INTRODUCTION

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

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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 countrie – 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 Pisar 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."