

2018

## A Conversation with the Honorable Rosalie Silberman Abella and Dean Matthew Diller

Rosalie Silberman Abella  
*Supreme Court of Canada*

Matthew Diller  
*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Courts Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Rosalie Silberman Abella and Matthew Diller, *A Conversation with the Honorable Rosalie Silberman Abella and Dean Matthew Diller*, 87 Fordham L. Rev. 843 (2018).

Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss3/1>

This Lecture is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

**THE ROBERT L. LEVINE  
DISTINGUISHED LECTURE**

**A CONVERSATION WITH THE  
HONORABLE ROSALIE SILBERMAN ABELLA  
AND DEAN MATTHEW DILLER\***

DEAN MATTHEW DILLER: I want to welcome all of you to the Robert L. Levine Distinguished Lecture for this year, and I want to give a special thanks to the Levine family for making this lecture and the whole series possible. Fordham Law has been able to host really fantastic guests through this series, including last year Justice Ginsburg, Justice Sandra Day O'Connor, the late Chief Judge Judith Kaye, Judge Robert Katzmann, and Judge Raymond Lohier.

I also want to thank the staff of the *Fordham Law Review* and in particular Amanda Gottlieb for helping to organize this event. It is always expertly done when the *Law Review* is involved, and I appreciate that.

This year we are leading up to our celebration of 100 Years of Women at Fordham Law School. In September 1918, the Fordham Law faculty voted to admit women,<sup>1</sup> and we are planning to celebrate that in style.

But tonight perhaps is a bit of a teaser for that.

Justice Rosalie Silberman Abella is a woman of firsts. She is the first Jewish woman to sit on the bench of the Supreme Court of Canada, and before the Supreme Court, when she was appointed to the Ontario Family Court in 1976, she became the first Jewish woman judge in Canadian history. At that time, she was also the country's second youngest judge—and I will just say, younger than thirty.

Did I mention that she was also at that point carrying her second son, Zachary, making her Canada's first pregnant judge as well?

Zachary, by the way, as did his brother Jacob, grew up to be a lawyer, as lawyers will, and carry on the tradition.

In 1983, Justice Abella was appointed to head the Royal Commission on Equality in Employment, which was established to address the issues of

---

\* The conversation was held on February 22, 2018, at Fordham University School of Law. The transcript has been lightly edited.

1. See generally *100 Years of Women*, FORDHAM U. SCH. L., [https://www.fordham.edu/info/25038/events/10431/100\\_years\\_of\\_women/1](https://www.fordham.edu/info/25038/events/10431/100_years_of_women/1) [<https://perma.cc/Y5LM-UK35>] (last visited Nov. 15, 2018).

disadvantage in the workplace for women, native people, the disabled, and other vulnerable communities. As the sole Commissioner—that is a great Commission—Justice Abella authored the *Equality in Employment* report,<sup>2</sup> in which she coined the term “employment equity” and thoughtfully laid out strategies for protecting minority rights on the job. Her concepts were adopted not only by the Supreme Court of Canada, but also by the governments of New Zealand, Northern Ireland, and South Africa.

Justice Abella has been awarded thirty-eight honorary degrees and was the first sitting judge elected to be a fellow of the Royal Society of Canada, an organization consisting of Canada’s leading scholars.

She was also the first incumbent of the James R. Bullock Visiting Chair in Canadian Studies at the Hebrew University and was the first woman to receive the Distinguished Alumnus Award from the University of Toronto Faculty of Law. I could keep going on with the list of awards.

She served as a judge of the Giller Literary Prize, Canada’s most prestigious literary award. In 2003, she was awarded the International Justice Prize of the Peter Gruber Foundation and, the following year, the Walter Tarnopolsky Award for Human Rights by the Canadian Bar Association and the International Commission of Jurists. Just two years ago, the Northwestern School of Law honored Justice Abella as its Global Jurist of the Year.

This gives you a sense of the accolades, awards, and accomplishments that Justice Abella has both done and received over the course of her career. Her career has been distinguished by an unflagging commitment to human rights, equality, and justice.

Last year, in a commencement address she delivered at Brandeis University, she issued a wake-up call for the graduates, and I am going to quote a bit from this because I find it so striking:

[Y]ou see before you a Justice of the Supreme Court of Canada who is deeply worried about the state of justice in the world. . . . [H]ere we are in 2017 . . . watching “Never Again” turn into “Again and Again,” and watching that wonderful democratic consensus fragment, shattered by narcissistic populism, an unhealthy tolerance for intolerance, a cavalier indifference to equality, a deliberate amnesia about the instruments and values of democracy . . . , and a shocking disrespect for the borders between power and its independent adjudicators like the press and the courts.<sup>3</sup>

Justice Abella feels a great sense of duty in combatting these encroachments to democracy and has dedicated time to educating others about the responsibilities of members of a free society. She is the coauthor of four books and over seventy-five articles.

---

2. Judge Rosalie Silberman Abella, *General Summary from “Equality in Employment: A Royal Commission Report,”* 6 CANADIAN WOMAN STUD. 6 (1985).

3. Justice Rosalie Silberman Abella, Supreme Court of Can., Keynote Address at Brandeis University Commencement (May 21, 2017), <http://www.brandeis.edu/commencement/2017/abella.html> [<https://perma.cc/QWR3-56VL>].

I am going to stop here, because I could go on, and just say that we are so thrilled and delighted to have you with us here this evening and eager to hear from you. So I am going to stop talking at this point and ask you a question or two.

JUSTICE ROSALIE SILBERMAN ABELLA: Thank you. That was really generous. I appreciate it.

DEAN DILLER: I think I will get right into it and start with your commencement address at Brandeis. Can you tell us what you are so concerned about in terms of the fate of liberal democracies in the world? Is this a critical moment?

JUSTICE ABELLA: Can I say something first?

DEAN DILLER: Sure.

JUSTICE ABELLA: This is among the firsts I can now add to: first time ever at Fordham Law School. I have been a fan of your dean for a long time and an admirer of the law school, and I am so grateful for the chance to be able to come here, so thank you Levine family and *Law Review* for giving me this opportunity. It is really an honor to be able to be here with you.

DEAN DILLER: Thank you. Let's get right into it and talk about the threat to liberal democracies on a global scale.

JUSTICE ABELLA: When I wrote that speech at Brandeis last May, we had just come home from having an exchange with the German Constitutional Court. Three of the judges from the Supreme Court of Canada met with their Constitutional Court. That same month, I had meetings with the Italian Constitutional Court, and I was on a panel in Italy with female judges from around the world.

It was so striking to me how preoccupied all of the judges were with what was happening in Europe. They were aware of what was going on in North America, about which there is very little that I can say, but they were particularly worried about what was happening in Hungary; they were worried about Turkey; and they were worried about Poland.

Their concern, as people who are enforcers of the rule of law—and I really do not like the phrase “rule of law,” but I think you know what I mean: the instruments of democracy, due process, freedom of the press, the right to dissent, all of those things which I prefer much more than the “rule of law” because, let's be frank, the “rule of law” was what brought us segregation, apartheid, and genocidal regimes.

In any event, I gave that commencement address in the United States having just come from an environment where people were preoccupied with populism. It is a global problem. By populism, what I had in my head was the majoritarian impulse to be exclusionary. It frightened me because I was born in Germany after the Second World War. My parents had been in concentration camps. I do not know how they survived, but they did, and my grandmother as well. I was born in 1946, during the Nuremberg Trials. We came to Canada in 1950. The trials were by then over. The shadow of my childhood was all about what had happened in Nazi Germany.

It was not, for some reason that I cannot explain, a depressing shadow for me. My parents were very happy, optimistic people; they never complained. My father had been a lawyer in Europe, a graduate of the Jagiellonian University in Kraków, came to Canada and went to the Law Society and asked, “What tests do I have to take to be a lawyer?” because the Americans had hired him in Germany to represent displaced persons.

And the Law Society said: “In Ontario you cannot be a lawyer. You have to be a citizen, and that will take you five years.”

My father had my younger sister and me, my mother, and my grandmother to support, so he became an insurance agent. He never complained.

I made up my mind at that moment—it is one of my earliest memories—that I was going to be a lawyer. I was four, and I had no idea what it meant, but I was going to be what my father could not be.

That is the origin of how I was introduced to what I think is “justice” and “injustice.” It ends up in my Brandeis speech this way: To go back to Germany, having left as a displaced person who lived in Stuttgart in the displaced-persons camp, and then go back in 2017 as a judge of Canada’s Supreme Court and meet with the judges of the German Constitutional Court, was fantastic. As you know from Ingo Müller’s book *Hitler’s Justice*,<sup>4</sup> judges in Nazi Germany were the people from whom I learned not to use the words “rule of law.” They were so technical in their approach, and they were aggressive in implementing all of the anti-Semitic laws.<sup>5</sup>

So, I was terrified at what was happening in the rest of the world. Canada is in wonderful shape. The United States is strong and resilient. But we made a global bargain after World War II. We had Nuremberg, we had the Genocide Convention, we had the Declaration of Human Rights, and the bargain was human rights primacy: we do not murder people; we do not allow states to take their rights away.

And yet, here we are. It is happening again. There is no human rights enforcement; forty million people have died since the United Nations was set up. Imagine, forty million people in global conflicts.

But look at how respectful the global community has been about trade. We have the World Trade Organization, set up by the Marrakesh Agreement in 1994.<sup>6</sup> There is an enforcement mechanism; countries comply with their trade obligations. But not with their human rights obligations.

So I am nervous because I have grandchildren, and I am nervous for the world because people who say “we must get our rights back” are polarized and said to be left-wing. Imagine human rights being left-wing. And there is a sense of governments keeping hands off again, instead of intervening to help with human rights, and there is nothing that I see internationally that

---

4. See generally INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1992).

5. See generally *id.*

6. Marrakesh Agreement Establishing the World Trade Organization art. I, Apr. 15, 1994, 1867 U.N.T.S. 3.

makes me feel that the moral consensus that put together the United Nations and those 1948 conventions is there anymore.

Because there is nothing to stop it—I am not talking about “boots on the ground”; I really understand that that is not just one country’s responsibility. I am talking about a moral sense, a moral coalition, and I just do not see it developing.

So, I came back from Germany to Brandeis feeling very moved about being back in Germany as a judge, but also worrying about what was happening everywhere in Europe *except* in Germany. How ironic is that?

The Brandeis speech was a cry from the heart ending with, as you will remember, a thank you to the United States because it was the United States—the army, the Allies in Stuttgart, where we lived, and where my father practiced law for the Americans—that restored his confidence in the possibility of justice. So I always saw Americans as the beacons. They were the people who taught us about justice; they were the people who made our lives possible, let alone our sense of justice. So I am grateful but also wistful, and I am worried.

DEAN DILLER: How do you think about your role as a justice in speaking to issues like this?

JUSTICE ABELLA: One of the great advantages of being older is that you have lived through trends. When I graduated from law school in 1970, I was a Canadian law student who was so jealous of the American Supreme Court. I thought the muscular application of your Constitution in the Warren Court was just tremendous.

Canada at the time had a Constitution, which was about the division of powers. So what did we learn from our 700-page casebook? Who was in charge of egg marketing boards—the federal government or the provincial government?

I saw what you were doing and the rights that were being protected here—speech, the rights of the accused—in so many areas, and it made me so proud of your judges.

Then it started to happen in Canada when we got our constitutionalized set of rights in 1982, and what was wonderful was that the press was with us and loved the newly strong, rights-focused Supreme Court. Here’s another thing, when we struck laws down, like abortion or gay marriage, the waters closed. We do not revisit them. It seems that the issues here in the United States, on the other hand, stay alive forever.

In the 1980s, Canada had a very popular Supreme Court. And then in the 1990s we started to get some of the rhetorical impact of what was happening here in the United States. People started to talk about judicial activism; about the politicization of the Canadian judiciary; about how judges should only interpret law, not make it.

So I started to think hard: “What is my role as a judge?” And when I figured out that those were labels that were meant to presumptively dismiss results that people did not agree with, I realized that my role *was* to make

law, that that is what judges do. Even when you are interpreting law, you are making law.

I will give you a classic example: The Canadian Constitution said that only “Persons” could be appointed to the Senate.<sup>7</sup> Five women wanted to go to the Senate. The Supreme Court of Canada in 1928 said that “Persons” does not include women,<sup>8</sup> an originalist interpretation of the Constitution.

It went to the Privy Council in England, which was our appeal route in those days until 1949, and Lord Sankey, who was the Chief Justice, said: “Of course ‘Persons’ includes women.” Constitutions are—and this is our guiding constitutional principle—“living trees” that grow with the times. You have to give what Lord Sankey called “a large and liberal interpretation,” not a technical one.<sup>9</sup>

So judges in Canada think they have a responsibility to approach law, constitutional law in particular, in a way that tries at least to keep pace and occasionally lead. Courts are not majoritarian institutions, they are not there to cater to the majority. That is what legislatures do; they are responsive to the public, and if they do not do what the public wants, they can lose their jobs at the polls.

Judges in my country have until they are seventy-five. We are independent and have tenure until then so that we can be impartial, risk being unpopular, and be able to do things that protect minorities. Judges are not in a popularity contest. We do what we think is the right thing, and time will tell whether it was right. If it turns out not to be, we have changed it, as we did with the law of assisted dying. Twenty-five years ago our Court said, “There’s nothing wrong with a criminal prohibition.” Two years ago, we said there was.

We did the same thing with the prostitution laws. Twenty-five years ago the Court said, “There is nothing wrong with criminalizing it.” Two years ago, we said, “There is a problem if it means prostitution is unsafe.”

It is not that we are indifferent to public opinion, we just don’t know who the “public” is. So we are not accountable to public opinion because I don’t even know what that means. Is it what the *Washington Post* says? Is it what the *Wall Street Journal* says? Is it what social media says?

We are not unaware of what our reading tells us is happening, but we’re responsible to the public interest. And I think that gives us a responsibility to try to make the right decision notwithstanding what we think the public, the majority of the public—whatever that means—wants us to do.

DEAN DILLER: That is a fantastic statement of the judicial role in adjudicating cases. What about in speaking to issues outside of the context of a case? I ask because I know how forthright you are in Canada about your

---

7. See Constitution Act, 1867, 30 & 31 Vict., c 3, para. 24 (U.K.).

8. See Reference re Meaning of the Word “Persons” in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276, 276 (Can.).

9. See *Edwards v. Canada (Att’y Gen)*, [1930] AC 124 (PC) 136 (appeal taken from Sup. Ct. of Can.).

deeply felt views and your commitment to justice. How do you think about, like this forum, speaking out on issues outside the context of deciding a case?

JUSTICE ABELLA: I think that is a fair question. I think once you become a judge there is a Faustian bargain. I have lost certain rights of speech, but I made the bargain willingly because the only opinions that matter most are those that will show up in a judgment. I know I will be criticized if people don't like those opinions, but that's their right.

But there are a lot of things I cannot talk about, will not talk about. But I feel perfectly free, and believe strongly, that judges should be explaining to the public what they do and why they do it. We are not hermetically sealed, and we belong to the public. But that doesn't mean we're not also private people.

I will speak at universities. There are some groups I will not speak to just because they have expressly political—small “p” or large “P”—agendas. But after forty-two years, I have to say I cannot complain that I have not had a chance to say what I think on matters related to being a judge.

We in Canada, at least, have the conversation about should we, shouldn't we, is this the right forum, is that the right forum? I have to say there is a part of me that just looks at the freedom of expression your judges seem to have, the books they write, the lectures they give, the articles they write, the things they speak about—and part of me goes: “Wow! That is really gutsy.”

We are Canadian. We are not un-gutsy, but we are not as “out there.”

DEAN DILLER: You have written a few books and articles yourself.

JUSTICE ABELLA: I have. But the context is different; the culture is different; the expectations are different.

You had judges speaking out. It has always been a very different tradition. We are “kinder and gentler” and more cautious, I think. But we are moving toward being more “out there.”

DEAN DILLER: I want to come back to something that you touched on in your comment about your Brandeis speech, which was that what brought you to it were meetings you had just had with the German Constitutional Court and the Italian Constitutional Court. The frame for the speech is really a moral consensus among democracies. How important is it for judiciaries to be in contact with each other, and how do you affect each other?

JUSTICE ABELLA: I think it is crucial for us to be in touch with one another, and I think a lot of your judges feel the same way. We have exchanges with the American Supreme Court every three years. We either go to Washington or they come to Ottawa.

I have to tell you, when the American Supreme Court comes to Ottawa, and I am walking down the street, people will say, “Who's that with Sandra Day O'Connor?” Canadians know all of your justices. I don't think they could name the nine judges on the Canadian Supreme Court.

We also have exchanges with the Israeli Supreme Court, the U.K., the Indian Supreme Court, the European Court of Human Rights, France, South Africa, Australia, among others. And it is because those of us with



constitutions all have post–World War II constitutions. The post–World War II constitutions see the world differently.

For a start, we all have a balancing provision. It is the very first provision in the Canadian Constitution: all rights are guaranteed subject only to those reasonable limits justified in a free and democratic society.<sup>10</sup> What that means is, if there is a breach of the Constitution, the onus shifts to the government to justify it by looking at what other democracies are doing.

There you have the very first section of our Constitution not only giving us a balancing as opposed to the absolutist approach seemingly mandated by your older Constitution, we are also directed to look at international and comparative law. We do not have the debate about whether we should be looking at what other countries do. It is constitutionally required.

And we find it really helpful because many constitutional issues arise all over the world. There are universal concerns with local contexts. The constitutional democracies look at what each is doing in the rights area.

But it has led to, I think, even though there are certainly conversations with American judges, the rest of us having conversations—what Cynthia Ozick called the “exegetical voices calling to one another”<sup>11</sup>—and watching each other’s jurisprudence, whether we like what they do or whether we don’t. You can get some very good ideas even from people you disagree with. It is Isaiah Berlin who said that there is no pearl without some irritation in the oyster.<sup>12</sup> It makes you think, what don’t I like about that?

But what has happened among the post–World War II constitutional courts is that we have similar approaches to equality and to speech—to hate speech, for example—while the United States, because it has a different constitutional history, approaches its Constitution differently from the rest of us. I do not want to say “outlier” because it has its own traditions, and they are venerable and respectable traditions, but they are very different from what every other liberal democracy in the world is doing in key areas.

DEAN DILLER: Earlier you said that the Warren Court was a huge influence on you and shaped your conception of what judges can do and courts can do. Does the U.S. Supreme Court still have that kind of influence globally?

JUSTICE ABELLA: Not in the rights area, I would say, and it is because the constitutional histories are very different. I will give you an example of Canada’s approach to originalism. In 1985, three years after the Charter was

---

10. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) (“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”).

11. CYNTHIA OZICK, *HEIR TO THE GLIMMERING WORLD* 73 (First Mariner Books ed. 2005).

12. *Cf.* Letter from Isaiah Berlin to John Grigg (May 26, 1981), *in* ISAIAH BERLIN, *AFFIRMING: LETTERS 1975–1997* (Henry Hardy & Mark Pottle eds., 2015) (“Supposing an oyster says that it is not interested in pearls, doesn’t want to enrich culture, just wants to live an ordinary, normal oyster’s life in the kind of conditions in which other creatures live theirs—if need be, remain ungifted, ordinary and obscure—is that forbidden?”).

enacted, we had a case called the *Reference re BC Motor Vehicle Act*,<sup>13</sup> and the question was, what does Section 7 of the Charter of Rights and Freedoms mean? Section 7 says that everyone is entitled to life, liberty, and security of the person.<sup>14</sup>

We had evidence from the government that what it intended was that this be a procedural provision. The Supreme Court, in a unanimous decision, said: We think it should be procedural *and* substantive.<sup>15</sup> That was last time anybody ever made an originalist argument. [Laughter]

On the other hand, in division-of-powers cases, we do look at history. I know from your 1934 *Snyder*<sup>16</sup> case that history matters. But we do not use it as an anchor. We understand that it is important to be aware of where you have been and why, but we take that as a starting point rather than the end of the conversation.

The main reason I think there are differences between the United States and Canada and other liberal democracies is self-evident: we are all affected by our political origins.

Canada was a bargain between two groups at the constitutional table: the French and the English. Their bargain was: “We are two different cultures, but we are coming together as equals.” So in our DNA is the right to be different. That means that when we got our Charter, our rights protection, in 1982 we already had rights that were group rights, along with the individual rights you have. This is why we excel at multiculturalism.

In the United States, on the other hand, the political origins were Hobbes, Locke, Hume, Mill, with an emphasis on the right of the individual. Because you had come from the bizarre brow of George III, every individual was to be equal, and that meant every individual was to be treated the same. Whether you were the king or the person who cleaned the king’s palace, you had the same rights. That is what “civil liberties” meant: the same right to be treated the same by the state. Those are the origins of libertarianism and the political origins of this country.

It made it very difficult to think in terms of groups. I think affirmative action is a tricky concept here because it is a group remedy, and the constitutional DNA here does not seem to feel comfortable with group rights.

Assimilation is your model: treat everybody the same. Our model is: you cannot be equal unless you acknowledge how different people are. If you are in a wheelchair, you cannot be treated as somebody who is able-bodied; you need a ramp to get in. If you are pregnant, if you are nonwhite, if you are indigenous—you are entitled to have your differences respected. So we have integration, and you have assimilation.

You have a “melting pot” theory, and we have a “melting pot if necessary but not necessarily a melting pot” theory. I think this binary nature of rights,

---

13. *Reference re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486 (Can.).

14. Canadian Charter of Rights and Freedoms § 7, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

15. *See generally* *Reference re BC Motor Vehicle Act*, 2 S.C.R. 486 (Can.).

16. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

which drives Canada's constitutional interpretation, is a huge difference. And it explains the differences in our approaches to both speech and equality.

DEAN DILLER: I will ask about speech in a moment. Your comments made me think about employment equity, which is a very different concept in Canadian law than antidiscrimination law, and I think it draws on some of the distinctions you are talking about. What is the concept of employment equity?

JUSTICE ABELLA: Employment equity is something that I made up. [Laughter]

This is something that judges will rarely admit to doing, but this was a Royal Commission. You do not have Royal Commissions here.

DEAN DILLER: Without the word "royal," we have commissions.

JUSTICE ABELLA: This was a one-person Royal Commission that the government of Canada asked me to do when I was thirty-seven years old, to look at how to deal with the barriers in employment for women, aboriginal people, nonwhites—they called them "visible minorities"—and persons with disabilities.

I suspected at the time that it was not necessarily something that was going to be taken all that seriously because I was a one-person, provincially appointed judge doing a federal Royal Commission for \$1 million, and I had one year to do it. And what was floating around the country at the same time was a seven-person, four-year, several-million-dollar Royal Commission on Baby Seals.<sup>17</sup> I said to myself, "Okay, do your best, but it's not going to go anywhere."

The main question for my Royal Commission was: Should Canada have affirmative action? I met for two hours in seventeen cities over the course of six weeks with each of the four groups, plus representatives of business and labor. That meant six meetings in each city with only one break in the seventeen weeks.

What was amazing to me was that in those two-hour meetings—this is how the pearl comes from irritation—the first hour of every meeting with each one of the six groups was a debate about what "affirmative action" meant. The person who was the head of the Equal Employment Opportunity Commission (EEOC) dealing with affirmative action at the time was Clarence Thomas.

They either said affirmative action means quotas, or no quotas, and I thought, "Really? Do I want to adopt a phrase nobody understands?" And I am not a quota fan because quotas were used to keep Jews out of universities, so I never really saw them as something that allows people in. I also thought that quotas start off being the floor, and they often end up being the ceiling.

I listened to all of these people tell me what they thought affirmative action meant. No consensus. And I thought, "Why not come up with something

---

17. See generally ROYAL COMM'N ON SEALS & THE SEALING INDUS. IN CAN., SEALS AND SEALING IN CANADA: REPORT OF THE ROYAL COMMISSION (1986), <http://publications.gc.ca/site/eng/472269/publication.html> [<https://perma.cc/D87J-HZEL>].

new that is distinctly Canadian?” I thought, “It is about fairness, equity — that is a term lawyers use—in employment.” So it became “employment equity.”

But the most important part of that report—it was a 300-page report, all written by hand except for the part about statistics, which I do not understand, so I actually say in the report, “This part on statistics was written by a statistician named Jenny Podoluk.”<sup>18</sup>

The first eighteen pages were my intellectual struggle with “What does equality mean?”<sup>19</sup> It was a Royal Commission on Equality in Employment. The only example I had was the Fourteenth Amendment.<sup>20</sup> And I did not like the Fourteenth Amendment jurisprudence because it was Diceyan and Aristotelian: you treat likes alike. As Anatole France said, the rich and the poor have the same right to sleep under bridges and steal bread.<sup>21</sup> But “sameness” was not what I was hearing. I heard people being excluded because they were different, which is the heart of discrimination.

Then I found *Griggs v. Duke Power Co.*<sup>22</sup> and the Title VII jurisprudence from the American Supreme Court. When I read this 1971 decision about the built-in headwinds that exclude people based on race, I thought: “Perfect. That’s exactly the model that I think equality needs. It’s an antidiscrimination tool.” So in those first eighteen pages I said that equality means accommodating and acknowledging people’s differences so they could be treated as equals.<sup>23</sup>

The Report of the Royal Commission was implemented in Canada within four months, then in Northern Ireland<sup>24</sup> and New Zealand<sup>25</sup>—which had a government that ran on the promise that if they were elected, they would get rid of employment equity. They were and they did. I didn’t put it on my curriculum vitae, “repealed before she was forty.”

But what was really moving to me was that the very first case the Supreme Court of Canada heard about what our new equality provision meant—the report came out in 1984—was a case in 1989 called *Andrews*.<sup>26</sup> The question was whether a lawyer from England could practice law or whether the citizenship requirement in the Law Society Act violated the equality guarantee in the Constitution.

---

18. See ROSALIE SILBERMAN ABELLA, EQUALITY IN EMPLOYMENT: A ROYAL COMMISSION REPORT 52 (1984).

19. *Id.* at 1–18.

20. U.S. CONST. amend. XIV.

21. ANATOLE FRANCE, THE RED LILY 87 (Maison Mazarin Paris ed. 1905) (“The poor must work for this, in presence of the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread.”).

22. 401 U.S. 424 (1971).

23. See ABELLA, *supra* note 18, at 3 (“Sometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equals by accommodating their differences.”).

24. See Fair Employment (Northern Ireland) Act 1989 c. 32.

25. See Employment Equity Act 1990 (N.Z.).

26. See *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143 (Can.).

DEAN DILLER: It had a certain family resonance with you, I take it.

JUSTICE ABELLA: The Supreme Court of Canada used my words and my definition of equality to strike down what had kept my father out of the practice of law. He died when I was in my third year of law school, so he never saw any of this.

Life is quite amazing, isn't it? If somebody had said: "Do this Royal Commission. One day it will be part of your family history and be something that your father would have valued and appreciated."

But the chances of that happening were so remote. It feels wondrous to me to be able to say that you are the person who created what equality means in Canada, someone who came from where I came from, from what had happened to my family.

I united the country when my Royal Commission came out. I really did: every newspaper in Canada said, "This is awful." It is very hard to get consensus on a public policy issue, but in 1984 on November 21st when the report came out, every single newspaper said: "What? You're going to force people to hire more women? What about the merit system? What about reverse discrimination?"

I just thought, "Mm-hmm, they really don't like it."

Then the government, a different government from the one that had appointed me to do the Royal Commission—a Conservative government—adopted it.<sup>27</sup> So you never know. You just got to do what you got to do.

DEAN DILLER: That is an amazing story.

JUSTICE ABELLA: Incredible, isn't it?

DEAN DILLER: Thank you for sharing it.

While we are talking about employment equality, you were appointed to the bench when you were twenty-nine years old. What particular challenges did you face as a young woman as a lawyer and as a judge?

JUSTICE ABELLA: I think in a way it was a lot easier for me than it was for women who are lawyers now or even ten years after me. When I went to law school there were five women out of one hundred and fifty law students. When I was called to the bar—you had to article for a year—there were about fifteen women out of over five hundred lawyers.

So we were anomalous. We did not threaten anybody. I never saw another woman in a courtroom. When I had our first child in 1973, I did not know any lawyers who were mothers. So I didn't have anybody who said to me, "You shouldn't be wearing hot pants in court." I didn't know that because there were no other women in the courtroom. And I can tell you that pregnancy was a very good advocacy technique, because I never lost a case when I was pregnant. [Laughter]

So I did not have the role model problem. I did not have lean in, lean out, lean up, lean down,<sup>28</sup> anything like it. And there was no such thing as how

---

27. See Employment Equity Act, S.C. 1995, c 44 (Can.).

28. See, e.g., SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

to do work-life balance because there was no work-life balance. In fact, there *is* no work-life balance.

I did it in a way that worked for us, for my husband and me, not because this is what “one” does. I came home every day at 6:00 to be with the kids, and I went back downtown every night at 8:00 when they were in bed and then 9:00 and then 10:00, and then I realized, “You know, they could probably get to bed without me,” because 10:00 is very late to go downtown, and coming home at 3:00 a.m. is very late to come back.

When I would come back downtown to go to work, that is when I saw male lawyers going home. But I *needed* to see my children. It was really important for me to get that battery charge of seeing them. I knew they were fine; my husband was home with them because he was a professor and he made the time to be with them because he wanted to.

It was very lucky for me, but because I was so anomalous as a judge and a mother and a lawyer I got a lot of calls from the press saying, “We want to do a ‘how do you manage?’ story.”

And I said, not until I’m seventy-five. I have a really supportive husband. My mother lives five minutes away. My kids are healthy. My husband’s whole salary goes towards paying for a nanny. Why are you asking me how I manage? Why don’t you ask the women who get up at 4:00 a.m., drag their kids to daycare, come home from underpaid jobs, do the housework when they get home, and then do it again the next day. And they have terrific kids. That’s who you should be doing articles about. If, when I am seventy-five and my husband still likes me and my kids are nice people, then maybe.

It was so clear to me that they were so surprised by women with credentials, but they did not realize that we have had working women for a long time under really tough circumstances. They never had magazine articles on work-life balance because there wasn’t any.

I took a job as a family court judge because they asked me. That is the story of my career. So I am saying to all of you law students: I never once dreamed of being a judge, let alone on the Supreme Court. I went to law school because I really wanted to be a lawyer, and I wanted to be a really good lawyer. But I never had any thoughts of anything beyond that.

When you are an immigrant, you never think in terms of entitlement. You think in terms of opportunities and working really hard. So my career is like Sammy Cahn, the songwriter. Somebody once said to him, “What came first, the words or the music?” He said, “The phone call.”

So that is my career. “You want to be a family court judge?”

“Sure, that sounds great.”

And people said: “Don’t be a family court judge. Are you kidding? You could one day be on the Supreme Court of Ontario, a real trial court. The family court is nothing. It’s the bottom of the judicial hierarchy!”

I said: “I don’t even know any judges, and they want me to be one. I’m not going to say no.” And I did that all the way through my career.

But what was hard—and I had not anticipated—was that as a family court judge I was deciding every day for seven years whether to take other people’s

babies away, when I had two of my own. I was pregnant with one child, and I had a three-year-old at home. I do not think in all my years as a judge, as a labor board chair, Royal Commissioner, nothing was ever harder than deciding whether to take other people's kids away because I knew what it felt like to have a child. Even if you say you're only removing the child for three weeks, that is a long time for a child.

But here is the irony. I learned how to be a judge from the family court, because the tendency always in law is to be top-down. I learned to see law from the experiences of the people who were before me, not top-down, not looking *at* people who do not have childcare and do not have healthy kids and do not have husbands who are ready to do everything they can to help. Looking *at it from their eyes*. Looking at the law and justice from their eyes taught me how to be a judge through all the rest of my judicial career.

This is my message to all of you law students: take chances. Here I am on the Supreme Court of Canada, having done everything that came along because they asked me to. And if you had said to me, "If you want to be on the Supreme Court of Canada, don't you dare do the family court, because they never elevate judges from that court. You do not go from being on the lowest court in the country to being on the highest."

They also said: "You don't want to be a Royal Commissioner on affirmative action. It's too controversial." And, "You don't want to do a labor board because that is nothing but strikes and problems all the time." Law Reform Commission? "Terrible. Always changing the law."

So it was not until I got to the Ontario Court of Appeal that they said: "Oh, good. A *real* job in the legal profession." [Laughter]

But, I wrote the first gay rights judgments on the Court of Appeal.<sup>29</sup> That is a deal breaker. Striking down the anti-sodomy provisions for fourteen- to eighteen-year-olds in the criminal code? If I had in my head, "Will this help me or hurt me get to the Supreme Court?" I do not know what I would have done. Ambition can be a sedative, if there is something you really want. But there was nothing I really wanted. I felt so lucky that I was on the Court of Appeal.

Doing the right thing can sometimes take you places you never dreamed possible.

DEAN DILLER: That is fantastic advice. I have a few more questions.

JUSTICE ABELLA: When people want to give you advice, do what you want to do, because advice comes from above, and everybody is different.

Dean Diller, did you take people's advice? Didn't you just do what you thought was the right thing to do?

DEAN DILLER: I find it helpful to hear advice because I think when you react when you hear advice, it helps clarify how you think about it because you react to the advice. I am a gatherer, I believe in gathering advice. That does not mean you follow the advice.

JUSTICE ABELLA: Good distinction.

---

29. *See R. v. Carmen M.*, [1995] 23 O.R. 3d 629 (Can. Ont. C.A.).

DEAN DILLER: In the end, you have to do what is comfortable to you and what your gut tells you to do. But getting to that point, I find I am helped by advice.

JUSTICE ABELLA: You're right.

DEAN DILLER: There is no—and everyone is different. Everyone is different.

JUSTICE ABELLA: That is very good advice. [Laughter]

DEAN DILLER: Given your long work on employment equality, how do you look at the Me Too movement now and issues of sexual harassment that are now drawing such public attention, and is that going on in Canada as well?

JUSTICE ABELLA: Every generation rediscovers the women's movement. It is part of our history in North America. Every generation of the women's movement has talked about pay equity, childcare, sexual harassment, and domestic violence.

It was all over the consciousness of Canada in the 1970s and here in the United States and in the 1980s and in the 1990s, and it just stayed there. It was a tenacious reality for dependent women in workplaces. So everybody knew it because there were cases that occasionally made their way through the courts, but we all knew that most cases did not.

What is intriguing to me, because it was not just Me Too, was the fact that it did not really ignite as a movement until it hit Hollywood. It was fascinating for me to see that. What did it, I think, was that the victims were famous. They were people the public related to. And I am struck by how it has taken off. It is a social conflagration.

I think it is largely to be expected because it has been under wraps for a long time, and the grievances have been private. I think we all have to be careful about disclosures and make sure you have got all the information.

But the fact of this now giving women a chance to publicly air the fact that they have felt inappropriately exploited for a long time is, I think, something that was coming for a long time.

I do not know what is going to happen down the road, whether it will affect the other areas in need of attention, like domestic violence, pay equity, or other forms of harassment. But as a spectator it was amazing to watch.

DEAN DILLER: I have one more question for you.

I started by asking you about your Brandeis speech and your concern for the state of democracy in the world, so I want to end on something that is a little different, and this is a good segue, which is: What is going on that gives you real hope and excitement and holds real promise?

JUSTICE ABELLA: Other than my granddaughter and grandson? The fact that there are people who are really concerned about what is going on. I do not feel that I am out there alone speaking up about what is going on in Europe or in Canada. I think millions of people are concerned about the social polarization, about the global fragmentation, people who are younger, people with more expertise than I have, people who can speak out. That gives me hope.



People are on it. Democracy is complicated, and I think it works best when there are checks and balances; when you have a very strong and independent judiciary and you have a very strong and independent press.

When those things are not there, as they are not in some places in the world, it is problematic, if not tragic. But at least people talk about it, and they worry about what to do about it.

I will tell you this: I think some of the international organizations we have set up and held up to fix these problems are organizations we need to rethink. I am just not sure that we aren't where we were with the League of Nations. I think the U.N. agencies do amazing work, but I think as a deliberative body setting the norms, if you look at what the United Nations was set up to do—setting the world's norms—I think a lot could be said for the fact that even though it is all we have, it is surely not the best we can do.

Young people are hope. That is the future, young lawyers in a law school like this one who have great professors telling them what justice means. They can form their own conclusions, but they will get bedrock ideas. Whatever you do—corporate world, legal services, teaching, novelist, it doesn't matter—you will understand what justice means from this school. So you are the hope. So thank you for teaching them.

DEAN DILLER: By the way, I completely agree with that.

Justice Abella, thank you so much. Let me say on many topics we have barely scratched the surface, or really not scratched the surface, but at the same time I think you have conveyed a powerful image of justice and the role of the courts and the meaning of democracy, and I thank you for that. It is great to have you here at our school.

JUSTICE ABELLA: Thank you. It is a pleasure to be here. Thank you all for coming.