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

EMMETT MACFARLANE

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.