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Louise Arbour

An Interview with the Honourable Madam Justice Louise Arbour

L'honorable Louise Arbour a reçu un LL.L. (avec distinction) de l'Université de Montréal en 1970 et est membre des Barreaux du Québec et de l'Ontario. Au cours de sa carrière exceptionnelle, Madame Arbour a occupé différentes fonctions : elle a notamment enseigné à la Osgoode Hall Law School, œuvré comme juge à trois différents échelons du système judiciaire et été nommée Haut-Commissaire des Nations unies aux droits de l'homme. Plus récemment, Madame Arbour a ajouté la pratique privée au vaste éventail de ses diverses fonctions en se joignant au cabinet juridique Borden Ladner Gervais s.r.l., s.e.n.c.r.l. (BLG) en qualité de juriste en résidence*.

L'équipe de la *Revue de droit d'Ottawa*, composée d'Andrea Kareclas, de Jason Wang, de Julio Paoletti et de Morgan Teeple Hopkins, a rencontré Madame Arbour dans les bureaux de BLG à Montréal au cours de l'automne 2014. Madame Arbour a relaté son parcours en remontant au tout début de sa formation juridique, elle a généreusement accepté de partager les expériences qu'elle a vécues dans nombre de ses importantes fonctions, en ponctuant son récit de réflexions à propos de différents domaines du droit, et a conclu en nous donnant un aperçu des projets auxquels elle travaille actuellement.

The Honourable Madam Justice Louise Arbour received an LLL (with honours) from the Université de Montréal in 1970 and is a member of both the Québec and Ontario Bars. Over the course of her distinguished career, Louise Arbour has worked in a number of varied positions, including teaching at Osgoode Hall Law School, serving as a judge at three different levels of court and acting as the United Nations High Commissioner for Human Rights. Most recently, Louise Arbour added private practice to her repertoire of diverse positions, joining the law firm Borden Ladner Gervais LLP (BLG) as a jurist in residence.*

The *Ottawa Law Review's* Andrea Kareclas, Jason Wang, Julio Paoletti and Morgan Teeple Hopkins met with Louise Arbour at the Montréal office of BLG in the fall of 2014. Starting right at the beginning of her legal education, Louise Arbour shared her experience in a number of exciting positions, provided her insight on different areas of the law and gave us a glimpse at some of the work she is currently engaged in.

* As a jurist in residence, Louise Arbour mentors younger lawyers and provides strategic advice to BLG's International Trade and Arbitration Group. See Borden Ladner Gervais LLP, "The Honourable Louise Arbour, C.C., G.O.Q.", online: <www.blg.com>.



An Interview with the Honourable Madam Justice Louise Arbour

November 21, 2014

Ottawa Law Review [OLR]: What initially inspired you to study law?

Louise Arbour [LA]: Nothing, in short. I was raised here in Montréal and I went to a classical college. In fact, when I started there it was a girls' convent school.¹ So I have a BA with a classical background, and what you did after that, at least what women typically did since I was in an all-girls school until after I finished my BA, was either medicine, law—I don't think anybody ever thought of engineering—and some would do a graduate degree in history or literature and then go and teach. So the avenues were very narrow. I didn't know any lawyers or judges, there were none in my family, and I had no idea what law was really about. But I had eliminated all the other options and so I went into law very much by default, thinking of it as a continuation of my general education with what I thought at the time may lead to a career in either journalism or politics. And then by Christmas of first-year, I knew it was really for me—I thought law was just a perfect fit. And I had done much better in law school than I had done in undergrad. It was a miracle they even accepted me—in those days they were not very discriminating. I was always a good student, but not fabulous, and I was no longer very interested in the girls school environment when I graduated. But law school, no question, it was made for me.

OLR: After law school² you went on to clerk for Justice Louis-Philippe Pigeon at the Supreme Court of Canada.³ We'd like to hear about your clerking experience, starting with what the hiring process was like for clerks at the time.

1 Louise Arbour attended Collège Régina Assumpta in Montréal. Collège Régina Assumpta was founded in 1955 as an all-girls school by The Sisters of the Congregation of Notre-Dame. It ceased awarding Bachelor of Arts degrees in 1967. Louise Arbour was a member of the last graduating class. It is now a private secondary school for girls and boys. See Collège Régina Assumpta, "Historique", online: <www2.reginaassumpta.qc.ca>.

2 Louise Arbour attended the Faculté de droit, Université de Montréal from 1967 to 1970, and graduated with an LLL (with distinction). See Supreme Court of Canada, "The Honourable Madam Justice Louise Arbour", online: <www.scc-csc.gc.ca> [Supreme Court of Canada Biography, Justice Arbour].

3 Louise Arbour clerked at the Supreme Court of Canada from 1971 to 1972 (*ibid*).

LA: It was actually quite interesting. First of all, I had heard about it from I think a poster in the bar admission course and somebody had told me that a guy named Gérard Tremblay⁴ had done it and I think I spoke with him about his experience. I had never been to Ottawa and in fact hadn't had much contact with English Canada in those days. I had been to France a couple of time but never much west of Québec. And I had made applications to do graduate work in a couple of places and somebody said to me, "Well, clerking is like graduate work except it pays, instead of you paying," which was a major attraction. So back then you would send an application to the Chief Justice, not to individual judges, and then you just waited to see if anybody called. And in those days for some peculiar reason, the three Québec judges⁵ would only take people who were already called to the bar, while all the other judges from other provinces took students straight out of law school. They had some kind of notion—I think mostly the Chief Justice⁶—that you had to have been sworn to the bar or something, I don't know. So I applied after I finished my bar admission course and I received a call from Justice Pigeon. So I borrowed a car and, I'll never forget, I drove to Ottawa and I thought "no way," I hadn't given it very serious thought as I had a couple of acceptances for graduate work. So I drove there, I got to the court and nobody spoke French—so I didn't think that was looking too good. And then when I got to the interview with Justice Pigeon, he spoke to me entirely in French, and only at the end I think he said something like, "How is your English?," and I said, "Good," which was *not* the truth. And then he said, "Well I'd like to offer you the position." So I said to him, "Well I have to think about it." And he was not pleased. He said, "Well you applied" and I said, "Yes—but," and he interrupts and said, "You thought you never had a chance." And I said, "Well, yes that's true." And then he made his first mistake—he said, "Because you're a woman." And I thought oh man he hasn't figured out I don't really speak English! And then he went on and explained to me at length that he had been instrumental in the reform of the Québec Civil Code⁷ dealing with the status of married women and that given equal competencies he would always give a chance to a woman. I thought this was so cool. I said, "Okay then I'll come." So there I went.

4 Gérard R. Tremblay is now a partner at McCarthy Tétrault LLP in their Litigation Group in Montréal. Mr. Tremblay was a law clerk at the Supreme Court of Canada from 1967 to 1969. See McCarthy Tétrault LLP, "Gérald R. Tremblay", online: <www.mccarthy.ca>.

5 The Supreme Court of Canada is composed of the Chief Justice and eight puisne judges. Under the *Supreme Court Act*, RSC 1895, c S-26, three of the nine judges must be from Québec. By either convention or established practice, the remaining six are divided between Ontario (3), British Columbia (1), Alberta/Saskatchewan/Manitoba (1) and the Maritime Provinces (1). See Adam Dodek, *The Canadian Constitution* (Toronto: Dundurn Press, 2013) at 122.

6 The Right Honourable Joseph Honoré Gérald Fauteux was named Chief Justice of Canada on March 23, 1970. He served on the Supreme Court for 24 years and retired on December 23, 1973. See Supreme Court of Canada, "The Right Honourable Joseph Honoré Gérald Fauteux, P.C., C.C.", online: <www.scc-csc.gc.ca>.

7 The Honourable Mr. Justice Louis-Philippe Pigeon was a Law Clerk of the Québec Legislature from 1940 to 1944. He also acted as legal adviser to the Premier of Québec, Jean Lesage, from 1960 to 1966. See Supreme Court of Canada, "The Honourable Mr. Justice Louis-Philippe Pigeon", online: <www.scc-csc.gc.ca>.

OLR: *Can you describe your experience clerking at the Supreme Court of Canada?*

LA: It was fantastic. First of all, there were just nine of us and we were in this room—in those days just in front of the library—and it had on top of the door that led to the library nine Christmas-like lights, and when your judge wanted you, your light went on. So we'd all be in the same room with a big black telephone and sometimes you'd be reading something and someone would say, "Hey, Louise – *ta lumière est allumée*," and you'd have to put your jacket on and rush down to see the judge. Now you have to imagine, in those days, there was an automatic right of appeal for all cases over just \$10,000.⁸ So there were very few motions for leave to appeal, because virtually everything was appealable as of right, although there were still some things that you needed leave for. So, there was a little courtroom—it's now the judges' dining room—for the motions that were argued on I think Monday morning, and the caseload was huge, with a significant backlog. The list went from Ontario, Maritimes, West and so on, and we never got beyond the backlog. So you had to fish out the good cases out of this massive non-descript pile. Justice Pigeon, when he interviewed me, asked me what areas of law interested me and I told him criminal law, administrative law, constitutional law—all public law. And he said, "Well that's very interesting because I will not require your services in these areas because since you're interested I take it you will keep up your interest." He said, "You have to understand you're not here to help me, I'm here to help you continue your education, and therefore, I will try to develop your skills in other fields." So the first case he gave me was under the *Canada Shipping Act*,⁹ which of course I didn't find very interesting. Oh, and we would do memos handwritten, typed by a legal secretary, with a carbon copy—oh my god—it was quite antique!

OLR: *Did you always agree with Justice Pigeon's decisions?*

LA: Almost never. And he didn't seem to care. And he was not very keen to discuss. I would write him something with my opinion, certainly in criminal cases, all the areas that I liked, and, under the *Canadian Bill of Rights*,¹⁰ he had a very conservative interpretation. Fortunately, Justice Bora Laskin¹¹ was there. He was a junior judge at the time, so I liked him. Justice Pigeon was a wonderful man and I remained in touch with him subsequently, but in terms of the substance of the work, our

8 *Supreme Court Act*, RSC 1970, V-vii (1st Supp), c S-19, s 36(a), as it appeared in 1971 [*Supreme Court Act*, 1970].

9 Today, the *Canada Shipping Act, 2001*, is the principal legislation governing safety in marine transportation and recreational boating, as well as protection of the marine environment. It applies to Canadian vessels operating in Canadian waters, including canoes, kayaks, cruise ships and tankers. See *Canada Shipping Act, 2001*, RSC 2001, c 26; Transport Canada, *Canada Shipping Act, 2001 (CSA 2001)*, "Frequently Asked Questions", online: <www.tc.gc.ca>.

10 *Canadian Bill of Rights*, SC 1960, c 44, reprinted in RSC 1985, App III.

11 The Right Honourable Bora Laskin was appointed to the Supreme Court of Canada on March 19, 1970. He was named Chief Justice of Canada on December 27, 1973 and served on the Supreme Court of Canada for 14 years. See Supreme Court of Canada, "The Right Honourable Bora Laskin, P.C., C.C.", online: <www.scc-csc.gc.ca>.

opinions would often differ. I remember one day there was an appeal that I worked on and I sent him a note and I said, “I don’t think the court has jurisdiction,” because it was an insurance claim and there were 12 individual claimants, each one of whom who had a claim under the \$10,000 limit, so collectively, the case looked like a \$60,000. So I wrote to him and I said, “I looked at the *Supreme Court Act*,¹² and I’m really concerned that there’s no jurisdiction here, they should have asked for leave.” And I was very keen to see what he would say, so I asked him, “So what do you think?” And he just sort of smiled and didn’t say anything. So he goes into court, I’m in the courtroom, the appellant stands up, and before the appellant can open his mouth, Justice Pigeon—who was feared by all litigants, he had a formidable voice—said, “Counsel, can you explain to me on what basis we have jurisdiction?” And the guy had no idea what he was talking about, and I kept thinking, “Just tell him you’re going to ask for leave!” And so the appellant was devastated and I think Justice Pigeon dismissed the whole thing. And so afterwards I went to go see him and I said, “Had you noticed that yourself or...?” and he wouldn’t tell me, which I thought was very mean.

OLR: *Do you think Justice Pigeon influenced you as judge?*¹³

LA: Well it’s difficult to say whether it was Justice Pigeon or just being at the court. For me, the whole clerking experience was a very big thing. First of all, I worked in French with Justice Pigeon but the entire environment was English and it was the first time in my life that I really had to work in English. And, during that year, I also did my Master’s courses at the University of Ottawa. I never wrote the thesis, but I took five courses at night during that year, because when I moved there I thought, “I don’t know anybody in Ottawa and I won’t have anything to do,” looking back I don’t know what I was thinking. But, anyway, I was very busy, and the whole year was very important for me, so it’s hard to tell how much of that was Justice Pigeon. Justice Pigeon was a very, very rigorous man. His great specialty was statutory interpretation, on which he wrote what was then the reference book. I didn’t know that area of law very well, so he drew me into that. And Justice Pigeon was very patient with me. When he decided I had to learn something, he would walk me into the library and show me. It was a great experience—scary—but great.

OLR: *What were your fellow law clerks like? Were there many women?*

LA: There was one other woman, she was also from Québec, but we didn’t see very much of her. She was married and I didn’t know her very well. As for the others, one of them became the father of my children—so I knew him quite well. He’s no longer a part of my life, but he was for 30 years and that in fact triggered my staying

12 See *Supreme Court Act*, 1970, *supra* note 9.

13 Louise Arbour was appointed to the Supreme Court of Ontario (High Court of Justice) in 1987. She was then appointed to the Court of Appeal for Ontario in 1990 and then to the Supreme Court of Canada in 1999. See *Supreme Court of Canada Biography, Justice Arbour*, *supra* note 3.

in Ontario, teaching at Osgoode and so forth. And I've stayed in touch with several other people I clerked with. When we have law clerk reunions, I see them and, although there are a few with whom I've lost contact, it was a fantastic group; we were all very close. I remember at lunchtime the only place to eat near the Court was the basement at some place I think on Sparks Street. It was a pool hall, it was very big, and it had some 20 billiard tables. The guy who owned it was a great big guy, retired football player, and the clerks always went there, and I would go with them. At the beginning I just sat there—and then one day the owner said to me, “If you come Saturday mornings, I'll teach you how to play.” And I did. And I played pool quite competently that year and subsequently.

OLR: *Were there any other reasons you decided to stay in Ontario instead of your home province of Québec?*

LA: Not really, no. Since there were only nine law clerks every year or so, it was a small pool of candidates and the Deans from different law schools would come to the court and try to recruit. The year I was clerking, Harry Arthurs,¹⁴ who was the Dean of Osgoode Hall Law School, asked me to teach and I told him I didn't think I could teach in English at the time. And I didn't right away. I stayed in Ottawa for one year after I clerked. Tony Lamer,¹⁵ who had taught me criminal law and was then the Vice-Chairman of the Law Reform Commission of Canada, had asked me to come work for the Commission, which was then a full-fledged big enterprise.¹⁶ Another one of my criminal law professors was also there, Jacques Fortin,¹⁷ lots of people—Neil Brooks¹⁸ and so on—so it was a really good place. And so I stayed in

14 Harry Arthurs was the Dean of Osgoode Hall Law School from 1972 to 1977 and President of York University from 1985 to 1992. He is a distinguished academic, arbitrator and mediator in labour disputes. See Osgoode Hall Law School, “Harry Arthurs”, online: <www.osgoode.yorku.ca>.

15 Antonio Lamer was appointed Vice-Chairman of the Law Reform Commission of Canada in 1971 and then Chairman of the Commission in 1976. Four years later, he was appointed to the Supreme Court of Canada and became the Chief Justice in 1990. See Supreme Court of Canada, “The Right Honourable Antonio Lamer, P.C., C.C., C.D.”, online: <www.scc-csc.gc.ca>.

16 The Law Reform Commission of Canada was initially created in 1971 to recommend the improvement, modernization and reform of federal laws. The federal government disbanded the commission in 1993 in an attempt to reduce spending and the federal deficit. The Commission was re-established in 1997 with the objective of keeping federal laws relevant to the changing times. The Commission developed research programs, engaged in public consultation and produced reports to Parliament on recommended law reforms. Although the Commission was permanently disbanded in 2006, law reform commissions continue to exist at the provincial level. See Patricia G Bailey, “Law Reform Commission of Canada” (30 March 2009), online: The Canadian Encyclopedia <www.thecanadianencyclopedia.ca>.

17 Jacques Fortin taught criminal law, criminal procedure and criminal evidence at the Faculté de droit, Université de Montréal. He played a significant role in the work of the Law Reform Commission of Canada and was the Commission's Vice-President when he died in 1985. See Patrick Fitzgerald, ed, *Crime, Justice & Codification: Essays in Commemoration of Jacques Fortin* (Toronto: Carswell, 1986) at vii.

18 Neil Brooks was a Research Officer with the Law Reform Commission of Canada from 1971 to 1973. He is currently the Director of the Graduate Program in Taxation at Osgoode Hall Law School and has taught tax law and policy for over 35 years. See Osgoode Hall Law School, “Neil Brooks”, online: <www.osgoode.yorku.ca>.

Ottawa after the Court for one year and my English got better. And then I moved to Toronto and started teaching, one year part-time and then I got a full time tenure-track appointment at Osgoode Hall Law School.¹⁹

OLR: *While you were teaching at Osgoode Hall Law School, you were offered a judicial appointment. Can you tell us about the day you received the offer? How did it unfold?*

LA: *Oh mon Dieu!* Well, first of all, in those days you didn't apply. And so I was called to the Bar in Québec in 1971, and then when I started teaching at Osgoode, I got a letter one day from the Law Society²⁰ saying, "As a tenure-track law professor in Ontario, after two years you're entitled to an academic call to the Bar." And I thought, "I can't practice law here," I thought, "I still don't know about my English and so on." And so then this friend of mine said to me, "You have to go, this is ridiculous. They're giving it to you, you don't even have to write anything; you're going to be a member of the Law Society of Upper Canada. Just go." And I remember, in fact, the call to the Bar in Ontario, because I was pregnant, so I had to borrow a robe, or some gown or something. So anyway, I went and I was called to the Bar and then I carried on teaching. And then I became the Associate Dean at Osgoode,²¹ and every day I would come back to my office with a pile of messages. One day I had a message from someone from Ottawa I didn't know, with no details, and it took me several days to return his call. When I finally, did I said, "Sorry it took so long to get back to you, but it didn't seem urgent, you called me..." And the guy on the phone said, "You obviously have no idea who I am," and I said, "Actually, no." And he said, "I'm the Appointment Secretary to the Minister of Justice, usually people return my call within 10 seconds of my leaving a message!" [*Oh!*] So then he asked me, "Would you consider a judicial appointment? Contrary to what is usually the case with academics, we are thinking of the trial court." [*Gasp*] I had never practiced, and then he said, "We need to clarify one thing: can you confirm the date that you were called to the Bar in Ontario?" I think at the time you had to have been called to the Bar for at least 10 years before you could be a judge in Ontario.²² So of course I thought, "Oh man, did I make a good move that time." It was 10 years and 1 month, basically. So he said, "That's what we have in our records, we just wanted

19 Louise Arbour was a law professor at Osgoode Hall Law School from 1974 to 1987. She and Mary Jane Mossman became the first women to teach as full-time faculty members in the 1976-1977 school year. See Osgoode Hall Law School, "History: 1976" online: <www.osgoode.yorku.ca>.

20 The Law Society of Upper Canada governs the admission of lawyers to the Bar in Ontario. See The Law Society of Upper Canada, "About the Law Society", online: <www.lsuc.on.ca>.

21 Louise Arbour became the Associate Dean of Osgoode Hall Law School in 1987. See Supreme Court of Canada Biography, Justice Arbour, *supra* note 3.

22 Today, the 10 year call to the bar requirement is still in place for judicial appointments in Ontario. The minimum requirement to apply to be a judge in the Ontario Court of Justice is 10 complete years at the Bar of one of the Provinces or Territories of Canada. To be considered a candidate for a judicial appointment to the Superior Court of Justice, an individual must be a lawyer who has practiced law for at least 10 years. See Ontario Court of Justice, "Judicial Appointments Advisory Committee: Frequently Asked Questions", online: <www.ontariocourts.ca/ocj>; Superior Court of Justice, "About Judges & Judicial Officials", online: <www.ontariocourts.ca/scj>.

to be sure. So, we'll let you know, we just want..."—and then I told him, "Listen, I'm teaching, so you cannot appoint me at just any time. This is something I would consider, but it would have to be, either in the summer or between terms. I cannot drop everything midterm." This was in October, I think. And then, when I was supervising my Evidence exam in December—14th or 16th—my secretary came to the room and she said, "You've just been appointed to the bench" [*Laughs*] Yeah, and then it was done. I mean, when they move, it's done—there's nothing to negotiate and then you have to drop everything. So I had to quit teaching and resign from the Canadian Civil Liberties Association and become a trial judge, which was a big step.

OLR: *How did you manage the transition from being a law professor to a judge, especially considering you had never practiced law before?*

LA: Well, because God is a very kind person. I had volunteered just out of the kindness of my heart the semester I was appointed to teach civil procedure because the Dean was a bit short. And I had taught Criminal Law, Evidence, Criminal Procedure—even some Comparative Law. But Civil Procedure, I had never taught that. But the Dean was short for people and I thought, "Well, I'm interested in comparative procedural systems so I'll do it." [*Sigh*] Obviously to teach it, I had to learn it—and I needed to learn it in Ontario in particular because I don't have a common law degree, I have a civil law degree. So at least I figured out *before* my appointment the mechanics of the whole process and costs and all these things that I had long forgotten (I must have taken it in Québec in the Bar Admission Course, but that was a long time ago). So, fortunately, I knew something about it, and I knew *a lot* about Evidence, which unfortunately didn't seem to play very much in the day-to-day—particularly in civil litigation—it doesn't play a very big role.... Now I should say, I've had lots of jobs for which I was completely unqualified, there's no question about it. That's not to suggest that I didn't do well, I think that I did perfectly well, but on paper, every step of the way, I did something—I clerked without speaking English, I started teaching law without, again, not being very good in English, and not having a common law degree. So, I think right from the beginning, I did things that were very challenging. This was [*laughs*] at that point, probably the biggest step, but I only stayed on the trial court two years, and then I went to the Court of Appeal, which is too bad—you know, you can't turn it down—but I would have liked to stay maybe five or six years because I did a lot of things only *once* as a trial judge and then I'd always think, "Oh, if I could just get another wrongful dismissal—I would know how it works!" But then I never got another one. I got lots of new things all the time.

OLR: *Are there any memorable trials or cases that really stand out to you from your time as a trial judge?*

LA: I remember more of my cases in these two years than of all the cases I've had in the Supreme Court of Canada. First of all, because, in some cases, they take longer and you have real people in front of you, so it's like remembering a movie, or something. In the Supreme Court, sometimes I go back and I read something I've

written but, if my name was not on it, I'm not sure I would recognize it. I vaguely remember but I can't tell if it's something I've read—maybe an article—and if you just took my name and took the context out, I'd have trouble remembering it. But the things I did as a trial judge—and I was only there two years—I remember. For example, after just five months of being a trial judge, the Chief Justice²³ sent me on a special assignment. He sent me to Windsor, Ontario, on a trial to determine the ownership of the tunnel between Windsor and Detroit. God. [Laughs] It was a very big case, which unfortunately only took a few days in court, and then I went back home with about sixty boxes of documents. [Laughs] I thought I was going to drown trying to master that case! This one I remember very well, even though there was not a lot of court time and it was appealed all the way to the Supreme Court.²⁴ Then I had a very large motor vehicle accident case that I remember very well.²⁵ It took about thirteen weeks. I remember the people in it; I remember the witnesses. And then I remember the counsel who appeared before me during my trial work much more than the people who have appeared before me on bigger issues on appeal subsequently. It was really, very interesting work.

OLR: *Moving from your time as a trial judge, we'd like to hear about your experience at the Ontario Court of Appeal. Who were some of your colleagues at the time?*

LA: I remember every one of them. But first of all I should tell you, and you may find it strange when I say it, a lot of people don't believe me, but I think it was the best job I've ever had. I've had other jobs that were much more exciting, but for me it was the absolute perfect mix of intellectual challenge, volume of work and space for a collegial, and I would say pretty stress-free, environment. I think it's more stressful to be a trial judge. Anyway, it was a dream—an absolute dream job, I really had a wonderful time. And my colleagues were splendid—all of them. Charles Dubin was the Chief Justice at the time.²⁶ He was fantastic—very smart, very funny, very engaged, very supportive of me—including when I talked to him about going to prosecute war criminals in The Hague. He never blinked. He also encouraged me to take the Commission of Inquiry in the Prison for Women. Allan

23 William Dirkens Parker was the Chief Justice of the High Court of Justice from 1985 to 1989. See Ontario Courts, "Former Judges of the Superior Courts", online: <www.ontariocourts.ca>. [Ontario Courts, "Former Judges"]

24 *Windsor (City) v Detroit and Windsor Subway Co* (1988), 66 OR (2d) 353, 3 RPR (2d) 152 (H Ct J), aff'd (1990), 12 RPR (2d) 244, 50 MPLR 225; *Detroit & Windsor Subway Co v Windsor (City)* (1989), 69 OR (2d) 665, 6 RPR (2d) 201 (H Ct J), rev'd (1990), 74 OR (2d) 626, 12 RPR (2d) 240 (Div Ct), aff'd (1995), 26 OR (3d) 737, 87 OAC 187 (CA), leave to appeal to SCC refused, 25149 (26 September 1996).

25 See *Andani Estate v Peel (Regional Municipality)* (1989), 15 ACWS (3d) 99, 1989 CarswellOnt 1646 (WL Can) (H Ct J).

26 Charles Dubin was appointed to the Court of Appeal for Ontario in 1973 and was Chief Justice from 1990 to 1996. See The Law Society of Upper Canada, "In Memoriam: Charles L. Dubin, O.C., O. Ont., Q.C., 1921-2008" *Ontario Lawyers Gazette* (2008) 48, online: <www.lsuc.on.ca/media/olg_winter08_in_memoriam.pdf>.

Goodman,²⁷ David Doherty,²⁸ Coulter Osborne,²⁹ Jean-Marc Labrosse³⁰ and Marc Rosenberg³¹ were some of my colleagues, along with older judges and people who came on the court around the same time I did. They were all terrific colleagues and friends with whom I'm still very friendly. Hilda McKinlay³² was also at the Court of Appeal. She was the second woman appointed to the Ontario Court of Appeal after Bertha Wilson,³³ and I was the third. And Hilda was great. She had been mostly a commercial lawyer—very good company, good friend. It was a very collegial court—very strong both in Criminal Law and Commercial Law. It had a terrific reputation. Sid Robins³⁴ too, just wonderful people. I could go down the list one by one—it was always a pleasure to work with all of them.

OLR: *What types of cases did you enjoy the most during your time at the Ontario Court of Appeal?*

LA: Everything. It, again, was a very big surprise for me because my background was very much in criminal law and I didn't even have a formal background in common law, I enjoyed it all, including the private law matters. Today it's the same thing. The minute you put something in front of me, I read two paragraphs and I think, "Now wait a minute, that's interesting. How does it work?" [Laughs] And the next thing you know, I'm in it. And so I liked a lot of things. Of course, I think I had more to contribute in the fields in which I had a deeper academic understanding—so evidence, criminal law, constitutional issues—but there was nothing I didn't like.

27 Allan Goodman served on the Court of Appeal for Ontario from 1979 to 1996. See Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal in Canada, 1792-2013* (Toronto, University of Toronto Press, 2014) at 231.

28 David H. Doherty was appointed to the Court of Appeal for Ontario in September, 1990, and is still at the Court today. See Court of Appeal for Ontario, "Brief Biographical Note of Justice David H. Doherty", online: <www.ontariocourts.ca>.

29 Coulter A. Osborne was appointed to the Court of Appeal for Ontario in 1990 and in 1999 to the position of Associate Chief Justice. Since retiring from the bench in 2001, Mr. Osborne has been engaged in alternative dispute resolution on corporate and commercial matters. See Arbitration Place, "The Honourable Coulter A. Osborne", online: <www.arbitrationplace.com>.

30 Jean-Marc Labrosse was appointed to the Court of Appeal for Ontario in 1990. See Ontario Courts, "Former Judges", *supra* note 24.

31 Justice Marc Rosenberg was appointed to the Court of Appeal for Ontario in December, 1995, and is still at the Court today. See Court of Appeal for Ontario, "Brief Biographical Note of Justice Marc Rosenberg", online: <www.ontariocourts.ca>.

32 Hilda M. McKinlay served on the Court of Appeal for Ontario from 1987 to 1999. She was honoured by Osgoode Hall Law School with The Award of Excellence in 2003 and is a member of ADR Chambers, a Toronto-based alternative dispute resolution group. See York Media Relations, "Three Distinguished Alumni to Receive Osgoode Award of Excellence" (17 February 2003), online: York University <news.yorku.ca>.

33 Bertha Wilson was appointed to the Ontario Court of Appeal in 1975. She was also the first woman to be appointed to the Supreme Court of Canada in 1982. See Dodek, *supra* note 6 at 130.

34 Sydney Lewis Robins served on the Court of Appeal for Ontario from 1981 to 1998. See The Law Society of Upper Canada, "In Memoriam: Sydney L. Robins, O. Ont, QC, 1923 – 2014" (13 January 2014), online: <www.lawsocietygazette.ca>.

OLR: *Were there any specific cases that really stood out for you at your time at the Court of Appeal?*

LA: There are several. Maybe the one...well I should say first, I think it's very difficult to talk about cases. I think it is bad form for judges to talk about their decisions, but there is this one case that stands out for me, and what I will tell you is on the record. It's called *Eaton v Brant County Board of Education*.³⁵ The issue was the question of the integration of a severely disabled child into a mainstream public classroom. There was a young child, about 10-years old at the time who had very severe cerebral palsy with no known means of communications, and the Board said that she had to be in a special education classroom with other children with special needs, and her parents insisted that she should be in the general population. Basically, in other words, as I use the expression, not segregated. And I reversed the Board's decision—and my two colleagues agreed with me.³⁶ I felt very strongly that as a matter of constitutional right basically, the burden was on those who wanted to exclude or segregate the child to make the case. That's the way to approach it, as a matter of law. The decision was then reversed by the Supreme Court of Canada, 9-0 from the Bench.³⁷ That's in part why I remember it!

OLR: *During your time at the Ontario Court of Appeal, you led the Commission of Inquiry into Certain Events at the Prison for Women in Kingston.*³⁸ *Is there anything in particular that really stands out to you from that experience?*

LA: There are many things. The first one, which I think is very explicit in my report, is, even for someone like me, who had worked in criminal law most of my career, it just made me realize how the correctional part of it—everything that happens post-sentence is—*occulté*—it's completely obscured in the system. It actually reminded me of how the law was, when I was in law school, about police powers. The incidents didn't happen in court, but the only criminal law part that you saw was the court part; what happened before and after you didn't see. Now, over the decades, we've put a lot of spotlights on investigative powers, supervision of

35 22 OR (3d) 1, 123 DLR (4th) 43 (CA).

36 Justice James Joseph Carthy and Justice Jean-Marc Labrosse presided over the case with Louise Arbour.

37 The Supreme Court of Canada held that the decision of the Ontario Special Education Tribunal, which confirmed the child's placement in a special education class contrary to the wishes of her parents, did not contravene the equality provisions of section 15 of the *Charter*. The Court concluded that the Tribunal based its decision on what was in the best interests of the child and therefore no violation of section 15 occurred. The Court refused to consider the issue of the validity of section 8 of the *Education Act*, RSO 1990, c E.2, which authorized the Tribunal to proceed as it did, on the basis that no notice of a constitutional question had been given in accordance with section 109 of the *Courts of Justice Act*. See *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241, 31 OR (3d) 574.

38 Louise Arbour was appointed Commissioner "to investigate and report on the state and management of that part of the business of the Correctional Service of Canada that pertains to the incidents that occurred at the Prison for Women in Kingston, Ontario, beginning on April 22, 1994." See Canada, Public Works and Government Services Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1995) at 2.

police powers, and the *Charter* required a lot of that. But then when I arrived in this correctional environment, I realized, “This is surreal. I’ve worked all my life in this field and I know virtually nothing about this environment.” So in my report I called for a lot more transparency, openness and judicial oversight. So that was the first thing. The second thing is that it was the first time that I worked on an issue very intensely and in a very concrete way that was totally gender-specific. It was a women’s issue which was, again, very interesting for me, and it’s very acute; in this kind of environment—it raises all kinds of questions about the suitability of having, for example, male correctional officers in women’s prisons, all these things. And thirdly, it was my first encounter with the specificity of Aboriginal peoples who, across the system, are disproportionately represented in the correctional system and were so in my inquiry.³⁹ I think of the eight principal women involved, five or six were Aboriginal women. So, for me it was an opening to all kinds of really interesting insights.

OLR: *Also during your time at the Ontario Court of Appeal, you were part of the five-judge panel that confirmed the acquittal of Imre Finta in Canada’s first trial of an alleged war criminal.⁴⁰ Did that experience inform your role as the chief prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda?*

LA: Well, first of all, until the creation of these tribunals, international criminal law did not really exist—I mean, since Nuremburg and Tokyo, there hadn’t been any other enforcement of international humanitarian law and the Geneva and Genocide Convention.⁴¹ So when I heard about the creation of these tribunals, I thought, “That has to be the answer,” because at least in this country, where there’s a constitutional right to a jury trial for serious offenses, domestic criminal law was never developed to go that far back in history. But the tribunals were meant to be contemporaneous to the offences, give-or-take a few years, so you’re not reaching back. But, domestic criminal law, at least certainly in common law systems, has been unsuccessful in prosecuting war criminals, particularly when reaching back over long periods of time. For example, all efforts to prosecute Nazi war criminals had been, for the

39 See e.g. Statistics Canada, *The Incarceration of Aboriginal People in Adult Correctional Services*, vol 29, No 3 by Samuel Perreault (Ottawa: Statistics Canada, July 2009) at 9 (in 2007/2008, aboriginal adults accounted for 17 percent of adults admitted to remand, 18 percent admitted to provincial and territorial custody, 16 percent admitted to probation and 19 percent admitted to a conditional sentence—yet only 3.1 percent of adults over the age of 18 identified themselves as Aboriginal in the 2006 Census).

40 See *R v Finta* (1992), 92 DLR (4th) 1, 73 CCC (3d) 65 (Ont CA). The majority of the Court held that the trial judge was correct in holding that it was the jury and not the trial judge that was required to determine whether the respondent’s acts violated the *Criminal Code*, RSC 1985, c C-46, and whether they amounted to war crimes or crimes against humanity.

41 The United Nations Security Council established the International Criminal Tribunals for the former Yugoslavia and Rwanda in May 1993 and November 1994 in order to bring to trial those persons responsible for violations of international humanitarian law (and human rights) before an international jurisdiction. These two tribunals were the first international judicial bodies to be given the responsibility of trying war criminals since the Nuremberg and Tokyo Trials in 1945. See Track Impunity Always, “The International Criminal Tribunal for Rwanda”, online: <www.trial-ch.org>.

most part, unsuccessful in Australia, in the UK, in Canada. It's been a little bit more successful in civil law jurisdictions such as France—but even here, the rules of evidence, the burden of proof, the methods of introducing evidence, relying a lot on, for instance, eye-witness identification and so on, are just not geared to reaching way, way back in history. In fact, in a lot of places you have statutes of limitations in criminal cases. We don't, but we rarely have to go back, you know, 30 to 40 years. So, the strain on the jury system, I think, meant that the chances of successful historical prosecutions in common law countries were probably not very good, so the creation of these international venues had a better chance in the long run of being contemporaneous, which I thought, was very exciting.

OLR: How were you appointed to the position of Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda?

LA: Well like for most of my positions, I didn't apply! That just shows you what a different generation we are. In my day, for a lot of things you didn't apply. And it's not very helpful when I talk to students for example and all I can say is, "Well, you know, the phone rang." So again here, the way it started was with a phone call from a Canadian judge, whom at that point I had never met, from another province, and he told me that he had agreed to go to a conference in South Africa, but he couldn't go and he asked me if I would replace him. And I had never been to Africa. And I said to him, "I thought we had sanctions against South Africa?" He said, "Yes, but on this one, the government is very keen, it's to start talking to judges and lawyers about the new South Africa when the Apartheid regime will collapse"—it hadn't collapsed then, this was in, I think probably 1990.⁴² So I went and I met Richard Goldstone⁴³ at that conference, who became the first prosecutor of these international tribunals. I was then invited to go back the following year to give a keynote address at the annual meeting of the Bar, I think in Durban. So I went and I met Richard again. And then, a year or so later, he was a judge at the Constitutional Court of South Africa, and I found out, just in the newspaper or something, that he's been appointed the prosecutor for these war crimes in Yugoslavia. And I thought, "That's amazing!" I didn't even know they had started these tribunals. And then he called me and said that he and his wife were coming to Ottawa for a visit, and they'd come to Toronto. We had dinner, and I told him, "This is amazing! Tell me about these war crime tribunals, it's so exciting" and he said "Yeah, but I can't stay.

42 In 1990, Nelson Mandela was released from prison after 27 years and began to lead the negotiations with President Frederik Willem de Klerk to end apartheid. In 1994, a new constitution that enfranchised black South Africans and other racial groups took effect and elections that year led to a coalition government with a nonwhite majority, marking the official end of the apartheid system. See A+E Networks Digital, "Apartheid", online: History Canada <www.history.ca>.

43 Justice Richard Goldstone served as Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda from August 1994 to September 1996. He was a justice at the Constitutional Court of South Africa from 1994 to 2003. See The Codification Division of the United Nations Office of Legal Affairs, "Justice Richard Goldstone", online: The United Nations Audiovisual Library of International Law <legal.un.org/avl/pdf/ls/Goldstone_bio.pdf>.

I have to go back. The Constitutional Court has lots of big cases coming up—death penalty, constitutionality of death penalty, and so on. I have to go back.” He had been there for about a year, year and a half. And he said, “The Secretary General has asked me for names for my replacements.” In the meantime, he had inherited the Tribunal for Rwanda, so they were looking at bilingual people preferably because Rwanda was mostly French. He said, “I’d like to give your name.” [Laughs] I said, “You’re crazy! I mean I’d never set foot in the UN, I don’t know anybody in Canada in foreign affairs. I’ve never worked internationally. But international criminal law? This is...wow.” So I said, “Give my name,” absolutely persuaded this would never go anywhere. And I was in the middle of my Commission on the Prison for Women. And then, a month or so later, I got a call from the Canadian Ambassador to the UN, who said “the Secretary General would like to speak to you, he asked me to reach out to you. Can you take his call at four o’clock today?” I said, “Yes.” He said, “Do you know why the Secretary General wants to talk to you?” I said, “You should know, you’re the Ambassador, you’re sitting there.” I said, “Well I have an idea.” I thought this had to be it. When I spoke to the SG, I said, “Well, you know, I’m a judge in Canada—I would have to know what the Government of Canada thinks of that.” And he said, “Well actually, I’ve just spoken to your Prime Minister, and he’s very keen.”

OLR: *Was it complicated to amend the Judges Act⁴⁴ to allow you, as a sitting judge, to hold another paid function?*

LA: It was very complicated. At first I didn’t know how it would work. I was on a leave of absence with pay to do the Commission of Inquiry—so I knew how that worked because when I took that on, they explained to me: you know you just keep drawing your salary, you work for the Government of Canada—it’s fine. This one, I wasn’t too sure until it became perfectly clear that I couldn’t do it under the existing circumstances. And so something needed to be done because I was not prepared to resign because I had no idea whether this thing was for real. Richard Goldstone had stayed only a year and a half, even though it was a four-year appointment, renewable once. So, of course, I didn’t think I’d be able to come back after eight years to the Court of Appeal and just sit like I’d never left—but, on the other hand, there was no guarantee that I’d even stay six months. I had no idea. I just remember thinking, “Is this serious? Is this credible? Is this workable?” So the government amended the *Judges Act*.

OLR: *Did you know that section 56.1⁴⁵ of the Judges Act is still in force?*

LA: I haven’t looked. I suppose it’s just part of the historical record.

44 *Judges Act*, RSC 1985, c J-1.

45 *Ibid.* Section 56.1(1) states that, “[n]otwithstanding section 55, Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.”

OLR: *Can you tell us what you found to be the most challenging part of your role as Chief Prosecutor?*

LA: I think the most challenging part is that it was *extremely* operational. When I went, I thought of it as a kind of a laboratory of comparative law—you know, I was going to work with civil law trained lawyers and criminal lawyers and international lawyers and prosecutors—but I didn't realize that in fact in the early years during my time, 90 percent of the work was investigations and arrests. We were barely getting one or two cases into trial. And *that* [investigations and arrests], I didn't know very well. In fact, when the Secretary-General⁴⁶ made the proposal to appoint me to the Security Council, the Americans in particular asked a lot of questions—I found out subsequently that they tasked one of their lawyers to read every single decision I've ever written, and I had to meet with them. And then after the Russians found out, I had to meet with them as well. The French didn't care as much; as soon as they figured out I was French-speaking, they were very favourable. And the British I heard, subsequently, weren't very keen to meet with me because they had their own candidate. I didn't know any of that at the time, just the phone rang, and they said, "Yes, it's done". So I admit I didn't really know. I don't know what I thought it would be but, when I got there, we had to run investigations in very challenging circumstances with none of the tools that I was familiar with. We obviously didn't speak the language. We were investigating in a country where I had only been as a tourist—Dubrovnik, Zagreb, Sarajevo—and I had never been to Belgrade. And the investigators came from all over the world, so they didn't speak Serbo-Croatian as it was then called. We didn't know the country; we had no pre-existing network of informants; we didn't have wiretap capacity; we didn't have search warrant capacity. It was *very* challenging. And for me, the body of law was also very new because what we were investigating were crimes against humanity—war crimes, that is Geneva Conventions.⁴⁷ And I didn't know anything about the function of armies, chains of command—and so that part of it was very hard. The politics were also really brutal. And when I say it was operational, the biggest challenge when I arrived was to get people arrested. There was a lot of pressure from the judges in particular who had nothing to do to amend the statute to make us a court that would try *in absentia*—which I thought, "If they go this way, I'm going home. It's going to just be like an

46 UN Secretary General Boutros Boutros-Ghali invited Louise Arbour to the post of Chief Prosecutor. See Jane Petch, "Louise Arbour at Salt Spring's Forum", *Island Times* 25:13 (4 July 2013) 8, online: <www.islandtimes.com>.

47 The Geneva Conventions comprise four treaties, and three additional protocols that establish the standards of international law for the humanitarian treatment of war. See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31, Can TS 1965 No 20 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85, Can TS 1965 No 20 [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135, Can TS 1965 No 20 [Geneva Convention III]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, Can TS 1965 No 20 [Geneva Convention IV].

archive, I don't want to do that." So we developed strategies for arrest and initiatives. And I had to, in my own mind, develop a position as to the legality of arrests. Would I sustain a position where we might try to apprehend someone through methods that might not be fully legal? And what position would I take? We had to design all kinds of rules that would work in that unique environment. This is not like a state. In fact, in most cases, the state is on the other side, no wonder it was so hard. We kept asking ourselves that. It was so hard because we were using national rules in a sense to put constraints on the might of the state facing an individual who needs a lot of protection, such as the right to counsel and the presumption of innocence. But in those international cases, very often, the accused was a general or a political leader from a country that was protecting him, sheltering him and not sharing evidence... so it was operationally and structurally very hard.

OLR: *Can you tell us how you decided to indict Slobodan Milošević⁴⁸ and what needed to happen for that to take place?*

LA: The statute required that we investigate and prosecute those most responsible for the most serious crimes. So we had determined internally that those most responsible meant up the chain of command and that the low-key perpetrators, even though they may have actually killed hundreds of people, were not the most responsible in a system that didn't have the capacity to try thousands or even hundreds of cases. The original strategy that my predecessor had put in place was very similar to what you would do in a national system in an organized crime type prosecutions—or at least so they say: you start by catching the small fish and you squeeze them by making a deal—give them either some kind of immunity or a very light sentence and then they turn. Well first of all, it doesn't necessarily work very well in an extremely politicized environment where there are lots of loyalties and where people don't turn because they believe in their cause. More importantly, what kind of deal do you make to someone who is a party to genocide? So when I got there, I thought we now know enough about what happened to select the events that we think, on the basis of what we know so far, are the most likely to bring us up the chain of command. And, in the case of Milošević, this was *very* challenging because most of the crimes that we were looking into had been perpetrated in the territory of Bosnia. Milošević was never the President of Bosnia—in fact, to make an analogy, it's as though you were trying to impute responsibility to the Governor of Arizona for crimes perpetrated by the US Army in Afghanistan. Well, what's the connection? *De jure*, there is no connection. *De facto*, everybody knew he called all the shots. But what everybody knows and what you can bring in a courtroom

48 Slobodan Milošević was President of Serbia from 1990 to 1997 and President of the Federal Republic of Yugoslavia from 1997 to 2000. The International Criminal Tribunal indicted him for crimes carried out against civilians in Kosovo, Croatia, Bosnia and Herzegovina including genocide, deportation, murder and persecutions on political, racial or religious grounds. See International Criminal Tribunal for the former Yugoslavia, "Slobodan Milošević", online: <www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf>.

is a very different thing. So that's why it took *many* years, even after I left, before there was enough evidence to bring charges against him for crimes in Bosnia. What changed, even though we were working on that from the time I got there, was when Milošević started committing crimes in Kosovo, which led to NATO essentially declaring war in January 1999, when it agreed to the use of air strikes and started bombing.⁴⁹ At that point, under the Serbian Constitution, Milošević became *de jure*, in law, the Commander of the Army and of all the police forces—so now *in law*, he was imputable. And we would systematically send him letters telling him that we have reasonable grounds to believe that a massacre has been perpetrated, you have a duty to prevent, and a duty to punish, so that he couldn't say, "I didn't know." So it was at this point that the legal case was falling into our hands, we just had to collect the facts, which was challenging enough. So I indicted him in May 1999 for offences committed in the prior three months because finally it was falling into place. But what had become a little easier as a matter of law, had become a lot harder as a matter of politics because NATO was bombing. This is actually also an interesting little footnote to my appointment as Chief Prosecutor under the *Judges Act*. There had been suggestions that I could go and remain paid by Canada, sort of seconded to the UN, to do that role. And I took the position that this was not realistic—even though Canada was not a party and there was not an immediate appearance of conflict of interest—the statute said that a Prosecutor shall not seek nor receive instruction from any government nor any other source. So the Chief Prosecutor position was a purely independent post and I couldn't be on Canada's payroll. Well, as it turned out, when NATO started bombing Kosovo, Canada fell under my jurisdiction. So had I not insisted on the necessity to have *no links*, I think at that point I would have been in a very difficult position because there would have at least been an appearance of a conflict. Anyway, so the politics then were tense because NATO was conducting war essentially from 35,000 feet—there were no troops on the ground and so no body bags—and they had been bombing for about 70 or 80 days when I brought the indictment and NATO started to be very worried that Milošević was not capitulating and they might have to send ground troops. And

49 Kosovo lies in southern Serbia and has a mixed population, the majority of which being ethnic Albanians. The region enjoyed a high degree of autonomy within the former Yugoslavia until President Milošević altered the status of the region by removing its autonomy and bringing it under the direct control of Belgrade, the Serbian capital. The Kosovar Albanians strenuously opposed the move. In 1998, open conflict between Serbian military and police forces and Kosovar Albanian forces resulted in the deaths of over 1,500 Kosovar Albanians and forced 400,000 people from their homes. The international community became gravely concerned about the escalating conflict, its humanitarian consequences and the risk of it spreading to other countries. President Milošević's disregard for diplomatic efforts aimed at peacefully resolving the crisis became a concern for the North Atlantic Treaty Organization (NATO). In January 1999, NATO agreed to the use of air strikes if required, by issuing a warning to both sides in the conflict. In March 1999, US Ambassador Holbrooke flew to Belgrade in a final attempt to persuade President Milošević to stop attacks on the Kosovar Albanians or face imminent NATO air strikes. Milošević refused to comply and NATO gave the order to commence air strikes (Operation Allied Force) on March 23, 1999. See NATO, "NATO's Role in Relation to the Conflict in Kosovo" (15 July 1999), online: <www.nato.int>.

so, even though nobody said anything to me, I think the general feeling was that an indictment would not be a good idea because Milošević would feel trapped and he would never surrender, which may require an escalation of the war and a change of methods. Well he did: he surrendered about a week after we indicted him. I can't take credit for that, because there was no way to know how he would react to the indictment.

OLR: *Following your time as Chief Prosecutor, you were then appointed to the Supreme Court of Canada.⁵⁰ Did you think at that point you would return to a position with the United Nations?*

LA: No—I never expected to have any other job once I was appointed to the Supreme Court. Even though I had a pretty jumpy career, I really thought that this is it. I bought a house, I renovated it and I thought it was going to be my home in perpetuity. That's very much how everybody feels when you go to the Supreme Court. In retrospect, I think I probably would not have stayed until 75. And I look at others who have been appointed after me and I think there is more of a trend now—you know give it a good 10, maybe 15 years, and retire. When you are appointed relatively young I believe you've had a chance to make your mark and say what you have to say in 10 or 15 years. And there is lots of talent in this country, lots of other people who have something to contribute, and so I believe that that's good. But in my case, in none of the jobs that I've had, have I thought about the future. I mean, when I was Chief Prosecutor, I left after three years because the Prime Minister called—the phone rang—and offered me the Supreme Court, which I felt I had to go. But if I hadn't received that call, I would have completed my four years and gone back to the Court of Appeal. Again because I thought in the longer term: if I'm away for eight years, I'm done with Canada. And my children were still relatively... not young, young, but too young for me to cut my ties completely to Canada and plunge into purely international work. So when I went to the Supreme Court, I was coming home for good.

OLR: *So then what?*

LA: Then the phone rang.

OLR: *And what was it about that phone call that really made you decide to return to the UN?*

LA: First of all, again, it's very surreal how these things happen. I came out of court one day, my secretary told me that there's a message to call the Secretary-General of the UN.⁵¹ So I assumed that he must want a reference to someone and I felt *very*

50 Louise Arbour was appointed to the Supreme Court of Canada on September 15, 1999 and retired from the bench on June 30, 2004. See Supreme Court of Canada Biography, Justice Arbour, *supra* note 3.

51 The Secretary-General of the United Nations at the time was Kofi Annan, who held the position from January 1997 to December 2006. See United Nations, "Former Secretaries-General", online: <www.un.org>.

badly because this was in October of 2003 and that August before, his very, very good friend, whom I knew very well, Sérgio Vieira de Mello,⁵² had been killed in Baghdad. And I meant to write to the Secretary-General and I knew Sergio, and I knew they were very close, but it was one of the things—you don't say, you don't do it, you don't write—and I knew as soon as I had him on the phone, I would have to say something about Sergio and I thought, "This is really painful." So I called them back and before he could say anything, I said, "I want to tell you how sorry I am about Sergio." And he said, "Well that's the purpose of my call." He said something like, "I'd like you to replace him." And I thought, "You want me to go to Baghdad, you're serious?" And then I had forgotten that Sergio was the High Commissioner for Human Rights, very briefly, about eight months and then he went on a special assignment in Iraq and was killed. So I'd forgotten that he was actually the High Commissioner for Human Rights. So he said, "I'd like you to come back as the High Commissioner for Human Rights." And I said, "I can't, you don't understand, I'm at the Supreme Court. Nobody quits, I can't. I mean this is my lifetime assignment, in perpetuity!" But I also told Kofi Annan "But you know how much I enjoyed working with you, if I can help you in any other way, you know small things that I could do, talk, that's fine. But I can't do that." And I hung up the phone and I didn't tell anybody. But I just kept thinking, "Oh my god, that would be great, human rights." And the Office of the High Commissioner for Human Rights did not have a very good reputation in the UN. It was not very operational, and I thought, "I can move it and make it much more field based—anyway, stop dreaming it won't happen." And then during the Christmas holiday, actually I think New Year's Eve that year, I had a friend from The Hague who used to work with me, Catherine Cisse. We were at a New Year's party and it had been a long time since the call and so I decided to mention it to Catherine and to someone else who was not a lawyer but knows the politics, the UN, *et cetera*. And I said, "You'll never believe who called me this fall—Kofi." And she says, "Oh yeah, what did he want?" And I said, "Oh, he wanted me to become the High Commissioner." And she said "And...?" And I told her, "And I said no." She says, "Are you crazy? There's nine of you on the Supreme Court, you're just a voice in the wilderness, that's the job you must take." And I said, "Well I'm sure they've filled it anyway, so just forget about it." And, well, they hadn't filled it, and the issue got resurrected and they called again and I thought I could do something—especially if Kofi backs me up at the beginning—since this was midway through his second term, his term would expire before mine—I thought, maybe I could do something. So I went.

52 Sérgio Vieira de Mello was appointed to the position of United Nations High Commissioner for Human Rights on September 12, 2002. Shortly after his appointment, he took a leave from the position to serve as Special Representative for Kofi Annan in Iraq. Sérgio Vieira de Mello and 22 colleagues were killed in an attack on the United Nations headquarters in Baghdad on August 19, 2003 at the age of 55. See Office of the High Commissioner for Human Rights, "Sérgio Vieira de Mello", online: United Nations Human Rights: <www.ohchr.org>.

OLR: *What were some highlights of your time as the UN High Commissioner⁵³ and some of the challenges?*

LA: Well, it's very interesting, because very often the most impact that you can have or the biggest challenges are completely invisible. I think, in that job, in the four years I was there, the work that to me was the most significant is the work I did internally. It's an office that had not been, I think, historically very well managed. So there were lots of employment issues, a lot of the people, like 80 percent of the staff, were on three- to six-month contracts. It was just very messy and very hard then to mobilize people. So for the first almost 18 months I was there, I did a lot of work internally to try to regularize posts. And part of my objective in doing that was to get people out of Geneva and become much more field based. It was a system that was way too geared to servicing member states, servicing the United Nations Commission of Human Rights (UNCHR) as it was then called. Later, it became the United Nations Human Rights Council and, in a sense, too deferential, I think, to states' interest and just addicted to seminars and conferences and so on. I was concerned about the lack of impact and so I tried to reorganize the office and tried to open space for us to work in the field, which was *very* hard. I encountered lots of resistance. States saw it exactly the way I did, which is where the impact will be, and therefore many of them were not very keen. And to add insult to injury, if you can imagine the political environment—this was 2004 to 2008, which was during the Bush Administration in the US so the Americans on a good day were absent, and on a bad day, pretty hostile. At a time when they were confronting even the normative basis of the torture convention, resorting to extraordinary rendition and the like, I mean it was a *very* challenging environment politically when you have a country that should be a pillar of support so disengaged and adding fuel to the claims of double standards that many countries were advancing to distance themselves from their own human rights obligations. But to me, the biggest thing was to try to get a bigger presence in the field and the one that was the most successful became huge—we opened a very large presence in Nepal. Again, it's not very visible because it never makes the press in countries like Canada, but it had a lot of impact.

OLR: *Following your position as the UN High Commissioner for Human Rights, you then served as the President and Chief Executive Officer for the International Crisis Group.⁵⁴ Can you tell us some of the priorities of that role, some of the challenges and some of your proudest accomplishments?*

LA: I knew Crisis Group from my work as the Chief Prosecutor in the years that I worked at The Hague and subsequently as the High Commissioner. The Crisis

53 Louise Arbour served as United Nations High Commissioner for Human Rights from 2004 to 2008. See Office of the High Commissioner for Human Rights, "Louise Arbour", online: United Nations Human Rights <www.ohchr.org>.

54 The International Crisis group is an independent, non-profit, non-governmental organization that works to prevent and resolve deadly conflict. It conducts field-based research, provides policy prescriptions and engages in global advocacy. See International Crisis Group, "About Crisis Group", online: <www.crisisgroup.org>.

Group was founded in the Balkans and, at the time, I was doing something very narrow, which was investigating war crimes. But Crisis Group was doing contemporary political analysis, which we had no capacity to do internally at ICTY—so I read a lot of their materials and thought it was really good and very helpful. So when I left The Hague and joined the Supreme Court of Canada, they asked me to join their Board. And, after talking to a few of my colleagues, I realized I could probably do that because Crisis Group will never be a litigant before the Court. So I joined the Board. I would go to their meetings; it was my lifeline to international affairs—you know remaining at least knowledgeable. So when I left the post of High Commissioner, again I rejoined, I had resigned because it was incompatible. So I rejoined the Board and then Gareth Evans,⁵⁵ who had been the President and CEO for nine years, left they approached me and asked me if I'd be interested. At that point, all these stints I made in Europe had been short: I was three years in The Hague, four years in Geneva. It's very hard for me to be away for long periods. And this was based in Brussels. I was not very keen to live abroad again but I loved the organization and I thought the work was very high quality. So I agreed to go, first for three years, and then eventually I stayed five. But it's the longest I've been away. And in this role, it's the farthest I've been away from law. Even as the High Commissioner, it's not all law, but there is a legal framework for international treaties. This was pure political analysis in crisis, conflict prevention and conflict resolution. There were *some* legal issues: we had to deal at times with the effectiveness of the International Criminal Court, the Court of Lebanon—of which we were quite critical—so it was a again a new learning curve for me. Even though I knew the organization a bit, I had not run something that had so little legal content. But the mandate was very clear, the people were very talented, so there was not a big challenge like I found in my prior positions, where you had to build things from scratch at the tribunal or as the High Commissioner and where there had been so many internal challenges and dysfunctions. This was not at all the case at the Crisis Group. So, in a sense, the biggest challenge for me was the challenge of being a generalist leading teams of specialists. It's a very humbling position to in. What remained for me the most difficult part of that kind of work, which I think eventually got the better of me, was the fundraising aspect. Crisis Group has an annual budget of about \$20 million. It's an NGO and you have to raise that money. It takes a lot of time and energy, and it's a talent and it's very hard and it's not something I particularly enjoy.

55 The Honourable Gareth Evans was President and Chief Executive Officer of the International Crisis Group from 2000 to 2009. He is recognized internationally for his role in the UN peace plan for Cambodia and was made a Companion of the Order of Australia (AC) in 2012 for his eminent service to international relations, particularly in the Asia-Pacific region. He has been Chancellor of the Australian National University since January 2010. See Personal Website of Gareth Evans, "Summary Biography of Gareth Evans", online: <www.gevans.org>.

OLR: *Is there one moment or accomplishment that really stands out for you during your time as the President and the CEO of the ICG?*

LA: The biggest project that I oversaw was the work we did in Sri Lanka. Even though it was a little bit at the edge of the organization, we produced a report the first year I was there called “War Crimes in Sri Lanka.”⁵⁶ Almost nobody else was doing that kind of work, and we were doing it, not from human rights point of view, but from a conflict prevention point of view. We took the position that, unless the government acknowledges and accounts for the slaughter that basically took place when the government finally eradicated the LTTE (Liberation Tigers of Tamil Eelam) in 2009—unless there’s a truthful accounting for that with responsibility visited on the particular government officials responsible for the killing—we estimated 30,000—subsequently some numbers went up to 40,000 Tamils on the beaches of Sri Lanka—the chances of a sustainable peace in Sri Lanka would disappear and there will eventually be a revival of extremism. So we did it from that perspective but it was very difficult work—taking on a government that is again very hostile and ferociously organized to push back. And not many others were doing that. And, as an NGO, it’s pretty remarkable because we published a report and we basically lobbied the United Nations to take it on. And eventually to his credit, Ban Ki-Moon⁵⁷ almost personally took an interest, which led to reports by the UN that validated the work we had done and put a lot of pressure. Now, there still hasn’t been any prosecutions, but what otherwise would have been buried a long time ago hasn’t gone away either. So of all the things during my time with the Crisis Group, this is probably the one in which I was the most directly involved and that I think had quite a substantial impact.

OLR: *What led you to private practice after all your years of work on the international stage?*

LA: Well, I don’t feel—even though we are sitting here in this wonderful office—that I’m in private practice in the traditional sense. Although it’s hard to tell, whatever comes across my desk I seem to find interesting. But I have kept some of my international commitments. I was appointed to be *ad hoc* judge at the International Court of Justice in the case between Bolivia and Chile.⁵⁸ I’m a member of the Global

56 See International Crisis Group, “War Crimes in Sri Lanka, Asia Report N°191” (17 May 2010), online: <www.crisisgroup.org>.

57 Secretary General Ban Ki-Moon is the current Secretary General of the United Nations and has held this position since January 1, 2007. Secretary General Ban Ki-Moon was unanimously re-elected in 2011, and he will continue in this role until December 31, 2016. See United Nations, “Secretary General Ban-Ki Moon: Biography”, online: <www.un.org>.

58 Bolivia initiated proceedings against Chile in 2013 over a dispute about Bolivia’s sovereign access to the Pacific Ocean. When a state party to proceedings before the International Court of Justice (ICJ) lacks a judge from its country on the ICJ bench, that party may select a judge to sit *ad hoc* on that case. See International Court of Justice, “The Court: Judges *ad hoc*”, online: <www.icj-cij.org>; International Court of Justice, Press Release, No 2013/11, “Bolivia Institutes Proceedings Against Chile with Regard to a Dispute Concerning the Obligation of Chile to Negotiate the ‘Sovereign Access of Bolivia to the Pacific Ocean’” (24 April 2013), online: <www.icj-cij.org/docket/files/153/17340.pdf>.

Commission on Drug Policy,⁵⁹ which I'm very interested in. I'm going to Geneva tomorrow for the International Commission against the Death Penalty.⁶⁰ So I have all kinds of bits and pieces of things that I need to do and I need help for that. And maybe because I had drifted quite a bit from the law in my most recent job, I was keen to reconnect with a legal environment. But I thought it would be interesting to, now that I'm back home, to keep involved in these international issues, but re-engage a bit more on domestic matters. So I knew several of the lawyers at this firm who had appeared before me, mostly in fact from the Toronto and Ottawa offices, because that's where most of my career was, but I knew some people in the Montréal office and I was determined to finally come back to Montréal. So it was an easy choice and very good fit for me. And I only started a couple of months ago, so already people come to me with different things. So it's not a very traditional practice, but it suits my interests and I hope it's helpful to some people inside the office.

OLR: Reflecting back on your career is there anything you would change or do differently? Or do you think everything happened the way it did for a reason?

LA: I don't know what the reason is so far but there can only be so many coincidences. Why am I so often moved to very different things? Presumably, I must have—I mean I look at some of my colleagues who were appointed to the bench at the same time I was, who are still there having developed very deep expertise. Some of them are still doing murder cases 30 years later, so they know everything there is to know about one thing, and I think some people find their professional comfort in that exquisite amount of specialization. I would not have had this insight into my own makeup at the outset but now, when I look back, I think it's pretty obvious that what I like and crave is that period of uncertainty—that kind of learning curve. It's very clear: I really like that phase where I don't really get it. And it's not that I get bored. In fact, that's the irony of it. After I finally feel a little more comfortable, I'm really interested. I've never walked away from anything I've done—from teaching, trial work, appellate work, international work—because I didn't like it, and even less so because I was bored. There is nothing boring about it. It's just that I seem to have this irresistible attraction to taking on something for which I'm entirely unqualified. There's no other way to put it I think.

59 The purpose of the Global Commission on Drug Policy is to bring to the international level an informed and science-based discussion about humane and effective ways to reduce the harm caused by drugs. The Commission's main areas of inquiry include the current international drug control regime; global overview of drug policies and laws; confronting the production and supply chain; criminal justice challenges; demand reduction through prevention, harm reduction and treatment; and the economic and political implications of drug trade and organized crime. See Global Commission on Drug Policy, "What We Do", online: <www.globalcommissionondrugs.org> [Global Commission on Drug Policy].

60 The mandate of the International Commission against the Death Penalty is to support work that aims to abolish the death penalty in all regions of the world. Its objectives include abolishing the death sentence in national legislation, promoting a worldwide moratorium on the death penalty and calling for a stop to executions where International Law restricts the practice. See International Commission against the Death Penalty, "Mandate", online: <www.icomdp.org>.

OLR: *As a woman who has had so many leadership roles, what work, if any, do you think still needs to be done to increase the number of women in leadership positions in the legal profession?*

LA: I think it's obvious we have to do something because it's just not happening. Women have entered the law schools in unprecedented numbers. They enter the profession in all kinds of different capacities and then they just disappear. I think collectively we have to find an explanation. I know there's a big debate in the literature between different viewpoints. For example, there's Sheryl Sandberg's perspective who wrote *Lean In*⁶¹—the idea that women have to learn to be much more aggressive, putting themselves forward and so on. And then there's Anne-Marie Slaughter who published this piece in the Atlantic entitled “Why Women Still Can't Have It All.”⁶² I tend to be more of that view. I think culturally, legally, politically—it's a question of time management in two ways: first, the 24-hour working day is notoriously unhelpful to women who have, and in our culture continue to have, disproportionate family responsibilities. And by family I mean looking after their small children, looking after their teenagers, looking after their elderly parents. All this. So the 24-hour working day, even with all the technological advances that at some point we thought would be a real revolution like work-at-home and flextime. And so the reality is that, certainly, high-paying jobs, but probably across the marketplace, have either pushed women into poorly paid part-time work or have not opened the space. So the 24-hour day is bad for women. And then the life span of when you're supposed to take off in your career is problematic. It's reasonably egalitarian when women don't have a lot of family responsibilities. So until you're, in our society, in your late twenties where you don't have small children, teenagers or ancient parents, you're at a competitive par with your peers. But the minute these family responsibilities kick in, they just happen to hit you in the decade where you're supposed to be on the jumping pad to great success and that's where it doesn't happen. So I think it's both ways. I think it's not helpful. And I think the reality speaks for itself. It's just not happening. I was talking to a woman I met yesterday about women in the workplace and the glass ceiling and how Hillary Clinton, when she ran, said, “I put 18-million cracks in the highest and hardest glass

61 See Sheryl Sandberg, *Lean In: Women, Work, and the Will to Lead* (New York: Alfred A Knopf, 2013). Sheryl Sandberg is the Chief Operating Officer of Facebook. She holds a BA in Economics from Harvard and an MBA from Harvard Business School. Before joining Facebook, she was the Vice-President of Global Online Sales and Operations at Google and Chief of Staff at the United States Treasury Department.

62 See Anne-Marie Slaughter, “Why Women Still Can't Have It All”, *The Atlantic* 310:1 (July/August 2012) 84. In 2012, Princeton Professor Anne-Marie Slaughter wrote a popular article that renewed debate over the professional barriers women face as a result of incompatible work and family obligations. Slaughter drew on her experience as Director of Policy Planning at the State Department to argue that American women today “still can't have it all.” She argues that most women are forced to make tough choices between pursuing a successful career and participating fully in family life. In the article, Slaughter criticizes Sandberg's explanation for the lack of women in leadership positions as implicitly blaming women for their under-representation.

ceiling” and so on.⁶³ So it’s a metaphor that is very familiar. And this woman said to me, “I don’t think it’s quite right.” And I said, “Oh no, how is that?” And she said, “Well, when you think of the glass ceiling, it has some features: it’s invisible but it’s very real and you move on and then one day boom! You just crash and you hit your head and it just shatters or it doesn’t shatter, but it shatters you. But it’s this hard, invisible thing. But the reality is, we should be thinking of it more as a kind of zone of toxic poison. Like an ozone layer of toxic gas. Also invisible. So you move along and you go to law school and you do your thing. And then one day you don’t feel so good. Things are just not coming your way anymore. You don’t know it but you’ve entered this poisonous gas.” I like it. I think it’s a much better metaphor than the ceiling. It’s an invidious toxic thing that has the same effect essentially, but is even more pernicious than the ceiling.

OLR: *If you could give students starting their legal careers one piece of advice, what would it be?*

LA: It’s very hard. As I said, I don’t have a lot of insights. I did a lot of different things. So I could say, “If you want to be like me...” But why should I assume anybody wants to be like me? But assuming that’s what you think you’d want to do, well then I would say, you have to be able to take risks. The biggest risk I took after having invested years in law school and the Bar admission course was moving to Ontario, which is like moving to Mars. I didn’t speak the language. I didn’t know the legal system. I was not a member of the Bar. After that everything else was of the same genre. You have to be able to take risks, not fit the mould and not let anybody squeeze you into their expectations of what your career should look like. And it’s going to sound completely absurd but also not to be too ambitious. *[Laughs]* How can one look at my career and say oh she was not very ambitious? But I think sometimes ambition can just drive you into making the wrong choices—making conservative choices—you know being worried that you’ve invested in something and you should stay there. But who am I to say that? What good is it to people who are not like me and who will have a wonderful, happy, professional life in a very different environment, maybe much narrower in a great area of specialty? So in the end, I think the greatest difficulty is the lack of insights we have into our own desires or ambitions or needs. And particularly for you, and for me at least, there were just so many choices... now you’re solicited in so many ways I don’t know how you manage this. On the other hand, compared to many people I’ve met in the rest of the world, how can you complain about having so many choices and options and opportunities? So I would say just trust your instinct. Don’t be scared. You could try something and it may not work out. I can’t really say that. Things worked out

63 In 2008, Hillary Clinton gave a speech announcing that she would suspend her campaign for the Democratic presidential nomination. In the speech she said, “[a]lthough we weren’t able to shatter that highest, hardest glass ceiling this time, thanks to you, it’s got about 18 million cracks in it and the light is shining through like never before, filling us all with the hope and the sure knowledge that the path will be a little easier next time.” See “Hillary Clinton Endorses Barack Obama”, Transcript, *The New York Times* (7 June 2008) online: <www.nytimes.com>.

pretty well for me but it wasn't written anywhere that it was going to work out. It just worked. But I don't know if it would work for anybody else.

OLR: *We'd like to shift now and ask you your opinion on a few substantive areas of law drawing on some of judgments. In Gosselin v Québec⁶⁴ you wrote a dissenting opinion where you held that section 7 of the Charter⁶⁵ imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens. The majority held that the facts did not compel finding a positive obligation under section 7, but left open the possibility that another factual scenario could support finding a positive obligation on the part of the state to ensure the life, liberty and security of the person for individuals. Do we have any reason to think the Court will ever recognize positive obligations under section 7?*

LA: Quite honestly, I have no reason to think anything about what the Court will do in the future. First of all, I don't know them. I don't read judgments on a systematic basis. I mean I'm not a student of the Court. Even though I sat there for many years, I don't sit around reading all their cases—so I don't have a very good sense of what the current thinking is, whether the Court is very imaginative or not, or what it's doing. And the bottom line is, the Court cannot initiate anything, so a case would have to come up that would have the right set of facts. And the beauty of the law is that of course that you can never anticipate. The good case that comes to you is never a case that you saw coming for the most part and the issues come to you in all kinds of different ways. So I have absolutely no idea whether a case will ever come up that will give an opportunity for the Court to revisit what I thought was its erroneous position and whether the Court at that time would be as enlightened as I thought I was.

OLR: *Having worked in the field of international human rights for several years after Winnipeg Child and Family Services v K LW,⁶⁶ do you see the balancing act between the rights of the parent and child at the heart of this case any differently now?*

64 *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429. Gosselin brought a class action lawsuit challenging the constitutionality of certain provisions of the social assistance scheme in Québec. Gosselin argued that conditions and restrictions on access to social assistance for recipients under the age of 30 violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter]. While the majority of the Court rejected both arguments, Justice Arbour (as she then was) wrote an important dissent recognizing a positive obligation on the state to ensure basic protections for life, liberty and security of the person.

65 *Charter*, *supra* note 63, s 7. Section 7 provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

66 *Winnipeg Child and Family Services v K LW*, 2000 SCC 48, [2000] 2 SCR 519. This case concerned the constitutionality of a legislative provision allowing for the warrantless apprehension of a child in non-emergency situations. The majority of the Court held that even in non-emergency situations, the risks posed to the child's life and health by the delays associated with a prior hearing outweigh the benefits of requiring a hearing. In a dissenting opinion, Chief Justice McLachlin and Justice Arbour found that a post-apprehension hearing could not justify infringing upon an individual's section 7 rights. The principles of fundamental justice require prior judicial authorization before interfering with the parent's interests in raising one's own child.

LA: Probably not. If I think in the context of, for instance, child-parent relationships they're very different from other contexts because, in most societies, for instance, in developing worlds, what parents crave is more state support or intervention because they have so few resources and that's why economic and social rights are so important. The right to health and the right to education are critical for the actual survival of their children. So, in that sense, the social and political context would sometimes be very different than what in that case was the question of the protection of the child. We must balance intrusive state action and procedural protections to put in place to ensure that in its protective mandate, the state doesn't overstep or shatter the relationship unduly. So the context may be very different. In a sense it comes back maybe to *Gosselin*. I think in lots of developing countries where politically there is always a stronger claim for support for social and economic rights than for civil and political rights. It's in part because of that. Because of what is needed from the state, I think, is much more compatible with the interests the parents have and their children. They just need a lot of help to raise them. But in the end it wouldn't change my sense starting from *Gosselin* that states have a responsibility, not just to their citizens but to all people that fall under their jurisdiction to provide for life, liberty, security, health, education, safety in a family environment. But also that there needs to be a recognition of the parental relationship and the danger I think in societies that have a lot of state capacity of overreach and so on. And that's where the judiciary has to play an important role, whether it's the judiciary or any kind of independent observer. So the context is very different but I think the call... the relationship between the individual and the state with respect to fundamental rights is the same it's just the context that is different.

OLR: *In Sauvé v Canada (2002)*,⁶⁷ you wrote for the court that section 51(e) of the *Canada Elections Act*,⁶⁸ which denied prisoners the right to vote, was unconstitutional. Over 10 years later, you heard a similar constitutional challenge at the Supreme Court of Canada.⁶⁹ Was there anything striking about hearing a case as a Supreme Court judge when you had heard a related case as a Court of Appeal judge?

LA: It was a different case because the *Canada Elections Act* had been amended, and the justification that the government was putting forward for the deprivation of the right to vote for prisoners was very different than the rationale that they advanced at the Ontario Court of Appeal. At the Court of Appeal, the law at that

67 *Sauvé v Canada* (1992), 7 OR (3d) 481, 89 DLR (4th) 644 (CA). Sauvé challenged the constitutionality of section 51(e) under the *Canadian Elections Act*, which denied the right to vote to all persons undergoing punishment as an inmate in any penal institution for the commission of an offence. Justice Arbour found that the provision infringed section 3 of the *Charter* and was not justified under section 1. *Canada Elections Act*, RSC 1985, c E-2, s 51(e).

68 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519. After the Supreme Court found the section prohibiting all inmates from voting in federal elections unconstitutional, Parliament replaced the section with a narrower prohibition on voting for inmates serving sentences of two or more years. See *Canada Elections Act*, SC 2000, c 9, s 4(c).

point I think was that you couldn't vote if you were incarcerated on the day of the vote. I mean under *Oakes* you couldn't even pass a rationality test. There was nothing rational about it, particularly when I think the evidence was that, on any given day, as much as a third of the people who are incarcerated were there on a default provision. So it was completely irrational, totally random. I mean if the elections had been the day before or the day after—a lot of people are there for 24 hours or a very short period—they would have been able to vote. But, by the time the case came to the Supreme Court of Canada, the law had changed and the rationale for it was articulated differently. I think you couldn't vote if you'd been convicted of a felony punishable by more than two years or something. And now the government's rationale was that in order to be entitled to exercise your constitutional right to vote, Canada needed an enlightened and decent citizenry—or something like that. So even though the case may look like the same case—it's a prisoners' right to vote case—the entire analysis was very different. What it reveals about the dialogue—I don't know about other areas of the law—but I think it's fair to say on this one the Canadian government was pretty tenacious on its position. They just wouldn't take no for an answer and came back at it in many different ways, which is quite ironic because when the *Charter* came into force in 1982, there were at least two classes of people who were clearly disenfranchised—prisoners and judges—and both challenged it. Of course judges alerted the Minister that they would challenge the constitutionality of that and the Minister caved in right away and said, “Don't worry, we'll change the provision, you're right, this is not constitutional.” And then for prisoners, it's like decades of litigation, change the law, and so on. So, if one wants to be a little cynical, this is the kind of issue that is very costly politically. I don't think you lose a lot of votes for resisting giving prisoners the right to vote, nor do you gain many votes by granting them that right. Maybe it's purely ideological.

OLR: *The next question stems from your judgment in R v Khan,⁷⁰ where, in the context of a murder trial, a lot of faith is placed in the jury's ability to appreciate the rules of evidence that govern the relevant materials upon which they are called upon to make a decision. Do you think juries are equally capable of applying the rules of evidence in the civil context?*

LA: I've only had I think two civil jury trials when I was a trial judge and, of course, we didn't have that in Québec, so this was very new. I think what's different in the civil cases I did—it's a long time ago, maybe the rules have changed, I don't know.

70 *R v Khan*, 2001 SCC 86, [2001] 3 SCR 823. During a first-degree murder trial, the jury was inadvertently given access to documents with inadmissible evidence that should have been expunged. The jury found the accused guilty of first-degree murder. The trial judge refused to grant defence counsel's motion for a mistrial. Both the Court of Appeal and the Supreme Court upheld this finding. The majority of the Supreme Court found that the trial judge was in the best position to assess the impact of the inadmissible evidence on the jury and that she did not err in refusing to grant a mistrial.

First of all, I think trial judges are best placed to evaluate the jury's capacity to handle the case—and there may be disagreements on that—but many trial judges that I've spoken to, and that I've known over the years, are impressed with a jury's ability to appreciate the rules of evidence, including in some cases where the verdict goes against the expectations of public opinion. And you'd speak to the trial judge and they'd say the jurors were right on it—diligent, attentive. And you know, who are you, as a single judge, to think you know better? Maybe you understand the mechanics of the rules better, but you know, I've had juries who came to a conclusion different than the one I would have taken, but I defer entirely. On their appreciation of the facts, I would have found probably differently, but I defer. They got it right, as far as I'm concerned. So in a civil case, because they answer questions, there is the capacity to get more insight into the jury's thinking. It's a little bit like forcing them to give reasons by unpacking the questions. And when the law is odd and you charge the jury, you say something that you know that they're going to think doesn't make any sense. And you look at them and sure enough, you can just see on their faces, this can't be serious. Like causation, for instance. Say you have a murder case where there's an issue of causation. So, the accused did the initial act but then there were a lot of pre-existing or intervening causes. You have to decide whether they broke the chain of causation so as to exonerate the accused.... Explain that to the jury, and sometimes they look at you, "Seriously?" You can tell. But I've never sensed their reluctance. You know, when you explain to them, "You have to take the law as I give it to you. If I make a mistake it will be fixed, but you can't change that. But on the facts, I'm entitled to give you my opinion. But I won't and if you think you know what I think, don't pay attention to it." I have a lot of trust and confidence in juries. I had a civil case where again I didn't know how the jury would decide—it was an accident in which a child died and I called one of my colleagues and I said I have this intuition that the jury is going to award more damages than the plaintiff asked for—for loss of care, guidance and companionship—and I said, "This was a really sad case and I have a sense they're going to come up with a much larger award". And so they came back with a question: could I give them a range? And in those days, the law was no. Which frankly made no sense. I had to say to them, "All I can tell you is that you have to give something that's not too little, not too much." What is that supposed to mean? Completely unhelpful. Now I think it's changed. Shortly after I rendered the decision, I think now judges are entitled to give a range for these kinds of cases. Anyways, I couldn't give them a range and sure enough they came back with a number way above the range. And I'd asked my colleagues, "What do I do?" So they said, "Well if you have an experienced counsel for the plaintiff, he's going to ask to amend the pleadings. And you say yes, and let the Court of Appeal sort it out. And if he's not very experienced, you look at him and you say, 'Counsel, do you have a motion to amend your pleading?'" Because you have to get a record that's appealable. And he was experienced so he asked to amend and I said "yes" and it was all set.

OLR: In your dissenting opinion in *R v Lévesque*,⁷¹ you stated that you disagreed with the majority on the admissibility of evidence “on the very particular facts” of the case. You have mentioned in other interviews how important the specific facts of a case are to the study and practice of law. Do you think the importance of the very particular facts is equally true for all cases or are subtle nuances in the facts of a case more important in certain areas of law over others?

LA: I think it’s all about facts. It was the greatest revelation for me going from teaching law to being a trial judge. Having taught law, particularly evidence and so on, it was all rules and systems and so on, and then I walked into court, particularly when I had to sit alone as a trial judge in areas of the law that I didn’t really know, and I would think, “Oh, that’s going to be so complicated.” But after you found the facts, you have the story, the narrative, you just have to look it up and it usually falls into place. The law is not the hard part—it’s sorting out contradictory evidence, what is plausible, and then when you have that, I still believe, that if you’re honest about.... And unfortunately, in modern litigation, the facts may have become unmanageable—you know when you have discoveries of billions of e-mails and so on, you’re buried under a massive amount of factual reconstruction, which I think is.... I don’t know how lawyers do it, where I hear about these very large cases where there’s so much material to digest. After you’ve got that, you’ve got the narrative fully in place, usually, certainly at the trial level, you make all your findings and if the Court of Appeal has the decency not to interfere unless you really miss something very big, then in *some cases*, there is a legal issue where the law is unresolved or has gone in different directions, but that’s not the run of the mill case and that’s fixable either at the trial level or higher up. I’m still a big believer of the facts.

OLR: In your dissenting opinion in *R v Malmo-Levine*,⁷² you held that the harm associated with marijuana use did not justify the state’s decision to use imprisonment as a sanction against the prohibition of its possession. What informed your opinion in this case?

LA: I believe that there are restrictions both on the *mens rea* side and on the *actus reus* side to what the state can do through the use of imprisonment or the threat of

71 *R v Lévesque*, 2000 SCC 47, [2000] 2 SCR 487. The accused pled guilty to robbery at a residence and was sentenced to 10 years in prison. The accused appealed the sentence and sought to have new evidence admitted. The Court of Appeal allowed the motion to bring new evidence and substituted the sentence for a lesser one. The majority of the Supreme Court overturned this decision, finding that fresh evidence could not be admitted on appeal simply because it provides more detail than evidence brought at trial. In her dissenting opinion, Justice Arbour held that the Court of Appeal was entitled to admit fresh evidence because the trial judge had mischaracterized the crime. As such, the Court of Appeal was within its authority to admit the evidence required to determine the proper sentence for the accused.

72 *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571. Malmo-Levine operated a non-profit association focused on reducing harm of marijuana use. Police entered the premises and seized 300 grams of marijuana, charging Malmo-Levine with possession of an illegal substance for the purpose of trafficking under the *Narcotic Control Act*. Malmo-Levine challenged the constitutionality of the provision on the grounds that it violated the harm principle. The majority of the Supreme Court rejected this argument, finding that the harm principle is not a principle of fundamental justice. In a dissenting judgment, Justice Arbour held that a law carrying the risk of imprisoning a person whose conduct causes little or no harm to others offends the principles of fundamental justice.

imprisonment, which I view as the criminal law field. I believe in the state's power to regulate conduct, including by prohibiting certain things, but not under the stigmatization and the employment of measures that are particular to the criminal law. The work I'm doing now on the Global Commission on Drug Policy⁷³ is really interesting because it's basically the same issue. It's a massive international effort to revisit all the international conventions that have been put in place worldwide—a system for the control of the non-medical use of drugs that is 100 percent repressive based on prohibition. There is no other field—you know nuclear waste—there's no other field that is the subject of total prohibition. Everything is regulated on a scale, including firearms. All kinds of very dangerous things are regulated. And, in fact, if somebody today...if we didn't have 50 years of experience with the war on drugs, and we were today trying to put in place a system, those who would advocate for total prohibition would be seen as radicals, proposing an unmanageable system of repression. So yes, I do believe that the recourse to the criminal law has to be done with great circumspection both on what the mental, moral element of what the crime is and what kind of conduct should be susceptible to that extreme form of state intervention.

OLR: *Drawing on that, has your work on imprisonment issues, such as your work on the Commission of Inquiry in the Prison for Women, informed your opinion the scope of the criminal law power?*

LA: I think imprisonment is a positive act on the part of the state, the deprivation of liberty is pretty fundamental, and so that's why on the correctional side I believe if you deprive people of their ability to look after themselves—when you're in prison you have no capacity to feed yourself, to look after your health, your security, your intellectual needs and so on—it imposes on the state an enormous obligation because you've put a person in a position of *extreme* vulnerability. But it's not just that: I think the stigma of a criminal conviction is a serious matter, and that's why I think we have a system of safeguards, such as the presumption of innocence, appellate review, *et cetera*, which are entirely appropriate before we take that kind of disposition. But imprisonment is particularly an enormous responsibility on the part of state, which cannot be taken lightly and where I think the state needs to take enormous responsibility, including in the case of wrongful convictions.

OLR: *In order for international law to be effective, do you think there needs to be an enforcement mechanism, such as a tribunal? Are international treaties more effective in certain areas of law over others?*

LA: I think in the field of international human rights law, the absence of an international court of human rights is fatal to the serious enforcement of rights. I think, in all the countries or regions in which human rights have had a real bite, it's been done

73 See Global Commission on Drug Policy, *supra* note 60.

through courts. It's true in Canada; it's true in countries that have constitutional human rights protection. And then it's true regionally, for example, the European Court of Human Rights and Inter-American Court of Human Rights. And in contrast to that, the absence of national and/or regional, sub-regional mechanisms in Asia, is a blatant explanation as to why these rights are so difficult to enforce. This is not to diminish the importance of the treaty bodies, for instance in the UN system, and the further development of the advancement of doctrines for the development of cultural political acceptance of the boundaries of gender discrimination, racial discrimination for example. At the end of the day, states are duty bearers and we are rights holders, and the system is run by duty bearers for their own benefit. Until you have a court, an adjudicator—you know the human rights council is a marketplace of trade-offs between different interests, of finger-pointing, of positioning, of posturing. But at the end of the day, without an impartial, credible, public, transparent, adjudicative function with enforcement capacity, the progress will be extremely limited. Now, there may be other areas of the law where you can rely on in state-to-state cooperation and don't need that. But when you're dealing with this politically intimate relationship between a state and its citizens, I don't think that a body of state is likely to be the best environment to advance rights. But this will not happen in my lifetime—I mean that's one thing I tried when I was the High Commissioner. I thought I was being very subtle, but not obviously subtle enough: I tried to launch an initiative to merge all the treaty bodies, so you have you know CEDAW (the Committee on the Elimination of Discrimination Against Women), the Committee Against Torture and the Committee on the Rights of the Child—and they all have their individual meetings and they do their own things and they're *completely* invisible as far as I'm concerned. Certainly, when I was a judge in the Supreme Court of Canada, we didn't spend a lot of time reading opinions of the UN Treaty Body System. So I told them, we should merge all these committees with one big main door—be the door to the treaty bodies. What I could see over the horizon is, if you did all that, that's step one to eventually, possibly, a court. Well I think although I was being very subtle—“No not a court, no no no!”—but I think others could see where that could go—and then of course all the actors have an interest in preserving their own specialty and they're just so special and so much better than the other guys. Anyway, it went absolutely nowhere, but in my mind that was it—it was trying to invest into a movement that could eventually lead to an adjudicative body with enforcement—with coercive capacity.

OLR: *As a final question to wrap up our interview today, in what areas of law do you think we'll see significant changes or advancements in the foreseeable future?*

LA: It's hard to tell. I don't follow enough of the literature or the case law in the courts. On the big picture, I think the big tickets are environmental protection. I think climate change is the defining challenge of our generation and so if there was ever to be an international treaty and so on, I think that this would then lead to national implementation. So that's one possibility. Politically, it still looks slightly

out of reach for the time being, but it has to start happening—it's really five minutes to midnight on this one. The work I do on the International Commission on Drug Policy has actually moved somewhat faster than we thought—I mean with the first report of the Commission,⁷⁴ all we were hoping for was the capacity in the US, in Canada, in Europe to have conversations about the failure of the war on drugs—just put a little oxygen so you're not denounced for being some kind of hippy every time you want to have a conversation about it. Well, even that we thought would take a decade. But it moved pretty quickly. Now the next chapter is trying to mobilize enough space for countries to be allowed to experiment with different models of regulation, which is what we're talking about. I think it's a mistake to talk about legalization, because people hear—even though that's not what it means—free for all, totally unregulated—which is absurd because there is no area of human conduct that is totally unregulated. So we need to talk about regulation. If this happened, it would again have a significant impact on human health because we want to shift from a repressive model to a public health model. It would have a huge impact on organized crime and violence in countries. You know this initiative came from Latin America, not surprisingly, chaired by President Cardoso of Brazil, all former heads of states in Mexico, Columbia, Guatemala that are trying to mobilize for a change. If this were to happen, it would change organized crime and, therefore, have an influence on corruption issues. But I'm not holding my breath that this is around the corner. These are the areas I know—domestically I don't know what's brewing in the court system that's ripe for change. I just don't follow it enough to know.

OLR: *Thank you for sharing your experiences and insights in such depth with us today.*

74 *War on Drugs: Report of the Global Commission on Drug Policy* (June 2011), online: Global Commission on Drug Policy <www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf>.