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National Post – December 5, 2005

Chief Justice: McLachlin tells judges to be bold ‘even in the face of clearly enacted laws’

By Janice Tibbetts, CanWest News Service

OTTAWA – Judges should feel “emboldened” to trump the written word of the Constitution when protecting fundamental, unwritten principles and rights, Canada’s Chief Justice says.

Beverley McLachlin, in a speech delivered in New Zealand, took on critics who say judges have no business going beyond the strict letter of the Constitution to strike down laws and enforce rights.

“The rule of law requires judges to uphold unwritten constitutional norms, even in the face of clearly enacted laws or hostile public opinion,” said a prepared text of the lecture Judge McLachlin gave to law students at Victoria University of Wellington late last week.

“There is certainly no guarantee or presumption that a given list of constitutional principles is complete, even assuming the good faith intention of the drafters to provide such a catalogue.”

Judge McLachlin set out a blueprint for when judges must rely on unwritten principles, which she defined as “norms that are essential to a nation’s history, identity, values and legal system.”

Even in countries that have written bills of rights enshrined in their constitutions, such as the Canadian Charter of Rights and Freedoms, Judge McLachlin said unwritten principles have a role for several reasons.

Societal values change over time, and the constitution document can be incomplete or open to interpretation.

“I believe that judges have the duty to insist that legislative and executive branches of government conform to certain established and fundamental norms, even in times of trouble,” she said.

Even countries without constitutionalized bills of rights, such as New Zealand, find ways to ensure fundamental justice based on unwritten norms of fairness, she said.

She noted critics have advocated reining in the use of unwritten constitutional principles on the grounds that it amounts to “judicial imperialism” or even the personal views of an individual judge.

In 1998, the Supreme Court of Canada broke new ground by invoking unwritten constitutional principles in a historic opinion on whether Quebec could unilaterally secede from Canada, she said.

The Canadian Constitution is silent on whether a government can secede. So the unanimous court invoked the unwritten principles of federalism, democracy, the rule of law and respect for minorities to arrive at its opinion that Quebecers can leave if they really want to, but only after a clear majority say so in a referendum with a clear question.

In 2001, the Ontario Court of Appeal again relied on unwritten constitutional principles of protecting minorities in a ruling that found it unconstitutional to reduce services at Ottawa's only exclusively French hospital.

Judge McLachlin listed several unwritten constitutional norms that have evolved into entrenched rights over time, such as the right to not be punished without a trial, to retain counsel and to enjoy the presumption of innocence.

In another ruling that has been described as one of the Supreme Court's boldest, the judges used unwritten constitutional principles in 1997 to order provincial governments to set up independent commissions to set judges' salaries.

Critics complained the court entered new territory by telling legislatures the process they were to use in doing their jobs.

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The Ottawa Citizen – December 5, 2005

McLachlin urges judges to go beyond letter of law Courts should defy legislation to protect rights, chief justice says Janice Tibbetts

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