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Don't go beating up on the 'god-like'

By Ted Byfield

The endless yapping of Canada's liberal news media in favour of greater independence for Canadian members of Parliament is matched only by their consternation when some Tory MP actually does speak out independently. He must be disciplined at once, the liberal media agree. Just consider for a moment the case of Maurice Vellacott, Tory member for Saskatoon, who tried to defend Parliament against the invasion of its rights and prerogatives by the Supreme Court of Canada.

Now if any institution should properly speak out in protest against this particular outrage, surely it is Parliament itself, the body whose centuries-old powers are being blithely pirated by a Supreme Court-gone-nuts, drunk with delusions of an unlimited mandate to exercise supra-parliamentary authority. If Parliament isn't prepared to defend its ancient democratic role, then who can?

This at any rate was how Vellacott saw it, an opinion that got him, in effect, fired from a Commons chairmanship (aboriginal affairs) quite unrelated to his remarks about the Supreme Court. The apparent intention was to serve notice on the rest of the Tory caucus that if they criticize the Supremes, they're on the way out, which ironically enough confirmed what Vellacott said.

His offence was to criticize Chief Justice Beverley McLachlin's notably exalted description of a judge's role, delivered in her celebrated speech in New Zealand. She said, Vellacott charged, that when lawyers become judges, "all of a sudden there's some mystical kind of power comes over them by which everything that they ever decree then is not to be questioned, they take on these almost godlike powers." Well, the chief justice admittedly did not use those precise words. But careful examination of the powers of moral perception which she did attribute to judges confirms that something very like it is certainly implied. Unless judges have been somehow endowed with the power to discern and invent "new natural law," as she calls it, whereas mere elected politicians lack that power, then how could the court justify making up laws, rather than allowing Parliament to do it? There's only one possible answer: Judges have mystical qualifications not bestowed upon most mortals. If that indeed is what she is asserting, Vellacott is right.

No, says the Harper government, Vellacott is wrong. Meaning exactly what? Meaning the Harper government must agree with Chief Justice McLachlin that a judge is indeed endowed with some hallowed capability that its own MPs do not have, and therefore the court is free to govern the country as it sees fit. In short, by forcing Vellacott's resignation, the Tories have in effect affirmed what he said. They must really think the Supremes are somehow god-like, beyond criticism or reproach.

Isn't it curious, however, that neither the government nor the liberal media saw fit to speak up rather sooner on this question? Contrast, for example, these two views of the function of a judge:

First, the McLachlin view as delivered in New Zealand: "There exist fundamental norms of justice so basic 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."

Second, a very different view: "Canada is a federation in which Parliament and the provincial legislatures make the laws. When Parliament or the legislatures have conferred a discretionary

power on judges, that discretion must be exercised within the bounds established by the legislatures or Parliament.”

By the first view, judges are at liberty to ignore restraints imposed by “constitutional texts,” meaning the Charter and the laws passed by federal Parliament and provincial legislatures. By the second view, judges are to act “within the bounds established by the legislatures and Parliament.” Thus judges are not above the written laws. They are, in effect, not “like gods.”

The second view looks like Vellacott’s, doesn’t it? But it was not he who delivered it. This, in fact, was the view expressed by the future Justice Marshall Rothstein last March, before a parliamentary committee reviewing his appointment to the Supreme Court of Canada. It’s funny the liberal media didn’t beat him up the way they did Vellacott. But how could they? He was about to become “god-like.” You can’t go around beating up on the god-like.