "most liberal and controversial judge."[16] After her retirement from the Supreme Court,

she scarcely hid from continued controversy. She almost immediately took up the chair of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, a body charged with studying the condition of women in the legal profession, which she must have known would produce a contentious report.[17]

The controversial label, however, sits somewhat uneasily on Bertha Wilson, who, despite her remarkable list of "FW2s" (first woman to), had a complicated relationship with feminism and judicial activism. In a number of her interviews and speeches, she clearly recognized the differential treatment women receive relative to men, and in many cases she noted that such treatment amounted to discrimination.[18] In some instances, she courageously and loudly identified and condemned women's inequality, and in at least one instance, she identified herself as a "moderate feminist."[19] Yet, in the biography authored by Ellen Anderson, Justice Wilson appears as a woman who distanced herself from feminism.[20] And although her judgments and positions are clearly and carefully articulated, and although in some cases they describe the disadvantages faced by women and other equality-seeking groups, numerous scholars have critiqued her work for not going far enough to support those groups. A number of the chapters in this collection struggle with Justice Wilson's relationship to feminism, attempting to make sense of her judgments and her public positions. Regardless of whether one characterizes Justice Wilson or any of her judgments as feminist, especially in her decisions outside of criminal and constitutional law, she might be best described as an incrementalist, intent on the gradual development of the law.[21] On the face of the complete record, it would be hard to fathom Bertha Wilson as a radical who would inspire the label the "most controversial" judge.

Another aspect of Wilson's work that is emphasized in many chapters is her insistence on situating law in its wider context. In her remarks on her retirement, she reflected that "[t]he *Charter* put law into its true perspective – as large as life itself – not a narrow legalistic discipline in which inflexible rules are applied regardless of the justice or fairness of the result, but a set of values that we, as a civilized, cultured and caring people, endorse as the right of all our citizens of whatever colour or creed, male or female, rich or poor, to enjoy."[22] Although the demand for a contextual analysis seems to be a regular refrain in current judicial decision making, its pervasiveness has been attributed to the efforts of Justice Wilson at the Supreme Court. Her success in persuading the Court of the importance of a contextual analysis is not without controversy itself. She and her work have been criticized by some academic commentators who express concerns that such an analysis can easily become divorced from legal principles.[23] Nevertheless, Justice Wilson remained a constant advocate of the importance of context and supported social context training for the judiciary.[24] The authors in this collection accept the importance of context, querying instead what sort of

context is relevant and questioning whether Justice Wilson went far enough in incorporating context into her own judgments.[25]

The fourth dimension of Justice Wilson's work, one related to her ability to locate law in its social, economic, and political context, is the passion she appears to have had for the protection of the equality rights of marginalized communities and "ordinary citizens," which in turn was fuelled by her capacity for "entering into the skin" of litigants.[26] These abilities, which echo through the record of her life, may have stemmed from her full and varied experience: as a student of "Enlightenment Scotland";[27] a clergyperson's wife; a receptionist in a dental office; an immigrant to Canada; a mature law student who had been discouraged from attending law school; an articling student working on prostitution cases, buggery charges, and drunk and disorderly files; a reluctantly, but eventually warmly, embraced articling student and then lawyer on Bay Street; and from her interest in reading literature. This empathy is, perhaps, what informs her strong support (whatever her identification with feminism) for women and other equality-seeking groups and for fairness and justice, broadly cast.[28] She was, for example, a strong proponent of the Court Challenges Program, a project that enabled minority language and equality challenges to be at least partially funded by the federal government,[29] and of access to justice measures generally.[30] Also, despite the demanding nature of the work and the controversy she would undoubtedly encounter, she was an enthusiastic chair of the Canadian Bar Association Task Force and a member of the Royal Commission on Aboriginal Peoples.

Finally, the degree to which the details of Justice Wilson's life inform her judgments is an underlying theme in many of the chapters in this collection. Perhaps predictably, some commentators are more focused on the implications of her personal experiences on her family and criminal law decisions, and on her views about judging more broadly, than they are on the implications of those experiences in her commercial and private law decisions.[31] Yet, even in these private law areas, connections between Bertha Wilson's life experience and her decisions receive attention.[32]

The title of this collection, *Justice Bertha Wilson: One Woman's Difference,* highlights many of the themes identified in this introduction that thread throughout the following chapters. Most obviously, it raises the question of what difference Justice Wilson made, without prejudging whether that difference might be evaluated positively or negatively in any given instance.[33] But the title also means to invoke other questions, including the one she posed for herself in her most famous speech "Will Women Judges Really Make a Difference?" This question, in turn, alludes to an issue raised in psychologist Carol Gilligan's *In a Different Voice*. Published in the year of Wilson's appointment to the Supreme Court, this book posited that women

were more likely than men to engage in moral argumentation that emphasized specific contexts and relationships.[34] In addition, the title raises the often-evoked question of the possible effect of Justice Wilson's sex and gender on her judicial decision making and on her approach as lawyer and advocate. It underscores the fact that, although Wilson might have made a difference, she was only one woman, and we should not necessarily expect her to make a difference for all women. Finally, the title raises the question of whether there was something about Justice Wilson herself that made her different from other women – more likely, perhaps, to be the kind of person who would, again and again, become the "first woman to."[35]

The chapters in the collection are grouped into three parts: Foundations, Controversy, and Reflections. The first explores Justice Wilson's contributions in the areas often considered to be building blocks of the common law system, including property law, contract law, and fiduciary duties. These areas were the core of Wilson's legal practice at Osler and also the subject of her earliest articles after she graduated from law school.[36] Few commentators have explored her work in these areas.[37]

Part 1 opens with a chapter authored by Angela Fernandez and Beatrice Tice, which sets Justice Wilson's private law expertise in context by detailing her efforts to establish a research practice and department at Osler. On one level, the chapter presents a social history of law firm practice in the period from 1958 to 1975. It is rich with original research thanks to the extensive interview data gathered by the authors, who interviewed several of the lawyers who worked with Wilson during her time at the firm. The chapter reveals Wilson's meticulous and careful work habits, her facility with systems and processes, and her ability to press lightly at the boundaries and to "get along" and "fit in" without upsetting the entire workings of networks and practices that predated her arrival. These skills, along with the development of the extensive and in-depth legal knowledge of many areas of law required for the client service she provided in her practice, prepared her for the challenges she would face upon her move to the bench in 1975.

In Chapter 2, Larissa Katz focuses on Justice Wilson's property law jurisprudence. She underlines Wilson's early interest in property law and her enthusiasm for the subject (indeed, she won a scholarship, which she did not pursue, to undertake graduate work at Harvard in property law and nuisance). After a brief tour of Justice Wilson's property law contributions on the bench, the chapter turns to a rehabilitation of her decision in *Keefer,* a case addressing adverse possession, or squatters' rights, which the author argues has been misunderstood.

Building on the idea that Justice Wilson was an able technician, well versed in the difficult areas of private law, Chapter 3, by Janis Sarra, explores Justice Wilson's development of the concept of fiduciary obligation in the corporate

and commercial law areas and the use of equitable remedies when those obligations are breached. Sarra's illustration of how Justice Wilson imported equitable principles into commercial law reveals Wilson's ability to abstract from legal categories that appear closed to broader underlying principles. It also underlines Justice Wilson's ability to draw connections between different areas of the law in the search for those broad and unifying principles.

Chapter 4 turns to Justice Wilson's contract law decisions, and here Moira McConnell addresses whether Wilson was primarily a skilled and careful technician, gradually developing but not altering the principles found in the common law, or an innovator bringing a unique perspective to the application of those principles. Ultimately, McConnell suggests that Justice Wilson was perhaps a bit of both. In arriving at this conclusion, she reviews a broad sample of Justice Wilson's contract law cases. The review reveals Wilson's preoccupation with reasonableness, fairness, and justice.

Wilson's willingness to recognize in the law the fullness of what it is to be human, including, for example, her recognition of the emotional side of human relationships, is one element of her judging that perhaps most distinguished her from those who preceded her on the Supreme Court. Part 1 concludes with Chapter 5, Shannon O'Byrne's illustration of how Justice Wilson provided the groundwork required to give emotions their due in the area of intangible loss in contract law. O'Byrne's analysis reviews the deep-rooted history of the devaluation of emotion in law and sets Justice Wilson's unique contributions in this area into their broader context – a context that enabled judges to strenuously resist the incursion of emotion into their reasons and remedies.

Part 2 of the collection (Controversy) examines Justice Wilson's publicly controversial contributions, largely in the area of public law. Although a number of scholars have explored her contributions in these areas, these chapters seek to take the analysis further, setting them in their wider social and economic context, and in the light of the subsequent developments in the law.

Part 2 opens with Chapter 6, by Elizabeth Adjin-Tettey, which examines the tort of discrimination. During her tenure on the Ontario Court of Appeal, Justice Wilson authored a judgment that would have enabled courts to develop a tort of discrimination. This opening was, however, quickly closed by the Supreme Court, which held that provincial human rights codes present complete systems of justice that preclude discrimination claims through the common law. Adjin-Tettey argues that a separate tort action for discrimination would rectify what has become a two-tier system of access to justice for victims of discrimination. Her piece is particularly timely since the Supreme Court revisited this issue in a 2008 decision and again concluded (contrary to Justice Wilson's holding in *Bhadauria*) that, at least at this time, there is no separate actionable tort of discrimination.

The regulation of prostitution has posed innumerable challenges for judges and legislators. In Chapter 7, Janine Benedet sets Justice Wilson's contributions to the jurisprudence on the criminal law regulating prostitution-related activities within various paradigms of prostitution. She argues that few commentators (and perhaps fewer judges) explicitly recognize the importance of the paradigm they embrace in their analysis of the criminal laws of prostitution; however, Justice Wilson at least appears to have perceived that, by and large, the paradigm chosen predetermines the legal outcome. Given that there are two cases currently before the courts that challenge Canada's prostitution-related offences, Benedet's piece is a timely and significant contribution.

In Chapter 8, Isabel Grant and Debra Parkes turn to criminal law defences, reviewing the contributions of Justice Wilson to locating law, and these defences in particular, within their social context. Wilson's developing understanding of equality in criminal law is traced through three of her most significant decisions – *Perka, Hill,* and *Lavallee*. The authors argue that courts need to build on Justice Wilson's analysis by extending a contextual inquiry beyond the facts of particular cases and into the social context of the particular criminal law defence itself, situating that defence within historical and existing inequalities.

Chapter 9 moves from criminal law to family law but remains focused on the importance of context. Gillian Calder examines the significance of the role of time and prevailing attitudes and values in *Racine*. She locates the decision within the residential school experience and the sixties scoop, and the subsequent scholarship on *Racine* and the law that builds the case. Ultimately, the author urges courts (and scholars) to be conscious of the relationship between law, culture, and time and to interrogate the linear, liberal, and individual conception of time reflected in many child welfare adjudications.

Part 2 concludes with Chapter 10, Susan Boyd's review of Justice Wilson's child custody and access decisions. Justice Wilson's family law decisions have been much critiqued by feminist scholars, and many have been considered highly controversial. Boyd locates them in their broader context by situating them within the shifting socio-legal norms relating to children, family, motherhood, and fatherhood. Perhaps not surprisingly, given her penchant for writing in dissent, in five of the seven judgments analyzed by Boyd, Justice Wilson was writing in dissent. Ultimately, Boyd explains Justice Wilson's decisions by reference to the law reform movements of the time, concluding that, though some of her decisions exposed the impact of patriarchal norms on the development of the law, others laid the groundwork for the mother blaming that has arisen in subsequent child custody decisions.

Part 3 of the collection (Reflections) includes chapters that provide an overview of Justice Wilson's contributions to the law and the legal profession.

It opens with Chapter 11, by Beverley Baines, which squarely addresses the question of whether Bertha Wilson can be called a feminist judge. In evaluating Wilson's commitment to substantive equality, Baines discusses three of her most contentious decisions – *Pelech, Morgentaler,* and *Hess; Nguyen*. Like Calder and Boyd (in Chapters 9 and 10), Baines identifies the effect of the passage of time and changing attitudes and values on our reading of these decisions. She offers a new lens through which to examine Justice Wilson's decisions – gender theory – which requires interrogating the distinctions between sex and gender. Baines concludes that, at least by the standards of her time, Justice Wilson could be called a feminist judge, although she notes that whether these three judgments line up with contemporary gender theory will require building further on the analysis she provides in the chapter.

In Chapter 12, Marie-Claire Belleau, Rebecca Johnson, and Christina Vinters provide systematic empirical evidence in approaching the question of what kind of difference Justice Wilson made. They explore the degree to which Wilson was able to manifest judicial creativity through her authorship of concurrences and dissents. Their analysis confirms her willingness to express a contrary opinion and point of view; in particular, it emphasizes her high rate of writing separate opinions and her lower rate of signing them.

In Chapter 13, a more personal account of Bertha Wilson, Lorna Turnbull addresses her importance as a role model. In innumerable accounts of Wilson, authored on her appointment to both benches, upon her retirement, and at her death, women emphasize her significance as a role model. Yet, this element of her life is hard to theorize and hence has received little sustained attention. In her chapter, Turnbull situates her own relationship with Bertha Wilson within the context of the literature on role modelling. Turnbull's analysis reveals the importance not only of the professional accomplishments of role models but also of their personal attributes.

Chapters 14 and 15 address Bertha Wilson's contributions to the Canadian Bar Association Task Force on Gender Equality in the Legal Profession and some of its ramifications for judicial education. These aspects of Wilson's work have been almost entirely ignored by commentators in the past, despite the fact that her contributions to women's advancement in the legal profession and to the process of judging and education of judges were significant. In Chapter 14, Melina Buckley, who participated with Wilson on the task force, recounts its formation and history, details its workings, and discusses the release of its report. Her analysis provides some insight into Wilson's meticulous, thorough, and thoughtful nature, as well as supports the many accounts of Wilson's industry. It also underlines the effect of these kinds of processes on the education of those involved in them.

In Chapter 15, Rosemary Cairns Way and Brettel Dawson use Bertha Wilson's public commitment to reconceptualizing the judicial role and her

public stance on the importance of judicial education as the jumping-off point for a detailed social history of the evolution of social context education in Canada. The authors have each played central roles in the National Judicial Institute's social context education program and are therefore well positioned to recount this previously untold story. They conclude the chapter by referring back to Justice Wilson's own words from her Betcherman Lecture, leaving the reader on the optimistic note that women judges and women lawyers can and will continue to make a difference.

The collection ends with Chapter 16, by Mary Jane Mossman, which queries the silences in Bertha Wilson's story. To explore the way in which gender was both present and absent from the text of Wilson's life, Mossman focuses on three of her decisions – *Re Rynard, Pettkus,* and *Pelech* – and challenges a linear story of the evolution of Wilson's ideas. She urges the reader to explore Wilson's non-*Charter* decisions more carefully, something this collection begins to do, as a way of better understanding Wilson the woman. Finally, she concludes by returning to the importance of considering how Wilson's relationship with the male legal world would have influenced her feeling that she needed to prove herself repeatedly, as well as how male lawyers might have assisted her in her judicial appointments and other career successes.

This introduction opened with a list of Justice Wilson's best-known Supreme Court of Canada judgments. But those judgments represent only a small sample of her work on the Court, a smaller portion of her work as a judge, and a fragment of her work as a jurist; they give us very little insight, perhaps, about who she was as a person and as a woman. They leave us with questions about the "silences" in her record. We hope that this collection will lead its readers to speculate not only about the questions raised by Bertha 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.

Acknowledgments

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Notes

1 See Chapter 12 for a review of Justice Wilson's authorial patterns while on the Supreme Court.

2 For a discussion of the characterization of the relationship between Bertha Wilson's gender and her immigrant status, see Chapter 16, 298-99, this volume.

3 For details, see Chapter 1, this volume.

4 A review of Justice Wilson's many speeches reveals an astonishing familiarity and comfort with many philosophers, legal scholars, literary scholars and authors, and political theorists, including, simply to illustrate, Aristotle, James Boswell, Robert Burns, Marc Connelly, Peter de Vries, Carol Gilligan, David Hume, Jane Jenson, Duncan Kennedy, Roscoe Pound, Peter Russell, and Henry Marshall Tory, among many others, despite her statement that she "went

to university against [her] will." See Susan Lightstone, "Bertha Wilson: A Personal View on Women and the Law" *National* (August-September 1993) 12 at 12.

5 For example, Bertha Wilson sat on the Board of Trustees of the Clarke Institute of Psychiatry, the Toronto School of Theology, and the Canadian Centre for Philanthropy, was Chair of the Rhodes Scholarship Selection Committee (Ontario), and was a member on the Board of Governors of Carleton University.

6 In a 1993 interview with Susan Lightstone, Justice Wilson stated, "I could never complain about paying taxes." See Lightstone, *supra* note 4 at 12.

7 Indeed, her partner, the Reverend John Wilson, reportedly shared in a good many of the household tasks during their marriage. His 28 June 2008 obituary in the *Ottawa Citizen* states that, since her death on 28 April 2007, "life has been kind of a shadowland, punctuated with memories of a wonderful partnership, where we shared joys and sorrows, disappointments and triumphs." John Wilson's Obituary, *Ottawa Citizen* (28 July 2008) E7.

8 See *e.g.* her comments on her 30 March 1982 Supreme Court of Canada swearing-in: "I can only pray that by being a true servant of the law, I can in some measure worthily follow in the footsteps of the distinguished predecessors who have sat on this Bench before me." Bertha Wilson, "The Honourable Madame Justice Bertha Wilson" (1982) 16 L. Soc'y Gaz. 172 at 179.

9 See *e.g.* her reportedly incendiary (and yet surprisingly tame) speech "Will Women Judges Really Make a Difference?" where she reflects that "[c]hange in the law comes slowly and incrementally; that is its nature." Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507 at 507.

10 See Chapter 3, this volume, for a discussion of the application of Justice Wilson's *Frame v. Smith* decision in the context of commercial law.

11 See Chapter 6, this volume, for an examination of *Seneca College v. Bhadauria*.

12 For the story of the development of Bertha Wilson's research expertise at Osler, see Chapter 1, this volume.

13 See *e.g.* Chapter 2, this volume, for an analysis of Justice Wilson's decision on adverse possession.

14 For details, see Chapter 12, this volume.

15 See *e.g.* her unequivocal reply to Robert Fulford's critique of the Court's use of the *Charter* in "Law and Policy in a Court of Last Resort" in Frank E. McArdle, ed., *The Cambridge Lectures* (Montreal: Édition Yvon Blais, 1990) 219 at 220 ("It will not surprise this audience to learn that I cannot agree with Mr. Fulford").

16 See Steven Bindman, "First Woman on Supreme Court to Retire in '91: Public-Shy Wilson Inspired Controversy with Her Liberal Views" *Gazette* (21 November 1990) A1. The comment was echoed in the *Toronto Star:* see David Vienneau, "Retiring Justice Praises Charter" *Toronto Star* (5 December 1990) A11.

17 See Chapters 14 and 15, this volume.

18 See *e.g.* her interviews with Susan Lightstone and David Vienneau. Lightstone, *supra* note 4; David Vienneau, "One on One with Bertha Wilson" *Law Times* (21-27 March 1994). See also her speech on gender equality in which she asserts that gender bias "seeps like a noxious pollutant into the fibres of society in ever new and subtle forms": "Gender Equality: A Challenge for the Law Profession" (Speech delivered at the Faculty of Law, University of Ottawa, no date) at 3 [unpublished, notes on file with author]. See also her article "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 Queen's L.J. 5 at 14 ("much of women's experience of inequality, degradation, and subjugation has been perpetrated by the institution of the family and by their loved ones behind closed doors").

19 Sandra Gwyn, "Sense and Sensibility" *Saturday Night* (July 1985) 13 at 19.

20 Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2001). Several reviewers of the biography focus on the degree to which it reflects a vilification of feminism. See *e.g.* Clare McGlynn, "Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* – Book Review" (2003) 11 Fem. Legal Stud. 307; Constance Backhouse, "Reviews – Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life*" (2003) 51 Labour/Le Travail 295.

21 See Chapter 2, this volume.

22 See Remarks of the Honourable Mme Justice Bertha Wilson at her retirement ceremony (Tuesday, 4 December 1990) at 1-2 [unpublished, Supreme Court of Canada Library, Ottawa].
23 Robert E. Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.
24 For a discussion of Bertha Wilson's role in supporting social context education, see Chapter 15, this volume.
25 See *e.g.* the analysis set out in Chapters 8, 9, and 10, this volume.
26 A phrase that Justice Wilson used in her Betcherman Lecture, *supra* note 9 at 521.
27 See Alan Watson, "The Scottish Enlightenment, the Democratic Intellect and the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 23.
28 See Chapter 4, this volume, for an analysis of Justice Wilson's willingness to "enter the skin" of litigants and her penchant for reasonableness, fairness, and justice.
29 See her remarks in "Women and the Canadian Charter of Rights and Freedoms" (Keynote address to the "Tenth Biennial Conference Healing the Past, Forming the Future" of the National Association of Women and the Law, 19-21 February 1993) at 4.
30 See Hester Lessard, "Equality and Access to Justice in the Work of Bertha Wilson" (1992) 15 Dal. L.J. 35.
31 See *e.g.* Chapters 10 and 16, this volume.
32 See in particular Chapters 2 and 5, this volume.
33 See the question posed by Marie-Claire Belleau, Rebecca Johnson, and Christina Vinters in Chapter 12, this volume: "*[T]his* woman judge did indeed make a profound difference. But the inevitable rejoinder arises: What *kind* of difference?" at 229.
34 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982). See in particular the discussion in Chapter 15 at 281, this volume.
35 In this vein, see the questions posted at the end of Chapter 16, this volume.
36 Bertha Wilson, "A Choice of Values" (1961) 4 Can. Bar J. 448 at 449-57; Bertha Wilson, "Equity and the Tenant for Life" (1960) 3 Can. Bar J. 117.
37 But see Maureen Maloney, "Economic Actors in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 197.

Part 1
Foundations

1
Bertha Wilson's Practice Years (1958-75): Establishing a Research Practice and Founding a Research Department in Canada

Angela Fernandez and Beatrice Tice

Bertha Wilson created the research department at Osler, Hoskin & Harcourt, the first of its kind in Canada. The department was founded on Wilson's own interests, and the force of her personality lies behind its existence. It was also, as she herself put it, "a function of chauvinism" in the sense that she took up the practice of law at a time when many clients and other lawyers were not comfortable with the idea of a woman lawyer. Behind-the-scenes research was a way to put Wilson's talents to work while still respecting conventional attitudes toward gender in a conservative profession during the 1960s. The research department, which continued after Wilson left Osler for the Court of Appeal in 1975, proved to be a model for similar departments at other large Toronto law firms and remains a key practice area at Osler today.

This chapter explores Wilson's establishment of the department. In particular, it focuses on the research-related initiatives with which she was involved during her time at Osler, such as the law firm library and the information-retrieval systems for memoranda, opinion letters, and precedents. These are not functions that one would associate with a research department today. Knowledge-management specialization means that many of the projects in which Wilson participated would now have their own dedicated staff. However, the boundaries between roles and functions were blurry at best in Wilson's day. One of the aims of this chapter is to capture this era and its gendered dimensions. We hope to provide a snapshot of some of the on-the-ground features of law firm practice at a particular time and place: a large Toronto law firm in the 1960s and early 1970s. We also aim to provide a description of how one extraordinary woman made her way in this environment. What we are providing here is by no means a typical tale – Osler was not a commonplace law practice setting, and Bertha Wilson was an exceptional jurist and an exceptional woman.

Articling at Osler: A Legal Researcher Emerges

> Whatever your assignment, little or least,
> your great maxim is: "Make yourself indispensable."
>
> – Bertha Wilson, Mount St. Vincent University
> Convocation Address, 1984

In the mid-1950s very few women were practising law in Canada.[1] Wilson was confronted with this reality even before she became a law student at Dalhousie Law School, where the Dean dismissively questioned her interest in applying.[2] Wilson persisted and, having achieved top-ten standing in her class during all three years of study, received a scholarship to undertake an LL.M. at Harvard Law School. Once again, she was discouraged by the Dean, who told her that attempting to be an academic was foolhardy: "There will never be women academics teaching in law schools, not in your day."[3] Wilson did not pursue the LL.M., but her interest in an academic approach to law persisted throughout her career and manifested itself in her intense interest in research.[4] After moving with her husband, John, to Toronto, she secured an articling position with Osler in 1958 – becoming its first female associate after she was called to the bar in 1959. On 1 January 1968, she became the first female partner in the law firm's history.[5]

Osler's articling offer to Wilson did not express a tidal wave of liberal social reform at the firm. Indeed, Allan Beattie – a lawyer senior to Wilson who arrived in 1951, was made a partner in 1955, and succeeded Harold Mockridge as head of the firm – recalled "an incredibly long and solemn debate as to whether a woman could really be suited to the practice of law."[6] According to Stuart Thom, another close friend of Wilson's at Osler, these were men to whom "law was a downtown business for the man, and the lawyer[s] they hired had certain qualities and connections and patterns of behaviour. Women just didn't fit."[7] Mockridge, then head of Osler and emphatically not a social reformer, shared this view.[8] He and other skeptical members of the firm required a demonstration not only of Wilson's abilities as a lawyer but also that she could fit into the male-dominated practice environment.

The articling period was therefore a test year on many levels. Wilson herself certainly understood the importance of this probationary phase. When it was made clear to her that her position at Osler was confined to the one articling year, she replied with some spunk: "Well, I think that would be a mutually acceptable arrangement. I might not like it here either."[9] She later noted that many women entering a man's world underestimate just how important this proving stage is: "A lot of women, I think, are of the view that as soon as you get into a group, you can start trying to change things. I don't think it works. I think you have to go through this process of proving

yourself first."[10] And prove herself she did. From her first assignment – "what is a bond?" – Wilson demonstrated her outstanding capacity to research, read, write, and, in Beattie's words, to *think*.[11]

Wilson remembered "getting a number of research assignments like that during the first months at the firm, and slowly realizing that she could learn the context of the research by going to the filing department and pulling the file herself."[12] Osler had a central filing system, in keeping with its philosophy that clients were firm clients and not those of individual lawyers. As Wilson's biographer Ellen Anderson put it, "The central storage meant that when presented with a research question Wilson could retrieve the file, discover the factual background to the research query, and discern the legal options open to the client and the pros and cons attaching to each."[13] Thus, Wilson took steps to enhance the quality of her work while at the same time overcoming any discomfort that her clients or immediate superiors might have felt working with her face to face. No one showed her how to access the files so as to increase the practical relevance of the advice she gave; she simply figured it out.[14]

It did not take long for the lawyers at Osler to realize they had something special in Wilson in terms of her aptitude for legal research and writing.[15] An initially skeptical Harold Mockridge grew to respect her. Justice Dennis Lane, who worked in the firm's fledgling litigation department, recalled one telling incident. Mr. Mockridge (as everyone at the firm addressed him) gave Wilson an assignment that involved the interpretation of a will for a client. He handed her the will and sent her away to construct the argument for one side. She returned with her memo. He sent her off to research the issue again from the other side, which was actually the client's side. When she returned it, he was pleased and wanted her to go to court to argue the case. However, Wilson demurred.[16]

If Mockridge was motivated to assist Wilson in her career development, she had a very different sense of what shape this was going to take. She did not want to occupy the traditional lawyer roles of the barrister who goes to court or the solicitor who sees clients to gather the relevant facts. She had an enormous appetite for books and wanted to work with them. As Lane put it, it was the law that she loved – "she left the rest of us to fiddle with the facts."[17] Anderson notes that "she preferred a minimum of client contact in her legal work, especially relishing her freedom from any of the social responsibility of rainmaking such as taking clients out to lunch ... [S]he was free [instead] to consider herself an academic lawyer."[18] Lane believes that Mockridge came to understand and respect this choice as he was interested in the business dimensions of law practice more than in the traditional barrister or solicitor functions.[19] He supported Wilson's effort to carve out a niche practice structured around what she wanted to do. And in those days, it was his support that counted in the end.

Despite any reluctance to prepare herself for traditional law practice, within a year Bertha Wilson had made herself indispensable at Osler. She recounted that, as her articling stint was nearing its end, one of the lawyers came to her with a research assignment that was expected to go on for months: "I said I think you'd better get somebody else – you do know that tomorrow is my last day. He said, 'What do you mean that tomorrow is your last day?' I said, 'I get my call to the bar tomorrow and that's when I leave.'" Horrified, the lawyer said, "'Don't go anywhere, stay here,' and off he went." He returned to tell her that everyone had taken it for granted that she was going to stay on. As Wilson put it, "I did stay on; I stayed on for seventeen years."[20]

Practice at Osler: Still Working to Make a Place of Her Own

> Next, let me deal with interpersonal relations – your responsibility to get along.
>
> – Bertha Wilson, Mount St. Vincent University Convocation Address, 1984

Wilson's own specialized practice focused on estates and trusts. However, she was not content merely to draw up wills. She therefore let it be known that she was willing to work on whatever research problem anyone doing any kind of work in the firm might have. Lane reported that, if a colleague took a problem to her, she would send back a memo that was clearly written and thoroughly researched. Lawyers could either work with her one-on-one, or they could send their request and wait to hear back.[21]

Moving among practice areas was not considered unusual in the 1950s and '60s. During this period, most lawyers, even at big firms such as Osler, were generalists. As Lane put it, you became a labour lawyer if your client had labour problems.[22] Although "the pace and scope" of a trend toward specialization such as departmentalization "varied widely from firm to firm ... by the early 1970s certain trends were clearly visible at large [Canadian] law firms."[23] Indeed, the 1971 *Income Tax Act* "appears to have been a turning point, marking the end of the all-rounder – the lawyer who was able to handle essentially any kind of case." It was "[t]he final nail in the coffin of generalization."[24]

Wilson was in her element in a generalist context. According to Lane, she earned a reputation for thorough research and soundness, putting the law together with whatever facts the client provided to create a persuasive package. She would, in essence, become an expert in whatever area of law was presented by the particular legal problem. The notion that this floating expertise could be its own kind of specialization lay at the heart of the idea for a research department. The department would consist of partners and

partner-track associates who specialized in providing high-level, high-quality research on particularly complex legal problems requiring more extensive treatment than a lawyer working in an individual department would or could devote to them.

Any lawyer could send a request to the research department. It would be assigned to an associate or partner, who would perform the additional requested research. The nature of this assistance would run the gamut from help with the drafting of pleadings to the production of written memoranda on points of law where more information was desired. The research lawyer might work directly with the client, but, more often, he or she would work with the other Osler lawyers who had passed along the problem.[25]

As Wilson's reputation for sound argument and thorough research and analysis grew, her role gradually developed from that of a young lawyer assisting on matters to a seasoned expert advising her colleagues on the state of the law and its application to cases. She became, as Beattie put it, "a *lawyer's* lawyer."[26] Although it is difficult to pinpoint exactly when research became the main component of Wilson's practice, Maurice Coombs, her first junior colleague in the research department, figures that this occurred some time around 1962, approximately four years after she began articling at the firm.[27]

Lane recalls taking a problem to Wilson and watching her work. She would go to the library, select the books she wanted to use, return to her office, and line them up on her desk in the order in which she intended to treat them in the memo. Next, she would pick up the dictaphone, pause, open a book, read a passage, make a comment, and then open another book and read another passage. When transcribed, her memo would be in near-final form, typically requiring only minor edits. "Like a great athlete," Lane said, "she made it look easy." She was "a mountain of information about the law."[28]

For the most part, Wilson worked from behind the scenes through written memoranda.[29] Although she worked at arm's length, she was regarded as an approachable and collegial person. Lane recalls, for instance, that she had good relationships with the estates and trusts clients.[30] Beattie said he came to think of her as a "den mother" because she was so interested in people and had a way of talking to them about a wide range of personal and professional issues.[31] Coombs called this her "people thing," which "involved working with young lawyers, encouraging them, guiding them and looking out for their interests in the partnership," as well as "provid[ing] a sympathetic ear and wise advice to older partners struggling with the modernization of legal practice throughout the sixties and seventies."[32]

By all accounts, hiring and retaining Bertha Wilson was one of the best risks Osler ever took. However, despite the fact that her colleagues deemed her indispensable to the firm, and despite their enormous respect for, and reliance on, Wilson's judgment, she would wait nine years – three times as

long as some lawyers at the time – before being made the first female partner in Osler's history.

No Gender Discrimination?

> [Y]ou have a responsibility to be patient. Promotion will appear to be painfully slow ... In fact you will begin to think that the powers that be have a vested interest in keeping you at the level you're at simply because you are so good at assisting your superiors and making them look better than they really are!
>
> – Bertha Wilson, Mount St. Vincent University Convocation Address, 1984

It was the impression of Wilson's biographer that Wilson was reluctant to acknowledge experiences of discrimination. Wilson said, "I really didn't see it that way. I didn't recognize discrimination even when I met it, probably."[33]

Wilson attributed her own delay in making partner at Osler to the unusual nature of her practice when compared with the practices of other lawyers at the firm who made partner in five years or less.[34] Former colleagues have emphasized the fact that partnerships were considered in three-year cycles; hence, depending on when a person came to the firm, missing one cycle could mean waiting for the next triennial consideration.[35] Each partner also had a veto in the decision-making process, so unanimity was required.[36] However, it is worth noting that Wilson herself wondered why she had to wait so long. When she asked, one senior colleague replied, "We never thought you would stay because you were married and you really had no reason to be working and we never saw you as a career person, looking ahead."[37] To some, the fact that she was married meant that she "did not 'really need to work' and might leave at any time."[38]

Wilson experienced many instances of sexism – both deliberate and unintended – throughout her legal career.[39] Her time at Osler was no exception. Indeed, one of the reasons she became a "lawyer's lawyer" was to avoid creating discomfort for clients who might feel uneasy working directly with a female lawyer. The research role "kept her from having direct contact with traditional male clients who might not have complete confidence in a woman lawyer."[40] Moreover, colleagues could choose to send her research requests without having face-to-face contact, and some might choose to send no requests. As laudable as the institution of the research department became, it began, as she put it, "as a function of chauvinism."[41]

Wilson was always aware of the nervousness created by those who, like her, lived between worlds – in her case, the traditional male and female spheres of work and family life of the 1950s and '60s. Her policy was to put

people at ease (whatever their reason for feeling ill at ease) and to do her best to fit in "beautifully."[42] Faced with the problem of doing this at a large elite Toronto law firm, which she once described as run by "[g]entlemen of the old school," at a time when there was little reason to think that a female lawyer would be welcome there, Wilson responded with her usual practicality: she would simply work hard, demonstrate her value, and do her best, gender discrimination be damned.[43] In reference to her time sitting with Wilson on the Supreme Court of Canada from 1987 to 1991, Justice Claire L'Heureux-Dubé described this strategy as "working three times harder than everyone else."[44]

According to Anderson, Wilson "had no desire to assert herself as equal in the sense of being identical with the more prominent male lawyers."[45] Allan Beattie, for instance, emphasized that Wilson was never on the law firm management committee and would never have wanted to be.[46] Instead, Wilson was, in Anderson's words, "permitted to carve out the role she wanted, a different role. She was respected for her expertise in that role and built her own bailiwick within the firm."[47] If this role appeared to be a subordinate one – the "brains behind the big names,"[48] who operated as "a kind of resource person for everyone else"[49] – that was just fine. It was the type of work she liked to do and at which she excelled, and it was intensely appreciated by the individuals with whom she worked. Indeed, contemporaries from the time emphasize that there were few difficult files at the firm in which she was *not* involved. Picking up the phone to ask Wilson whether X or Y was sound advice that should be conveyed to a client was thought of as a sort of insurance policy, given how good she was and how much her counsel was valued around the place.[50]

Wilson's strengths and interests were a perfect match with the backroom role of a research lawyer. This complimented the role of the other lawyers at the firm who dealt directly with clients on transactions and did not have the time or inclination to take on intensive research, creating what was in many respects "a perfect marriage."[51] Indeed, some of Wilson's colleagues might have come to rely on her too much – making herself a little too indispensable for their good, and for her own. Wilson's remark in the convocation address that "assist[ing ...] your superiors and making them look better than they really are" could create "a vested interest in keeping you at the level" seems to be a reference to her own delayed promotion and a complaint about permanently inhabiting the role of helpmate.[52]

Indeed, the metaphor of marriage and the conventional role of wife as helpmate reflects in an important way Wilson's privileged middle-class background and how that helped her fit into a conservative professional milieu in law school and at Osler. The excellent liberal arts education she received in Scotland, her marriage to a minister, even her personal style and charm, including being famously shy and soft-spoken, were all aspects of

her person and personality that would have reassured conventional colleagues that she was a safe and agreeable addition to the law firm despite the fact that she was a woman – and yes, she was practising law, if not in a completely traditional way.

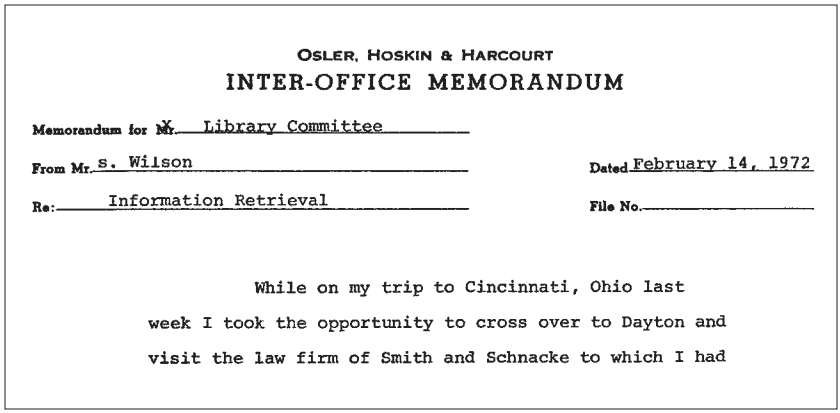
Some of the "helpmate" projects that Wilson undertook probably came to her for gender-related reasons. For example, oversight of the law library fell to her. Indeed, some who saw her operating in her behind-the-scenes role at Osler "took her for some kind of high-grade librarian."[53] Wilson had actually acted as a law librarian from time to time when she was at Dalhousie Law School.[54] As a devout user of the library, she would have been more interested than most in its operations.

Librarianship has been a female-dominated profession throughout the twentieth century.[55] One therefore wonders whether gender played a role in the fact that library-stewardship fell to Wilson. However, it was also standard practice for there to be a library committee and for one lawyer to be responsible for the law firm library.[56] From Allan Beattie's perspective, "Bertha was the law firm library committee."[57] She was the person who took an interest in its operations and who had the clout and credibility to make bottom-line recommendations about what was most needed.

Lane, who was at times on the library committee with Wilson, recalls that her secretary handled the logistics of acquisitions.[58] Prior to the 1960s and the rise of specialized roles for law firm administration, secretaries would have done the bulk of routine work, including filing, or lawyers handled it personally.[59] Wilson operated in a pre-specialized world in which either she or her secretary probably did whatever needed to be done, big or small.

Wilson did not reject projects such as law firm library management on the grounds that a woman lawyer might quite justifiably use today – namely, that it is important to avoid getting boxed into a "pink ghetto," doing non-billable work that needs to be done and might be appreciated but that is not highly valued by the institution. It would have been hard for Wilson to think in these terms, if only because the very notion of a ghetto assumes that there are others with whom one could be ghettoized, and Wilson was the only woman lawyer at Osler for quite a few years.[60] One has the impression that she was simply trying to find a way of putting her skills to use on terms with which everyone, including herself, would be comfortable.

Even in 1960, however, carving out a comfort zone did not mean total surrender to the gender norms of the day. For instance, Wilson stood up for her need to be allowed to travel for work. Concerns were expressed about the propriety of this, given that both she and the male lawyers with whom she would be travelling were married. Yet, Wilson insisted that she be permitted to travel, and she was allowed to do so.[61] Anderson referred to her "principled boldness" on this and other issues.[62]



OSLER, HOSKIN & HARCOURT

INTER-OFFICE MEMORANDUM

Memorandum for Mr. Library Committee

From Mr. s. Wilson — Dated February 14, 1972

Re: Information Retrieval — File No.

While on my trip to Cincinnati, Ohio last week I took the opportunity to cross over to Dayton and visit the law firm of Smith and Schnacke to which I had

Figure 1.1 Osler, Hoskin & Harcourt inter-office memorandum. Permission to reproduce given by Osler, Hoskin & Harcourt.

By the 1990s, the Canadian Bar Association's report on gender in the profession, of which Wilson was the chair, pointed to some of the problems that she faced while at Osler. For instance, the report noted that, in private practice, work was divided between "pink files" and "blue files," with women lawyers assigned more of the former. Pink files "involve[d] less high profile matters, less client contact and correspondence, and reduced opportunities to develop legal skills and a client base."[63] The excuse that clients would not want to work with a female lawyer was used.[64] Female lawyers felt that they were "steered into research or clerical work."[65] "Even as partners, women report[ed] that they hit a glass ceiling," with a lack of representation on powerful committees and overrepresentation on committees with less authority, such as the library committee.[66] The kinds of things that Wilson would have been willing to accept in 1960 were no longer acceptable by 1990.

Consider Figure 1.1 – the first page of a memorandum from Wilson to the library committee. Notice how she added her own "s" to "Mr." to make a "Mrs." for herself on one of the Osler standard-form memos. The date here is 1972. Wilson had been with the firm for fourteen years, and she was still required to make this alteration. Did she have her secretary add the "s" in every typed inter-office memo using this form?

Anderson noted that a theme in many of Wilson's convocation addresses was the ability to tolerate "minor injustices" in the workplace. These should be "accepted with good humour," Wilson counselled, and thought of as "so trivial as to be properly beneath notice."[67] However, what would be considered major and minor has changed substantially over time. At the present time, for instance, it is extremely difficult to imagine any woman

lawyer in a law firm reacting as Wilson did to the suspicion that her married status indicated that she was not committed to her career. When the question of why she had had to wait so long for partnership prompted the suggestion that, as a married woman who did not need to work, she might leave at any time, "Wilson laughingly said that she thought this answer was 'quite good' but it did not bother her particularly."[68]

Wilson never identified as a feminist, despite a clear and keen interest in women's issues.[69] Interestingly, she did not advocate for female lawyers at Osler; nor did she act as a mentor in that respect. As Osler lawyer Barbara McGregor, whose time at the firm overlapped with Wilson's, put it, "My memory of Bertha during my articling year [1972-73] is that she was an icon – very much a role model. I would not have thought of her as a mentor – there were no such things at that time. Mentoring came later. She provided an example that it (succeeding as a lawyer in a large firm) could be done. She did not advocate for the female lawyers at Oslers – she just excelled at what she did. She broke the path."[70] Wilson may not have seen herself as a feminist or may have felt uncomfortable carrying the label. However, others at the firm associated her with the cause of women's rights. Allan Beattie recalled one lunchtime event at a restaurant during which the Osler lawyers were seated next to a table of women who, a little too loudly and rather too exuberantly, were having an office party celebration. Wilson was teased by her colleagues: "Bertha, are those the women whose rights you are fighting so hard for?"[71]

The depth and breadth of the gender stereotyping that Wilson faced might be difficult for us to appreciate now. Allan Beattie emphasized that, to a man of Mr. Mockridge's background and life experience, who had initially thought that women could not practise law, realizing what Wilson could do was the equivalent of seeing someone walk on water.[72] In McGregor's words, Wilson "broke the path," making it "less difficult for the women who followed, to carve a position for themselves."[73]

It is remarkable that the senior male lawyers at Osler were able to set aside whatever gender prejudices they had and let Wilson into their group. However, since she was so good at what she did and so valuable to the firm for that reason, one can see why they would have been motivated to do so. What is perhaps more remarkable is the way that Wilson leveraged credibility and social capital from the kind of activity one might associate with the most undesirable aspects of law practice – the "clerkish scutwork" – and made it an important and well-respected niche activity.[74] In a way, she was transforming lemons into lemonade. Wilson took her "difference" from the other, more prominent male partners, both in terms of what she liked to do and in terms of what she and others were comfortable having her do, given the times in which they were living – and founded a unique kind of law practice. In turn, this practice gave rise to a unique phenomenon: the research

department. This department became a fixture at Osler and remains an important part of the firm today, which other large law firms copied.[75]

It is difficult to avoid the conclusion that the successful founding of the research department at Osler was largely due to the force of Wilson's personality: her interests, energy, credibility, and clout. However, we hesitate to say that it was solely a matter of human agency and serendipity. Timing, for instance, probably also had some role to play.

The bulk of Wilson's time at Osler has been described as a period of relative stability. In the post-war United States, until about the 1970s, "law firms [were] locked into long-term relations with major clients and handle[d] virtually all those clients' business." However, after about 1975, "corporate law practice in the United States ... entered a distinctly new phase" characterized by instability: among other things, much "legal work [went] in-house, and ... fragments of specialized work [were auctioned off] to many different outside firms," resulting in a new, highly competitive style of corporate practice.[76] Whereas America began its "boom" of large law firms during the 1950s and 1960s, Canada was slower in this respect.[77] However, the post-1975 situation in Canada seems to have been quite similar to that of the United States albeit on a smaller scale.[78]

Wilson sought institutional support for her projects in a period that predated the extremely rapid changes of the 1970s, which culminated in the intense specialization we know today. If an idea did not work out, long-term client relationships would not be endangered. However, if it met with success, there was value added in the sense of improving client service and competitiveness. At the same time, the research department's role was premised on a growing trend toward that specialization. Good economic times meant enough work to sustain divisions among lawyers, who did not all have to be cut from the same cloth, and a research practice helped bridge the gaps in knowledge and experience between those increasingly specialized lawyers.

Thus, specialized research support stood on the cusp between the old stable world and the new unstable one. It was institutionalized in a calmer time, before records management itself became professionalized, economically rationalized, and specialized. It was in this particular context that Wilson leveraged her "difference" rather than denying it. In so doing, and quite by accident in some cases, she forever changed the shape of Canadian law practice in a large firm.

Building a Research Practice: The Accidental Contributions

> Your responsibility [is] to be faithful in little things.
>
> – Bertha Wilson, Mount St. Vincent University Convocation Address, 1984

It is important to note that Wilson did not start out with an agenda to build a research department. According to Allan Beattie, the department grew out of her particular way of approaching the practice of law. Wilson was intensely practical in her approach to legal problems. In Beattie's words, she was "practically oriented towards the practical."[79] She took initiatives to improve the quality of her own practice wherever she saw the need, and she was willing to institute her systems on a firm-wide basis. Whether the initiative was taking on responsibility for the law library or introducing a legislation service or a synopsis service for providing client information, Wilson appeared to be tireless.[80] These projects gravitated toward her and she toward them, although it is often difficult to tell exactly how much of her time she devoted to them, and certainly her contributions to the firm went well beyond them. However, the other members of the partnership came to expect that Wilson would set these kinds of projects into motion and oversee them. At least some of these initiatives continued to be associated with the research department after her departure in 1975.

As early as 1970, Wilson was quoted in the journal of the Canadian Bar Association as saying, "What I would like to see ... is a system where, if I want a precedent I can just pick up the phone and describe what I want via certain key words and, if a document exists, it can be found and I can quickly get a copy, plus the research that may have gone into such a document."[81] In the 1972 memo, the letterhead of which is reproduced in Figure 1.1, Wilson described a visit to a law firm in Dayton, Ohio, to learn about the use of a computer for storing and retrieving "its own internal work product, *i.e.* its research memoranda, opinion letters and precedents." She noted this and compared it to "the think process" in which the Osler library committee was engaged.[82]

Lane recalls that the idea of using computers was on the library committee's agenda from about 1969 on.[83] "Of course we're all kicking around the idea of computers," Wilson remarked in 1970.[84] It is difficult to overstate just how new this technology was, although some flavour of this is captured by Wilson's description of the computer that her contact at a Cincinnati law firm was using: "[The] cathode ray tube terminal ... looks like a television set with a keyboard in front through which the lawyer can pose questions to and receive answers from the computer which appear on the television screen."[85] The first machines had no memory capacity. Coombs recalls the extreme anxiety that the new technology created for some of the Osler secretaries.[86] Wilson herself had sympathy for those, lawyers included, who had trouble making the transition to newer technologies.[87]

On her Ohio trip, Wilson received a demonstration on what the Ohio State Bar Association was doing with the computerization of Ohio statutes and case law. Encouraged by the great strides that Hugh Lawford was making with Quicklaw and Canadian law, Wilson wrote, "I am now most anxious

that Osler, Hoskin & Harcourt cooperate with Professor Lawford, the Director of the computer project being conducted at Queen's University, by allowing a terminal to be installed in our office."[88] Lane recalls a trip to an American Bar Association conference in Philadelphia where Lawford's full-text retrievals "blew everyone's mind."[89] As the *Canadian Bar Journal* put it, it "[s]ounds as though Mrs. Wilson and Prof. Lawford should get together."[90] They eventually did.[91]

The Dayton law firm that Wilson visited, Smith and Schnacke, was computerizing its precedents. These consisted of thousands of forms for wills, inter vivos trusts, real estate documents, corporate financing documents, and the like.[92] However, the firm decided that handling the research memos and opinion letters with "a card index system" was "much less costly."[93] Likewise, Osler did not computerize either its precedents or the research memos and legal opinions during this period. Technologically, this was possible. Lane reported on a punch-card system he saw being used by lawyers at Aetna Life Insurance Company in Hartford, Connecticut, to store and retrieve legal memos using IBM's KWIC (Key Words in Context) system.[94] Rather, as at Smith and Schnacke, the decision was a matter of cost, compounded by the fact that Osler was told the technology would quickly become obsolete.[95]

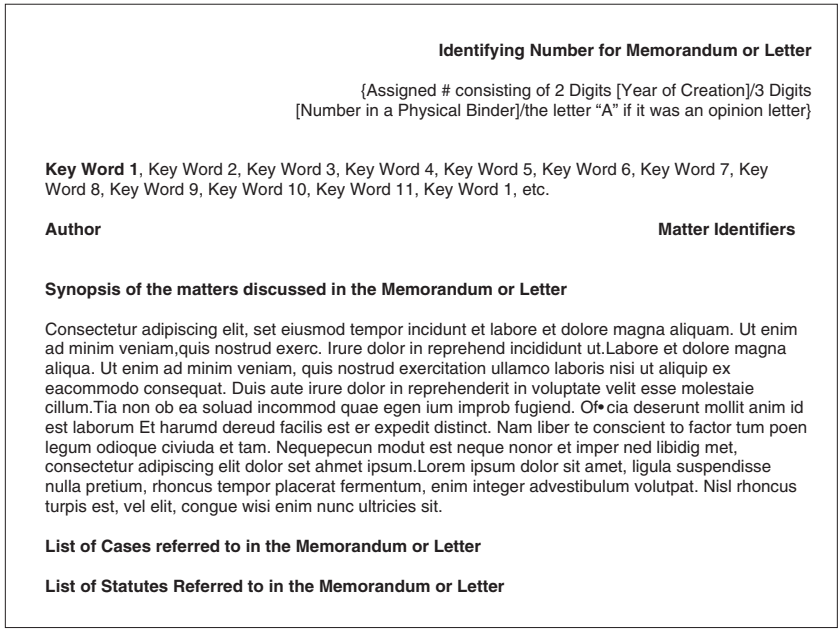
A 1970 visit to White and Case in New York City showed Osler lawyers a perfectly acceptable non-computerized approach to precedents. Essentially, the system would be left to "run itself." Senior lawyers in each department would be responsible for identifying "starter documents" and making sure that members in their practice groups added to these documents from time to time.[96] A more hands-on approach that used the research department and the library was taken with the card system for research memos. A similar manual system was also observed at White and Case, which used "a standard library-type card catalogue by subject with a brief description of the contents of each memo appearing on each card."[97] According to Lane, "The memos themselves [were] bound in volumes by code number, roughly chronological, and the volumes [were] maintained in the library near the card catalogue."[98] The indexing was done by one individual, and the "precedent index and storage system ... [were] maintained entirely separately from the Library and from the legal research system."[99]

Wilson had a long practice of keeping research memoranda and re-using them when the opportunity presented itself. As she put it in 1970, "It's really criminal to have lawyers spending their time going over and over work that has already been done."[100] This repetition not only created the risk of inconsistency that could potentially embarrass the firm but was also a waste. Wilson "knew that she could save time and provide a more efficient service to the other lawyers in the firm by establishing an information retrieval system so that the basic research product needed only adaptation

and perhaps updating for the particular client situation."[101] However, if the client paid less, the firm made less. Thus, this time-saving cut into the amount of revenue Wilson generated, created some tension for her at the firm, and ultimately led to others determining the amount of her bills.[102]

Wilson wanted to add the memos produced by other Osler lawyers to her dataset and to include a specific indication of whether a formal opinion letter had been sent out. The rendering of opinions was the area in which the potential to create embarrassing inconsistency, and to engage the firm's liability, was at its highest. This information was also easy to collect through the law firm's daybooks, or "pinks" – copies on pink paper of all correspondence that left the firm – which were deposited in binders as the letters were sent out.[103] These binders were the equivalent of daybooks, a correspondence record of the day's events.[104] Indeed, the carbon sheet separated the letter from a green copy, a yellow copy, a pink copy, and a blue copy. Coombs recalls an occasion in which one of the clerks from the mailroom presented himself to Wilson, pointing out that the wrong colour copy had been sent for the daybook. Wilson took the sheet, wrote "pink copy" at the top, and handed it back to him.[105]

In 1974, shortly before Wilson's departure for the Court of Appeal, Maurice Coombs and two articling students set to work creating a system for recording and retrieving Wilson's memos and those of other lawyers in the firm. Coombs



Identifying Number for Memorandum or Letter

{Assigned # consisting of 2 Digits [Year of Creation]/3 Digits [Number in a Physical Binder]/the letter "A" if it was an opinion letter}

Key Word 1, Key Word 2, Key Word 3, Key Word 4, Key Word 5, Key Word 6, Key Word 7, Key Word 8, Key Word 9, Key Word 10, Key Word 11, Key Word 1, etc.

Author **Matter Identifiers**

Synopsis of the matters discussed in the Memorandum or Letter

Consectetur adipiscing elit, set eiusmod tempor incidunt et labore et dolore magna aliquam. Ut enim ad minim veniam,quis nostrud exerc. Irure dolor in reprehend incididunt ut.Labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex eacommodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse molestaie cillum.Tia non ob ea soluad incommod quae egen ium improb fugiend. Of•cia deserunt mollit anim id est laborum Et harumd dereud facilis est er expedit distinct. Nam liber te conscient to factor tum poen legum odioque civiuda et tam. Nequepecun modut est neque nonor et imper ned libidig met, consectetur adipiscing elit dolor set ahmet ipsum.Lorem ipsum dolor sit amet, ligula suspendisse nulla pretium, rhoncus tempor placerat fermentum, enim integer advestibulum volutpat. Nisl rhoncus turpis est, vel elit, congue wisi enim nunc ultricies sit.

List of Cases referred to in the Memorandum or Letter

List of Statutes Referred to in the Memorandum or Letter

Figure 1.2 Mock-up index card. Permission to reproduce given by Maurice Coombs.

believed that Wilson was thinking about institutionalizing a kind of legacy to the law firm that would continue to exist after her own departure.[106]

Although the physical cards have not survived, Maurice Coombs kindly constructed the Figure 1.2 mock-up from memory. A separate card was made for each of the following pieces of information: keywords, author, matter identifier, cases, and statutes. It was therefore possible to search the system's contents using any of these categories. Such cross-indexing was not a feature of the White and Case system.[107] In 1983, when the system contained approximately seven thousand items, the proportion of research memos to opinion letters was roughly seven to three in favour of memoranda.[108] Client names were included on the original cards but were deleted when the information was sent to Quicklaw for the database.[109]

All of the cards were housed in a "rolodex contraption" with several trays stacked one over the other in a kind of pulley system. Called an "Acme Visible Stratomatic" machine, it was much like the one from Acme Visible Records reproduced in Figure 1.3. The cards were organized into plastic trays that rotated independently on parallel tracks, rather like side-by-side ferris wheels. More than one person could stand at the machine and access the plastic trays in the various wheels. Apparently, there was an issue about the noisy clacking of the plastic trays and by the fact that more than one lawyer could use the machine at the same time, creating chit-chat conditions that

Figure 1.3 Acme Visible Records, Inc. Image obtained from American Brands Inc., 1972 Annual Report, at 16.

were disruptive to those sitting in the library reading room area.[110] The machine was housed in the library and unquestionably understood to be a part of its resources.

The actual memos and opinion letters were stored in "Accogrip" binders. A person using the system would undertake a search for an item, say by keyword (*e.g.* smoke easement), would find all the cards under that keyword, and could then pull the physical documents from the binders using the assigned numbers on each card. Physical copies of the memos tended to disappear as people took them away to use them and forgot to return them. Hence, a master copy was kept to replace the gaps that would appear in the binders over time. By 1983 abstracts on the index cards were typed into a word processor, and the documents themselves were transferred onto microfiche.[111] Indeed, many of Wilson's memos are still accessible as scanned PDF documents on the current Osler system, and Osler lawyers report that they continue to pop up during routine searches on the system.[112]

Lawyers were supposed to deposit copies of their research work into the system for indexing and archiving. However, getting people to remember to give their memos to the system was difficult. Users of the system tended to be contributors to it, particularly young lawyers who were more comfortable with new technologies.[113] Research lawyers were well represented as both users and contributors. As Diane Snell, one of the indexing lawyers, put it in 1983, "[t]he research group's work is ... our motherlode."[114]

A Research Lawyer at the Supreme Court of Canada

If one were to ask oneself in the abstract "Where is the best place for an academically oriented lawyer to be in the Canadian legal system?" the last place one would choose is probably a big corporate commercial law firm in downtown Toronto. A university, yes; an appellate court such as the Ontario Court of Appeal, yes; the Supreme Court of Canada, most certainly, yes. But Osler, Hoskin & Harcourt?

Wilson did much innovative and important work in her judgments on both the Ontario Court of Appeal and the Supreme Court of Canada, as many of the essays in this collection demonstrate. The research-intensive approach that she developed during her long Osler years must have affected the way in which she approached the thinking, research, and writing of her judgments.[115] In addition to being an intensely practical person, Wilson was also (perhaps paradoxically) quite philosophical by orientation, a tendency which made many of her judgments lucid, readable, and compelling.[116] Yet in the environment that one would have expected to suit the academic and philosophical aspects of her personality best – the Supreme Court of Canada – Wilson had a difficult time. In part, the difficulty had to do with leaving Toronto after many happy years spent there.[117] It seems also to have been related to the way the Court ran at the time.

Wilson never felt comfortable with the informal consensus building around judgments, which she saw as inappropriate lobbying.[118] An individualist in outlook and operation, she thought that the consensus-oriented approach produced a "[c]alculated ambiguity."[119] She also felt excluded by informal discussions between the other justices and was in favour of implementing "set procedures or a clear protocol" to address issues: these included when judges should comment on the various positions that were emerging in the decision-making process (were they required to wait for a written draft of the majority opinion?) and how those responses were to be given (must they be in writing, and if so, would the memo be made available to everyone?).[120] Wilson's own preference for an "open process" effectuated through memo writing stemmed from her days at Osler, when she worked primarily through memos.[121]

Wilson's direct one-on-one research-intensive and memo-oriented style flourished in a large law firm setting, where meticulous solitary work was of the utmost importance, at least for the sort of practice she had. However, the memo-writing strategy that had worked so well in private practice ran into a wall at the Supreme Court. Indeed, the Court seemed to be the one place where the simple "work hard" approach did not do the trick. Perhaps this was because the Supreme Court culture included a level of give and take that Wilson had not previously been required to incorporate into her working style. A lack of support and goodwill also seemed to be an issue. With respect to the memo-writing protocol, for instance, good reasons existed for not adopting a strict formal system.[122] The fact that Wilson felt she needed one to be properly included in the collective deliberation process is quite a dramatic complaint about the collegiality of the group at that time.[123]

Wilson felt excluded by the more informal decision-making processes, many of which seemed to take place over sports-related activities. This placed a female judge "with arthritis who does not play golf or squash or tennis and does not ski or attend hockey games at something of a disadvantage."[124] The problem may also have been the specific personalities on the Court at that time. In particular, despite a reputation as "the great dissenter," Chief Justice Laskin had come to discourage dissent on the Court after 1979.[125] Laskin had not supported Wilson's candidacy, fearing in part that she would disrupt the unanimity on the Court and maintaining that there were better-qualified male candidates.[126] His attitudes could not have made for happy working conditions, at least for the two years until Brian Dickson became Chief Justice in 1984. Dickson retired in 1990, and Wilson followed suit in 1991, a full seven years early.[127]

The Canadian Bar Association report's section on judges, which Wilson oversaw and wrote, included many of the things that she personally experienced. When first appointed, many women judges "were not made to feel welcome, that in many cases they were told that they had been appointed

simply because they were women and that there were male candidates 'out there' who would have been better appointees."[128] Many had left a "collegial environment" and found that "[t]hey now had to start from scratch proving themselves all over again to a fresh group of sceptics."[129] Wilson reported the comment of one defensive judge: "No woman can do my job!"[130] And she wrote that "many women judges feel a tremendous sense of alienation where they are the only one or one of a very small number on their court. They have no real sense of belonging and are unable to discuss their situation with their previous colleagues at the Bar."[131]

There is some irony in the fact that the intense academic style of Wilson's memo writing found greater support at Osler than at the high-level appellate courts where one might have thought her way of working would be most welcome.

Conclusion

It has been noted that Canadian law firms have been remarkably consistent in their "stubborn resistance to such innovations as democratic methods of firm governance, aggressive programs of client development, meritocratic hiring practices, and the adoption of new technology."[132] However, this started to change in the 1970s when the boom in capital markets led to the demise of the "old family compact," and "an aggressive, transaction-oriented meritocracy" replaced the traditional nepotism.[133] Wilson played an important role in this at Osler, as it moved away from internal autocratic rule toward more transparent and consensus-oriented law firm governance, as well as enhanced client services such as the synopsis and legislation services, and the research department itself. She herself was an example of a greater scope given to meritocracy, and, as we have seen, she advocated strongly for the adoption of new technologies.

However, positive change was accompanied by much that was negative, particularly for women in the profession, who, thanks to Wilson's example, would now be more welcome than they had been. For instance, the new, more aggressive order would see the rise of billable hours as the way to measure workplace performance, a male-model of what constitutes a dedicated associate, and a frenetic style that women with young children find difficult to keep pace with. Wilson herself had no children and an exceptionally supportive spouse.[134] Her professional coping strategy, "working three times harder than everyone else," was not one that all women could follow. Also, after the 1970s, many women would not be satisfied at being relegated to the less glamorous aspects of law practice, and they would not feel as Wilson did about operating quietly behind the scenes. Why should they be forced to make lemonade from lemons?

Wilson's Osler period is important from the point of view of legal culture in Canada, specifically on the history of the development of research procedures

and protocols at Canadian law firms. It is also an important part of appreciating the legal life of Bertha Wilson and the complex role her gender played in that life. Among other things, Wilson's founding of the research department was evidence of how she broke into an exclusive, powerful, all-male institution and successfully implemented her particular way of working with the law even if it was not necessarily a template for success for all women in the profession. Her approach found support, and she institutionalized it in a way that effected lasting change on the structures of large law firms in Canada. The founding of the research department should therefore be seen as one of her most successful law reform projects.

The story of the development of the research department embodies two of the most dramatic and admirable things that we have come to associate with Wilson: creative perseverance in the face of gender discrimination and an interest in implementing lasting change in the Canadian legal system. Her initiatives succeeded in what was in many respects a hostile environment, in part because of timing, as we have seen. Wilson stood on the cusp of a new, more unstable and aggressive transaction-oriented world characterized by increased specialization, all of which was a good fit with the research function. This new more meritocratic world order could fold a Bertha Wilson comfortably into its cloak. Yet, the success of the research department was also a function of her personality: her pragmatic style, relentlessly stubborn approach to all matters, and, as she put it, her dedication to the "little things."[135]

Acknowledgments

The authors wish to thank Allan Beattie, Maurice Coombs, Dennis Lane, John Layton, Barbara McGregor, and Heather Grant for agreeing to be interviewed for this project and for providing information and (in some cases) documents relating to the issues investigated here. This chapter simply could not have been written without their participation, and we are very grateful for the enthusiasm they expressed about what we were doing. Thanks also to Mary Jane Mossman, Ellen Anderson, and Curtis Cole for their assistance, particularly at the initial stages of the research, as well as to Laura Fric, Tim Kennish, Edward Saunders, and Purdy Crawford for their input at the end stage. We would also like to acknowledge our colleagues at the University of Toronto Faculty of Law, who provided helpful feedback when we presented the piece at our faculty workshop on 25 February 2008, fellow collection contributors who participated in the conference funded by the Social Sciences and Humanities Research Council at McGill University on 18 April 2008, and the group of Osler lawyers who turned out to a lunchtime presentation kindly organized by Gail Henderson at the law firm on 26 June 2008. Matias Milet kindly liaised with Stephen Sigurdson at Osler regarding copyright permission for the Bertha Wilson memorandum reproduced in Figure 1.1. Susan Barker and Sooin Kim of the Bora Laskin Law Library at the University of Toronto, Faculty of Law, worked to get all three images into the book. Lastly, we are very grateful to collection editor Kim Brooks for her tremendous work on the project as a whole, as well as the specific suggestions and attention she gave to our chapter, from which it greatly benefited.

Notes

1 See Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart, 2006) at 67-112.

2 Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2001) at 38.
3 Quoted in *ibid.* at 48.
4 It has been suggested that moving to Boston to do the LL.M. was not financially feasible and that Wilson would not have wanted to leave John, who was posted in Halifax. The couple moved to Toronto after John was offered a fundraising position with the United Church there. Interview of Allan Beattie by Angela Fernandez and Beatrice Tice (3 October 2007).
5 Curtis Cole, *Osler, Hoskin & Harcourt: Portrait of a Partnership* (Toronto: McGraw-Hill Ryerson, 1995) at 143.
6 Quoted in Sandra Gwyn, "Sense and Sensibility" *Saturday Night* (July 1985) 13 at 17.
7 Quoted in Cole, *supra* note 5 at 123.
8 *Ibid*.
9 Quoted in *ibid.*
10 Quoted in Anderson, *supra* note 2 at 127.
11 Interview of Beattie, *supra* note 4.
12 Cole, *supra* note 5 at 124.
13 Anderson, *supra* note 2 at 54.
14 See Cole, *supra* note 5 at 124.
15 Interview of Beattie, *supra* note 4.
16 Interview of Dennis Lane by Angela Fernandez and Beatrice Tice (12 October 2007).
17 *Ibid*.
18 Anderson, *supra* note 2 at 64.
19 Interview of Lane, *supra* note 16.
20 Quoted in Cole, *supra* note 5 at 124-25.
21 Interview of Lane, *supra* note 16.
22 *Ibid*.
23 Carol Wilton, "Introduction: Inside the Law – Canadian Law Firms in Historical Perspective" in Carol Wilton, ed., *Essays in the History of Canadian Law: Inside the Law – Canadian Law Firms in Historical Perspective,* vol. 7 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1996) 3 at 31.
24 *Ibid*. at 30.
25 Interview of John Layton by Angela Fernandez and Beatrice Tice (25 January 2008).
26 Quoted in Gwyn, *supra* note 6 at 17 [emphasis in original].
27 See Maurice Coombs, "Bertha Wilson: A Woman of the Law" *Briefly Speaking/En bref* (May 2007) (newsletter of the Ontario branch of the Canadian Bar Association).
28 Interview of Lane, *supra* note 16.
29 Anderson, *supra* note 2 at 192.
30 Interview of Lane, *supra* note 16.
31 Interview of Beattie, *supra* note 4.
32 Coombs, *supra* note 27.
33 Ellen Anderson, *Bertha Wilson: Postmodern Judge in a Postmodern Time,* vol. 2 (S.J.D. Thesis, University of Toronto Graduate Department in Law, 2000) at 399, n. 118 [unpublished]. The thesis is cited only where a point is not included in the published book. Please note that both the University of Toronto library copy of the thesis and that of the National Library of Canada are incomplete in that they are missing the third volume.
34 See Anderson, *supra* note 2 at 58.
35 Interview of Maurice Coombs by Angela Fernandez and Beatrice Tice (21 September 2007).
36 See Anderson, *supra* note 33, vol. 1 at 185, n. 26.
37 Quoted in *ibid.,* vol. 2 at 309, n. 132.
38 *Ibid.,* vol. 2 at 248.
39 See *e.g.* Anderson, *supra* note 2 at 94-95, 156.
40 Cole, *supra* note 5 at 125.
41 *Ibid*. Telephone conversation between Curtis Cole and Angela Fernandez (13 September 2007) (remarking that this point came from Wilson).
42 See *e.g.* Anderson, *supra* note 2 at 46.

43 Quoted in *ibid.* at 57.
44 Remarks made by Claire L'Heureux-Dubé, Women's Legal Education and Action Fund (LEAF) Equality Day Celebration, Justice Bertha Wilson Fund Launch, Cocktail Reception (17 April 2008) [L'Heureux-Dubé, Remarks]. For an empirical report of just how much work Wilson did during her time at the Supreme Court of Canada, specifically her high rate of writing when compared to the other judges, see Chapter 12 at 242, this volume. See also Robert J. Sharpe and Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003) at 372, for a description of Wilson's exasperation with the slow pace of work of most of her colleagues in the mid-1980s.
45 Anderson, *supra* note 2 at 64-65.
46 Interview of Beattie, *supra* note 4.
47 Anderson, *supra* note 2 at 65.
48 *Ibid.* at 58.
49 Gwyn, *supra* note 6 at 17.
50 Telephone conversation between Tim Kennish and Angela Fernandez relaying perspectives communicated to him by Edward Saunders and Purdy Crawford (11 July 2008).
51 Interview of Barbara McGregor and Heather Grant by Angela Fernandez (2 July 2008).
52 Bertha Wilson, "Remarks Made at Mount St. Vincent University Convocation upon Acceptance of an Honorary Degree" in Janet Matyskiel and Louise Lévesque, comp., *Speeches Delivered by the Honorable Bertha Wilson, 1976-1991* (Ottawa: Supreme Court of Canada, 1992) 176 at 180 [Wilson, "Remarks"].
53 Gwyn, *supra* note 6 at 17.
54 Anderson, *supra* note 2 at 39.
55 See Katherine Phenix, "The Status of Women Librarians" (1987) 9:2 Frontiers: A Journal of Women's Studies 36. See also A.R. Schiller, "Women in Librarianship" in M.J. Voight and M.H. Harris, eds., *Advances in Librarianship* (Phoenix, AZ: Oryz, 1974) 103 at 125.
56 See Joan Circa, "Variety and Routine in Law Firm Librarianship" in *Selections from Continuing Education Programme on Developing and Using Law Libraries* (N.p.: Law Society of Upper Canada, Department of Continuing Education, 1971) 155 at 159; Bette Carmichael, "Organization and Equipment in the Law Firm Library" in the same collection 135 at 141. Carmichael was the Osler librarian during Wilson's time.
57 Telephone interview between Allan Beattie and Angela Fernandez (24 September 2007).
58 Interview of Lane, *supra* note 16.
59 See George C. Cunningham and John C. Montaña, *The Lawyer's Guide to Records Management and Retention* (Chicago: American Bar Association, 2006) at 8.
60 The next woman to join the firm did so in 1966, Alicia Forgie, and she was made a partner five years later in 1971. Forgie practised real estate, an area that was relatively "friendly" to female lawyers, according to Barbara McGregor. E-mail from Barbara McGregor to the authors (6 May 2008). Heather Grant (then Frawley), who started out her practice in real estate and asked after two and half years to be switched to the corporate department, joined the firm as an associate in 1970 and became a partner in 1976. She was the first lawyer to have a baby while at Osler, triggering the development of a policy on paid maternity leave – one month for every year of work; when she had her first child, she had been at Osler for four years, so she received four months of leave. This, in her words, "set the policy for King and Bay." Interview of McGregor and Grant, *supra* note 51. The fourth female partner at the firm, Barbara McGregor, became an associate in 1974 and a partner in the real estate department in 1979. By 1981 there were sixteen women lawyers at Osler, five of whom were partners: Forgie, Grant (then Frawley), McGregor, along with Nancy Chaplick (who joined the firm in 1975 and was made a partner in 1980), and Jean Demarco (who joined Osler in 1976 and was made a partner in 1981). See Cole, *supra* note 6 at 155, 339 n. 21.
61 See Anderson, *supra* note 2 at 62.
62 See *ibid.* at 133.
63 Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 87 [*Touchstones*].

64 *Ibid*. at 88.
65 *Ibid*. at 87.
66 *Ibid*. at 94.
67 Quoted in Anderson, *supra* note 2 at 58.
68 Anderson, *supra* note 33, vol. 2 at 309, n. 132.
69 See Anderson, *supra* note 2 at 136, 197.
70 E-mail from McGregor, *supra* note 60.
71 Interview of Beattie, *supra* note 4.
72 *Ibid*.
73 E-mail from McGregor, *supra* note 60.
74 Gwyn, *supra* note 6 at 17.
75 Other Canadian law firms with research lawyers today include Torys, Stikeman Elliott, Goodmans, Fasken Martineau, and Ogilvy Renault. This list is based on a search of law firm websites (the quality of which varies widely) and is therefore likely to be incomplete.
76 Robert W. Gordon, "A Perspective from the United States" in Carol Wilton, ed., *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930,* vol. 4 (Toronto: Butterworths for the Osgoode Society for Canadian Legal History, 1990) 425 at 433-34.
77 Wilton, *supra* note 23 at 30.
78 See *ibid*. at 38; John Hagan and Fiona Kay, "Hierarchy in Practice: The Significance of Gender in Ontario Law Firms" in Wilton, *supra* note 23, 530 at 532, 541.
79 Interview of Beattie, *supra* note 4.
80 See Anderson, *supra* note 2 at 54-55, 71.
81 Quoted in L.F. Webster, "Filing: The Unsolved Problem" (February 1970) Can. Bar J. 28 at 32.
82 Memorandum from Bertha Wilson to the law firm library committee (14 February 1972) at 2. Copy provided to the authors by Dennis Lane.
83 Interview of Lane, *supra* note 16.
84 Quoted in Webster, *supra* note 81 at 30.
85 Wilson Memorandum, *supra* note 82 at 1.
86 Interview of Coombs, *supra* note 35.
87 See *e.g. Vorvis v. Insurance Corporation of British Columbia,* [1989] 1 S.C.R. 1085 at para. 32 (noting with sympathy that one of the problems the employer in the wrongful dismissal case had with plaintiff/employee/lawyer was his writing in "long-hand" as opposed to using "a dictating machine"). But see *Richardson v. Richardson,* [1987] 1 S.C.R. 857 (a spousal support case in which Wilson had little sympathy for the fact that Mrs. Richardson's clerical skills – the employment she engaged in before her marriage and intermittently throughout it – had become outdated as a result of computerization).
88 Wilson Memorandum, *supra* note 82 at 5.
89 E-mail from Dennis Lane to the authors (28 September 2007).
90 Webster, *supra* note 81 at 32.
91 Anderson, *supra* note 33, vol. 1 at 137 ("Oslers was able to arrange to store its research index (client names expunged to ensure absolute confidentiality) on QuickLaw with, of course, the further safeguard of an Oslers-only password").
92 Wilson Memorandum, *supra* note 82 at 7.
93 *Ibid*. at 6.
94 Dennis Lane, "An Approach to the Storage and Retrieval of Legal Research in a Large Law Firm" in *Selections from Continuing Education, supra* note 56, 237 at 240.
95 Interview of Lane, *supra* note 16; Diane Snell, "An Information Retrieval System – Why and How: Responses to Queries by the Canadian Association of Law Librarians Convention" (Saskatoon, SK, 1983) at 4 [unpublished]. Copies provided to the authors by Maurice Coombs and Dennis Lane.
96 Memorandum from J.T. Kennish to members of the library committee, re Proposed Commercial Precedent System (no date) at 6-7. Copy provided to the authors by Dennis Lane. Not until the 1990s did the firm became focused on its system of precedents and their computerization. Cole, *supra* note 5 at 242-43.
97 Lane, *supra* note 94 at 242.
98 *Ibid*.

99 *Ibid*. at 243.
100 Quoted in Webster, *supra* note 81 at 32.
101 Anderson, *supra* note 2 at 54.
102 See *ibid*. at 60-61. Interview of Beattie, *supra* note 4. What Wilson wanted – charging for the time required to do the work, whether that was short or long – was in keeping with current billing practices.
103 Snell, *supra* note 95 at 6.
104 E-mail from Maurice Coombs to the authors (3 October 2007).
105 Interview of Coombs, *supra* note 35.
106 *Ibid*.
107 Lane, *supra* note 94 at 242.
108 Snell, *supra* note 95 at 2.
109 *Ibid*. at 8 ("Once an in-house computer system is acquired the client's name will be re-instated and we will have the best of all possible worlds").
110 Interview of Coombs, *supra* note 35.
111 See Snell, *supra* note 95 at 7-9.
112 Comment made by Laura Fric, Osler presentation by Angela Fernandez (26 June 2008).
113 Interview of Coombs, *supra* note 35.
114 Snell, *supra* note 95 at 5.
115 See Chapter 16, this volume, for a discussion of how Wilson's academic approach played out in some of her judgments during her time at the Ontario Court of Appeal and the Supreme Court of Canada.
116 See *e.g. Perka v. The Queen,* [1984] 2 S.C.R. 232 (for a Wilson concurrence that wrestles with Kant and Hegel).
117 See Anderson, *supra* note 2 at 12.
118 See *ibid*. at 162-64.
119 *Ibid*. at 164 (Wilson thought it was "far better to have a range of judgments offering options, including a dissent and a diverging concurrence if necessary, as long as each judgment was written with crystal clarity").
120 *Ibid*. at 165.
121 See *ibid*. at 192.
122 See *ibid*. at 163-64 (arguments against a rigid procedure include not wanting to increase "the deluge of paper" and that the preservation of informal discussion is an important way to prevent positions from hardening in the decision-making process).
123 *Ibid*. See also Sandra Martin, "Bertha Wilson, 83" *Globe and Mail* (30 April 2007), online: <http://www.theglobeandmail.com> (noting that Wilson was "not fully accepted by the other members of the court").
124 Anderson, *supra* note 2 at 153. See also at 257.
125 See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 433.
126 See Anderson, *supra* note 2 at 154; Girard, *ibid*. at 529; Edward Goldenberg, *The Way It Works: Inside Ottawa* (Toronto: McClelland and Stewart, 2006) at 89, quoted in Martin, *supra* note 123.
127 Anderson, *supra* note 2 at xvi. See also at 325-26 (elaborating reasons for departure, some financial and some personal, including the fact that Dickson had retired five months earlier and "[c]hange seemed, if anything, less likely with Dickson gone"). See also Martin, *supra* note 123, quoting Madame Justice Rosalie Abella of the Supreme Court of Canada, calling Wilson and Dickson "the Fred and Ginger of the Charter." L'Heureux-Dubé publicly reported that Dickson wanted Wilson to replace him as Chief Justice, but she declined for health reasons. Dickson used to say that Wilson taught him everything he knew about human rights and the *Charter.* L'Heureux-Dubé also confirmed that the decision making was very much a male club, from which she and Wilson felt excluded. For instance, they would not be invited to lunches where the male judges would be agreeing to the majority and strategizing about that. Wilson spoke up about this on one occasion during conference, which caused Dickson to turn bright red. He was not a part of that exclusion. L'Heureux-Dubé, Remarks, *supra* note 44.

128 *Touchstones, supra* note 63 at 192.
129 *Ibid*.
130 *Ibid*. at 193.
131 *Ibid*. at 194. See Anderson, *supra* note 2 at 346-51 (for a discussion of the controversy surrounding this section of the report – Chief Justice Antonio Lamer wanted to know which judges had made the complaints, but Wilson refused to disclose the information as she had elicited it personally with guarantees of confidentiality). This section of the report contains pointed criticism of the Canadian Judicial Council, which must have upset Lamer as its head. See *Touchstones, supra* note 63 at 198. See also Chapter 14 and Chapter 15 at 282-85, this volume.
132 Wilton, *supra* note 23 at 5.
133 Cole, *supra* note 5 at 207 (quoting Christopher Portner), 214 (an informal "anti-nepotism rule" was in place by the 1970s).
134 See Anderson, *supra* note 2 at 404, n. 29 (describing Wilson's childlessness as "a matter of sad happenstance rather than choice"). See also at 47, 131, 199 (in terms of domestic labour, Wilson's husband, John, did shopping and cooking, and Wilson did the house cleaning until the time of her Supreme Court appointment. John ran the household once they moved to Ottawa).
135 Wilson, "Remarks," *supra* note 52 at 179.