The Empire Club Presents

THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, CHIEF JUSTICE OF CANADA

WITH: **CHANGES AND CHALLENGES**

Welcome Address, by Barbara Jesson President of Jesson + Company Communications Inc. and President of the Empire Club of Canada

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November 14, 2017

Good afternoon, ladies and gentlemen. From One King Street West Hotel in downtown Toronto, welcome, to the Empire Club of Canada. For those of you just joining us through either our webcast or our podcast, welcome, to the meeting.

Before Our distinguished speaker is introduced today, it gives me great pleasure to introduce our Head Table Guests.

I would ask each guest to rise for a brief moment and be seated as your name is called. Then, if I can ask you to refrain from applauding until everyone has been introduced, that would be terrific.

HEAD TABLE

Distinguished Guest Speaker:

The Right Honourable Beverley McLachlin, Chief Justice of Canada

Guests:

Ms. Ann Curran, Executive Director, Australia-Canada Economic Leadership Forum; Past President, Empire Club of Canada
Mr. Jeremy Devereux, Partner, Norton Rose Fulbright Canada LLP
Ms. Sinziana Hennig, Partner, Stikeman Elliott
Mr. Frank McArdle, Executive Director, Canadian Superior Courts Judges Association
Mr. Nick McHaffie, Partner, Stikeman Elliott Ottawa
Dr. Gordon McIvor, Past President, Empire Club of Canada
Ms. Andrea Wood, Senior Vice President, Legal Services, TELUS; Past President, Empire Club of Canada

My name is Barbara Jesson. I am the President of the Empire Club of Canada and the President of Jesson + Company Communications. Ladies and gentlemen, your Head Table.

We are very honoured to have with us a number of very renowned guests, the Honourable George Strathy, Chief Justice of Ontario, is with us today. Mr. Chief Justice, thank you for joining us. Paul Schabas, Law Society Treasurer is also with us. Thank you so much, both of you, for joining us.

We live in a time where judicial systems and their relationship to the citizens they adjudicate are in flux in many parts of the world. While politics are frequently a factor in judicial appointments, we do not have to look too far to see the extreme politicization of Supreme Court nominees and an alarming trend toward executive branch attacks on the impartiality of distinguished justices.

In Canada, we have been relatively safe from aggressive undermining of our judicial system. I am not sure we can always attribute this to the high-mindedness of our political representatives, but, rather, to the quality of the justices appointed to our courts.

Given the high standards set by our judiciary, it may be tempting to characterize these latter kinds of criticism as not applicable to us. Still, we should not be complacent. For example, we cannot simply gloss over the historically troubled interactions between Canada's Indigenous people and our justice system.

It goes without saying that no system is perfect. For the most part, our legal system has somehow managed to strike the delicate balance between clinical interpretation of our Constitution and Charter and the measured application of compassion. Our Canadian judges, who have, thankfully, not yet had their character impugned by our head of state, continue to work tirelessly to apply both the letter and the spirit of the law in a climate where it has become more and more apparent that judicial rulings do not exist in a vacuum but, instead, resonate on every level and every tier of society.

Our speaker, today, stands at the forefront of a vanguard of exemplary judges. Chief Justice Beverley McLachlin recently announced that she will step aside on December 15th. I must say, however, she appears anything but retiring.

Even as she received a lifetime achievement award, the G. Arthur Martin Criminal Justice Medal from the Criminal Lawyers' Association late last month, she waded into the very charged environment around sexual assault, currently making daily headlines, and asserted the rights of the accused in the face of growing public demands for convictions, whether or not the evidence supports them.

Over a distinguished and truly groundbreaking career, Chief Justice Beverley McLachlin has cultivated a reputation as a staunch defender of constitutional rights, an implacable advocate of judicial independence, and a progressive proponent of the vulnerable and disadvantaged.

Originally appointed to the Supreme Court in 1989, she became Chief Justice in 2000, under Prime Minister Jean Chrétien. As both the first female and longest-serving Chief Justice in Canada in Canadian history, Chief Justice McLachlin's outsized impact on Canadian law will influence generations to come.

Justice McLachlin's approach of conscious objectivity, which injected her judgments with a touch of empathy and a consideration for social context, is clearly evident through her most famous rulings. In her opposition to mandatory sentencing in cases of assisted dying, Chief Justice illustrated her willingness to stand for individual constitutional rights, even when it is not popular or politically expedient to do so.

A frequent target of critics who sought to brand her a judicial activist, Justice McLachlin refused to be cowed by pressure. She has stood toe to toe with political challenges to judiciary independents and, in doing so, protected the courts from changes that some believe would irrevocably undermine the reputation of our judiciary.

She has been particularly vocal on issues of justice for our First Nations people, noting their disproportionate representation in our prisons. She has drawn attention to what Canadian courts have historically done to marginalize these communities.

Outside of the Supreme Court, Justice McLachlin is the Chairperson of the Canadian Judicial Council, and a member of the board of the Advisory Council of the Order of Canada. She served as Administrator of Canada, notably giving royal assent to the Civil Marriage Act.

Ladies and gentlemen, please, join me in welcoming the Honourable Chief Justice Beverley McLachlin, once again, to our podium.

The Right Honourable Chief Justice Beverley McLachlin

Thank you for that very kind introduction and thank you all for being here, today. Merci beaucoup. Today, I would like to talk about the Canadian judiciary. My talk is entitled "Changes and Challenges."

On April 22nd, 1981, I was appointed to the County Court of Vancouver and became a judge. I still have the photo of my swearing in: Chin up, hair dark, proudly wearing my pinstripe skirt and my judge's gown for the first time. That was a long time ago. The woman in that old photo bears little resemblance to the woman who stands before you today.

[Remarks in French] La femme qui figurines dans cette vieille photo ressembles peu à celle que vous se trouves devant vous aujourd'hui.

I do not want to talk about how I have changed. Today, I want to talk about how the judiciary I joined that day has changed in the 38 years since I was sworn in as a judge. My takeaway is this: The role of judges and the task of judging has evolved greatly over the past four-odd decades. This evolution has mostly been for the better, but important challenges lie before us.

Before I get into how the judiciary has changed and the challenges we now face, let me digress to explain why this should matter to you, as Canadians. The first reason is legal, more specifically, constitutional. Quite simply, the judiciary is part of Canada's constitutional machinery, the third branch of governance under the Constitution Act of 1982. The Constitution is the foundational document that determines how our governance is organized.

[Remarks in French] Le document fondamental qui établit les bases de l'organisation de notre gouvernance.

It divides the exercise of public power between the legislative branch, parliament in the legislatures; the executive branch, the prime minister, cabinet and the myriad agencies that apply and enforce the law; and the judicial branch, the courts that settle legal disputes and define constitutional boundaries. In short, the judiciary, as a vital part of Canada's constitutional machinery, is key to how we govern ourselves.

The second reason why the judiciary matter is practical. The judiciary is essential to maintain the rule of law and re-

solve disputes. A society that cannot peacefully resolve its disputes will end in chaos. The judiciary tackles disputes between the state and the accused in criminal cases and disputes between private actors on the civil side. It conducts administrative review when government action or powers are challenged, and it determines constitutional issues. These constitutional issues may involve competing federal and provincial claims to power, rights under the Charter of Rights and Freedoms, and Aboriginal rights under Section 35 of the Constitution Act, 1982.

In addition, governments, seeking answers that provide important guidance to legislators, may refer legal questions to appellate courts in the Supreme Court of Canada. Think of the Reference re Québec Secession, which provided the foundation for the Clarity Act, the Reference re Same-Sex Marriage, and the Senate Reference.

I conclude that for legal and practical reasons, a strong, independent judiciary is essential to democratic governance, the rule of law, and just outcomes and disputes crucial and mutually reinforcing values.

On the criminal side, it maintains justice, security and order in society. On the civil side, it allows economic and social activity to proceed with the assurance that rights and obligations will be enforced. Put simply, an independent judiciary allows us to trust one another. And in the constitutional realm, it is the machinery that ensures that government powers are exercised in accordance with the rule of law and the Constitution.

[Remarks in French] L'appareil qui veille à ce que les pouvoirs de l'état soient exercés, conformément à la Constitution et doit principe de la primauté de droit.

Against that background, let me tackle my subject, how Canada's judiciary has changed in the last three decades and what challenges it faces. Even as it continues to fulfill these essential roles, the last three decades have seen a virtually complete transformation of Canada's judiciary. In the next few minutes, I would like to highlight just some of the changes that have taken place and indicate the challenges we still face as we move into the future. I am going to focus on five areas: First, the judicial appointment process; second, diversity on the bench; third, judicial education; fourth, judicial governance; and, finally, our ability to respond to current challenges.

Let me start with the appointment process. When I was appointed to the bench, the tap-on-the-shoulder appointment process prevailed. Judges were usually chosen from leading ranks of lawyers. The named candidates generally proved to be good judges, fair and learned in the law. This said, it must be acknowledged that political factors sometimes played a role in the choice of a judge, something that hardly enhanced confidence in the process of appointment.

In recent times, the process for appointing judges has changed. England has adopted a commission system almost entirely divorced from the political process. Change has not proved so easy in Canada, since the Constitution provides that superior court or Section 96 judges are appointed by order in council, that is, by the government. We know how hard it is to change the Canadian Constitution.

Canada has done a workaround on the appointment front. For more than two decades now, governments have committed to choosing judges who are pronounced fit for office by independent councils comprised of judges, lawyers and laypeople, called Judicial Advisory Committees, or JACs, for short. Applicants with a sufficient number of years at the bar apply to become a judge, and they are assessed by these committees, these JACs. The result is the end of the tap-on-the-shoulder system and a more transparent process that gives Canadians the assurance that their judges are fit for office. Provincial schemes follow similar processes.

Still, we face challenges on the appointment front. First, there is a worry in some quarters that excellent candidates may fail to apply, and, therefore, that we will lose great judicial material. Second, due in part to government delay, which has occurred from time to time in constituting the committees, this has caused delay in filling vacancies. This means that sometimes courts do not have enough judges to hear the cases that are brought before them. This, in turn, results in adjournments and delays.

The government is currently working to fill a backlog of outstanding vacancies in courts across the country. My hope for the future is that we will commit to a zero tolerance for vacancies, so that the courts can properly discharge their responsibilities to provide justice to those who seek it.

My second topic is diversity, diversity on the bench.

I was the second woman appointed to the County Court of Vancouver, the first appointed to the Supreme Court of

British Columbia, and the first appointed to the British Columbia Court of Appeal, the third appointed to the Supreme Court of Canada. The benches of the day, when I was first appointed, consisted of almost entirely of middle-aged, white, Anglo-Saxon males—no women, no judges from minority groups, no Indigenous judges. Canadians now expect that courts should, to the extent possible, reflect the make-up of the society they judge for two reasons. First, diverse judges bring diverse perspectives into the courtroom. They bring different experiences to bear and give the judiciary, as a whole, a more nuanced understanding of the country and of the issues. The result is better judging. As I once wrote of women, and I am quoting myself, "We lead different lives. We have no choice." The basic truth is that women and men do, indeed, lead different lives, and, thus, bring different real-life experiences to the task of judging. The same goes for people of minority groups and religions and for our Indigenous citizens. Judges from these communities can provide insights and perspectives that might otherwise be missed, insights and perspectives that are essential to modern justice.

Second, a diverse bench contributes to judicial legitimacy. An Indigenous man facing an all-white court or, for that matter, an all-white jury, a subject on which our court, as well as the courts of this province have opined, may experience the court as an alien institution disconnected from, even indifferent to, his lived reality. He may consequently reject the court's ability or right to judge his case and consider the outcome unfair. The same may apply to a woman facing an

all-male courtroom or a person of colour facing an all-white court.

Canada is a democracy, and its courts are not elite establishments. They are the people's courts. They should reflect the people.

[Remarks in French] La magistrature doit refléter la population qu'elle sert.

We have made considerable progress on the diversity front, but there is a ways to go. Only about one-third of Canada's judges are women. We can do better. There is even more work to do in securing Indigenous judges and judges of colour on our courts. Efforts to improve the situation run up against the reality that, until recently, diverse groups were underrepresented in the Canadian legal system, and not many Indigenous people became lawyers. Fortunately, that is changing. I look forward to steadily increasing diversity on Canada's benches. It will only make our legal system stronger.

My third topic and challenge is judicial education. When I became a judge, judicial education was sparse and rudimentary. It was assumed that when one took the judicial oath of office, everything one needed to know to be a good judge descended on one, like a dove from on high.

At some point in my second year of judging, my chief justice suggested I might want to attend a week's course for new judges, rather belatedly. Apart from those five days and the odd conference, I received no formal training in judicial or legal matters or judging, the art and craft of judging. Many of my judicial colleagues did not go to any conferences or courses at all. Happily, all this has dramatically changed.

Today, each new judge takes new judges training and judges are expected to continue annual training throughout their careers. Most of this instruction is provided through the National Judicial Institute, which has grown into one of the most respected judicial training centres of the world. The world is increasingly complex and constantly changing and so are the law and the craft of judging. Continuing legal education is essential for all of us on the bench to keep up.

Education is not only essential to ensure high-quality judging; it is also crucial to ensure judicial independence. The National Judicial Institute is guided by a board on which judges sit, as well as a CEO who is a judge. For judges to be independent and to be perceived as such, the judiciary, not the government or anyone else, must determine the content of judicial education. The state is a party in all criminal cases and many civil cases. If the government controlled the content of judicial education, parties in the public might fear the state has programmed judges in a way that undermine their impartiality.

One of the most important areas of judicial education is, as already mentioned, social context education. Social context education sensitizes judges to the need to see the world from different perspectives, be they the perspectives of gender, race or social background. Education is not a complete substitute for judicial diversity on the bench, but it helps.

Social context education trains judges in how the world and the legal system may appear to a rural Indigenous youth

brought before the court on charges or to a complainant in a sexual assault trial who is called as a witness to testify about the assault.

Sexual assault cases have received particular attention in recent years. While thousands of sexual assault trials are conducted each year throughout Canada with sensitivity and justice, no system is perfect, and we have, unfortunately, witnessed a few recent trials that violated the high standards expected of Canadian judges. This is disappointing. Cases involving sexual assault allegations are difficult. Judges deal with difficult issues all the time, so I know we can do better. We need to strengthen our efforts to ensure that every judge who sits on a sexual assault trial is fully trained to do so with sensitivity and respect. Judges must understand that giving evidence of the private details of a sexual assault can be enormously difficult for the complainant. They must ensure appropriate procedures to respect and protect the dignity of complainants while maintaining basic Charter protections to the accused. This is not an easy task, but it is absolutely necessary.

The National Judicial Institute has been training judges on these issues for at least two decades, and we have seen attitudes change during that time. We have to keep working at it. The judiciary is committed to ensuring that every judge who sits on a sexual assault trial is equipped to do so in a fair and impartial manner.

Fourth, the judicial governance. When I became a judge, courts were modest affairs. Populations were smaller, and in

those pre-electronic and pre-Charter days, procedures were simpler. The public was not as educated and articulate as it is now and, hence, made fewer demands on the judicial system. Social media and the digitally connected world were not even blips on the horizon. Today, the demands on our court systems are enormous, and running courts is big business. Unfortunately, we may not always have the best business model to allow courts to operate as efficiently and as effectively as they should. Government funding for the justice system has not always kept up with demand. The judiciary must make governance decisions, how the courts run, for reasons of judicial independence, but we have to ensure that the judiciary can do this effectively.

Most Canadian courts interact with the governments that fund their operations on what is called an executive model. What this means, in essence, is that the government provides courthouses staff and equipment, which are then put to use by judges under the guidance of the chief justice. Too often, judges simply have had to make do with inadequate resources.

[Remarks in French] Trop souvent les [juges] doivent tout simplement compose avec de ressources insuffisantes.

Trials are delayed because there are not enough sheriffs and court clerks. Computers, electronic equipment and electronic filing systems that could make court processes more efficient and accessible are often nowhere to be found. Chief justices and judges struggle to introduce efficiencies, but do not always succeed. Waste and delay are the result. It is actually expensive, as every businessperson knows, to be inefficient.

The Canadian Judicial Council has developed alternative models of court administration, which point the way to better administration of the courts. Other countries, like Ireland and the United Kingdom, are also turning to more effective models of judicial governance, which promote efficient, judge-led processes based on planning and cooperation with the governments that are responsible for funding the courts. These models are working. I believe we need to move in the same direction in Canada. If we are to maintain and strengthen public confidence in our justice system, we must do this.

Finally: Judicial response to current challenges. The world in which I became a judge was a quiet world. Change, when it happened, came slowly and incrementally, allowing the judicial system to adapt gradually without undue stress. Today, our world is changing at an exponential rate and perforce so are the challenges the courts face. Change is our modern reality. An effective judiciary must be able to respond to current changes and challenges in a prompt, effective way.

One current challenge, and one on which I have often spoken, is access to justice. The courts are not to preserve of the wealthy or big business. Every woman and man, however humble, is entitled to find justice within their precincts.

The twin problems that bedevil access to justice are delay and expense. We can cut delay and expense with good governance and sensible procedures proportionate to the matter at hand. Many efforts to help ordinary Canadians access the justice system are currently underway. I applaud all those involved—governments, the bar, scholars and judges—and look

forward to continued progress on the difficult challenge of access to justice.

A second current challenge is the burgeoning phenomenon of self-represented litigants. When I started my judicial career, self-represented litigants were few and far between. Somehow, most people seemed to find legal assistance. Today, up to 50% of cases in some courtrooms involve at least one self-represented litigant. This can increase delay and complicate the task of the judge, who must somehow try to bring justice out of a mass of unanalyzed allegations, not to mention that the judge in assisting the self-represented litigant may be seen as biased against the other side.

I believe that self-represented litigants are not going to go away anytime soon. The only option is to adapt our rules, procedures and processes to help untrained people navigate the system. Many jurisdictions in the United States are now working hard on doing this. I think we need to follow suit.

The final current challenge I will mention is the challenge of delay in criminal trials. The Charter guarantees the right to be tried within a reasonable time, but honouring this guarantee has proved difficult. The modern criminal trial is a long and complex affair. When I started judging, a murder trial might last a week. Now, it is likely to take several months. Electronic documents abound; experts are numerous; Charter motions take time. Intermittent shortages of judges do not help either. Last year, the Supreme Court of Canada issued a clarion call for change in R. v. Jordan. It decried the culture of complacency that had established itself and the routine vi-

olation of the right to be tried within a reasonable time that was the consequence. Prosecutors, lawyers, and judges are responding to this judicial-led call for change. New ideas and proposals for streamlining the system are being implemented. I am confident we will beat the problem of delay in criminal cases. Prompt trials, after all, are good for everyone, for the witnesses and complainants, for the accused, for the victims who seek justice, and they are what our system and our Constitution require.

Let me conclude, the judicial system of today is vastly different from the judicial system in which I began my career as a judge. In my opinion, it is also vastly improved. It is a system of which I am enormously proud.

[Remarks in French] C'est un système dont je suis énormément fier.

Still, in this age of incredible and sometimes exhilarating change, the judicial branch of government dares not rest on its laurels. It must embrace the world in all its complexity and prove that it is capable of delivering justice, real justice, as we move into the future.

Real justice is not an ideal; it is not a dream; it is a goal, and I know that we can achieve it.

Thank you for letting me share these thoughts with you.

[Remarks in French] Merci de m'avoir permis de vous faites partie de ces réflexions.

Note of Appreciation, by Andrea Wood, Senior Vice President, Legal Services, TELUS Past President, Empire Club of Canada

Madam Chief Justice, thank you for your remarks today. The Empire Club has been very privileged to have been able to host you as a speaker three times, I think, in the past few years. Your speech two years ago remains one of the highlights, for me, of my time with the Empire Club. We are grateful to have had the opportunity to host you, again, and to celebrate your contributions to the Canadian system of justice as you approach your retirement next month.

During your 17-year tenure as Chief Justice of Canada, you have tirelessly championed the importance of the judiciary to the rule of law and a just society. You fought to maintain the quality and diversity of judicial appointments, advocated for improved access to legal advice and assistance, addressed the need to reduce delays in our court systems by demanding the resources needed to support the proper administration of justice, and worked to address the special challenges faced by Indigenous people in Canadian society, particularly, within the criminal justice system.

Under your leadership, Canada's Supreme Court remains stalwart in its defence of civil liberties protected by the Canadian Charter of Rights and Freedoms while adapting to social norms, and it became the world's most gender-balanced, national high court today—although you have reminded us of the challenges that we continue to face. Thanks in great part to you

and your service, the Canadian justice system continues to be strong and a pillar of Canada's envious democratic tradition. Thank you, again, Madam Chief Justice for your remarks, today, for reminding us of the importance of the judiciary and for your years of service to the Canadian people. Thank you.

Concluding Remarks, by Barbara Jesson

We would like to thank mediaevents.ca, Canada's online event space, for webcasting today's event to thousands of viewers around the world. Although our club has been around since 1903, we have moved into the 21st century and are active on social media. Please, follow us on Twitter at @Empire_Club and visit us online at www.empireclub.org.

You can also follow us on Facebook, LinkedIn and Instagram.

Finally, please, join us at our next event, November 17th, with Dominic Barton, Global Managing Director at McKinsey & Company, at the Arcadian Court, and November 20th, with Rachel Notley, Premier of Alberta, at the Royal York Hotel. Thank you for your attendance, today.

This meeting is now adjourned.