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# The Supreme Court of Canada at 150



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## LETTERS

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INTRODUCTION

## IN AN ERA OF UPHEAVAL AND DIVISION, CANADA'S TOP COURT FACES SUPREME CHALLENGES AS IT MARKS 150 YEARS OF SHAPING THE NATION

RANDY BOSWELL

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Randy Boswell is a journalism professor at Carleton University and a former senior national writer with *Postmedia News* who covered politics, science and culture while developing a unique specialization in stories about Canadian history. He has served as guest editor of numerous volumes of *Canadian Issues* for the Association for Canadian Studies, including this present edition of the ACS's flagship publication.

On November 18, 1875, the Supreme Court of Canada was ceremonially inaugurated with a banquet at Rideau Hall hosted by the governor general of the day, Lord Dufferin. He toasted the six newly sworn justices by remarking that the establishment of the high court of the land “marks another epoch in the history of the Dominion; it exhibits another proof and pledge of the stability of our Confederation, and of the solidifying process which has knit into a homogeneous and patriotic community, the inhabitants of what a few years ago were the scattered districts of Great Britain’s North American possessions.”

The 150th anniversary of the Supreme Court of Canada in 2025 invites reflection on the impact of its most influential rulings, analysis of its strengths

and weaknesses, and assessments of its overall role in shaping Canadian society and identity. The occasion also offers a timely opportunity to compare Canada’s top court with that of other countries – particularly its nearest neighbour, where the U.S. Supreme Court is so deeply enmeshed in partisan politics – and to consider the inherent tensions between political and judicial power in Canada, along with the levels of trust Canadians have in the apex body of their justice system.

The sesquicentennial milestone is an opportune moment to consider the Supreme Court of Canada’s evolution over its 15 decades of existence and to gauge the enduring impact on both the country’s highest court and the nation writ large of the pivotal 1982 patriation of Canada’s Constitution and the

enshrining of the Canadian Charter of Rights and Freedoms.

It should be noted that there is no unanimous judgment on the Supreme Court's own performance in the era of the Charter. Coinciding with the 150th anniversary, the Macdonald-Laurier Institute – a conservative think-tank that argues the Supreme Court of Canada represents a “dramatic expansion of judicial power” in the country that is “unsettling the balance of our constitution” – launched a Judicial Foundations Project to watchdog the SCC's decisions, “articulate the legitimate boundaries of judicial power” and highlight “the dangers of judicial overreach” in public policy.

The Supreme Court of Canada marked its own landmark birthday with curated exhibitions, the striking of a commemorative coin and special gatherings to highlight the individuals and events that form the institution's history and legacy. The court, for example, encouraged Canadians to reflect on how its bench has evolved markedly since 1875 “to reflect the diverse perspectives and experiences of Canadians,” on how it continues to serve as a “pillar of our democracy,” and how it is “highly regarded for its commitment to the fundamental principles of openness, transparency and judicial independence.”

We have entered the second quarter of the 21st century in a destabilized world facing existential challenges to the post-Second World War rules-based international order – aspirational and imperfect as it has been. In Canada, political polarization fueled by so-called “culture wars” and heightened regionalism – intensified by strained economic and political relations with the U.S. under President Donald Trump – have spawned domestic

upheaval. Overall, it's a context in which all “pillars” of democracy and the rule of law – Canada's top court among them – are under greater pressure than they have been for generations.

This edition of *Canadian Issues* explores the century-and-a-half legacy of the Supreme Court of Canada and the swirl of issues the court confronts ahead of its next 150 years.

Among the distinguished contributors is **Emmett Macfarlane**, a professor of political science at the University of Waterloo, author of 2013's *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* and a leading expert on the Supreme Court's history and evolving influence in Canadian society. In his brief but sweeping survey of the court's transformation from “relative institutional obscurity” for much of its past to its Charter-era emergence “as one of our most prominent and unquestionably political institutions,” Macfarlane sounds a warning that “we may be entering a new, troubling era, where overt political attacks on the Court itself may become viewed as more palatable, threatening to take us down a disturbing road.”

In his essay, Macfarlane flags “the collapse of the traditional information and media ecosystem” as a factor in sharpened attacks against the Supreme Court driven by “right-wing populism” and eroding trust in public institutions. Carleton University journalism professor **Janice Tibbetts**, a longtime Supreme Court reporter with *Postmedia News* and *The Canadian Press* who teaches aspiring journalists, more fully explores the fallout of the “relatively sparse and rapidly dwindling” coverage of Canada's highest court in an era of deep cuts and closures for the country's news media. “When I was on the

Supreme Court beat during the years when news outlets were more plentiful and better resourced than today, there was a core group of national reporters for mainstream organizations that watched the court closely," Tibbetts writes. "There was competition among us to come up with stories beyond the routine agenda and we took pride in developing theme-related pieces that gave readers a big-picture view of legal trends or analytical examinations of the aftermath of decisions." The trend toward less depth and fewer stories about important rulings has at times been exacerbated, Tibbetts observes, by the cloistered culture of the institution and the court's own "restrictive method of accrediting journalists to cover its workings." Nevertheless, she notes, current Chief Justice Richard Wagner has spoken publicly about the paucity of high-quality news coverage of the Supreme Court, expressing "his worry about the decline in the number of journalists covering the court at a time when misinformation is escalating."

In keeping with Wagner's stated mission to enhance the public's knowledge of the Supreme Court, its history and ongoing role in Canadian society, the court and the University of Ottawa have collaborated on a cutting-edge audio-visual project aimed at opening the 150-year-old institution to wider online audiences. The anniversary initiative, titled *Supreme Court Experience*, is described by uOttawa law professor **Étienne Trépanier** – founder of the legal knowledge mobilization platform Jurivision.ca – as a bid to digitally counteract, online and through social media, the "misinformation and trust issues with our institutions."

By learning about the Supreme Court and some of its landmark rulings through easy-to-navigate videos – and even immersing in simulated courthouse

spaces and processes in a youth-friendly video game – students and other Canadians who want to better understand the highest court can do so instantly and conveniently at their desktops. "There are two objectives," Trépanier explained in a question-and-answer session with *Canadian Issues*. "One objective was to create engaging tools to reach young people where they are, either at school, through their teachers... And second, publishing some of that content on those platforms where younger folks are. Young Canadians don't watch TV anymore. They watch YouTube, Instagram and TikTok."

**Dr. Kerri A. Froc**, an associate professor of law at the University of New Brunswick, has contributed a critical, deep-dive examination of the Supreme Court of Canada's failure – both before and after the 1982 adoption of the Charter of Rights and Freedoms – to protect of the rights of Canadian women victimized by violence. "Over the years, the Supreme Court either reaffirmed discrimination embedded in the criminal law concerning male violence against women, or took tentative, insufficient steps to mitigate it," Froc argues. Troublingly, she explains, the promise the Charter represented as a shield to safeguard women against violence has been used to greater effect to address "the 'real issue': men's rights to fair trial and presumption of innocence." Froc concludes that, "given this history, one may be forgiven for having a certain degree of cynicism about whether the Court has come to grips with violence against women as a practice of discrimination."

**Jack Jedwab**, president of the Association for Canadian Studies, examines the fiery, partisan debate in Canada over provincial governments' increasing use of the notwithstanding clause, as well as Canadians' attitudes around the invocation

of this constitutional mechanism and their degree of trust in the Supreme Court of Canada to adjudicate such controversial matters. "Trust in the judiciary is widely seen as vital for democracies that value the rule of law. This trust, in turn, is regarded as essential in fostering societal cohesion," observes Jedwab, who cites recent survey results showing that, in fact, "the Supreme Court earns greater trust from the population than do either federal and provincial governments." Nevertheless, Jedwab highlights a serious challenge facing Canada's governing institutions. "The use of the notwithstanding clause reflects a wider societal problem around institutional trust in particular as it pertains to the courts and to elected officials," he argues. "If laws potentially violating minority rights can be defended in support of provincial autonomy, it implies an inherent problem when it comes to Constitutional protections that, on occasion, appear to undercut public trust."

The centrepiece of this issue of *Canadian Issues* is a wide-ranging interview with retired Supreme Court justice **Rosalie Silberman Abella**, who served on Canada's highest court from 2004 until 2021 and

is currently the Samuel and Judith Pizar visiting professor of law at Harvard Law School. Abella, the first Jewish woman and first refugee to serve as a Supreme Court justice in Canada, vividly describes how she felt upon learning of her surprise appointment during a trip to Ontario cottage country in August 2004, shares her views on criticisms of so-called "judicial activism" – "What is the opposite of judicial activism? Judicial inactivism? What are judges supposed to do?" – and expresses deep admiration for the strength of Canada's judiciary, its overall model of governance and citizens' shared belief in a country where "everyone gets a chance to flourish" regardless of differences.

"I think Canadians have every right to be so proud of the work that the Supreme Court of Canada has done in keeping the country fair – and in the respect that it gets, on the whole, from the media, from the legislatures, from governments," she says. "There's an understanding that there are separate spheres, and I'm proud of that. I think that's why Canada is so strong – one of the strongest democracies in the world."

# THE MODERN ROLE OF THE SUPREME COURT OF CANADA, AND ITS CONSEQUENCES

EMMETT MACFARLANE

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Emmett Macfarlane is a professor of political science at the University of Waterloo.

His research focuses on constitutional law, governance, and rights.

He is the author of *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press, 2013), *Constitutional Pariah: Reference re Senate Reform and the Future of Parliament* (UBC Press, 2021), and *Legislating under the Charter: Parliament, Executive Power, and Rights* (University of Toronto Press, 2023).

In 1985, James G. Snell and Frederick Vaughan published *The Supreme Court of Canada: History of the Institution*, a seminal work examining the Court's evolution to a body that, at the time, had only just begun to emerge as one of the country's most prominent governing institutions. Snell and Vaughan's book details the Court's inauspicious beginnings as a creature of Parliament rather than an entrenched feature of the constitution, in sharp contrast to its American counterpart. Created some eight years after Confederation, it was doomed to inferior status until the abolition of appeals to the Judicial Committee of the Privy Council (JCPC), which until 1949 served as Canada's highest court in the Imperial motherland across the Atlantic. Suffering from appointments of mixed quality a partial product of their being mired in patronage and not doing much to shape the nation's laws, the Court would take decades to come into its own even after 1949. Important 1975 reforms would finally give the Court more control

over its docket and a new focus on cases of national importance.

In the years since the publication of Snell and Vaughan's tome, much more has changed. The so-called Charter revolution dramatically increased the Court's power, and that of the judiciary generally. While courts always enjoyed the power of judicial review as umpires of Canadian federalism, the Canadian Charter of Rights and Freedoms meant courts were no longer limited to declaring which order of government had jurisdiction over a particular policy matter they could now determine whether a particular law or policy could be enacted at all. Under the Charter, the Supreme Court has revolutionized the criminal justice system and especially police powers through the enforcement of its Legal Rights guarantees, guaranteed equality rights for same-sex couples, made dramatic landmark decisions implicating labour relations and the right to

strike, and shaped a varied set of controversial social policies access to abortion services, safe consumption sites and medical assistance in dying (MAID).

Beyond the Charter, the Court grew increasingly bold after the 1980s in a host of other constitutional contexts, drawing on unwritten constitutional principles to invent new rules in its globally renowned opinion in the *Reference re Secession of Quebec* of 1998, and placing constitutional roadblocks on Senate reform and reform of the Supreme Court itself in two other landmark reference decisions in 2014. At times, the Court's judicial creativity has stretched the boundaries of law and politics, as the justices have even imposed new processes and rules on governments for the setting of judicial salaries in the name of the unwritten principle of judicial independence, an issue in which their self-interest was undeniable.

The public, media and scholarly debates over judicial activism or Charter dialogue ultimately proved less than illuminating. There seemed little point to debates that generally raised an underlying question of whether the Court should exercise power granted to it under the Constitution or where critics and defenders of the judicial role essentially talked past each other. By casting the debate over the Court's role in the seemingly artificial or subjective terms of whether its decisions are activist or whether the institutions of government are engaged in a meaningful dialogue over policy outcomes, those frames dampened, for some time, more fruitful explorations of how the Court actually exercises discretion, what factors inform the judges' decision-making, and what impact the Court has not only on discrete public policies but also on the role of governments and legislatures in the protection of Canadians' rights.

The debates could also be polarizing in ways that often defied accurate or nuanced portrayals of the Court's work in practice. Critics of the Court's modern role, and of judicial review under the Charter specifically, retain a fundamental position that this role is undemocratic, and that judges are essentially engaged in ideological politics. The Court's defenders resort to claims that the justices are merely following the law or they point out the positive outcomes engendered by many of its decisions, particularly those upholding rights. The problems with both views, at least when stated in stark terms, is their obvious lack of nuance. The Court's defenders risk advancing a patently unrealistic view of human nature when they implicitly assume the broadly-worded values entrenched in the Charter are not subject to judge's individual worldviews as to what would comprise a just result. Yet critics are similarly wrong when they suggest that judging is little more than ideology. As I explore in my own book, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, the law and the Court's distinctive role in upholding it often mitigate and constrain the degree to which politics influences outcomes. One piece of evidence for this is the extent to which the Court one composed of a relatively intellectually diverse bench, with identifiable liberal and conservative justices often enough arrives at unanimous outcomes, including in some of the most contentious contexts, such as decisions implicating laws around sex work or medical aid in dying.

Indeed, the Canadian Supreme Court stands in marked contrast to its American counterpart. The latter has evolved into a completely polarized, partisan and even corrupt institution. This is in part a function of a judicial appointments process and its cultivation of an explicitly partisan culture

around the nomination and confirmation process. As American partisanship and political culture have grown increasingly polarized, and the Republican Party especially has become more extreme and destructively populist, the Court has been subject to capture such that almost every decision can be predicted based on partisan and ideological considerations. It is a Court that, in 2025, has effectively abandoned the rule of law in the face of an authoritarian presidency.

Canada's Court has been buffered from these forces in part because federal politicians have thus far avoided overt partisan contestation over judicial appointments, and because the process itself avoids subjecting appointments to a parliamentary vote. More broadly, the Canadian legal community has generally resisted political polarization; there is a much stronger degree of consensus over the nature of law and the judicial role. However, that consensus comes with some degree of arrogance among the legal profession about the Court's capacity to deal with any and all political and policy issues that come before it. This is not simply a product of the Court's own behaviour. Under the Charter era, governments and legislators have been increasingly willing to let the Court settle political controversies in their stead.

Medical assistance in dying is a prominent example: despite poll after poll in the contemporary period showing an overwhelming majority of Canadians opposed the criminal law prohibition on access to MAID, no government of any political stripe was willing to expend the political capital necessary to repeal the law and establish a system of access. Better to let the Court force Parliament into making the changes. But the end result of this attitude is the very real risk that the role of elected leaders and parliamentarians in protecting and promoting rights becomes ossified, or, even worse, more vulnerable to ugly populist appeals to denigrate and violate rights.

The general lack of public outcry against pernicious uses of the notwithstanding clause suggests we may be entering a new, troubling era, where overt political attacks on the Court itself may become viewed as more palatable, threatening to take us down a disturbing road. A careful balance between the positions adopted by the Court's most ardent defenders and fiercest critics is needed, one that encourages judicial humility with respect for a institution that has generally remained principled and nonpartisan, even if it has undeniably emerged as one of our most prominent and unquestionably political institutions.

# JUSTICE IN THE SHADOWS? THE CHALLENGE TO MAINTAIN ROBUST MEDIA COVERAGE OF THE SUPREME COURT OF CANADA

JANICE TIBBETTS

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Janice Tibbetts is an associate professor of journalism at Carleton University, where she teaches justice reporting to aspiring journalists – including how to cover the Supreme Court. As a journalist, she covered the Supreme Court of Canada as a beat for *The Canadian Press* and *Postmedia News* from 1997 to 2011. During that time, she reported on hundreds of court decisions, including monumental rulings such as the legalization of cannabis and same-sex marriage, Quebec’s right to separate from Canada, whether parents can spank their children, the parameters of private health care, and whether terror suspects can be deported to countries where they face torture.

The Supreme Court plays a monumental role in shaping Canadian society, yet media coverage is relatively sparse and rapidly dwindling. The situation leaves the public increasingly uninformed about a court that rules on some of the most pressing issues of our time.

Compared to their American counterparts, the nine Canadian judges work in relative obscurity. They walk the streets of Ottawa without recognition and a survey shows<sup>1</sup> the majority of the public are largely unfamiliar with their faces and know little about the court.

The reasons are many: shrinking newsrooms and

news budgets; the court’s restrictive method of accrediting journalists to cover its workings; complex subject matters that make it difficult for overstretched journalists to dip in and out; and a 43-year-old Charter of Rights and Freedoms that prompts fewer landmark decisions attracting intense media attention than in past decades.

The Supreme Court gives the Parliamentary Press Gallery in Ottawa the discretion to accredit journalists and most of those who gain accreditation are Parliament Hill reporters who prioritize politics. This leads to a disconnect in which political happenings are covered intensely, while watershed decisions of the Supreme Court attract some momentary

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1 [https://angusreid.org/wp-content/uploads/2024/11/2024.11.13\\_CAN\\_Supreme\\_Court.pdf](https://angusreid.org/wp-content/uploads/2024/11/2024.11.13_CAN_Supreme_Court.pdf)

coverage, but more extensive reporting – such as critical analysis of issues and trends – is scarce.

Another reality for members of the Parliamentary Press Gallery is that political parties can be leaky ships, so there’s typically more payoff for journalists to prioritize politics over the court. In short, it’s easier to cultivate sources on the Hill, secure interviews and get “scoops” and other insider information that can lead to rewarding investigative work.

The Supreme Court, on the other hand, mainly speaks through its judgements. Interviews with the judges other than the chief justice have become increasingly rare in recent decades. The current chief justice, Richard Wagner, and his predecessor, Beverley McLachlin, have been the main voices for the court. Also, leaks from the Canadian Supreme Court are unheard of, unlike the high-profile 2022 leak of a U.S. Supreme Court draft opinion on abortion rights.<sup>2</sup> All of these impediments and disincentives add up to forcing a major time investment for already-stretched journalists to comprehensively cover the Supreme Court of Canada beyond occasional “news hits” arising from the court’s agenda.

So the court gets short shrift from reporters who are assigned to cover the realm of “justice” from both a political and judicial perspective. In my experience, decisions with clear political implications were more likely to draw the attention of politics-first news bureaus and, even then, there was editorial pressure

to focus on the political story instead of the legal questions surrounding a case. Issues involving pure political considerations or accusations of misbehaving judges also tend to draw even more attention, ranging from the 2014 Marc Nadon appointment<sup>3</sup> – which sparked a highly publicized spat between then-prime minister Stephen Harper and McLachlin, the chief justice at time. More recently, former Justice Russell Brown garnered widespread attention when he left the court in 2023 following accusations of inappropriate behaviour at an Arizona resort.<sup>4</sup>

When I was on the Supreme Court beat during the years when news outlets were more plentiful and better resourced than today, there was a core group of national reporters for mainstream organizations that watched the court closely. The media room at the Supreme Court on Wellington Street in Ottawa would overflow on Thursdays and sometimes Fridays, when decisions were (and continue to be) released at 9:45 a.m. sharp. There was competition among us to come up with stories beyond the routine agenda and we took pride in developing theme-related pieces that gave readers a big-picture view of legal trends or analytical examinations of the aftermath of decisions.

Even so, none of us covered the court full time; we also covered hectic Parliament Hill machinations that demanded most of our attention. In the 2006 scholarly book *The Last Word: Media Coverage of*

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2 <https://www.pbs.org/newshour/politics/what-the-supreme-court-found-in-their-roe-v-wade-leak-investigation>

3 <https://www.cbc.ca/news/politics/nadon-spat-between-harper-chief-justice-mclachlin-called-disturbing-1.2630896>

4 <https://www.canadianlawyermag.com/resources/professional-regulation/scc-judge-russell-brown-retiring-immediately-after-allegations-about-behaviour-at-arizona-resort/376677>

*the Supreme Court of Canada*, named and unnamed judges lamented that media coverage lacks expertise on legal matters and reporting on decisions is so superficial that the reasons underlying court rulings are rarely or briefly reported. Some journalists interviewed for the book countered that the upside of Parliament Hill reporters covering the Supreme Court, as well, is that the reporter better understands the politics that can surround a case.

Another reason the Supreme Court began to draw more media attention in the late 1990s and early 2000s was that it emerged as a flash point in a newspaper war between the *Globe and Mail* and the then-upstart *National Post*, which took an editorial stand against what it decried as “judge-made law.” The right-wing Reform party, and its successor the Canadian Alliance, were also frequent and fierce critics of the court and what they labelled the “judicial activism” of unelected judges striking down laws passed by elected politicians.

The heightened attention helped garner the Supreme Court of Canada the distinction of Time magazine’s Canadian Newsmaker of the Year in 1999 – rare public recognition for the top court’s role in shaping law and social policy with its landmark decisions that year on rights for the LGBTQ and Indigenous communities, as well as strengthened legal protection for sexual assault complainants.

Another factor leading to a higher profile Supreme Court in that era was that the chief justice through the 1990s was Antonio Lamer, a scrappy Montrealer who seemed to relish publicity. He would grant interviews liberally and passionately take on the court’s critics.

Fast forward 25 years, and Chief Justice Robert Wagner is among those who have lamented reduced media coverage in the present era, which he has said is diminishing every year. At a news conference in September in Yellowknife, the chief justice reiterated his worry about the decline in the number of journalists covering the court at a time when misinformation is escalating.

Wagner’s visit was part of a cross-country tour to five cities to mark the Supreme Court’s 150th anniversary by promoting a better understanding of the court’s role.

The tour is an element of an ongoing initiative by the Supreme Court to speak more directly to Canadians, in part because of the absence of robust media coverage. The court has also held hearings outside of Ottawa in recent years and started issuing one-page “cases in brief,” written in plain language to accompany the public release of decisions. The court has also started hiring strategic communications advisors from media backgrounds, including former CBC journalist Alison Crawford, who worked in the chief justice’s office from 2021 to 2023.

Wagner, at a gathering organized by the Canadian Bar Association in 2023, addressed the under-covered court and said an employee in his chambers was now tasked with calling journalists across the country to encourage them to cover cases that would be of interest to their audiences.

On top of more recent outreach to the public, the court also has a longstanding media-liaison committee in Ottawa, a well-equipped (and usually empty) media room in the Supreme Court building and an executive legal officer who fields calls from

journalists and provides media briefings on cases. However, the ELO is a senior lawyer whose main job is to act as a principal advisor to the chief justice.

The Supreme Court has also introduced other measures in past decades to make its proceedings more accessible for journalists. In 2004, after years of press-gallery lobbying, it became the first top court in the world in 2004 to hold “lockups” that permitted reporters to sift through the nuanced decisions for 45 minutes before they were released to the wider public, to better prepare them to immediately publish stories or go on live TV or radio within minutes of release time.

The court also was an early adopter of TV cameras in the courtroom and proceedings are broadcast on CPAC, the country’s public affairs news channel. Journalists can sign up for news releases apprising them of pending leaves to appeal, decisions, hearings and other news. The court also posts agenda items frequently on social media.

Still, Canadians know little about the Supreme Court, according to a November 2024 Angus Reid survey of 1,600 adults. The non-profit institute reported that Canadians are less knowledgeable about their country’s top court, in its “relative quietness,” than Americans are of theirs. For example, most Americans could correctly identify at least two U.S. Supreme Court justices from a list containing three names of real justices and three “decoy” names. Only one-quarter of Canadians could do the same.

Three in 10 couldn’t identify any Supreme Court justices and 43% could identify only one of the correct options. On the other hand, just 22% of those surveyed said they believe Canada’s Supreme Court is biased, compared to almost half of Americans who believe that about the U.S. Supreme Court. Canadians were divided on whether they have confidence in the court, but fewer than one-third of Americans reported feeling confident in their top court.

The findings track with what I have seen, anecdotally, among students enrolled in Carleton University’s specialized reporting course on the Supreme Court. The aspiring journalists seem to know more on day one about the overshadowing, polarized U.S. Supreme Court than its Canadian equivalent. Only a few students can name a judge or a decision from the Supreme Court of Canada. The learning curve is steep, but they leave the course able to report on proceedings in plain language, read decisions and other court documents, examine an issue in-depth and identify the judges and key decisions since the advent of the 1982 Charter of Rights and Freedoms.

Like many journalism professors, I encourage students to seek out under-reported stories and to go to places where it isn’t crowded with other media. This has led some students in my Supreme Court course to keep an eye on the institution when they become working journalists and even write about it from time to time – bucking the trend, perhaps, towards a top court that’s increasingly out of the public spotlight.

## JURIVISION’S ‘SUPREME COURT EXPERIENCE’

ÉTIENNE TRÉPANIÉ

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Étienne Trépanier is a lawyer, filmmaker and multimedia creator. A graduate of the Faculty of Law at the University of Ottawa (LL.L. 1996, LL.B. 1997), he was called to the Quebec Bar in 1998. He joined the federal Department of Justice where he first practiced as a litigator and then worked at Canadian Heritage focusing on communications and entertainment law. In addition to his career as a lawyer, Étienne produces film projects, including travel documentaries for distribution in Quebec and Europe. He joined uOttawa’s Civil Law Section in 2020 to launch the Jurivision.ca platform, a visual legal advocacy initiative for knowledge mobilization. He also teaches the Visual Advocacy/Law and Cinema experiential course in which he introduces law students to the production of visual advocacy multimedia projects for awareness, knowledge mobilization or persuasion. He also teaches Federal Legal Practice, a course to introduce law students to the diversity of legal careers in the federal public service.

*Étienne Trépanier spoke with Randy Boswell, guest editor of this edition of Canadian Issues/Diversité Canadienne, in October 2025.*

The 150th anniversary of the Supreme Court of Canada is a major milestone that has us thinking about its history. The Jurivision online portal’s “Supreme Court Experience” project certainly has historical components, but it’s also futuristic in nature. It includes both a docu-course and – I quote – an “interactive virtual experience in the form of a video game” that “allows Canadians to immerse

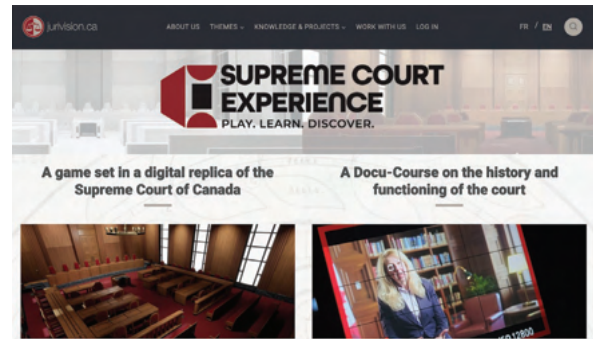
themselves in a digital, realistic environment that recreates the iconic Supreme Court of Canada building.” Could you tell me about the emergence of Jurivision, the “Supreme Court Experience” and what this is all about?

I guess I need to talk a bit about my background. So, I’m a lawyer – graduate from the University of

Ottawa – and practiced for the Department of Justice for 25 years as a litigator and in legal services... But I had a filmmaking practice on the side. So, I did travel films. I did a couple of short documentaries for the Franco-Ontarian schools here in the region. I did little projects, until I thought, you know, it'd be a good idea to use audio visual as a means of communication for the law...and to take the knowledge in the brains of researchers, from the experience of practitioners, and even the lived experiences of litigants or citizens, and bring those stories, in a storytelling narrative, to the public through an audio-visual platform. So our home base is Jurivision.ca. But we have a YouTube platform – trying to reach people where they are...

If we want to build trust, people need to know about how these institutions work and what type of human experience are lived in these institutions. And if we can inspire a few of those young Canadians to either get involved – go into law or something, that's great – but that's not what it's about. It's about civic education. So in the game, you discover the building. And we call it 'Echoes of the Court' because you hear bits and pieces from individuals (whose lives are linked) to the court. And hopefully, this will raise awareness, and maybe people want to learn more and they'll go to the docu-course – 'Keys to the Court' we call it. You learn about the court through the testimonies of lawyers and judges, but also through the experiences of five litigants – five individuals who went to the Supreme Court, took their cases to the highest court in the land.

Canadian Heritage was very much interested in the reproduction of the Supreme Court and the gaming experience. For the law foundations, it was probably a bit too much to pitch. So, we said, well, we'll build a course. But it was a great, great opportunity



The online portal to Jurivision's Supreme Court Experience game and video-based docu-course, developed by a team led by University of Ottawa law professor Étienne Trépanier.

for those two worlds to connect at one point. In the video game, there are components that are drawn from the docu-course. In the docu-course, there's stuff that's drawn from the from the game.

**You talk about this as a knowledge mobilization project, and that it's to engage not just university students in their studies, but also the broader public. Why do we need to have the broader public more engaged in this particular set of institutions – the Supreme Court and the broader justice system? There's perhaps a public appetite for crime news, which can include courtroom proceedings. But you're asking people to go a bit deeper into these institutions. Why do you feel that's an important mission?**

I think there's currently a lot of misinformation and trust issues with our institutions – what they are, what they do. So there are two objectives. One objective was to create engaging tools to reach young people where they are, either at school, through their teachers... And second, publishing some of that content on those platforms where younger folks are.

Young Canadians don't watch TV anymore. They watch Youtube, Instagram and TikTok... The idea is to reach young Canadians in a format that could be more engaging to them than the traditional assignment on the Supreme Court that they may get in high school or college or university... We've been on TikTok with some advertisement campaigns, and I see the numbers - like 2,000 people from TikTok came on the site this week... It's the idea of occupying algorithms with smart stuff, instead of leaving the algorithms occupied by silly stuff.

**You needed to have some buy-in from the Supreme Court, including judges who are members of the Supreme Court today, to gain access to the court's back rooms, to interview the justices themselves. It is a pretty cloistered institution for the most part. You had this idea. How did you make it work in terms of the buy-in from the Supreme Court players?**

I think the connection with this educational institution, the University of Ottawa, helped a lot. Chief Justice Wagner graduated from the uOttawa law school. You know, each time there's a new justice at the Supreme Court, there's a welcome ceremony



One of the highlights of the Supreme Court Experience is a rare glimpse of Canada's Supreme Court justices in the deliberation room prior to a hearing.

here at the University of Ottawa. It's been going on for years. So there is a special relationship between the university and all justices of the Supreme Court. In fact, when we did the launch event here, eight of the nine were present.

When I initiated this idea, at first they looked at me and said, 'You're a bit wild.' But at the same time, they were looking for some type of outstanding legacy for the 150th anniversary. The game they weren't sure about. But because I understood the institution so well, I think, I was able to express the project in a way that was reassuring and that wasn't compromising. I'm from that world. I'm a lawyer.

**The Supreme Court itself is in a moment where they're thinking about public outreach in a way that they may not have in the past - where they, too, recognize the need to reach out to make people more aware of what their institution is about. And I guess that coincides well with the anniversary. Can you discuss that?**

Exactly - I think it's key. The Chief Justice, since he arrived, has done a lot of things to open the doors... We didn't get access to everything, but we got access to a lot more than we used to. There was a willingness to explain a bit more what the institution is about. You know, we see Parliament's question period all the time - but the Supreme Court, it's rare that you'll see it on TV. The Court accepted that we set up cameras in different spots to be able to show different perspectives of a hearing. They accepted that we film in the deliberation room. They weren't discussing an actual case. It was before the hearing, but it was still an openness to show how - before and after the hearing - (the justices) meet all together... I mean, obviously I'm a lawyer, so for me, it was very



The Jurivision project was supported by the Supreme Court justices as a legacy project to mark the institution's 150th anniversary.

interesting, but I think also for a non-lawyer – for people to understand that the judges are all humans. There is a human component that is very interesting coming out from this project – and that was one of our key objectives.

**I looked at the interview with Rodney Small from Halifax, who challenged police racial profiling all the way to the Supreme Court and was acquitted in 1997. How did you go about selecting your case studies for deeper dives, even from the point of view of the appellant?**

We had a regional objective – five different cases from different regions of the country. There was a diversity component. But beyond that, we had to choose stories that had a human component to it. I could have done something on the regulation of airplanes or whatever, but it would have been more difficult to get the human (story). It was very, very interesting to see how their Supreme Court experience was still impacting them today. Rodney Small is an example – the (social) work he does now is

truly influenced by the lawyer who represented him.

**There is considerable tension in this country around the degree to which our Supreme Court judges are driving lawmaking or social change through ‘judicial activism.’ Could you tell me how you approach this through the project – things that are controversial about the Supreme Court, including the Charter of Rights and Freedoms, a contentious topic in our political landscape?**

For me, it was obvious that we had to deal with this. The project is an uOttawa project. It's not the Supreme Court's project. But at the same time, we had to strike a balance. So we asked the question to the Chief Justice. And we also asked the former chief justice, McLachlin, what was her view on this? And they provided interesting answers. Before the Charter, there was less judicial activism... The court itself doesn't seem to be hiding from the critiques...

There was a less glamorous era for the court – even some decisions that were taken – for the Japanese (internment), for example. We address these in our docu-course because these sorts of decisions are part of the Court's history.<sup>1</sup>

**Why do you think it is that we as a country, generally speaking, we know actually very little about the key figures in the Supreme Court's history and the current justices?**

It's always amazing to see how the judges can walk in the Byward Market and everything, and you

<sup>1</sup> Note: One video in the docu-course recounts the Supreme Court's upholding of the Canadian government's internment of more than 22,000 Japanese Canadians during the Second World War. Judicial history expert Emmett Macfarlane comments in the episode: "It's one of these black marks on the Supreme Court's history from a civil liberties perspective."

can cross paths with (Justice Mahmud) Jamal, or whoever – it happened to me – and he's alone and walking with his coffee, and nobody's bothering him. I guess that's Canada, and we're happy it's like this. I think our justice system, by not having the politicized aspect like the U.S., our judges are very much less exposed to the camera. There still seems to be a high level of trust towards the institution – but this could change.



Jurivision founder and uOttawa law professor Étienne Trépanier (left) said it's typical of the low public profile of members of the Supreme Court of Canada that he's observed Justice Mahmud Jamal (right) strolling around Ottawa's Byward Market unrecognized as one of the country's top judges.

# AN INCONVENIENT RIGHT: WOMEN'S EQUALITY, VIOLENCE AND THE SUPREME COURT OF CANADA

DR. KERRI A. FROC

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For much of the Supreme Court of Canada's 150-year existence, its jurisprudence concerning violence against women reflected an understanding of relevant legal rights as those possessed by men exclusively: under the common law; under the Canadian Bill of Rights, federal legislation passed in 1960; and later under the Canadian Charter of Rights and Freedoms of 1982. The law of sexual assault was characterized by "ambivalence... a shifting compromise between the values perceived as important," though protection of women from sexual assault has played a minor (and typically, incidental) role (Boyle, 1984). The Court's jurisprudence reflects this ambivalence pre and post Charter. Over the years, the Supreme Court either reaffirmed discrimination embedded in the criminal law concerning male violence against women, or took tentative, insufficient

steps to mitigate it. Feminist advocacy spurred Parliament to coursecorrect, repeatedly.

The irony is that after the Charter, the Court could not ignore women's equality rights, but its interpretation and application of the Charter impeded efforts to hold perpetrators of violence against women (VAW) accountable. It therefore also impeded advancements in women's rights – to equality under section 15, and to equal rights to bodily integrity and to fair trials under sections 7 and 28. Women's equality became visible in its jurisprudence – but often as an inconvenient right, dispatched before it addressed the "real issue": men's rights to fair trial and presumption of innocence. What I discuss below are non-exhaustive illustrations of this phenomenon in the Supreme Court's history.

In the late 19th and early 20th century, the Court held that men accused of rape had a legal right to put questions to complainants about their prior sexual history. Rape victims on the stand correspondingly had a “right” (really, a prerogative) not to answer. However, courts were not necessarily obliged to tell witnesses of this right in every instance (Boyle, 1984). Further, once the witness provided testimony regarding prior sexual history, it could be contradicted by introducing evidence of general reputation for promiscuity though not to establish specific instances of past sexual conduct (*R v Laliberté* (1877) 1 S.C.R. 117; Benedet & Grant, 2025).

Parliament attempted in 1976 to put some constraints on defence cross-examination of complainants on their prior sexual history. The Supreme Court then interpreted the law to strip from them even this historically granted protection – the right of refusal, and not to have their testimony contradicted by evidence led by the accused about their sexual conduct with others (*R v Forsythe*, [1980] 2 S.C.R. 268).

No pre-Charter Supreme Court of Canada decision refers to complainants in rape trials having legal rights (to equality or otherwise), in the same register as men’s legal rights to a fair trial and the presumption of innocence. Until patriation in 1982, a central preoccupation was corroboration in rape trials. For instance, *Warkentin v The Queen* [1977] 2 SCR 355 involved the brutal gang rape of a young Indigenous woman. One issue before the Court was whether forensic evidence and evidence from a couple in a vehicle who picked up the distraught victim, constituted corroboration. Justice Dickson in dissent said the evidence lent credibility to the complainant’s story but was not sufficiently “independent” to constitute corroboration. De Grandpré J, for the majority,

found instead that corroboration is a matter of “common sense” and that it should not be interpreted in a narrow, legalistic way. Whether in dissent or majority in these cases, however, no judge gave thought to the discriminatory nature of the corroboration requirement; the need for corroboration was simply accepted, as was, by implication, the diminished weight of complainants’ testimony, simply as a function of their status qua rape complainants. Released the same day as *Warkentin*, *R v Murphy*, [1977] 2 SCR 603, again involved a multi-perpetrator rape of a young Indigenous woman with the Court providing similar reasons.

The technicalities of applying the corroboration doctrine facilitated the Court’s ability to ignore the racist and sexist discourses already working in sexual assault law, and the significance to the accused’s motivation of these places being already marked as those in which colonial, sexualized violence could occur with impunity (Razack, 2002). Of note is that Gloria Moody from Williams Lake (where the men in *Warkentin* committed rape) was found murdered in 1969, the first of the unsolved murders associated with the “Highway of Tears” (IACHR, 2014).

Parliament abolished corroboration as a Criminal Code requirement in 1975. However, a contemporary commentator remarked that while corroboration was not a mandatory requirement, courts could (and did) refuse to convict without it and caution juries about the danger of convicting without corroboration (O’Sullivan, 1977). In 1983, Parliament barred such cautions. The 1983 suite of criminal justice reforms also replaced rape and indecent assault with sexual assault and revised the proto-“rape shield” law undermined by the Court in *Forsythe* (what became known as Criminal Code section 276).

With the Charter, the Court had to contend with constitutionally entrenched women's equality rights, with their comprehensive wording designed to overcome its earlier cramped reading of equal protection under the Canadian Bill of Rights. At times, the Court took women's equality seriously in its criminal law jurisprudence. It regarded equality as its own principle of fundamental justice, or at the least, an important contextual factor when examining men's fair trial rights under Charter section 7. Other times, it regarded equality as a subordinate, "societal interest" that it could disregard when faced with what it has perceived as its central task of protecting innocent men from wrongful conviction.

For instance, McLachlin J. (as the future chief justice then was), struck down section 276 of the Criminal Code in *R v Seaboyer*; *R v Gayme* [1991] 2 SCR 577. Section 276 put strict limitations on the ability of the defence to lead evidence of the complainant's sexual activity to support an inference of consent in the instance before the court or that the complainant was more likely to lie (the "twin myths"), and section 277 precluded evidence of the complainant's sexual reputation. The justice mentioned women's section 15 and 28 equality rights only briefly as part of the "variety of societal and individual interests" reflected in section 7's "fundamental justice."

However, their consideration was to be completely overborne by the accused's rights, because she stated that "a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event."

An amended rape shield law was reviewed again by the Court a decade later, in *R v Darrach* [2000] 2 SCR 443. In upholding the provision, the Court

took equality more seriously in the constitutional analysis. Even though the law had the potential of excluding relevant evidence (if the prejudicial effect was more than the probative value), it implicitly recognized women's equality rights as a principle of fundamental justice. Women's equality, accordingly, had an influence on the interpretation of the principle concerning the right to a fair trial (Froc, 2025).

Similarly, the Court upheld Criminal Code s.278's restrictions and procedural requirements for production orders relating to complainants' personal records from third parties. It held in *R v Mills*, [1999] 3 SCR 668 that fair trial rights ought to be interpreted in a "contextual manner," which meant "privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records." Section 278 and Mills followed *R v O'Connor* [1995] 4 SCR 411, in which the Court established a discretionary regime for records production that "precipitated a period of wide-open access to complainant records" (Gotell, 2008).

Even when upholding protections by invoking equality, some argue the Court diluted them into a simulacrum of the old common law (Coughlan, 2000; Gotell, 2006).

The Court's jurisprudence regarding *mens rea* ("guilty mind") for violent crimes shows similar ambivalence: articulations of discriminatory common law rules, legislative responses, and then constitutional review. *R v Pappajohn* [1980] 2 SCR 120, permitted accused men to argue that they had an "honest but mistaken belief in consent," even where the belief was unreasonable. Pappajohn had lured a real estate agent to an unoccupied home, restrained and raped her. While Pappajohn's conviction was restored, the

Court held that all that was required for a mistaken belief defence was that there be an “air of reality” about it.

Parliament once again stepped in and imposed a requirement that an accused cannot rely on his belief in consent unless he demonstrates he took reasonable steps to ascertain it. On the one hand, the Court fended off defence calls to create a potential loophole in the “reasonable steps” requirement, refusing to recognize the defence of “implied consent” in *R v Ewanchuk*, [1999] 1 SCR 330. It did so in part based on the concept being offensive to women’s equality. However, in *R v Morrison* (2019 SCC 15), the Court significantly undermined the “reasonable steps” requirement. It ruled the Crown cannot rely on the accused’s lack of reasonable steps to prove *mens rea* to commit sexual assault, unless he relies on mistake of fact as a defence. In other words, the Court essentially ruled that where the evidence shows the accused gave “no thought” to consent (instead of mistakenly believing in consent), he is entitled to an acquittal despite it being “precisely... where failure to take reasonable steps should count as a form of fault sufficient for conviction” (Stewart, 2019).

In *R v Daviault*, [1994] 3 SCR 63, the Court overturned common law doctrine precluding voluntary, self-induced intoxication from acting as a defence for crimes of general intent, including sexual assault. The case involved a man who had sexually assaulted his neighbour, who was partially paralyzed and used a wheelchair, after consuming a significant amount of alcohol. He asserted his intoxication made him enter a state akin to automatism. Despite the connection between violence against women and men’s intoxication, there is no reference to women’s rights in the judgement whatsoever (Froc & Sheehy, 2022).

Public outcry and feminist activism led to a legislative response. Criminal Code section 33.1 precluded such defences when the accused “departs markedly from the standard of reasonable care generally recognized in Canadian society.” The law defined “marked departure” as an accused voluntarily becoming so intoxicated that he becomes “unaware of, or incapable of consciously controlling, their behaviour” and as a result commits a crime of violence.

*R v Brown*, 2022 SCC 18, invalidated section 33.1 on the basis that it violated accused men’s section 7 rights and was inconsistent with the principle of fundamental justice that the “morally innocent” should not be convicted. The Court found that section 33.1 made the commission of extremely intoxicated violence a strict liability offence. All of the accused men had consumed massive amounts of intoxicants and had seriously injured their victims (all of whom, except one, were women). Justice Kasirer, for the Court, refused to follow *Mills* (and ignored *Darrach*), stating that women’s equality rights were a mere “social interest” that should be disregarded under fundamental justice.

Kasirer J. objected to the notion that this meant they were of “second order importance,” because they could receive due consideration under section 1. As in every s. 7 case, however, it ruled the violation could not be justified under section 1’s Oakes test. Parliament subsequently reintroduced a new version of s.33.1 that made clearer that it required a minimal standard of fault (criminal negligence) for men to be convicted for crimes of violence involving extreme intoxication. However, feminist scholars have raised concerns about the requirement of foreseeability of violence in the new provision. In their view, it will be unlikely the Crown will be able to invoke it where

a defendant has either never consumed that combination of intoxicants or had done so before and not been violent (Canada, 2023).

Confusingly, in the subsequent case of *R v J.J.*, 2022 SCC 28, the Court brought women's equality back in to "contextualize" the rights to a fair trial and full answer and defence under section 7. The Court upheld the "Ghomeshi amendments" to the Criminal Code that provides procedural protections concerning how complainants' private records in the possession of the accused can be used at trial.

Given this history, one may be forgiven for having a certain degree of cynicism about whether the Court has come to grips with violence against women as a practice of discrimination, its systemic nature, and its contribution to women's second-class status as rights holders.

Its jurisprudence reveals an ambivalence as to whether pursuant to Charter section 28 women are entitled to equal rights, at least when it comes to their treatment as complainants in the criminal justice system. True, they are not the ones who face a criminal record and jail time. However, VAW affects women's freedom to live without violence and curbs their physical liberty to carry on their lives in the world freely. They continue to be subject to revictimization in the trial process (Craig, 2018). The Supreme Court of Canada must reckon with its legacy, and whether its interpretation of rights reflects the whole image of the Charter, including the rights of both men and women, or is simply a failure of imagination.

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# COURTS, CLAUSES AND THE CONSTITUTION: IS THE TIMING RIGHT FOR A MEANINGFUL CONVERSATION?

JACK JEDWAB

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## INTRODUCTION

For 150 years, the Supreme Court of Canada has been a fundamental part of Canada's institutional landscape. Over that period of time, many decisions made by the highest court in the land have contributed immensely to the defining of Canadian identities. The court has played a critical role in its deliberations around gender, sexual orientation, indigeneity, immigration, religion, race and ethnicity, minority language rights and more.

Such issues are frequently the subject of important societal debates with great political ramifications. Consequently, the court's interventions in these realms sometimes give rise to questions about the lines or boundaries between the responsibilities and

authority of members of the judiciary and that of the legislators who appoint them.

As it marks its 150th anniversary in 2025, the Supreme Court of Canada is encountering one of its most important historic challenges. Section 33 of the Canadian constitution, commonly referred to as the Notwithstanding Clause, allows federal, provincial or territorial legislatures to pass a law that operates notwithstanding its contravention of certain provisions in the Canadian Charter of Rights and Freedoms for up to five years. Such a law can also be renewed thereafter.

The controversial clause was included as Section 33 of the Charter as part of a compromise struck at the 1981 First Ministers conference convened

by then-Prime Minister Pierre Trudeau in order to secure support from the country's provincial leaders for the 1982 Constitutional Act.

Since then, its invocation has had a critical impact on Supreme Court decisions, most notably on rulings that affect the protection of minorities. In September 2025, Canada's Attorney General, Sean Fraser, filed a factum with the Supreme Court outlining the federal government's concerns about the use of the notwithstanding clause and asked the court to identify appropriate parameters or limits to its use.

Observers contend that the opinion issued by the Supreme Court will shape the way both federal and provincial governments could use the notwithstanding clause in the years ahead. What follows is a consideration of the possible consequences of the federal government's recent intervention on the matter and what it might imply for the future of the Supreme Court in light of the mounting challenges to the protection of minorities in Canada.

### **FEDERAL FACTUM FILING**

The federal government filing was a response to the Supreme Court's hearing of a case concerning Quebec's secularism law, Bill 21. The bill was designed to prevent a Charter challenge to the province's highly controversial ban on public sector workers in positions of authority (such as teachers, judges and police officers) from wearing religious symbols. Adopted in 2019, the bill preemptively invoked the notwithstanding clause to forestall any

Charter challenge to the provincial prohibition.

The federal government is calling on the Supreme Court<sup>1</sup> to recognize that courts may invalidate the use of the clause should it result in "irreparable impairment" of Charter rights or freedoms violated by Section 33.

To date, the court has done little more than assess whether its invocation by Quebec's legislature properly followed due process. Fraser noted that the case is about much more than some of the immediate issues before the court and that - more broadly - the Supreme Court judges should be able to state that rights have been clearly violated by a law where the notwithstanding clause has been deployed, even if its use implies that the law cannot be struck down.

### **THE USE OF THE NOTWITHSTANDING CLAUSE**

The notwithstanding clause was initially conceived of as a measure for exceptional or emergency use in response to judicial decisions that were deemed to insufficiently acknowledge an imminent public security or safety need. To date, no federal government has ever invoked the notwithstanding clause. On the provincial side, however, it is Quebec that has most frequently deployed the clause with the intention of symbolically expressing its "sovereignty" by preemptively shielding legislation from constitutional challenges. Hence, the sovereigntist Parti Québécois government applied the clause to almost all provincial laws adopted between 1982 and 1985.

But the Quebec Liberals looked to stop to the

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1 [www.canada.ca/en/department-justice/news/2025/09/statement-from-minister-fraser-on-canadas-intervention-before-the-supreme-court-of-canada.html](http://www.canada.ca/en/department-justice/news/2025/09/statement-from-minister-fraser-on-canadas-intervention-before-the-supreme-court-of-canada.html)

automatic invocation of the clause when it took power in 1985. Yet shortly thereafter, in 1988, in a controversial move, the provincial Liberal government made recourse to the clause to override a Supreme Court decision that had struck down parts of a law that called for unilingual, French-only commercial exterior signs (under Bill 101), which the Supreme Court had described as an unreasonable limit on freedom of expression. The public outcry in Quebec against the court decision saw the Liberals invoke the clause in the name of what then Premier Robert Bourassa described as the preservation of social peace.

Sigalet and Snow (2025) point out that Canada's notwithstanding clause has been invoked in six different provincial laws since 2018. They contend that the resurgence is explained as a reaction to the growing judicial invalidation of provincial statutes as well as increasingly frequent federal-provincial partisan conflicts, particularly between conservative provincial governments and the Liberal federal government.

In 2019, Quebec's governing party, the conservative Coalition Avenir Québec (CAQ), preemptively invoked the notwithstanding clause in Bill 21, its secularism law. The CAQ used the clause again in the case of Bill 96 (2022), which reinforced the province's language law, including important amendments aimed at strengthening and extending provisions in Bill 101 protecting the French language.

In Ontario, Premier Doug Ford's Progressive Conservative government deployed the clause in 2021 to re-establish legislation that had curbed third-party election advertising in the 12 months prior to

an election. In the following year, the government used the clause to prevent teachers from going on strike. Similarly, in October 2025, the Alberta government used the notwithstanding clause to end a teachers' strike by adopting back-to-work legislation.

## **THE NOTWITHSTANDING CLAUSE AND GENDER IDENTITIES**

The latest provincial front in the deployment of the notwithstanding clause is in the area of gender identities. In October 2023, Saskatchewan invoked the clause to adopt a law that requires parental consent for students under 16 to change their name(s) or their pronouns at school. Following suit, the Alberta government introduced legislation accompanied by the clause to prevent legal challenges to measures affecting transgender youth and adults. Laws were passed in Alberta in 2024 to prevent youth under 16 from accessing, including puberty blockers and hormone therapy. The legislation also prohibits gender surgery for minors. Alberta Premier Danielle Smith contended that it could take years to resolve potential legal challenges to what were described as gender-based policies in health care and education, thus causing too much uncertainty.

Other legislation in Alberta required school staff to inform parents or guardians of any students under 18 who wish to be addressed by a name or pronoun of a different gender identity. Parents of students under 16 must give permission for school staff to use the student's chosen name and pronouns. A third bill called for anyone participating in female-only competitive sports in Alberta to have been assigned female at birth.

Opponents of these laws have described them as

“cynical and chilling” and insist that they call the rule of law into question. Public opinion is split on such issues. According to an Angus Reid survey, about two-in-five Canadians (43%) say parents should be informed and must give consent if a child wants to change their gender identity. About one-in-seven Canadians (14%) say that the parent should have no role in this decision. About one-in-three (35%) feel that parents should be made aware of any changes that are happening at the school but that these changes should not require parental consent. Finally, those Canadians with children younger than 18 feel more strongly about consent than those without school-aged children (48% compared to 41%).

While elected officials may justify their actions on the basis of public opinion, the courts need to be able to determine whether the rights of minorities are being violated regardless of where the public stands at a given point in time.

### **THE FEDERAL GOVERNMENT AND THE NOTWITHSTANDING CLAUSE**

Over the years, federal politicians have spoken out against the use of the notwithstanding clause. Former Prime Minister Justin Trudeau criticized its use by Ontario as well as in the cases of Quebec’s Bill 96 and earlier Bill 21. In an interview in January 2023, Trudeau stated his intention<sup>2</sup> to ultimately regulate the use of the clause. He insisted that the use of the clause must have political consequences and warned against minimizing the suspension of fundamental rights.

In the Bill 21 case, the Supreme Court of Canada is hearing a legal challenge in which appellants are asking the court to restrict the preemptive use of the clause and/or to consider whether courts can still weigh in on the constitutionality of a law when the clause is invoked. As noted above, the federal government is intervening in the case to determine whether the court can set limits on how governments use the notwithstanding clause to override Charter rights.

Echoing Trudeau’s concern, Canada’s current Prime Minister Mark Carney said he opposes the “anticipatory” or routine use of the notwithstanding clause, which he regards as undermining the Canadian Charter of Rights and Freedoms. He believes decisions about rights should be made by the courts, not bypassed through the pre-emptive use of the clause.

And while saying he supports the goal of Quebec’s Bill 96 in seeking to protect and promote the French language, Carney opposes the Quebec government’s decision to preemptively use Section 33 to shield the law from constitutional challenges.

In reaction to the federal government factum to the Supreme Court calling for limits on the clause, the premiers of Ontario, Quebec, Alberta, Saskatchewan and Nova Scotia have demanded<sup>3</sup> the immediate withdrawal of the federal submission. The premiers insist that the federal government’s arguments constitute a formal disavowal of the constitutional bargain that brought the Charter into being in the first place. They add that the factum “proposes an unclear and unworkable legal standard with no basis

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2 [www.lapresse.ca/actualites/politique/2023-01-21/disposition-de-derogation/trudeau-envisage-de-se-tourner-vers-la-cour-supreme.php](http://www.lapresse.ca/actualites/politique/2023-01-21/disposition-de-derogation/trudeau-envisage-de-se-tourner-vers-la-cour-supreme.php)

3 [www.cbc.ca/news/politics/premiers-carney-withdraw-court-submission-notwithstanding-1.7653648](http://www.cbc.ca/news/politics/premiers-carney-withdraw-court-submission-notwithstanding-1.7653648)

in the text of the Constitution," and which would "amount to indirectly amending the Constitution."

The front established by the five provinces ultimately ends up providing tacit support for Quebec legislation curbing religious symbols in parts of the public domain, and for gender-based policies in Saskatchewan and Alberta, through the premiers' insistence that provincial authority must prevail over other considerations.

On the other hand, the Manitoba government introduced a bill that seeks to curtail future use of the notwithstanding clause by provincial administrations. Bill 50, the Constitutional Questions Amendment Act, would require that the rationale for the use of the clause be laid out before the judiciary. Although the clause has never been invoked in Manitoba, Premier Wab Kinew suggested that the extra step would serve as a safeguard against its use to "trample" on the rights of vulnerable groups.

### **TRUST IN COURTS, LEGISLATORS AND PUBLIC OPINION**

The use of the notwithstanding clause reflects a wider societal problem around institutional trust in particular as it pertains to the courts and to elected officials. If laws potentially violating minority rights can be defended in support of provincial autonomy, it implies an inherent problem when it comes to Constitutional protections that, on occasion, appear to undercut public trust.

How do Canadians view the Supreme Court? A

majority of Canadians<sup>4</sup> (62%) believe the Supreme Court is "impartial", about three times the number who instead call it "biased" (22%). Despite the majority belief in the court's impartiality, overall, only about half (49%) of Canadians say they have confidence in the country's top court, while about two-in-five (42%) say they do not.

Trust in the judiciary is widely seen as vital for democracies that value the rule of law. This trust, in turn, is regarded as essential in fostering societal cohesion. One would assume that politicians want the public to trust the judges they appoint to the highest court(s). Yet politicians are accountable to their electorate and are therefore more directly affected by policy outcomes. A survey conducted in October 2025 by the firm Leger for the Association for Canadian Studies reveals that by comparison, the Supreme Court earns greater trust from the population than do either federal and provincial governments. The survey data in the Table below point to a rise in trust of the Supreme Court amongst persons over the age of 45.

Surveys confirm that many Canadians are concerned with the increased use of the notwithstanding clause. About three-in-five (58%) say they fret over the recent popularity of the clause, which has been considered or invoked frequently after not being deployed since 2005. About one-quarter of respondents (27%) are not concerned. In Quebec, about as many say they are concerned (41%) as not concerned (40%) with the clause's return to prominence.

A January 2023 Angus Reid survey reveals that

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4 <https://angusreid.org/supreme-court-appointment-impartial-bilingualism>

**TABLE 1. WHEN IT COMES TO THE FOLLOWING DO YOU VERY MUCH TRUST, SOMEWHAT TRUST (NET TRUST)**

	TOTAL	MALE	FEMALE	18-24	25-34	35-44	45-54	55-64	65+
Supreme Court	65%	66%	63%	59%	53%	58%	71%	71%	70%
Federal Government	47%	47%	47%	48%	47%	40%	47%	50%	51%
Provincial Government	45%	47%	43%	49%	49%	36%	43%	48%	45%

Sources: Leger Marketing for the Association for Canadian Studies.

sentiment on the notwithstanding clause is largely unchanged over the past three decades, with some 55% who favour abolishing it and 45% who would keep it. In Quebec, however, since 1992, the share that favour retaining the clause has risen from 53% to 63%.

## CONCLUSION

A healthy democracy will possess checks and balances against abuses of power and influence that may adversely affect minorities. Often, in the Canadian context, a province’s recourse to the notwithstanding clause is a tacit admission by the legislature that there is a rights violation in a proposed law.

Yet supporters of the notwithstanding clause contend that it is an indispensable tool in a free and democratic society as it curtails unchecked judicial oversight. For their part, critics of the clause insist that it undermines fundamental rights and suggest that if a government is unhappy with a court

judgment it should amend legislation rather than overriding and censoring the judiciary.

As the Supreme Court of Canada marks its 150th anniversary, the federal government asking the court to look at establishing limits on the use of the notwithstanding clause risks exposing Canada’s top judges to the politics of this thorny issue. As the clause is part of the Canadian Constitution itself, optimally an amendment would be required to secure the changes the federal government envisions.

Notwithstanding the factum and the pushback on the part of the provinces, there are limits on effecting meaningful changes without reopening discussions on the Constitution. Rather than placing the Supreme Court in the middle of a federal-provincial clash, the political gambit of constitutional talks – with a view to negotiating some amendment that sets clear limits on the use of the notwithstanding clause – may be worth considering.

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# ‘GREAT COLLEAGUES, GREAT CASES AND A GREAT WINDOW ON WHAT WAS HAPPENING TO JUSTICE IN CANADA AT THE TIME’

ROSALIE SILBERMAN ABELLA

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Rosalie Silberman Abella is the Samuel and Judith Pizar visiting professor of law at Harvard Law School and is a former justice of the Supreme Court of Canada (2004–2021). She was the first Jewish woman and first refugee to serve as a justice with Canada’s top court. She earned a B.A. in 1967 and an LL.B in 1970 from the University of Toronto and in 1976, at age 29, was appointed to the Ontario Family Court, becoming the first pregnant person ever appointed to the judiciary in Canada. She was appointed to the Ontario Court of Appeal in 1992. She was Chair and author of the Ontario Study on Access to Legal Services by the Disabled in 1983 and the sole Commissioner of the 1984 federal Royal Commission on Equality in Employment, creating the term and concept of “employment equity”. The theories of “equality” and “discrimination” she developed in her Royal Commission Report were adopted by the Supreme Court of Canada in its first decision dealing with equality rights under the Canadian Charter of Rights and Freedoms in 1989. The report has been implemented by the governments of Canada, New Zealand, Northern Ireland and South Africa.

She has written over 90 articles and written or co-edited four books. A collection of essays titled *Justice Rosalie Silberman Abella: A Life of Firsts* (edited by Vanessa MacDonnell, Stephen Bindman and Gerald Chan) was published in 2025.

*Rosalie Silberman Abella spoke with Randy Boswell, guest editor of this edition of Canadian Issues, in October 2025.*

The 150th anniversary of the Supreme Court of Canada happened to coincide with the publication of a new book of essays examining your legacy as a Supreme Court justice, which flowed from a special

symposium following your retirement from the Court in 2021. A long and distinguished legal career preceded your appointment to the Supreme Court, but perhaps the best place to start this conversation

**is with one of your many beginnings – a phone call you received in 2004 that marked the beginning of your journey as a Supreme Court justice. Can you tell me about that?**

The retirement in 2004 of Frank Iacobucci and Louise Arbour created two vacancies nobody expected. They happened around the same time. The last vacancy from Ontario was filled by Ian Binnie when John Sopinka died unexpectedly (1997). When there is a vacancy from Ontario, it will most often be filled by someone from the Ontario Court of Appeal or sometimes, as in the case of Ian Binnie, an outstanding member of the profession. So it was unclear what was going to happen. Because there were two vacancies, (Prime Minister) Paul Martin – with Irwin Cotler as the Minister of Justice – decided that he wanted to have two women, which was an historic move. It raised the number of female judges on the Canadian Supreme Court to four out of the nine.

He picked someone I really admired, Louise Charron, an outstanding jurist and a great colleague. I am quite sure that if there hadn't been two vacancies, there was little likelihood that I would have been appointed because the trajectory of my legal career was so untraditional. When I got the call, I was at the cottage with my family. It was towards the end of August, and we were totally convinced that it wasn't going to happen, and then it did. I just hid at my cottage for the next few days, because a whirlwind started and the press seemed to go haywire over my appointment. I don't think there'd ever been more controversial buzz around a Supreme Court appointment as there was around mine.

My appointment in 2004 was, to some groups, like the fathers' rights groups, worrying. And Real

Women. As for the rest of the country, I think they were just watching the debate and not sure what was going on. So 2004, when Justice Charron and I were appointed, was an interesting moment. We were on the cusp of a time when the country was trying to make up its mind – did they love this new Supreme Court that was muscular in the protection of rights as they had in the 1980s, or were they now wary of it?

And so began the 17-year journey. I had no idea what was ahead of me. And it was joyful all the way through: great colleagues, great cases and a great window on what was happening to justice in Canada at the time. It was extraordinary.

**So, the concern was, OK, here's someone who personifies the idea of judicial activism? Is that what the concern was?**

In the 1980s, when we first got the Charter, we got path-breaking jurisprudence from Brian Dickson as Chief Justice, Bertha Wilson, Gerry La Forest and later, at the end of the decade, Claire L'Heureux-Dubé and Bev McLachlin came on, along with Peter Cory and Frank Iacobucci. It was a very strong court that took the Charter seriously. Rather than taking baby steps, it was extremely bold.

I think it was a relief to the public that the Supreme Court, when it was finally given the chance to implement rights, was so bold. The Canadian judiciary had formerly taken baby steps – a little change here, a little bit there. Other than from the brilliant Bora Laskin, you really didn't see the assertive rights tradition that the American (Earl) Warren court had. But then out of the gate, with the Charter of Rights and Freedoms in 1982, it was ongoing rights protection. And the country cheered.

The whole conversation seemed to change in the (early) 1990s. We started hearing the term 'judicial activism' thrown around in the United States. And since there's no plexiglass between our borders, the phrase and related concepts started to creep into the Canadian environment when decisions expanded rights. We also had different press ownership (in the 1990s). The result was that what people had cheered about in the 1980s became suspect in the '90s. And people in Canada started throwing around the phrase 'judicial activism'.

I didn't even know what it meant. What, after all, is the opposite of judicial activism? Judicial inactivism? But we started to get these phrases in the '90s, these labels, and these rhetorically presumptively dismissive terms instead of analysis. It turned into, I think, a very unproductive approach to understanding the role of judges in a democracy.

And then what happened was *Bush v. Gore*, 2000, which was the ultimate act of judicial activism. After that, they seemed to stop using the term judicial activism.

**In your career prior to the Supreme Court appointment, it was obviously part of your job to be aware of what the Supreme Court of Canada was deciding. What was your view of the growing conversation around the protection of rights, the significance of the Charter?**

I started law school in 1967, with Vietnam in the background and swirling debates about social relationships in the United States and in Canada. And I was watching. I read a lot to try to keep up with what was going on.

When I graduated in 1970, we got the Royal Commission on the Status of Women that Florence Bird chaired. It ushered in a whole new era and started the social conversation in that decade, along with the B & B commission (Royal Commission on Bilingualism and Biculturalism) with its report on linguistic rights, and Pierre Elliott Trudeau as Minister of Justice saying that the state has no role in the 'bedrooms of the nation.' There was a reconfigured sense of what justice and law should look like.

I was paying close attention to what was going on in the United States in the '60s and '70s at the Supreme Court, where the court was fully engaged in making sure that law kept kept pace with changing realities. Canada didn't have that judicial tradition. The Supreme Court of Canada was not particularly central to the way the public thought. The view was that it was up to the government to create and protect rights, but not necessarily judges.

I became a family court judge in 1976 after four years of practising law. I became immersed in family law and what happens to families when they come into contact with the justice system. There was no guidance from the Supreme Court or even the Court of Appeal. It didn't seem to be anything that the courts were interested in or spent a lot of time dealing with. Meanwhile, I was getting a chance to watch how law works for real people, people who can't afford lawyers, who go from what Walter Lippmann called 'the day's drudgery to the evening's despair.' And I learned to step back and not look at judging from the top down. I learned to listen, to actually pay attention to what the people in front of me were saying about their lives and their families, and to stand back and say, 'This is not about you. You can't judge them as if they were you.' That's how I learned to be a judge.

And all around me, there were dialogues and conferences and conversations – about Indigenous rights, persons with disabilities, race, women. All of that was going full tilt in the 1970s. We were bursting with justice energy.

And at the end of that decade, you had Pierre Elliott Trudeau insisting that there be constitutional protection in the form of a Charter of Rights. There were certainly doubters who did not have confidence that the judiciary was up to the task. But then the courts became crucial players. Why? Because there were things legislatures couldn't do. Legislatures are a crucial part of the democratic framework, but only a part. Majorities elect legislatures. But the other part of the democratic catechism is that you have independent judiciaries protecting minorities who cannot easily get relief from the legislatures, because legislators – if they don't respond to majorities – lose their seats. Judges risk nothing but controversy for doing what they think is the right thing – sometimes for the majority, sometimes for the minority. That's what checks and balances are about, and all under the watchful eye of the independent media, who hold up the mirror and tell us whether we're the fairest of them all. That's the triumvirate that I see in a full-throttled liberal democracy: legislatures representing majorities, independent judges doing what they think is right under law, and the media observing all of the above. Plus the scrutiny of academics. It's quite amazing how well it has worked over the years since the Charter was enacted.

I think most members of the public were unaware of the Supreme Court or what it did until the Charter of Rights. It was a rebirth in 1982, and then it became an essential part of the public understanding of what democracy was – that it isn't just about majorities.

I think democracy is in full bloom in Canada. The Supreme Court has, I think, remained stalwart in understanding what its independent role is. I'm very proud of the role that the Supreme Court has played domestically and internationally. For the Canadian Supreme Court to go from underrecognized to central in the global constitutionalism conversation, is a remarkable journey – and all to the credit of those first Charter-era Supreme Court judges in the '80s and '90s. I stand on their shoulders, and I think Canadians have every right to be deeply proud of the work that the Supreme Court of Canada has done in protecting Canada's values.

**Can you tell me a bit about the dynamic of the group of people that you were on the Supreme Court with? Obviously not every judgment is a consensus. How did that play out for you during the 17 years that you were part of that group?**

I went from being a trial judge sitting alone to learning to be part of a tripartite panel at the Ontario Labour Relations Board and the (Ontario) Court of Appeal. So I learned what collegial decision-making was. On the Supreme Court, you're sitting with the same eight people every single time. That's a challenge. Learning to listen to them, pay serious attention, see how to make your views persuasive, or learning when to back off, that's a very different experience. And it wouldn't have worked if it weren't for the fact that I liked all of those people.

**Do you think that there is something about the way that we run our Supreme Court – and run our overall governing structure – that has helped to make the Supreme Court a workable institution in the way you're describing? Are we avoiding some of the pitfalls we see in the system across the border? Can we**

**avoid the politicization of the Supreme Court that we see in the United States and which, I think, most Canadians find worrying?**

To quote Yogi Berra, predictions are hard to make – especially about the future. But although I'm not smug, I have confidence that that we will stay true to the liberal democratic core for a long time, because most people in Canada are committed to what Canada is and what its values are. Where we are now, as a country, is in large part because we've

had wonderful legislatures and political leadership, we've had wonderful judges, a great media and great academic institutions.

To me it was such a privilege to be one of the judges on that court. I am very proud of the way this country has moved and kept moving towards the ever-increasing protection of rights. And to me, that's what a liberal democracy is all about: the promotion and protection of rights so that everyone gets a chance to flourish in their country.

