NO LONGER ALTERNATE DISPUTE RESOLUTION SYMPOSIUM

MAY 6, 2019,

KEYNOTE SPEAKER: JUSTICE MCLACHLIN

MR. DERER: It gives me great honour for Marney and me to introduce and present our keynote luncheon address speaker, The Right Honourable Beverley McLachlin, former Chief Justice of the Supreme Court of Canada, and the latest sensation on the Canadian literary scene.

Most of you will have read her first novel, Full Disclosure, released one year ago, May of 2018. It received widespread critical acclaim; and, as many of you will recall, the compelling story line was supplemented wonderfully with references to art and culture.

One of the main, but sadly short-lived characters in the book was, by education and training, a specialist in Haida art and culture.

The main suspect to the crime, around which the book is centered, was listening to Bruckner's Seventh as the police arrived at his home to apprehend him. There is periodic reference in the book to the music of Chopin, Debussy, and other giants of classical music.

Justice McLachlin then takes the reader on a tour of Vancouver and the BC lower mainland and with little side trips to the Okanagan and Haida Gwaii; pointing out famous and popular landmarks and examples of the work of architect, Arthur Erickson, and she references the art of some of

Canada's greatest artists, Gordon Smith, Toni Onley, Joel Plaskett, Riopelle, Tom Thomson, A.Y. Jackson of our Group of Seven. For art lovers like me, it was an added bonus to reading the book.

But before inviting Justice McLachlin to the podium, I would be remiss if I did not at least touch briefly on her earlier career before she became a celebrated author.

We are all familiar with her remarkable judicial career. She grew up in Pincher Creek, Alberta, received her B.A., M.A., and LL.B. from the University of Alberta. Her first judicial appointment came in April of 1981, and eight short years later in 1989, she was sworn in as a Justice of the Supreme Court of Canada.

In January of 2000, she was appointed Chief Justice of Canada. She was the only woman, to date, to serve as Chief Justice, and after 18 years in that role, the longest serving.

In her time on the Supreme Court of Canada, she participated in over 2,000 Judgments, of which she wrote 442.

Obviously, she is well-deserving of all the accolades showered upon her: Icon, trailblazer, national treasure.

It is hard to know when and how to stop

listing all of Justice McLachlin's achievements in her time on the bench and otherwise; but I thought I would start bringing my welcoming remarks to an end with a passage from a tribute speech delivered by Adrienne Clarkson, our 26th Governor General, on the occasion of Justice McLachlin's retirement from the bench in December of 2017.

And this is from Adrienne Clarkson in that tribute speech:

> "There are many reasons the country should be grateful to her, but I want you to know that one of the most interesting facts about her is that I am sure she is the only Chief Justice we have ever had who knows how to deliver a calf.
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> I don't think there's anything more revealing than going to Pincher Creek and seeing that beautiful little town nestled in the Foothills of Alberta and to enter through the roadway that is now called Bev McLachlin Drive.
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> I think that Bev McLachlin Drive really says a lot. It says that she comes from there. It says that she is known to everyone there, and it says that she is one of us...."

As Marney and I went about the early planning for this symposium, there was no other person, other than Justice McLachlin, on our list for possible keynote speaker.

We reached out to her with our plans for the day, the themes and objectives we had in mind for this gathering, and were thrilled, as I'm sure all of you are, that she agreed to join us; and, of course, Marney and I were also relieved because we had no backup plan.

No one can speak with greater authority, passion and conviction on the underlying themes to today's program: Respect, integrity, and effectiveness in our judicial process and private dispute resolution services that run parallel to it.

Ladies and gentlemen, please join me in welcoming the Right Honourable Beverley McLachlin.

JUSTICE MCLACHLIN: Good afternoon, everyone. It's really wonderful to be here and be back in Calgary. It's the second time in just a little over 30 days. I'm beginning to like the city, and I might stay awhile next time.

As you know, and as you've been told, I grew up not very far from here, so it always feels like

coming home to me.

Now, after that lead-up, I think you expect a lecture on Mahler, Chopin, and the fine art of architecture of Arthur Erickson; but I'm sorry I'm having to disappoint to keep in line with today's theme, which is respect for the rule of law as it is practiced in the courts, but also more and more in alternate dispute resolution.

I want to start by thanking Derer Lutz for organizing this conference, and for all of you for being here. It's really so important, I think, that members of the profession increase their understanding as the role of arbitration and mediation and the settlement of disputes increases.

Events like this help us to understand more about how to do the work we do in alternate dispute resolution and how to do it well.

I'd like to begin with an obvious disclaimer. Until recently, I had never done a formal mediation.

Of course, as a judge, I had occasionally had conferences with people to try to get them to settle their issues when it looked like the cost and time that was being consumed by the litigation was not being fruitful; however, I always thought my success in that was rather dubious. I always

seemed to do better on actually just making rulings.

But when I retired from almost 38 years on the bench, I'd been a trial judge, an appellate judge, and, finally, almost 18 years on the Supreme Court of Canada, well, I faced a problem. I was told I was too old to be a judge.

So what can you do if you're too old to be a judge? You try to be the next best thing; and I have gone into a new world, the world of alternate dispute resolution, where I am learning, which is a wonderful thing to do when you retire from a lifetime of doing the same sort of thing -- learn something new.

And I have found there is a lot to learn. A lot for me to learn anyway, about mediation and arbitration; and I have been thinking about it, as well, and thinking about its place.

So when you ask me, "Well, what do you know about arbitration?" Probably not that much. And I probably won't be able to give you a lot of, you know, hot tips on how to get a party to settle or how to wrap up reasons cogently and coherently.

But I would like to share with you, if I may, some broader thoughts on the role of alternate dispute resolution, on the role of arbitration and mediation as part of the inclusive thing we call

the law and the rule of law.

Think of it this way. Once upon a time, there was a room. The room was large, capacious, and tastefully furnished, everything in its place. And then an elephant entered the room and started picking up bits of furniture and rearranging it and, heaven forbid, sometimes worse.

Well, the room I'm talking about is the room of the law. The law as we know it. The way people live together, how they settle their disputes, and more.

And the elephant has been the growth -- it's a big elephant -- of alternate dispute resolution, arbitration, mediation, and other forms of alternate dispute resolution.

The furniture in the room was once that of courts; but, increasingly, that furniture is being pushed aside and new furniture is coming into place. And that is what I would like to talk about today.

Ever since Lord Bingham wrote his seminal book on the rule of law in 2011, it has been accepted that access to justice is a fundamental requirement of the rule of law. Not only, Lord Bingham wrote, are people bound by the laws, required to do what the laws say, but they also need access and the means to enforce the laws and

the rights that those laws create.

Now, historically, as we all know, the institution that provided that access, that enforcement of laws and rights created by them, were the courts. If people had a legal dispute, they went to court.

The courts were high-level dispute resolvers. They were independent of government and other influence. They were impartial.

Not only did courts settle disputes, *stare decisis* meant that the ratio of their decisions became the law. In this way, the law was able, on the one hand, to offer certainty so people knew what the law required and how to conduct themselves.

And on the other hand, it was allowed to evolve and change to meet the changing needs of society.

However, the courts, for better or worse, are now playing a less dominant role in dispute resolution than the past.

A few years ago, I wrote an article, lamenting, what I called "The Disappearing Trial." That was the name of the article.

I discussed how the combination of high legal costs and slow processes -- exacerbated, in some cases, by the desire for privacy on business and

personal matters -- were causing increasing numbers of litigants to look to arbitration, mediation, and other ADR for resolution of legal disputes.

I noted that more and more only large corporations and well-heeled individuals could afford the courts; and that even when they could afford them, they often chose alternate dispute resolution for reasons of immediacy, promptness, and privacy.

How would this new reality, the reality of the elephant in the room, arbitration and mediation, impact the legal system, I asked.

Unlike courts, arbitrator's reasons are often private, usually private, and never enter the public legal domain.

Unlike courts, arbitrator's decisions do not add to the core of the common law. *Stare decisis* doesn't apply to them, and whole sectors of the legal firmament, notably contract and construction law, are removed from the common-law pile.

When this happens, who knows what's in the pie, what most of the pie is made up of? How will people know how to govern themselves? How will the law grow?

Of course, arbitrators are bound to apply the law of whatever jurisdiction the arbitration

agreement specifies, but how are the nuances of a particular country's law to be interpreted?

How have they been interpreted by other arbitrators? Nobody knows.

And what will be the implications on the law's ability to change and grow to meet future needs in an evolutionary orderly process?

Without Courts of Appeal to determine what the rule of law should be, how will we develop a sophisticated binding legal system when we face new issues?

Will a system of principles we call the law on a given subject be reduced to a collection of individual reasons of which no one knows the details?

Beyond these queries lies an overarching question: What will become of the rule of law as we know it? The idea that there is a set of uniform known principles and rules that govern everybody equally, will it be replaced by a series of nuances and particular rules developed in private, in secret, by particular arbitrators of which no one knows? Where, in the end of all this experiment, will the rule of law stand?

I concluded my article on the vanishing court with a plea -- and that was quite a few years ago -- that we stop the trend to arbitration and

mediation and find a way to keep important issues before the courts, and I still think that should be the case. But my vision, at that time, was binary, more either the courts or alternate dispute resolution.

In the years that have passed, I have come to realize that maybe that's the wrong vision. Maybe the vision is an inclusive one.

We need courts, to be sure, to resolve the big legal issues, and we need to do more to allow people to access those courts, but we also need mediation and arbitration.

The world is simply too big and too complex for state-appointed judges to resolve all or even most of the disputes that arise.

My vision is no longer binary, but inclusive. We need courts, and vigorous and rapid dispute resolution mechanisms like arbitration.

With my new vision of the respective role of courts and arbitrators, ADR more broadly, came a new conception of what we need to do to help arbitration contribute to the development of the law.

After all, if alternate dispute resolution, ADR, arbitration, mediation, are part of the legal system, they're not outside it, they're in the room, then they need to uphold the highest

standards of the law.

If they are part of the legal firmament, we must work to ensure that they promote what we have come to think of as the rule of law in its broadest sense.

Today I'd like to suggest that this entails two things. We must first and foremost ensure that individual arbitrators, dispute resolvers, apply the standards, live up to the standards, high ethical standards that are the equivalent of what prevails before the courts and generally throughout institutions upholding the rule of law.

And secondly, we must build up, institutionally, support for that so that there are widely accepted standards so that there are mechanisms in place that ensure that people practicing ADR will maintain those standards.

So there's two perspectives, an individual one and an institutional one, and I'd like to briefly say a few words on each.

The first is how we, as individuals, develop and maintain professional standards and accountability.

Over the course of the centuries, lawyers and judges, in the common-law tradition, developed rules of professional conduct that promoted respect for the legal profession and the courts.

It didn't happen by magic that the courts became independent, that their word became the law. That happened because people respected them. They respected the integrity behind the process.

They respected the ethics that governed the process; and finally, they, through that respect, were able to adopt them as what the legal norm should be.

Because of this respect, because of the high ethical standards that developed in the profession and on the bench, people came to respect the law as a whole, even when, perhaps, they didn't agree with a particular decision, and uphold it and apply it in their decision making and in their lives.

The result was the creation of the edifice we call the rule of law. The edifice without which our society, as we understand it, would be impossible, and we would fall into chaos, or at least, looking at the news recently, more deeply into chaos.

Arbitration and other forms of alternate dispute resolution must follow the same policy, I think, if they wish to develop into a respected branch of the legal system, and they can do this.

There are two sort of reasons why I think they will and must do this. The first is that

arbitrators, alternate dispute resolvers, must continually remind themselves of the fact, and it is a fact, that they are bound to uphold the law.

There's this idea out there sometimes that independent ADR, dispute resolvers, are kind of a maverick. If it's not offensive to say it in this audience, the cowboys of the world who go out and decide things their own way.

Well, there's a certain attractiveness to that image, particularly in Calgary, but the fact is, I believe, that arbitration, and as I'll discuss in a moment, even mediation, is really grounded in the law, and you can't get away from that. It is under the umbrella of the law.

And arbitrators, no matter what their decision, as individuals, have to remember that what they're doing is a legal thing. It's a legal process. They may not be sworn in to uphold the law in the same way as the judge is in a court, but they are doing a legal thing.

First of all, their powers come from the arbitration agreement, which is a contract, and that is a matter upheld by the law; and even though there may be no appeal from their decision, they have to apply the law, the law of whatever country or jurisdiction is specified. They're not free, the arbitrator is not free to water down the

law or abandon the law.

Where does the arbitrator find the law? In applicable legal codes, statutes, or the principles of common law. Sometimes, as when the applicable law is the foreign country, one even brings an expert in to tell you what the law requires in that particular case.

A special word about mediation in relation to the duty to uphold the law. Most, if not all, mediation is based on the foundation of existing law, I believe.

The starting point is what courts would do if the matter went to court. That established, discounts for risk and costs of litigation kick in.

Even interspaced mediation, where risk and costs are paramount considerations, must, to some extent, to be fair, take into account the underlying substrate of the law. The watchword is always fairness, and fairness can never ignore the law.

So I've talked about how arbitrators, mediators, really are exercising, and have to continually remind themselves, they're exercising a legal function and apply the law.

The second thing I think they need to remind themselves of is that they are accountable.

Again, the cowboy image comes to mind. I know I'm going to offend all sorts of people here, but I was once a cowgirl. The image comes to mind that there's no accountability.

The arbitrator gets her mandate. She shows up to decide the case. She listens. She gives a decision. She collects her fee. End of story. No appeal. No recourse, not even any concern with enforcement. That's up to the parties and other enforcement mechanisms.

Where is the accountability, you might ask? And, yet, I think accountability is there, even in alternate dispute resolution.

One way of thinking about accountability of arbitrators and ADR people is by considering how judges are held accountable.

It was often said, at least when I started as a supreme court judge and even when I was chief justice, "Well, judges aren't accountable. They're these unaccountable people who aren't accountable to the electorate, they're appointed, and there's no mechanism to hold them accountable."

Well, I argued, and I convinced myself that that wasn't true. While it would be inappropriate to have judges held accountable through the electorate, although some states in the United

States do it, it's certainly not regarded as appropriate in our system. While it would be inappropriate to do that, there are other mechanisms of accountability.

First of all, there's the open court. The judge, with very rare exceptions, operates in open court where everybody can see what is going on, where reporters can come and the press can come. Everybody knows, so the judge has to behave, and the judge has to stay within the rules.

Secondly, another mechanism of accountability for a judge are reasons. The judge should give reasons, and almost always does, and it's become a norm that courts give reasons. Judges are accountable through their reasons, through an elaborate process of explaining why they arrived at the solution or the decision they did.

And then judges are accountable through judicial discipline bodies, like the Canadian Judicial Council, or for provincial court judges, provincial bodies, which ensure the judges comply with appropriate ethical norms.

And, finally, there's a very important judicial method of accountability for all but the apex court, which is appeals.

I used to always feel very secure when I was a trial judge in making a decision because I would

say to myself, "If I get it wrong, they'll will fix it up in the Court of Appeal." And that allowed me to sleep at nights when I sometimes went a little too far on an anti-legal proposition.

However, that is a method of accountability. If parties have a decision where they think it doesn't follow the law, they can appeal it, and they often do.

Now, that's the accountability in the judicial field. What is it like for, let's take first, the arbitrators?

Arbitrators, like judges, are not accountable at the ballot box. They're accountable, it seems, to their parties, but just to fulfill the contract. Nor are arbitrators, unlike judges, accountable through the open-court principle. Most arbitrations take place in private.

Arbitrators are, however, accountable, I believe, in several ways. First, they are accountable through their reasons. It is now standard for arbitrators to give legal reasons on the facts and legal conclusions that lead to their decision.

It is true that these reasons are usually private, reducing their force as a mechanism of accountability; yet, arbitral reasons can show

lack of jurisdiction, or clear legal error, and then they can be appealed, usually. And if they're totally inadequate, that may also be a ground to challenge reasons, and the decision.

And beyond that, as I'll mention later, some arbitral bodies are even starting to talk about the publication of anonymized reasons so that the reasons can be read by other practitioners and by the public.

Second, I think, our arbitrators are accountable through their contractual commitment; and, of course, this is obvious. They have to conduct themselves within the four corners of the agreement, and, if they don't, there's an obvious want of jurisdiction.

And, third, arbitrators are held accountable by the consequences of not adhering to their professional responsibilities. If they fail in their duties, word gets around and nobody retains them anymore. They don't have much work.

Or it may be that arbitral institutions, like the chambers that house articles or Arbitration Place in Toronto or in their equivalents here and elsewhere, may not invite them to become part of their group.

So there's kind of a self-regulating accountability, too, that takes place by word of

mouth.

So while the accountability of arbitrators is different and maybe not as extensive as for judges, it is there. And every arbitrator, as she sits down or he sits down to do their work, must remind themselves that there are these mechanisms of accountability which will help them stay within the room that I described as the rule of law.

Now, I want to make an aside here. Pleasing the parties, in the sense of fulfilling one's duties as an arbitrator, should not be confused with the mistaken idea that an arbitrator has to please a particular party on the dispute.

Every arbitrator must always be totally impartial. An arbitrator is never accountable to one of the parties to the dispute as opposed to the other.

The fact that an arbitrator on a panel may have been nominated by one of the parties to the dispute does not diminish that arbitrator's duty of impartiality. The arbitrator's basic obligation is always to act according to the law and impartially and arrive at just decision.

While I've suggested that arbitrators are accountable through their reasons, their contractual commitments, their professional responsibilities, to those mechanisms, I would add

two more methods of accountability that seem to be developing in recent years.

First, arbitration centres in locales such as London, Paris, Toronto, Singapore, Hong Kong, to name only some, developed standards and norms which govern arbitrators who are members of those centres. They hold conferences where norms are discussed. The same may happen more locally.

And when you're talking about construction law arbitrators or family law arbitrators who get together just to talk about what standards they think should govern -- perhaps some of that is going on here today -- this is exactly how the standards that informed judges and lawyers practicing before the courts were developed, when you think about it.

People in the profession got together, talked about what they were doing, and, therefore, developed standards of account, and that helped raise the level of accountability.

So I've been speaking about developing and maintaining professional standards and arbitration through reminding ourselves that we have to apply the law as arbitrators; and, secondly, that we are accountable in various ways.

Mediators have similar constraints. They give reasons -- they may not give reasons, rather.

They do not give reasons. And if they're unsuccessful, the parties go away.

Where is the accountability? Where is the need to adhere to the law, you say? And, yet, the costs of mediation are not insignificant and mediators owe it to the parties, I believe, to retain and prepare fastidiously, to act fairly, and never betray the confidences entrusted to them.

I had to review all this when I was asked to be a mediator in a case, and I found that I had worked many, many, many hours simply to prepare, to get ready to be the mediator, because I had to know those things.

I had to know what the pleadings and documents said. I had to know what the cause of action was in each case. I had to evaluate the strengths of the causes of action and the defences. I had to think about how much it would cost and how difficult it would be it put this through court.

I learned that mediation is more than getting into a small room with parties and banging their heads together. It's an intensely legal endeavour, and, in the end, one that entails applying the law, in a sense, and accountability.

So enough on the individual side of the

thing. In summary, whether a person acts as an arbitrator, a mediator, or some other form of dispute resolution, adherence to law and accountability are essential to ensuring high ethical and professional standards.

Arbitration is no longer -- and, again, I'm going to step on toes -- the wild west of the legal system. It is an integral part of everyone's system governed by its own set of professional responsibilities.

Well, let me get to the second and briefer part of my talk, and that is the need to institutionally develop a deep and rich legal ADR culture.

So far I've been discussing the need for ADR professionals to adhere to standards, professional standards, and why and how that is happening; but, you know, it's not enough for individuals to say, "I will act in a professional way."

Every profession, every system of governance, requires institutions to back that up. And I believe that, as arbitration and mediation and ADR mature, we will find more institutional backup developing.

Now, we are just at the beginning of this story, but it is a promising story, I believe. We are seeing gradual development on the

institutional side of ADR, particularly in the field of arbitration, that will promote adherence to the rule of law and accountability.

First of all, I mentioned already the publication of arbitral decisions. This is mostly on the international level, but it's something for all of us to watch.

The International Commercial Court of Arbitration just came out with something that proposes this: If the parties don't object after two years, the reasons can be anonymized -- nobody's quite sure what that means -- but names are out, at very least -- and summaries are created and reported.

So what we have here is exploration of the idea that arbitral decisions, at least in the international sphere, but it could happen anywhere, perhaps should be reported, in some sense, so that a practitioner or a construction lawyer or a party who wants to inform itself of the law can go and see what other arbitral panels and other arbitrators did on that situation.

I do work in Singapore, and Hong Kong, and London, as well as out of Toronto, and more and more people are talking about this. So it is something to watch for.

A second thing that's happening

institutionally is that bodies are developing rules of professional conduct and discipline.

The International Bar Association, the London Court of International Arbitration, the Canadian Institute of Arbitration, these bodies, to which practitioners adhere, are developing rules of conduct. The IBA has something on party rep's conduct. The London Court of International Arbitration has its rules on all international arbitrations. And if you look it up, and you can, you can Google it, there are speeches under the enticing tactic, for the more aggressive lawyers among you, of guerilla tactics.

So there's all sorts of stuff out there, and what we have are these institutions developing rules of professional conduct and, in some cases, discipline.

Now, the Swiss have proposed a body to discipline -- this may come as a shock, and a worrisome shock to some of you -- arbitration counsel.

They think that perhaps we should set up for international arbitration an international body that will actually, in the same way a law society would monitor a practitioner's conduct, look at the conduct of arbitrators.

I have to tell you, it's not going over

terribly well so far. It has been quite controversial. Lots of people are saying leave it to wherever the person is licensed, even if they don't have to be licensed, leave it to guidelines and codes of conduct. But it will be interesting to watch what comes of this.

Of course, the ADR Institute of Canada has its own code of ethics. Enforcement may be another matter.

Finally, I think that we are seeing a growing development of arbitration governance bodies. I've mentioned a few of them.

They all go by these acronyms that I can barely pronounce, but you know them as well as I do, as well as centres of arbitration in the places I've mentioned and elsewhere, which are developing their own standards and their own norms of conduct.

And how do they enforce them? Well, maybe not very effectively, in the sense that law societies would drum someone out of the practice or whatever, that could be argued.

However, there is an enforcement informally because people may or may not be invited to join a certain institution, et cetera, and that can be very important, and it is very powerful.

In short, I think that we're seeing a variety

of institutions which are working on ways to support the growing part of the legal pie occupied by ADR or, to mix metaphors, the growing space in the room that the elephant of ADR is taking up, and I believe that this is as it should be.

To ensure results that are consistently just, arbitration, mediation, and all forms of alternate dispute resolution, I think, need to commit themselves to building a supportive legal culture within which, in their particular domain, professional associations, ongoing education, like today, institutionalized ethical standards are essential to building and maintaining a supportive legal cultural for arbitration and mediation.

And together, these communities will provide the institutional foundation, which I believe will help alternate dispute resolution stay and play a very positive role within the overall rule of law.

So let me conclude. Arbitration, mediation, other forms of ADR have become a vital part of the legal system in Canada and the world. They are a permanent part of the legal constellation.

We need courts, and must work to ensure they maintain their historic role of interpreting the law to ensure that it stays in sync with our rapidly changing world, but we also need arbitration, mediation, and other forms of dispute

resolution. They, too, are a vital part of the legal firmament of the 21st century.

Viscount Sankey's metaphor of the law as a living tree, capable of growth and expansion within its natural limits, is more important in the exponentially developing world we live in today than ever before; but it can no longer be confined to the courts. It must extend to all forms of legal dispute resolution.

The way forward, I believe, is not to denigrate or suppress alternate dispute resolution. It is rather to continue to strengthen it by giving it the professional and ethical underpinnings necessary for it to mete out justice and sustain the rule of law.

Having acknowledged that arbitration, mediation, and other forms of dispute resolution are a permanent part of our legal system, we must commit ourselves to developing professional competence and ethical standards within them. The result will be a stronger legal system for everyone, a system in which the rule of law remains supreme.

Thank you for your attention.

MR. DERER: Justice McLachlin, thank you so much for your words of wisdom and insight. I

started taking notes of some of the points you were making, but then I gave up to just enjoy listening to them.

But it's very encouraging and inspiring for me, and I'm sure for Marney and everyone that's gathered here, to hear you talk about the inclusiveness and the need for private dispute resolution within the same room with the traditional judicial process.

And in a moment, Marney will be guiding you to another form of room here where, as you are aware, there will be a conversation unfold, and we're all very much looking forward to that.

And in a moment, I'll pass the mic on to Marney to talk about whatever else you might have time for this afternoon. We feel very privileged that you saw fit and could manage to squeeze us in with your very hectic international schedule.

Now, having said all that, I want to bring you back to art. And so, as a token of our appreciation of the time that you have devoted to us here, we have a small gift of appreciation that we'd like to give you.

So if you wouldn't mind coming up to the podium, we have this gift, and I know that you must travel very lightly because you're back to Ottawa, so I was going to invite you to open it.

I wrapped it, so it's bound to be full of holes, and so it should be easy to unwrap. And perhaps you can share your reaction to it, and I can give you just a very brief background to it.

JUSTICE MCLACHLIN: How exciting, a real surprise. Oh, it's beautiful. Isn't that lovely?

MR. DERER: So as most of us know, giving art as a gift is a very risky endeavour, and it took a little bit of convincing, on my part with Marney, that we would go down this road.

But this is a painting by R.F.M. McInnis, and my research tells me that you've had some conversations with him, have spent some time with him, may, in fact, even have some of his pieces in your personal collection.

And the subject matter is Waterton, Waterton National Park, which is in the extended backyard to where you grew up; and so we thought that this was a gamble worth taking in terms of likability and history.

JUSTICE MCLACHLIN: I am so touched.

MR. DERER: So we hope you will enjoy that. We will find a way to get it to you so that you don't have to struggle with it this afternoon and on your flight home.

JUSTICE MCLACHLIN: Thank you. Allow me to say I'm really, really overwhelmed. I love this

artist, and I think he captures the west, which is dear to my heart and the part of it I lived in, as no one else; and there's a serendipitous kind of story about it.

When I was first named a judge in 1989, the Supreme Court of Canada -- no, it was a year later, 1990, when Tony Lamer became chief justice, and he installed himself in the big corner office in the Supreme Court, as chief justices are required to do.

And a painting, a very large painting about, I don't know, 4 1/2 by 3 1/2, a very large painting, appeared on his wall. And it was a painting of some hills, and then some grain elevators, and then a little winding road going toward them.

And I was in his office, and I said, "Tony, where did you get that painting?" He said, "Oh, it's from -- it's being loaned by an art gallery." And I said, "That's the town -- that's just outside Pincher Creek." I said, "That's where I grew up." He said, "No, no, no, no, no." I said, "Tony," -- Chief Justice, excuse me -- I said, "You know, I know you like the painting, but if you ever get tired of it, I'd like to buy it from whatever galley has it." "Well," he said, "I'm never going to give it up." So that was fine.

And so he was chief justice until the end of 1999, and they cleaned out his office and they named me the new chief justice, and there was an interim few days. I came back and the painting wasn't there. And I thought, "Oh, that's interesting." And this is going on too long, I'm sorry.

But then one day a woman from the court brought the painting, and she said, "Do you want it hung over the fireplace?" And I said, "Oh, yes." I said, "I love that painting." I said, "What's the story?" She said, "Well, the gallery has gone bankrupt or something, and the trustee said not to worry about it, so just leave it."

So I thought, well, this is a court of law. I won't worry about the legalities too much. I'll try not to.

But, anyway, she then came back the next day with a little bronze plaque, and it said, "R.F. McInnis, Pincher Creek." So I knew I'd landed on my feet. And I still have the painting. I have legally acquired the painting.

Thank you very much for this wonderful gift, which I'll hang right beside it. Thank you.

MS. LUTZ: Okay. So this is the fun part. The next part is really fun because many of

you were kind enough to send in some questions that you had for Justice McLachlin, and so she and I are going to retire to the sitting area. And I have some questions that have been sent in in advance; however, I would love it, as would she, if there are some questions that people want to ask of her just in a chat sort of a style. So please think about whether you have anything you want to ask. I'll get us started with some of the questions from the list, and I might employ my dear partner with the microphone to go and find you if you want to ask a question of Justice McLachlin. So we're just going to move over here.

Now we're in the living room. So, Justice McLachlin, one of the questions that was submitted to us was tell us a little bit about what your life is like since retirement. What are you doing, and how are you spending your time?

JUSTICE MCLACHLIN: Well, it varies from day to day. I'm doing a lot of public speaking. I'm doing some dispute resolution. I sit on the Singapore International Commercial Court, and I sit on the Hong Kong Court of Final Appeal. Neither of those are full-time jobs. I was four weeks a year in Hong Kong, and maybe one or two times a year in Singapore.

I'm doing some arbitration, mediation. I've

done a little work with -- which I really enjoy -- helping lawyers who are going to the Supreme Court of Canada, will try out their case and their arguments, and I've done a little of that kind of work.

And I'm writing. I have completed a memoir which takes me from my roots in southern Alberta through to the present, and it will be published in the fall with Simon & Schuster. And then I'm supposed to get to work on a second novel at some point. So I'm pretty busy.

MS. LUTZ: I can see that.

JUSTICE MCLACHLIN: I have to look after my husband, too, so....

MS. LUTZ: No doubt. And so tell us about your second novel. Have you started to formulate that yet? Are you going to take us back to Jilly and adventures?

JUSTICE MCLACHLIN: Well, there seems to be some demand. I get letters and comments all the time. People want a sequel. So I'll certainly try to do that, but I haven't given it a lot of thought yet. So I just don't know whether I'll even be able to, but I'll try.

MS. LUTZ: Okay. Excellent.

Now, before I keep going, any questions out there? Anybody? All right. I'll keep rolling.

MR. DERER: We have one, Marney.

MS. LUTZ: I'm so sorry, I didn't see.

AUDIENCE MEMBER: Hi, Marney.

MS. LUTZ: Hi, Laura.

AUDIENCE MEMBER: So, Justice McLachlin, you mentioned that you're now helping to prep lawyers for -- in the Supreme Court, and just to -- in all of your years, what would you say is the number one mistake that lawyers make for that particular kind of advocacy and the number one thing that you do to help their --

JUSTICE MCLACHLIN: I'd love to have one, but there's lots. I always tell people the most important thing is to really have thought through your case critically, not just the strong arguments you want to make positively, but where your weaknesses are.

Because until you've done that, you're not going to be able to respond to the questions of the court, and you're not even going to be able to present your case in its best light.

It's often quite effective for counsel to say, you know, "There's two issues in this case. If you're against me on the first, then I'm going to lose. But, you know, I really think I have a good point on the second." What I'm getting at here is, come across as honest and really knowing

year case, the good parts and the bad parts.

And when I've done these -- it's only been a very few times -- rehearsals with lawyers, the thing that I often discover is that they aren't as aware of the weak points in their case as I would have expected them to be. You know, they might have won at trial, won in the Court of Appeal, and then say, "Well, you know, we got this great case."

One of the valuable things I can do as a lawyer is say, "Yeah, but there's that part in the reasons of the Court of Appeal that, you know, I could see some of the people on the Court of Appeal questioning that or asking you about that, and what are you going to answer?"

And so I would say think the case through in its entirety is the most important thing. Good question.

MS. LUTZ: Okay. Are there some cases that have been heard by the court since your departure that you wish you had been there for?

JUSTICE MCLACHLIN: Oh, yeah, every one.

MS. LUTZ: Okay. Any one in particular, or just all of them?

JUSTICE MCLACHLIN: No, I'm not going to start naming names, but, you know, it is -- I'll be very frank. I do miss the court, and I miss that work.

It was very wonderful work and very engaging work, and it was a wonderful privilege to be there. But I recognize the time comes to move on, and I'm very happy about that, too.

MS. LUTZ: So just staying with the theme of the court, statistics are showing that there's a trend towards more and more split decisions on the court.

Do you have any comments on that, on whether that's good, bad? Is there anything that the Court ought to be trying to address there?

JUSTICE MCLACHLIN: Well, I'm not there now so I can't comment on what's happening.

But when I became chief justice in 2000, and this wasn't only my doing, but there was, at that time, a lot of criticism of the Court for having too many concurring decisions, split decisions, and so on.

I mean, I've always been a champion of a good dissent, if there's really a reason to do it, and I've done it myself, not infrequently, and I don't think I've ever regretted it because I really dissented when I thought I had to on an important point.

But we decided in 2000, as a Court, that we would really try to strive aspirationally for one main set of reasons that gave a clear answer to

all the issues; and if there had to be a dissent, if there were to be a dissent, fine, it should be on special points that are identified so that people can see where the dissent is parting, and that, generally, we would discourage collateral reasons.

And so what developed was a culture in the court of people working very hard to come together, and that's a lot harder work, in my respectful opinion, in my experience, than simply sitting down and writing your own reasons.

If you start off with the assignment, one person is going to write for the majority, and that you are not going to -- you're going to try to avoid collateral reasons, then that involves a process of collaboration where the person who has written the first reasons might have to alter them somewhat, maybe not in any material particular, but, you know, change a line of reasoning somewhat, do whatever to allow everybody to sign on to it. And that was a very healthy process.

In my opinion, that really strengthened and enriched the decisions that did form the majority decision.

I'm aware there's another argument out there, which is often presented in England, that you get a lot of individual scholarship in various sets of

concurring decisions. So that's the counterargument; and people can have their own views on which is the better system.

But when I was there, for most of the time, we really did try to work and work very hard to get single sets of reasons, not too many concurring.

The way I looked at it was this. Under the *Supreme Court Act*, the job of the Court was to give guidance, maximum guidance possible. The more guidance, the better you're doing your job.

And so lawyers and litigants and the public should be able to read the decision and easily pick out what the law is on the various points and where they differ, if there are differences, and it should be easy to do that.

And so that was always my goal. But other people, I recognize, may have other views.

MS. LUTZ: Right. Thank you. Okay. Questions, others? I'm going to keep going until you guys start talking.

I want to ask you about your time growing up in Pincher Creek and what lessons, experiences, did you carry with you from that time and from your parents, your family life there?

JUSTICE MCLACHLIN: Well, integrity, hard work. I've always had a sense that, you know, you should

be who you are and not try to pretend to be someone you aren't, that you judge people by their integrity. And, by that, I mean not just whether or not they tell lies, but how they live their life, and that was the way it was in a small town.

The whole town brought you up. You knew the people, and people knew each other pretty well, and so everybody was held to a certain standard. Not everybody always achieved it, but they were judged by a certain standard.

And you felt that you needed to adhere to that standard: Honesty, integrity, paying your way, paying your debts, helping people when they needed help, and also, personally, a fairly strong libertarian, and may I say, a human rights component, an egalitarian component was there in that community.

Nobody was better because they had more money or more cattle or a bigger hat, or whatever it might be. You know, they were judged for who they are and what they did, and that was a lesson that helped make me, I think, who I am and helped me throughout my life.

MS. LUTZ: Your journey was a bit unusual at the time when you were growing up in the, what, late '40s, '50s, making the decision to go to law school.

And I heard you speak on this last month when you spoke in Calgary, and I would love it if you could relate that story of how you found your way to law school.

JUSTICE MCLACHLIN: Well, it was the mid '60s -- no, early '60s -- mid '60s, '64. Okay. I'm getting bad on numbers. But, anyway, I had graduated with an honours B.A., and my plan had been to go and do graduate work, but I started doubting that for various reasons.

And my fiance at the time, we later married, he came up with this idea. He said, "I think you'd be a good lawyer." And I looked at him and I thought, "Me a lawyer?" I'd always liked to argue and push points, but I'd never thought about doing the law.

I didn't know any women who had successfully done the law. I knew a few here and there maybe historically who'd been admitted, but it was just I'd never thought about it.

And so I went, I did some teaching in philosophy over the summer in Calgary, and then I went back to the ranch. And it was August, and I still hadn't decided what to do, and I decided to write to the faculty. So I wrote, "Dean, Faculty of Law, University of Alberta, Edmonton." And I wrote a letter, and I said, "Send me some

information."

So four days later, I went to the little post office, and I opened the box and there it was. And I took this letter out, but I expected a packet of information, and the letter was very short. It came from Dean Wilbur Bowker.

I don't know if anyone here remembers him, a wonderful, wonderful man, and a feminist in his own way -- he must have been. And he wrote back and he said, "Dear Beverley, you are admitted. Show up in September." So I decided to show up, and I stayed.

MS. LUTZ: And were you the only woman there?

JUSTICE MCLACHLIN: No, no. There were a number of women at that time. This was before the '70s when the class size went up to a third and half women. But we had a class of 65 and, to my recollection, there were maybe seven or eight women who started and maybe five or six graduated. Don't quote me on the numbers, but in that area, like, 10 percent, a little bit more maybe.

And so that was nice. It was good to have other women around, and female friends and that kind of thing, and it helped. But it was still very much a man's world. I mean, it was a very masculine environment, shall I say.

MS. LUTZ: It may not have changed that much. Just saying.

That brings me to an interesting question, I think -- sorry, I'm not giving you guys a chance. Anybody up there?

Okay. I wanted to ask you about diversity on the court, not just of gender, but diversity in general and your views on that and how important that is.

JUSTICE MCLACHLIN: Well, I think it's vitally important. I'll tell you a little story.

So I'm a trial judge in the '80s, and, in an afternoon, I'm assigned a matrimonial dispute, and it's a husband and wife who are divorcing, and the issue is how to divide the property. And they have a townhouse, and a car, and some other things.

And so the wife was there with her lawyer, and the lawyer was a woman, the court reporter was a woman. Everybody in the room, including me, was a woman, except for the husband, who was on his own.

And so we went through the wife's case, and then I said to the husband, "Now it's your turn to tell me your side of the story, and would you stand up."

He seemed to be having trouble standing up,

and so I thought maybe it was because he didn't have a lawyer, and I said, "You know, it's a very simple case, and I just need to hear your side of the story, and you shouldn't worry about not having a lawyer."

And he stood up and he said, "It's not the lawyer." He said, "Frankly, Your Honour, I feel a little outnumbered looking at all the women in the room."

And I went home that night and I thought, well, how many times have women stood up in front of a courtroom and felt a little outnumbered? I mean, it's that real. It's that tactile. It's how you feel in your institution, which is the courts, and do you feel like you're facing outsiders who don't understand you. And it's not that men can't have those feelings and do the job, but it's about making our institutions inclusive and representative so everyone feels that they have a part of it.

And that's why I believe we need to have Indigenous people on the bench, and we need to have people of various minorities. I think it makes our justice system more welcoming and more credible.

MS. LUTZ: Thank you. Questions? No? I'll keep going. I've got lots, and these are

your questions anyway, so it's not like I can take credit for them really, but --

When you're out and about in the world these days, do people recognize you? Do you have that feeling of celebrity that, you know, Beyonce or somebody would have?

JUSTICE MCLACHLIN: I don't know if I have the feeling of celebrity. I don't know what that is. But, yeah, I do get recognized, but not always. There's still quite a bit of anonymity. But, yeah, a lot of people, especially in Ottawa where I've lived -- I now live in Vancouver and in Ottawa, but I've been in Ottawa for a long, long time. And, of course, Ottawa's very keyed-in to all the institutions, so there's a high level of recognition when I go to buy groceries or whatever.

And now I'm getting recognized by a completely different audience, people who have read my little fiction book, and they want to talk about that. But, you know, sometimes it's very uplifting. You get recognized when you don't think you'll be recognized at all.

So last winter I was in Vancouver, and I don't have a car there, I usually walk; and when I don't do that, I take a cab or take the bus. So I had my transit pass, and I wanted to go to a shop

up main street, so I got on the bus.

And it's a rainy steamy -- not steamy, rainy cold day, and I get on the bus, and this man is sitting opposite me. And he looks at me, and I look away. He looks like he hasn't slept in a bed for a month, and I'm sort of not too comfortable.

And then I heard a voice, and he said, "You're Judge McLachlin, aren't you? You're Beverley McLachlin?" And I looked back, and I said, "Yes." And he said, this man said, "Thank you for everything you've done for us and for the country." And he was so sincere, and he talked about a decision or two.

And I thought about how just a few blocks from there was the safe injection site that I wrote the decision that we had kept it open, and how there were lots of community courts that, I suppose, I'd supported in some way in that area.

And I thought, wow, that really taught me a lesson, never look away. You will be recognized by lots of people. And there are lots of people out there who don't look like they care about the law or care about the justice system, but they do.

So I went away with a different appreciation and a different lesson, a lesson in humility. So I do get recognized, and sometimes it's very nice.

MS. LUTZ: Excellent. Thank you. Okay. On the issue of decisions, of your past decisions, are there some that really stand out for you as being particularly satisfying or difficult?

JUSTICE MCLACHLIN: You know, in different areas, I always used to say, "Well, the decision I'm working on is the most interesting." Which it was, and it completely seized me.

One of the wonderful things about working on the Supreme Court of Canada is you get to work with so many different issues, and I often enjoyed the commercial, or construction cases, or even the bankruptcy or tax cases because they required me to do a certain kind of analytical work, which was lots of fun, and they were important. And so I liked those things.

But I guess the ones I really look back on are Indigenous rights. I think the Court, during the time I was on it, before I was Chief Justice and continuing on after, did a lot of groundbreaking work on Indigenous rights, which I think was very important. It could have gone otherwise.

It was important work and, for the most part, I take satisfaction in that work. I think the court did quite well.

And the other ones are the ones that involve

people's life-and-death issues, be they rights to assistance in dying, or a safe injection sight, or discrimination against women in different ways, and sexual assault trials, or prostitution, or whatever you like, these are really, really important issues, I think, for our country to get right, and I always found them fascinating.

And they were also very, very difficult, and sometimes difficult to decide, but that doesn't mean that -- that just means you have to be totally engaged and doing your very, very best; and whether it is with the right answer, it's for other people to judge. But I loved that kind of work.

MS. LUTZ: Thank you. We heard a little bit from some of our panels this morning, and, in particular, one of our panels had a retired judge and a sitting judge on it, and we heard a little bit about the judicial mindset and having to shift that to move into the ADR realm; so I want to ask you a little bit about that, and you addressed it a bit in your talk, as well.

So how do you make the transition from that judicial mindset to the ADR mindset?

JUSTICE MCLACHLIN: Well, I probably haven't really made it, but it certainly is a different mindset, and that was one of the things I had to

learn and am learning.

You know, a judge has a certain amount of control over the situation. And so I'm a Chair on my first arbitration, and it's quite a big matter and there's counsel all over the place, and there's all sorts of problems getting dates -- and all of you would be familiar with that -- and I get the feeling that people aren't really trying very hard.

And I said -- this is in a conference call -- and I said, perhaps a little bit sharply, I said, "Well, is this arbitration going to happen or not?" And there was just this deathly silence.

And then one of my co-arbitrators said, "You know, we're really gentle with the parties because they're the ones who are hiring us." I said, "Okay. Lesson learned." But, you know, they got a date really quickly. Everything went really well, so I don't know who was right.

But I think there is an institutional difference there. The arbitrators are hiring you, you're bound by the agreement, and you have to be fairly deferential on procedural matters, and so on.

But at the same time, there's something creeping into arbitration that I hear about on the larger ones that is kind of an over -- it's

almost, like, happened to commercial litigation in the courts, you know, a kind of slowness and procedural niceties getting in the way of actually -- and people arguing about fine points against each other rather than what's really at issue.

And coming at it as an outsider, I think that's a challenge for arbitration. I think it's a challenge for the Courts. And, frankly, maybe the Courts haven't done as well at it as they should have.

But there's something to be said for finding a way to resolve the various procedural and personal points that people want to take, and say, "Look, what's really at issue here, and how are we going to resolve this thing fairly for everybody?" And let's not waste too many days, you know, arguing about things that aren't going to matter in the end, like, whether you got 40 particulars or 25 particulars or, you know, that kind of stuff. You just need to know your case.

I learned a lot in Singapore. They have a very sophisticated arbitration, and I'm not part of that arbitration part, but they also bring some of the same techniques into the International Commercial Court where I've worked.

And the idea of the International Commercial

Court is very like an arbitration, but it's a court; but, basically, it's voluntary jurisdiction, so if somebody's put that they'll go to this court in their agreement or they agree on it, and I may be exaggerating a bit on the timelines, but as soon as the case is filed, within a week or so you have a meeting with the judge who is going to hear the case, and it's only on procedural matters, and you lay out the whole process.

And within another couple of weeks, what we would call the pleadings or the whatever, are settled, and any fine points are brought to the judges and there's conferences, and that gets hammered out, and then they talk. They don't have any formal discovery, but there's exchange of documents on the pertinent points, which, by then, have been identified, and expert reports, and all of that kind of thing. And all that happens very quickly; so within a period of two or three months, you have everything ready to go, and decisions are made immediately as the issues come up.

If you can have a trial within three months on a complicated issue, and then you can have an appeal within another two or three months; and in each case, the aim is to give reasons within a few

weeks. I mean, it could be something so complex it would take longer, but normally that would be the trajectory.

So the idea is that within a year from beginning, you would have your answer, which is quicker than some arbitrations, right?

MS. LUTZ: Yes.

JUSTICE MCLACHLIN: But I think whether you're talking about a court like that or talking about arbitrations, there are things that we can learn abroad as to how to do things better.

MS. LUTZ: Interesting. Okay. Yes, Andrea?

AUDIENCE MEMBER: I'll speak loudly. Over the course of your career, whether as a lawyer or sitting on the bench, do you recall any big lessons that you had to learn the hard way?

Because I know that this is a career with a steep learning curve, no matter where you're at, and it never feels like you're done learning -- at least where I'm involved, because I'm relatively junior, but do you recall any of those big lessons that you learned in your career?

JUSTICE MCLACHLIN: The biggest lesson was simply to have the confidence to proceed and make a decision reasonably quickly.

When you're first named as a judge, I'd never

been a judge of any sort, and I didn't have much confidence, and my first case they settled, and I thought, "Well, they thought it would better to settle than have me decide the case." And the court clerk said, "No, no, no, no, no. They really got talking to each other, they saw you listening so hard." He was very kind. He saved my judicial career.

The second thing. I was a fairly young -- I was fairly junior on the Supreme Court, and I had a wonderful chief justice named Allan McEachern. Some of you may have known him.

And so he always had an open door when he was sitting himself, which was often, and so I can't remember what the point was, but the Charter was very new, and I believe it was some basic interpretational point on Section 7.

And I thought, oh, my god, no judge has ever ruled on this. What am I going to do? And it was also kind of interlocutory. And so I said, I have to go see the chief justice about this and he'll know what to do.

So I went in and saw him, and I described my dilemma, and he just looked at me, and he smiled, and he said, "Do the right thing." And that was the best thing he could have ever done for me. What he was telling me -- he was sending a lot of

messages.

He was saying, first of all, it's your problem. You're the judge. I'm not deciding this case. I'm not in the courtroom. You've got to do it.

And, secondly, you've got to have the confidence to do it, and you've got to do it, you know, reasonably promptly.

And, fourthly, and not least, you can do it. And all of those messages helped me enormously.

MS. LUTZ: Interesting. Okay. Thanks. Good question. Dale?

AUDIENCE MEMBER: You spoke about the difference of mindset between being a mediator and being a judge. Do you have any views on whether it's appropriate for the courts to house mediations and arbitrations versus having it completely outside the court system --

JUSTICE MCLACHLIN: Well, I don't know. I think it can mesh with the court system quite well. At a certain point, it's probably in the parties' interests, in a complex piece of litigation of any complexity, really, to sit down with somebody to get a reality check on the risks, what it's going to cost, what they could, perhaps, settle for now, and that helps everybody.

Even when I started practicing law in

Edmonton in the late '60s, you know, 90, 95 percent of the cases settled. It was done differently than perhaps now.

The lawyers did a lot of the settlement work in their offices. Very seldom did you go out to a mediator, but they were pretty effective, and there's just no way the court system can handle everything without a lot of settlement. It's there as the final backdrop, but everything would come crushing to a halt.

So there's nothing wrong, I think, with courts or court sets of rules saying, at some point -- I think it should be very early in the stage -- you should have a reality check.

Whether judges should get involved in settlement conferences in late stages is something I've never been absolutely convinced of. I'm not saying it's wrong, but there's a danger of actually almost replicating the trial in some cases. So that diminishes the advantage; and, by then, often positions are quite hardened because everything has developed so far, so it may be less effective. And it would have to be done, obviously, at that point, by I think a judge who is not going to hear the case because you'd get into the merits and so on. So it's a little more complex there.

But I really believe on a fairly quick -- and then I also believe that if the first mediation -- sometimes the first mediation doesn't work because there's just too much unknown. The pleadings haven't been properly fleshed out. People don't have their evidence, more importantly, lined up. They don't know whether they've got a hundred thousand dollar case or a ten thousand dollar case because they don't know what this or that witness will say or what this party will or will not do.

So those are unlikely -- they may not settle at the first mediation, but you may make some progress in bringing people together, so then have a second or a third a little later on. I think it's worthwhile. I don't know what the question was, but, anyway, I rambled.

MS. LUTZ: That's great. Thank you. There was another question over here. Yes?

AUDIENCE MEMBER: I was wondering what your famous piece of advice is for a young lawyer that's just starting out with their career?

JUSTICE MCLACHLIN: Well, I'm often asked that, and giving advice is so hard because I just never know what -- you know, people are so individual. But I always tell people just do your best job and work as hard as you can.

And that doesn't necessarily mean 17 hours a

day either. But do a good job at what you're doing and give the value at it. And I think things will usually work out, if you are a good lawyer and you're doing a good job for your clients, and you know when that's happening.

If you're in a really frustrating situation where you think things aren't going anywhere for you, you're consigned to doing work you're not interested in or that you don't think fully uses your legal ability, then, at some point, you need to consider your options, I think. But if you think you've found where you should be, the area of law you should be in, then I would just say, do your best and don't give up.

I mean, I think some people find it hard, and they, quite understandably, decide that practice isn't for them, or whatever, but hard things come to everybody. Certainly they came to me, and I could have given up, but I never even considered it an option, so I muddled through.

So maybe that's the best advice I can give. Find something you really think you like and that you feel is useful, and then don't give up too easily.

MS. LUTZ: Thank you. Yes, Perry?

AUDIENCE MEMBER: You began your remarks with a reference to -- this is something that some of us

have watched. Is there something or is there some form that you think would be useful on the civil justice side to make the trial more contracted and bring it back to the current development of the law?

JUSTICE MCLACHLIN: There's probably a lot, but, you know, I am not an expert. But I do think that we should look at how we can make trials more effective, whatever that means for whatever area.

Sometimes it means a degree of specialization in a judge. Sometimes it means making sure that the procedural niceties and delays don't interfere with getting to a trial on the issues as quickly as you can. And there are a lot of procedural steps where you could do an analysis and say, like, what will help us better? And I don't think we're doing the empiric work to do that.

For example, when I was in the courts, people used to argue about whether it was better to wait until all the pleadings and discoveries were complete to set a trial down, or whether it was better to set the trial down, get a date, and then make everything else conform.

I had my own views on it. I thought that the latter view was the better. But it was an argument impossible to win because nobody was, apart from anecdotal, keeping track of the

statistics. We don't know what we're doing.

I would love to have more stats on the time that is taken on the average for different -- before the trial vanishes altogether, and we'll never get them. You know, where are we spending our time and how can we, looking at it objectively, get a better result? How can we make the process more efficient?

And so I'm not here to say change this rule or that, but I am here to say I think this really needs a hard look. And the problem is that -- I'd suspect you'd get from a chief justice or the trial court of this province or any other, is that they're so hard put for money, and funds, and judges -- they don't have enough judges.

That there's never enough luxury to say, here's a million dollars to set up a study of how our court is working, where we're wasting time, how we could -- and then we could call in experts and do this better. And so it never happens, so we just go along in the same old way, and it seems to get worse.

Failing some sort of statistics and empirical work and new academic and judicial thought on this matter, then we can look elsewhere, I think, to other jurisdictions to see how they're handling things. And in some jurisdictions in the United

States, courts run really well. There's lots to choose from. But you can pick up tips here and there.

You know, I was at a conference, and in-person unrepresented litigants are a big issue for judges, right, everywhere, here too; and this judge from California said, "Well, here are five tips that we do." One of them was give firm expectations of how much time is going to be spent. Okay. You're a litigant, you got your day in court, but you're not going to get a day, you're going to get an hour, so tailor it.

And another was: Swear in the witness, the person, in-person litigant, and they're not a witness yet, they're a lawyer, but swear them in at the beginning because you know that they are going to mix up facts and evidence and law, or non-law, as the case may be.

So she said, "We swear them in right away, and that way we don't get into issues of, oh, no, you can't do that here." And she had about five tips, and they all sounded -- I'm not practicing there anymore, so maybe somebody who's a judge in those courts would say, no, it wouldn't work. So I'm not here to say that's the recipe, but they all sounded like they made a lot of sense to me.

So I think if we could get out of the way of

thinking as judges -- I'm not want one anymore -- and just say, okay, can we do this better, and how can we do it better, and so on.

Look abroad. Try to get some sense from the stats as to what's taking so long and costing so much. We know part of what's costing so much, but I think we could maybe make some improvements.

But what seems to be happening now is that a lot of provinces are going to sort of alternate courts for anything but large amounts. So that's also another development that's happened with anybody, I think, really studying it very much.

Anyway, very depressing, but thank you for raising it.

MS. LUTZ: Good question.

JUSTICE MCLACHLIN: I hope the next generation does better than mine.

MS. LUTZ: So we probably have time for one or two more questions.

AUDIENCE MEMBER: Yeah, I have a question if you might have a few top tips on it -- effective mediation.

JUSTICE MCLACHLIN: Well, you're not talking to an expert here.

What struck me in the very few I've had is, as I said in my talk, the amount of preparation you should do. I had no idea what to do with a

mediation.

And I think that, to be successful -- and I haven't had great success. I haven't had great mediations, but I've only done one, I'll confess. This is getting worse and worse. Anyway, and at the end, the parties couldn't agree, but I learned a lot.

But one thing I did was talk to a very successful mediator, and he was wonderful. He said, "First of all, you start by talking to the parties and just the expectations of what's going to happen, and what you're going to do and so on, and that you may be raising certain things with parties, but whatever's said to you when you're in that room with that party will stay there, unless permission is given."

So you establish this atmosphere of confidence. And, in the end, it's yours, it's not mine, it's your decision, and nobody's going to push you anywhere, but we're going to try to get you closer together. So you establish that, and anything you say is in confidence, unless you say no, and until you say you can tell the other party.

So those seem to be the ground rules you start off with, and then ask if there are any questions, and everybody's happy, then you go off

in your separate rooms.

But before you ever get there, I think, you really, as I said, have to have studied the case; and I had done little charts and all of this where I had positions, weaknesses in them, and so on.

Because one of the things, I think, a mediator says, well, you think you've got a great case, but there is this problem, and it's a risk factor that has to be put in when you're talking about whether you're willing -- what you're willing to settle for. So that's, I think, an important lesson for me, as a mediator, that I really have to do a lot of work.

Also, where you have multiple defendants, I've learned it's probably wrong to start by trying to figure out percentages on which and what. It's much better to kind of, in most cases, figure out what kind of a pot could be put together and then work from there; and then often you could have a second triage or something where you go through and figure out the liability issues.

But those are just a couple of things I've learned. I have a lot to learn yet, I can tell you.

MS. LUTZ: Thank you. Okay. One more question?

AUDIENCE MEMBER: I have a question.

MS. LUTZ: Oh, yes, hello.

AUDIENCE MEMBER: When an advocate has come before the court that he's given written argument first and then oral argument, how much of the decision typically is made with some written arguments? How effective is the role of oral argument?

JUSTICE MCLACHLIN: Okay. Are you talking courts in general or the Supreme Court of Canada or --

AUDIENCE MEMBER: The Supreme Court of Canada.

JUSTICE MCLACHLIN: Okay. Well, written arguments are memoirs, and occasionally you'll get an outline, which is helpful sometimes. But I think you might get different answers from different judges, but I'll give you mine.

I think oral argument is really, really important. I always relied on oral argument to test out my initial thoughts, inclinations, whatever, to test out weaknesses on one side or the other. I found it was indispensable to me, as a judge, to listen, and really listen in an engaged way. I took on a lot more than just reading the factums.

The sense you get sometimes is that somebody else has written the factum than the advocate, which isn't good.

We've had people stand up and give entirely different arguments than is in the factum. That's not good. So this can really depend. If you've got a really crappy factum, oral argument is pretty important -- or a totally different line of argument.

But my advice would be to make your written argument as strong as you can. Because, as you know, the Supreme Court of Canada Justices prepare in great depth. Not only did we prepare personally by reading the factums and going over them again the night before the hearing, but our law clerk has done a memo, and our different law clerks have discussed the points, and we've probably had some oral discussions with our law clerks about where the critical points in the case are. So that preparatory work is really, really important. The factums are really important.

And then I think the oral argument is very important, as I say, in dealing with helping a judge who might want to find for you, resolve some issues that they may have doubts on, thorny points, or if you have some problems with certain propositions, raising them. So I liked oral argument, not just to hear the words coming out, but I liked it as a dialog, a conversation.

I know advocates find it difficult sometimes

to answer questions. But in the Supreme Court of Canada, we always tried, and I think they still try to make sure that if they've asked you a lot of questions, you have a chance to sum up and put forward your points, which is also important.

But you really should be able to engage with the judges in a conversation about, not only the good points in your case, but the tough points. That's another reason I said earlier, know the weaknesses in your case, know the strengths in your opponents case, be prepared to engage with them and have those arguments ready.

It's a wonderful form of advocacy. It's totally different, much more sophisticated than simply rehearsing an argument that you're going to then deliver. Never read. Try to talk to the judges.

But it is a sophisticated form of advocacy at Supreme Court of Canada, and that's why some people, I guess, don't like it. They like the other old-fashioned way of laying -- but even in the old days, you know, people like J.J. Robinette, they would come to court prepared to argue the points. He would say, "I've been looking at this. I don't think I have much in that point, but I still have this other point."

You know, they would engage in this dialogue,

honest, frank dialogue with the justices, and that's an art. It's an art form, and you have to be very, very well-prepared to do it well. But when it's done well, it's extremely valuable.

So I'll just close with this. When we would get off the bench when I was there, it was quite common for someone to say, "Well, I didn't get much help from Counsel X," or alternatively, "Counsel Y was very helpful."

That is what I would strive for, was I able to help those judges resolve their issues and come to the right conclusion, of course, which you believe is in favour of your client.

MS. LUTZ: Justice McLachlin, thank you so much. On behalf of Ivan and I and all of us gathered here, I can't tell you what a treat it's been and a gift to have you with us today. It's really, really been lovely, so thank you for joining us.

JUSTICE MCLACHLIN: Thank you. It's been wonderful to be here. Thank you very much.
