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**Vellacott's gone, but his point remains**

**From rulings to appointments, the evidence points to political thinking**

**By Mark Milke**

Whenever Canada's courts show up in the headlines, the debate too often comes across as bipolar. For some, any criticism of a particular justice or ruling is an infringement on the necessary principle of judicial independence. The critic is thus presumed a barbarian who would subject the citizenry to the vagaries and occasional excesses of majority rule. The other half of this sometimes-stunted debate is the idea that any decision that overturns a law is always evidence of judicial activism, of an illegitimate overreach where a power-mad judge imposes her will on an unwilling populace.

The simplistic caricatures were once again on display last week when Maurice Vellacott, a Conservative Member of Parliament from Saskatchewan, stumbled in his critique of Canada's courts. Vellacott attributed words to Supreme Court Chief Justice Beverley McLachlin that she never actually spoke. He then resigned his post as chair of the Commons' aboriginal affairs committee after it was clear an Opposition-led non-confidence motion in him would succeed.

McLachlin has regularly asserted that the courts have not been politicized nor have they overreached in their interpretation of the constitution. She repeated that defence again last week. Well, perhaps she really believes that the appointment process has, until now, been non-political and that no judge or court in Canada has gone beyond a defensible reading of the constitution.

But the good justice's belief is belied by the facts. On politicization, I am sure it is a coincidence that, as CanWest newspapers reported last year, 13 of the 34 Quebec Superior Court justices appointed since 2000 by federal Liberal Justice ministers donated to the federal Liberal party in the three to five years before their appointment. It's also coincidental that no judge who donated to any other party was appointed. I am also sure it was irrelevant that more than 70% of those appointed between 2000 and 2005 to the Ontario Superior Court by justice ministers Martin Cauchon, Anne McLellan and Irwin Cotler, donated money only to the Liberal Party of Canada.

As for the notion that certain court judgments have not on occasion been political, it's a weak assertion. In September 1999 the Supreme Court issued a ruling as regards Nova Scotian Donald Marshall Jr. and said Marshall, a native, could fish in the off-season (in what turned out to be an incorrect reading of a past treaty). Rioting ensued in Atlantic Canada by non-aboriginals and the high court then issued a "clarification." It came less than two weeks later and was effectively a reversal of the original judgment. That the original ruling was severely flawed is beside the point; the reversal was political.

The lure of politics has occurred in several other judgments. Property rights, the right to life for the unborn and the right not to be discriminated against based on sexual orientation were all not included in the 1982 Charter of Rights and Freedoms. In fact, all were explicitly excluded, with the latter two being the subject of some extensive discussion at the time. Argue for or against rights to property, protection for the fetus, or for sexual orientation all you want: Since the adoption of the Charter, Canadian courts have read in only sexual orientation but not the other two assertions. Debate such categories as desirable or not, but don't argue Canada's court judgments have not been political; they clearly have been.

In the case of sexual orientation, the property rights equivalent would be if the court struck down B.C.'s Agricultural Land Reserve on the grounds the Charter protects private property rights. It

doesn't, it never has, and the court would be fanciful activist and political in its invention if it ever discovered such Charter rights now exist. The response to this has been the "living tree" argument, the idea that courts must interpret constitutional rights in the light of present context. That's fine insofar as a justice finds, say, that some law has not caught up with a technological advance and so may yet be applied to a new form of crime. (Stealing is still stealing even if some law wasn't written with cyber-theft in mind.)

Regardless of what one thinks of certain issues, it's a leap for the courts to take categories explicitly rejected by parliamentarians as rights and find later they exist as constitutionally protected. Not every appointment to the bench is political; not every justice who strikes down a law is being an activist. But the claim that politics does not exist in the political backrooms before appointments or that activism isn't occasionally evident in selected judicial decisions is unsupportable. Vellacott had a point, no matter how improperly expressed.

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