

Calgary Sun – May 15, 2006

Party time for Courts: Judiciary proves its power as a political force

By Ezra Levant

What is the second-most powerful political party in Canada?

If you guessed the Liberal party – because they're the Official Opposition – you're wrong.

The first real political defeat suffered by Stephen Harper's Conservatives was dealt not by the hapless Liberals, demoralized and in the midst of a leadership contest. No, the first blood drawn against the Tories was inflicted by a lesser-known but more powerful political force: The Court Party.

Of course the Court Party isn't an official party registered with Elections Canada. And the Court Party doesn't actually run any candidates in elections. That is one of the sources of their power: They can never be thrown out of office, since they have never been elected in the first place.

The Court Party consists of judges, lawyers, law school professors and a sympathetic media establishment, all united by the philosophy that unelected judges are the true keepers of the country, not the elected MPs who actually have to win grubby elections every four years.

The Court Party is very new, having grown up since the adoption of the Canadian Charter of Rights in 1982. The name was coined by two University of Calgary professors, Rainer Knopf and Ted Morton (Morton is now an MLA in the Alberta legislature). They were the first to describe this booming political industry, and to note it had shifted some important decisions away from the legislative arm of government towards the judicial arm. That's a move away from democracy and towards jurocracy.

There are certain public matters that are better decided by democratically unaccountable judges than by politicians. An example of this might be a complex business litigation matter, or even a scandalous criminal charge, where a judge up for re-election might be tempted to give in to public anger, whether or not the accused was actually guilty. But that's not where the real politicization of the courts is happening. It's happening in truly political matters, from gay rights to the question of Quebec separatism to Aboriginal affairs. Sometimes these matters are handed to the courts by timid politicians, who would rather someone else made the tough calls for them. Other times the courts jump in and make laws contrary to the express will of legislatures. The courts' unilateral lowering of the age of consent for sex to 14 is an example of this.

It's called judicial activism, or law-making from the bench, and it's undemocratic.

Needless to say, people with agendas that couldn't survive in a general election like activist courts to get their politics done that can't be done democratically.

Which brings us back to Harper's first defeat. A little-known, back-bench Tory MP named Maurice Vellacott had the audacity to call the judges like he saw them – as self-appointed high priests of society who often make laws up, instead of truly following the Constitution. He criticized the Chief Justice of the Supreme Court, Beverley McLachlin, saying she admitted in a speech that judges thought they were "God-like".

McLachlin publicly rebuked Vellacott, pointing out she never actually used those words. Vellacott corrected himself, but stood by his assertion that judges acted like they were supreme beings – a reasonable opinion, given many recent judgments.

The resultant hue and cry from the Court Party – ranging from retired judges to the Canadian Bar Association – calling for Vellacott’s head worked. Vellacott resigned from the chairmanship of a parliamentary committee before the Opposition parties could unite to dump him. On paper, it might have looked like the Liberals won. No, the Court Party did.