The Supreme Court at Canada's 150th

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In the drama of Canada's relatively brief history as a country, the Supreme Court has been a major player. From its early days in the former Senate reading room to ruling out of a former stable behind the West Block to its occupation, in 1946, of the majestic Ernest Cormier landmark Canadians associate with the court, the court has evolved along with the country.

The Supreme Court of Canada was an afterthought of confederation. And for most of its existence, the high court lived up this billing.

While the British North America Act empowered the Parliament of Canada to create a "general court of appeal for Canada", it was not necessary to do so right away because Canadians, as British subjects, could appeal to the Judicial Committee of the Privy Council in London. Thus, the Supreme Court of Canada's creation was deferred until 1875 and it laboured in the shadow of its British judicial parent for the first 75 years of its existence.

Through most of the 20th century, the court was content also to remain in the shadow of Parliament and the executive.

Until the enactment of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court functioned as a reliable defender of state power. Standing up for civil liberties was rare. In the World War I decision *Re Gray* (1918), the court sanctioned massive delegation of power from Parliament to the executive. That decision then provided the legal foundation for the orders-in-council interning more than 20,000 Japanese-Canadians during the Second World War and for the orders authorizing the deportation of Japanese Canadians after the war was over. The treatment of Japanese Canadians remains a deep stain not only on Canada's conscience but on the Supreme Court's record as well.

Decisions such as the *Alberta Press Case* (1938) invalidating restrictions on freedom of the press stand out precisely because of their rarity. Far more representative are cases like *Quong Wing* (1914) which upheld a Saskatchewan law prohibiting Asians from employing female workers and *Christie v. York* (1939) validating a tavern owner's right to refuse a serve a black customer.

In 1949, the Supreme Court of Canada truly became supreme when appeals to the Judicial Committee were abolished. It would take a long time for the court to actually develop the independence that it had been given. It was hoped by many that the enactment of the Canadian Bill of Rights in 1960 by the Diefenbaker government might change the equation.

The Canadian Bill of Rights was enacted at a time of tremendous change within Canadian society: it was the 1960s, after all. But the judges of the Supreme Court did not seem to notice. The Supreme Court was unable or unwilling to embrace a new rights-protecting role. Only once did the court strike down a law as inconsistent with the Bill.

The year 1982 marked an important turning point for the Supreme Court with the enactment of the Charter of Rights. In the preceding years, the court had become more independent.

The court had waded in on national issues through the reference function in a way that it had not done before. It decided the *Anti-Inflation Act Reference* in 1977, the *Upper House Reference* in 1979 and the *Patriation Reference* in 1981. These cases clearly cemented the Supreme Court's role as an important arbiter in federal-provincial relations.

The court took centre political stage, ruling on—or rather ruling out—Prime Minister Pierre Trudeau's proposed reforms to the Senate in 1979 as well as his plans for unilateral patriation of the Constitution in 1981. In the latter case—the *Patriation Reference*—a divided Supreme Court ruled that Trudeau's unilateral plan was legal but violated constitutional convention. As political scientist Peter Russell has characterized the decision, it was "bold statecraft" but "questionable jurisprudence". The decision forced the parties back to the bargaining table, leading to the patriation deal with the Charter (and the constitutional recognition of aboriginal rights).

The Charter required a more policy-based style of decision making, a role that, to the surprise of many, the once-reticent judges of the Supreme Court embraced with zeal.

Led by Chief Justice Brian Dickson (1984-1990), the Supreme Court in its first Charter cases embraced "the living tree doctrine" that had been first enunciated by the Judicial Committee in the 1929 *Person's Case*: the Constitution is "a living tree . . . capable of growth and expansion within its natural limits." The court rejected the legitimacy of "drafters' intent" or "originalism" as a guiding principle of constitutional interpretation at the same time as the doctrine was ascendant in the United States.

The Supreme Court Building in Ottawa, architect Ernest Cormier's masterpiece, home to Canada's highest court since 1944. *Policy photo*

The court proceeded with the task of giving life to the pronunciations laid out in the Charter and in the aboriginal rights provision (section 35) of the Constitution Act, 1982. It massively expanded the rights of criminal defendants, struck down the abortion law and ushered in an equality revolution. Antonio Lamer became Chief Justice on July 1, 1990 and the blockbuster cases continued.

However, the 1990s will be remembered as a turbulent decade for the Supreme Court. For the first part of the decade, it was a confident court, very much on the offensive, actively engaged in criminal justice law reform and law reform under the Charter in other areas. With the rise of the Reform Party in the west and in Parliament, the Supreme Court increasingly came under attack for its alleged "judicial activism".

There was a noticeable change in the court when Beverley McLachlin became Chief Justice in January 2000. The court became more measured, more pragmatic.

As the decade wore on, criticism of the court waned. The court seemed to pick its battles. It retreated from its previous jurisprudence in some of its most controversial and potentially far-reaching areas, such as judicial independence and the unwritten constitutional principles. On the whole, the court appeared more united—"consensus" became the watchword. In 2007, the court began to pivot from restraint to a greater willingness to revisit its earlier decisions.

It altered its approach to interjurisdictional immunity in *Canadian Western Bank* (2007) and held that the Charter could apply extra-territorially in some circumstances in *R. v. Hape* (2007). Most notably, in the *B.C. Health Services case* (2007), the court explicitly overruled previous precedent to find a right to bargain collectively in the Charter.

B.C. Health Services was a harbinger of things to come later with the blockbuster cases of *Bedford* (2013) (prostitution) and *Carter* (2015) (euthanasia). The Court had grown in its confidence in the second decade of the century.

In 2014, the Supreme Court "constitutionalized" itself in the reference regarding the appointment of Justice Marc Nadon to the high court. The court invalidated Prime Minister Harper's appointment of Nadon as well as the Harper government's attempt to amend the Supreme Court Act. It held that both required a constitutional amendment. That decision was soon followed up by a rejection of the Harper government's plans for Senate reform.

The prime minister himself reacted by publicly lashing out at the Chief Justice in May 2014 in what Harper biographer John Ibbitson described as "the nadir" of the Harper premiership. Public support was largely on the side of the chief justice and of the court. The incident showed the court's independence and its ability to weather a direct and intense political attack.

As Canada marks its 150th birthday, the Supreme Court has established itself in a manner that could not have been envisioned in 1867. It is a strong, self-confident and vital part of confederation. P

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