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

ROSALIE SILBERMAN ABELLA

Rosalie Silberman Abella is the Samuel and Judith Pisar 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 the 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.