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## Doing Canada justice

With its landmark decision on same-sex marriage in June, the Ontario Court of Appeal changed the Canadian social landscape. ERIN ANDERSSON profiles the three bold jurists who have been named The Globe and Mail's Nation Builders of 2003

**ERIN ANDERSSON**

December 13, 2003

On a sunny morning last June, a gathering of lovers and lawyers anxiously paced the red carpet of the registrar's office on the ground floor of Toronto's stately Osgoode Hall, watching the clock tick down to 9:30. Among the two dozen were Michael Leshner and Michael Stark, their gold bands in hand, a willing judge lined up to perform a marriage ceremony -- just in case.

Their lawyer, Martha McCarthy, was dressed in a white suit, purchased in case she had a wedding to attend that afternoon; in case not, she had been up until 2:30 a.



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m., writing the "we lose" speech in her basement office. Either way, she had pockets full of Kleenex.

Ms. McCarthy was one of the first to be handed the brown envelope when it came. She ripped it open and turned immediately to the last of the 61 pages.

With her clients peering over her shoulder, Ms. McCarthy found the lines she wanted: Four short, plain-spoken clauses in which the three judges unanimously declared the legal definition of marriage a violation of the Charter of Rights and Freedoms, and changed the wording from "one man and one woman" to "two persons." Moreover, they had ordered that the change come into effect immediately: The City of Toronto was to issue marriage licences without delay to any same-sex couple who came seeking one.

"We did it!" Ms. McCarthy shouted, and the crowd began hugging, weeping and making phone calls. The wedding planning began in earnest.

But the three main architects of this victory celebration were not present for the party. At the desk of his second-floor office in Osgoode's east wing, Chief Justice Roy McMurtry was flipping through the mail, or reading a last-minute brief. At 10:30, he pulled black robes over his famously broad football shoulders, and walked down to Courtroom 10 to hear a criminal case.

At her residence two hours away in London, Ont., Madam Justice Eileen Gillese had blended power smoothies for breakfast and walked three of her children to the school-bus stop, and was now sitting in her tidy, red-painted, book-laden den, in jeans, crafting a judgment. Her computer beeped: A one-line e-mail alerted her that the brown envelopes had been delivered. She returned to her writing.

And to the north, in Aurora, Ont., Mr. Justice James MacPherson could have been found swimming laps for his daily kilometre-long ritual at a community pool; when "the Michaels" said their vows in an old courthouse jury room that afternoon, Judge MacPherson was heading home after his annual doctor's physical. That night, he flicked on *The National*, and watched reports of the wedding on television with a grin. "Wow," he chuckled to himself, "they moved fast."

Everything, in fact, happened fast. Eight days later, Prime Minister Jean Chrétien announced that the federal government would not appeal the ruling, making Canada the third country in the world to legalize same-sex unions. By the end of summer, the Liberals had drafted legislation to formalize the decision and sent it the Supreme Court for a look-over. It has been estimated that one in every 10 marriage licences issued by the City of Toronto since June has been for a gay or lesbian couple.

The Court of Appeal ruling was an example of the willingness of the nation's judges to go with speed and precision where politicians only dither. In a year when Canada drew a forceful line with the United States by refusing to join the war in Iraq and moving ahead with the decriminalization of marijuana, the legalization of same-sex unions was the most concrete sign of the country's determination to be a socially liberal place, where differences can be celebrated and choice will be honoured. Suddenly, Canada -- as *The Economist* cheekily pointed out -- was cool. The freedom to pledge those time-honoured vows of love reverberated far beyond the couples who lined up to say them.

For all of this, Chief Justice McMurtry, Judge Gillese and Judge MacPherson have been named *The Globe and Mail's* Nation Builders of the year.

They are as Canadian a triumvirate as you might find. There are the two scholars -- the principal's boy from Nova Scotia and the native Albertan who bucked her traditionalist family to win a Rhodes scholarship the first year a woman could. And there is their leader, the jock-artist-politician born of a prominent Ontario family. He once rounded out another famous three, who are heralded for rescuing the very document that decrees a distinctly Canadian reason for Mr. Leshner and Mr. Stark to be allowed their "I dos" on a warm Tuesday afternoon in June.

Slouching deep into a worn, peach-coloured chair in his living room one morning, the Chief Justice comes across just the way his good friend, former Saskatchewan premier Roy Romanow described him: a little rumpled and sleepy-eyed, like "a warm, fuzzy teddy bear."

He is waiting, he explains in his slow, deliberate way, for a call from Ontario's new attorney-general, the post he once held himself. Sure enough, five minutes later, the phone rings. "Good morning, Mr. Attorney-General," Chief Justice McMurtry booms into the receiver jovially, and then proceeds to give a concise evaluation of the current case law on racial profiling. Which leads to the second part of Mr. Romanow's description: "Don't let the exterior fool you."

Chief Justice McMurtry, 71, had in fact encountered "the Michaels" before. In 1984, he was serving the last of 10 years as the attorney-general, and Mr. Leshner was a lawyer in his department. As Mr. Leshner recalls, it was at the annual Christmas party, at the McMurtry home in North Toronto's upscale Chaplin Estates, that he had decided to come out to his colleagues. On the receiving line, he and Mr. Stark stopped in front of their host, and made the pointed introductions.

"He handled himself with great aplomb," Mr. Leshner recalled. "He was the epitome of a Red Tory."

For Chief Justice McMurtry, entering politics was a decision based on "personal relationships rather than ideology" -- mainly the persuasive lobbying of his old college-football teammate William Davis, then the Ontario premier. The pictures in his home chart the history of those relationships, scattered between dozens of his own cheerful oil paintings, mostly landscapes from trips to France and Africa, and framed artwork by his grandchildren. There are many photographs of his six children -- tousle-haired boys in hockey uniforms, two young daughters bouncing election placards on their knees -- and his wife, Ria Jean, whom he spotted on a friend's arm at a university party, and finagled permission to date.

The Chief Justice is fond of recounting how his eldest daughter has become a judge, and his eldest son a high-school teacher, reversing their parents' former gender roles. That son, Jim, had a youthful impression of his father as a warm, booming man, who might flash his Irish temper if, say, you crumpled the morning paper before he had read it, but would give up his coat unrequested to keep you warm on the ski chairlift.

He once asked his father, then a vocal opponent of the death penalty, what he would do if someone hurt his children. "He said quickly, 'I'd kill them,'" Jim recalled. "I don't think he would, because he has too much respect for the law. But I don't know that entirely -- because he was our grand protector."

Chief Justice McMurtry grew up privileged, the eldest boy of a close-knit family in Forest Hill, with a mother who raised her four sons to be readers and a father, a prominent lawyer, who spoke passionately about underdogs he represented and the mistreatment of black lawyers he respected. "If you decided you want to be a ditch digger," he often said, "just make sure you're the best damn ditch digger you can be."

Reluctant to follow in his father's shadow, the boy figured he would be a teacher. But when he was midway through a history degree at the University of Toronto, his seemingly indestructible father suffered a major stroke on a flight home from England; he recovered mentally, but could not practise. His weak heart had disqualified him from insurance, so the family fortunes were altered dramatically. Not long after, Roy and one of his brothers chose to make their careers in law.

He ranks as a defining moment in his life the two university summers he spent pounding railway spikes for Frontier College for 90 cents an hour and teaching English to a group of Italian immigrants, some of whom remain his friends, in the evening. Until then, with his prosperous childhood and private-school education, he said, "I lived in my own little world."

At law school, like other students at the time, he took on pro bono cases. In one of his first successful cases, he met a Maritimer named John Muise, up on charges of assault. "I was a brash young brat then, and I guess if it hadn't been for Roy, I'd still be on the road I was on back then," said Mr. Muise, 70, who now owns a moving business in Charlottetown. The young law student encouraged him to go back to school; later, when Mr. Muise married, Chief Justice McMurtry was his best man.

Though he later served as High Commissioner to Britain and as CEO of the Canadian Football League, and made a failed bid for the Ontario Progressive Conservative leadership, his proudest achievements come from his time as attorney-general: He reformed Ontario family law, created a bilingual court system and increased penalties for assaults with racial motivations. He was known for his candour, his presence and his fondness for a party. In 1976, a Maclean's cover story

named him "Politics' Newest White Knight." He still has a letter framed on his office wall from the Grand Wizard of the Ku Klux Klan warning him of "grave consequences" should he persist in his "treacherous activities against the white race."

"It's nice," he said, "to have enemies like that."

His professional regrets come from the same period, in particular his failure to add protections on sexual orientation to the province's human-rights code. "I would be the first person to say it should have been amended." He was also the attorney-general in 1981 during a controversial series of police raids on gay bathhouses in Toronto. "It was an unhappy incident for everyone," he said, but insisted that politicians must not interfere with criminal investigations.

While Chief Justice McMurtry was making his name in politics, a young woman from Edmonton was defying her parents to get an education. The daughter of a struggling freelance writer and homemaker who felt that women should devote their energy to raising a family and not "waste money" on university, Eileen Gillese made her mark as brilliant scholar, winning a Rhodes scholarship to Oxford the first year it was opened to female students.

At Oxford, she said, they didn't teach law -- they let you discover it on your own, and she learned "never to be intimidated" by something new. One of her friends, a South African, returned home to fight apartheid and was jailed for weeks with no word to friends or family; that, she says, was when law became more than an academic study.

She returned home to Edmonton to practise, and later became the dean of law at the University of Western Ontario, where she tried to emphasize the profession's virtue and civility. Petite and soft-spoken at 49, she writes her judgments at home in London, where she can attend the volleyball games and activities of her four children, and where her husband runs an investment business.

Judge MacPherson, 53, followed a similar path, serving as dean of Osgoode Hall Law School before becoming a judge. He grew up in Lunenburg, N.S., born to a long line of teachers and clergymen. He still carries the mark, he said, of his upbringing in a small town where his family didn't have a lot of money, life moved slowly and there was "real respect for the role people play in the community."

After the Charter was passed, Judge MacPherson worked for the province of Saskatchewan, arguing cases before the Supreme Court and overhauling provincial legislation. But the highlight of his legal career dates back to 1985, when he began a three-year post as the executive legal officer for Brian Dickson, then chief justice of the Supreme Court, just as the early Charter cases were landing. It is chief justice Dickson's model that he now follows. "He balanced principle on the one hand, and imagination on the other hand."

However, it's Judge MacPherson's new boss who played a key role in the late-hour deal that saved the Charter's life. Talks with premiers had all but collapsed when Chief Justice McMurtry, then Ontario attorney-general, Mr. Romanow, his Saskatchewan counterpart, and Jean Chrétien, then federal justice minister, gathered in a small fifth-floor kitchen in the Ottawa Conference Centre to hammer out what is now known as the Kitchen Accord.

In the end, Mr. Chrétien urged prime minister Pierre Trudeau to accept a notwithstanding clause, which legislators could use to override Charter rulings in extreme circumstances. The story goes that Mr. Chrétien, who had trouble pronouncing the words, took to calling it the McMurtry clause.

"I have been very lucky to be in particular places at particular times," Chief Justice McMurtry said. "Life is more often about good luck than good management."

On a Monday afternoon, the three judges sat in their robes in the office of the Chief Justice, waiting to have their picture taken. As is the rule, they would not discuss the specifics of the gay-marriage ruling, nor even express how they feel about its ramifications, though they were clearly proud of being named nation builders. The court in this case diverted from its common practice of having one judge write and the others affirm -- the judgment was written as one unanimous voice, the product of more than 20 drafts and numerous discussions.

The other two judges deferred to the Chief Justice on most interview questions, but all three bristled at any suggestion that they crossed the line of judicial activism. In the dialogue the Charter created, individuals may seek redress in the court, the courts rule, and the legislators respond. "There's no way around it," Judge Gillese said. "It's our obligation to determine whether there has been a violation around the Charter."

With the notwithstanding clause, Judge MacPherson added, "legislatures have the final word." In fact, he said, the discussion about balancing the roles of the two entities is "the kind of public discourse you want in a democracy." Politicians, the Chief Justice added, should not be shy about using the clause where it make sense -- he could think of two instances in the past decade when they should have, though he would not specify.

As for the same-sex ruling, they acknowledge its significance, altering tradition as it did in 60 short pages. But then, Judge Gillese said, "we just get on with the job."

"The next case could be the Bulk Sales Act," Judge MacPherson said.

"We cannot be concerned with whether a decision is going to be popular," the Chief Justice said. "We obviously think we got it right." The crux, he suggested, is in Paragraph 2, Page 4: "This case is ultimately about the recognition and protection of human dignity and equality."

A worthy foundation on which to build a nation.

*Erin Anderssen is a feature writer in The Globe's Ottawa bureau.*

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