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The right to make new rights
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Parliament made history this past Feb. 27, when a special ad hoc, all-party committee of the House of Commons gathered in front of reporters and television cameras to query Supreme Court of Canada nominee Marshall Rothstein. Never before had a nominee to the country's highest court been compelled to face politicians in a public forum as a requirement to obtain his appointment. In fact, it was the first time a nominee's name had even been made public before his appointment. Justice Minister Vic Toews, who once studied under Rothstein, had ample justification in describing his former professor's three-hour conversation with politicians as "historic proceedings in the life of our country."

He was referring to the public hearing itself, not to its content. But both were remarkable, and potentially portend the possibility of a long-term shift in the Supreme Court's character. Rothstein's answers to MPs' questions, about the role of the judiciary in general and about the live-wire issue of judicial activism and the Charter of Rights and Freedoms specifically, were especially significant. "The important thing," he said at one point, "is that judges, when applying the charter, have to have recognition that the statute that they're dealing with was passed by a democratically elected legislature ... and therefore, they have to approach the matter with some restraint."

That idea of "restraint" may well have come from another era. Like it or not, the Supreme Court of Canada has earned itself a reputation – among traditionalists and progressives alike – of being anything but restrained. From allowing separate schools for francophones to lowering the ages of consent for sodomy, the court has distinguished itself in recent years as a vanguard of progressivism, rather than a bulwark of constitutional traditionalism. If Rothstein prefers reservation when it comes to applying Canadian charter rights, as he suggests, then he's at direct odds with the liberal activist approach of his new judicial colleagues. Justice Rosalie Abella, appointed in 2004, has called the charter "ideologically schizophrenic," characterized the notwithstanding clause – a device specifically designed to put democratic restraints on charter rulings – as an offensive anomaly, and has denounced the Constitution's protection of individual freedoms as a path to "fundamentalism" and "Puritanism." The head of the court, meanwhile, Chief Justice Beverley McLachlin has, in several speeches and interviews of late, not only defended the court's liberal interpretations of the charter, but has also arguably imagined new ways in which the court's de facto law-making powers might expand.

The most recent evidence of McLachlin's creative approach to jurisprudence was an eyebrow-raising address delivered to a legal conference in New Zealand on Dec. 1 of last year. In her speech, Canada's highest judge argued that there are times when the court must enforce norms that "transcend the law and executive action." In an exclusive interview with the Western Standard on March 25 in Ottawa, McLachlin appeared fully unapologetic for her visionary approach to charter interpretation (for an edited transcript of the interview, see Question Period). Her message, in a nutshell, is this: that, when necessary, the court has every right – nay, every responsibility – to invoke "unwritten values" when ruling on matters not explicitly enunciated in either the charter or the country's laws.

"The Constitution is first and foremost and fundamental, and I have said that repeatedly," McLachlin tells the Western Standard. "But in interpreting the constitutional provisions, from time to time the court can have and must have recourse to unwritten values." As an example, she raises the court's

1985 consideration of the reference question of Quebec's right to separate. "There's nothing in the Constitution about the right to secede," McLachlin acknowledges. But the answer, she argues, is in understanding the thinking behind the Constitution, not simply what appears in the document itself. "One of the things we said [in 1998] is you have to look at the values on which the country is predicated – values like democratic rights, federalism, protection of minorities, and so on. And these inform the Constitution as you have it and allowed us to suggest, as we did in that case, that the answer was no. But, that if a clear majority answered yes to secession on a clear question that there would have to be negotiations – discussions arising from our traditions of tolerance, federalism, democracy and protection of minorities."

But Rory Leishman, the author of the upcoming book Against Judicial Activism, argues that when the court finds itself in uncharted charter waters, its role is not to start thinking creatively, but rather, to refer the matter back to Parliament. That, he says, is what the court should have done in 1988. Parliament is supposed to make the law; the courts, on the other hand, are there to interpret it. "They're violating, essentially, the separation of powers," says the London, Ont.-based Leishman. "And it will have disastrous consequences for respect of the independence of the judiciary, which is vital to democratic, constitutional government." Leishman's upcoming book reaches much the same conclusion as The Charter Revolution and the Court Party, published in 2000 by University of Calgary academics F. L. (Ted) Morton and Rainer Knoff. In myriad ways, the Supreme Court has used the charter to change government policy on, according to the Calgarians, "an ever-expanding list of controversial issues - abortion, aboriginal rights, gay rights, bilingualism, criminal law enforcement and prisoner-voting."

To many traditionalists, especially conservative Christians, the most obvious of the court's infringements on Parliament's territory took place with its 1995 Egan decision, in which it added homosexual rights to the list of protected persons named in Section 15 of the charter. It did this in spite of the fact Parliament had explicitly omitted homosexuals from the section prior to the charter's adoption in 1982.

In her New Zealand speech several months ago, McLachlin delivered perhaps the clearest and most complete enunciation of the reasoning behind such judicial activism. To McLachlin, "there exists fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts." The idea of discovering unwritten constitutional principles "should not be seen as a rejection of the constitutional heritage" shared by countries such as Canada and New Zealand, she said. And whether explicitly expressed in a written form or not, McLachlin contended these "new natural law[s]" are of paramount importance to a civilized country: "The legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action." In other words, there are, in McLachlin's view, a whole set of constitutional principles that exist, but are not formally part of Canada's Constitution. It is the court's job to enforce those unwritten rules, regardless of what voters or the charter actually express. Where are they found? In three places, according to McLachlin: "customary usage; inferences from written constitutional principles; and the norms set out or implied in international" treaties. "This is not law-making in the legislative sense," she allowed, "but legitimate judicial work."

McLachlin argues that constitutions "are written in a way that allows for some flexibility." Currently, for instance, Section 15 of the charter explicitly offers protection against discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. These, she argues, "are not presented as the only categories and the language is open-ended." What's more, she adds, "it's clear that Parliament did not want that to be a closed

list." After all, "Who knows what kind of discrimination will be coming down in 50 or 75 years? The Constitution has to be flexible enough to [prevent] future kinds of discrimination."

But Toronto lawyer Gwendolyn Landolt, national vice-president of Real Women of Canada, a conservative activist group, sees the idea of judges enforcing unwritten law as a not-so-veiled grab for more power. "What she's trying to do, I think, is say, 'We judges are impeccable. We have the authority. We, the judges, know best. We are qualified. We can make these decisions, because we swear an oath to be impartial,' which is bunk," Landolt says. It's a fact, she argues, that Canadian judges are political appointees. Their actions, she concludes, are often political. "All McLachlin is really doing is being a propaganda machine, saying 'how noble we are and that we're not activists,'" Landolt says. "But every time she opens her mouth she just shows exactly what she's doing."

And it's true that McLachlin has appeared inconsistent in applying her concept of interpretative law. While the chief justice defends the court's licence to extend unwritten sexual orientation protections in Section 15, something she calls "a proper legal interpretation," Landolt wonders why the judge couldn't just as easily apply the same logic to property rights, which were also left out of the charter. While McLachlin says she believes the court has licence to consider as enforceable their understanding of "values on which the country is predicated," she insists that providing rights for property (which has arguably enjoyed better traditions of protection through most of our history than minorities have) is a matter strictly for elected governments. "That would be a decision for the provinces and federal government to make if and when they want to make it," says McLachlin. Not surprisingly, critics like Landolt see this sort of selective flexibility as function of political bias: the advancement of homosexual rights is a liberal cause; property rights are generally championed by conservatives.

Morton, now an Alberta MLA, says he can't help but draw the same conclusion. "It just shows her underlying ideological bias in favour of the sort of left-wing socialist causes," he says. Nor does he see an easy fix to the problem of one-sided judicial activism. Even if Prime Minister Stephen Harper were to institute a more rigorous parliamentary review of Supreme Court candidates, nothing would change for years since no new appointments are likely until about 2013 – due to the fact that Supreme Court judges serve until they are 75 years old. McLachlin, for example, has served on the court since 1988 and has been chief justice since January 2000, but, at 62 years old, has 13 years left on the bench. Morton points out that, in most European countries, judges typically serve for just nine years, and their appointments are staggered. As things stand in Canada now, "Harper could govern for the next two years, get re-elected to a majority government and govern from 2008 to 2012 and never make an appointment."

Still, if Harper's novel review process becomes a Canadian tradition, the very existence of public scrutiny could potentially change the nature of appointments, when they do eventually occur. Even a non-Conservative government would likely prefer to exercise more conservatism in making their picks, if only to steer clear of the political fallout that might occur when an outspoken or activist judge, like an Abella or a L'Hereux-Dubé, are cross-examined.

And Parliament retains the power to reconstitute the Supreme Court, should it choose; the court was created by an act of Parliament in 1875. Parliament might also establish a special committee to examine Supreme Court rulings that overturn laws and report to Parliament on possible remedies; former Reform party leader Preston Manning once suggested the establishment of such a committee. But nothing this far-reaching is currently on the agenda of any major party.

Moreover, making major changes to the court, specifically as it relates to the power to interpret the charter, would be a dicey move, politically. An Environics Research Group poll, conducted to mark the charter's 20th anniversary in 2002, found that seven of ten Canadians believed that the Supreme Court of Canada, and not Parliament, "should have the final say when the Court declares a law unconstitutional on the grounds that it conflicts with the Charter."

Significantly, however, the poll did not ask about the court's expanding power to create new law. At a time when social activists are publicly musing about enshrining the right to state-funded medicare or the right to welfare, these are meaningful issues. The ultimate question, then, is this: who do Canadians trust to decide what's best for the country – 308 elected parliamentarians or nine unelected judges?