PEOPLE PRINCIPLES PROGRESS

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THE ALBERTA COURT OF APPEAL'S FIRST CENTURY 1914 TO 2014

BY DAVID MITTELSTADT

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COURT OF APPEAL

As Her Majesty the Queen's representative, it is my pleasure to extend congratulations to the Court of Appeal of Alberta on the occasion of its Centennial. Albertans, and all Canadians, are fortunate to live in a society that ensures peace, order and good government. We enjoy these tremendous privileges thanks to certain key principles, including the rule of law and an independent judiciary, that stand at the heart of our nation's proud British heritage. I am honoured to recognize all of the men and women who have played a role in maintaining that important heritage through service to the Court of Appeal of Alberta over the past 100 years. I thank you for your great commitment to Crown and country and for your unyielding dedication to serving the greater good for the benefit of all citizens.

His Honour, Col. (Ret'd) the Honourable *Donald S. Ethell*,
OC OMM AOE MSC CD LLD
Lieutenant Governor of Alberta

FOREWORD

The true purpose of the law is not to abolish or restrain, but to preserve and enlarge freedom.

– John Locke, 1632–1704

One hundred years ago, in the midst of great provincial change and opportunity, the Alberta Court of Appeal came into being. Since inception, it has assisted in the administration of justice, provided an important route of appeal for Albertans and been empowered by the highest ideals of justice. Decisions of the Court of Appeal have been influential in the development of Alberta's voice and felt across our nation.

A number of cases that the Court of Appeal has ruled on have been pivotal to Alberta and Canada. In 1917, the Appellate Division of the Supreme Court of Alberta, this court's predecessor, was the first to rule in *R v Cyr* that women could sit on the bench as magistrates. *Cyr* was a prelude to the landmark "Persons Case," which confirmed that Canadian women had the same rights as Canadian men with respect to positions of political power.

The Alberta Court of Appeal was an important contributor to the early interpretation of the *Canadian Charter of Rights and Freedom*. In *Hunter v Southam*, the court was tasked with defining the *Charter* right to be free from unreasonable search and seizure. The Court of Appeal's analysis and application were unanimously upheld by the Supreme Court of Canada, and to this day it is the foundational case for interpreting section 8 of the *Charter*.

In *R v Big M Drug Mart*, the majority of the Alberta Court of Appeal decision was upheld at the Supreme Court of Canada, marking the first decision on the *Charter* protection of religious freedoms. This decision helped create the groundwork for the *Oakes* test, which continues to guide our courts in their balancing of individual rights and freedoms in a free and democratic society.

In the course of its 100 years of service to Albertans, the Alberta Court of Appeal has contributed to the realization of Canada's vision for an equal, democratic, and free society. This commemorative book celebrates the Alberta Court of Appeal's history and its dedication to the administration of justice in our province.

I would like to acknowledge the Legal Archives Society of Alberta (LASA) for its role in the creation of this book. LASA initiated and managed the project, and worked closely with the writer, David Mittelstadt, the Court of Appeal, and others to develop a resource that provides valuable insight into the Court's history. This project is an excellent example of LASA fulfilling its mission to preserve, promote, and understand the evolution of law and society in Alberta.

On behalf of all Albertans, I am honoured to congratulate the Alberta Court of Appeal on its first 100 years and recognize the important role it has had in shaping Alberta and Canadian society.

Alison M. Redford, QC
Premier of Alberta

ACKNOWLEDGMENTS

Many individuals and organizations made this book possible. First and foremost, Graham Price, the founding president of the Legal Archives Society of Alberta, conceived the history, and LASA executive director Stacy Kaufeld pursued funding and deftly administered the project. Chief Justice Catherine Fraser and the Court of the Appeal of Alberta were enthusiastic and unstinting supporters and provided funding, as did the Alberta Ministry of Justice, the Alberta Historical Resources Foundation, the Ministry of Community Development through the Community Initiative Program, the Calgary Bar Association, and LASA through Alberta Lotteries.

Special thanks are due to the LASA's volunteer Editorial Committee. Everett Bunnell, Stacy Kaufeld, Dr. Louis Knafla, the Honorable Willis O'Leary, Justice Keith Ritter, Justice Jack Watson, and Neil Watson reviewed many drafts and provided much valuable feedback to the author. Chief Justice Catherine Fraser reviewed the final draft and provided a great many very helpful suggestions. Many retired and current justices of the Court participated in interviews, some very extensive, including the Honourable Adelle Fruman, Howard Irving, Roger Kerans, Sam Lieberman, Herb Laycraft, John Major, Willis O'Leary, Anne Russell and William Stevenson; Justices Myra Bielby, Carole Conrad, Peter Costigan, Jean Côté, Catherine Fraser, Connie Hunt, Bruce McDonald, Peter Martin, Cliff O'Brien, Marina Paperny, Ellen Picard, Keith Ritter, Frans Slatter, and Jack Watson; and several officers of the Court, Registrars Sue Stushnoff and Lynn Varty, case management officers Bobbi Jo McDevitt and Cara Schlenker, and legal counsel Laurel Watson. I owe a great debt for the time, memories, and insights of these busy individuals. Special thanks as well to the Honourable Mary Hetherington and Elizabeth McFadyen, whose interviews for LASA's oral history program were very useful.

Many members of the staff of the Court of Appeal were involved in this book. Sue Stushnoff was invariably helpful in providing administrative records and dealing with odd research requests. Hildegard Krause provided many of the photographs, while Senior Legal Counsel to the Chief Justice Andrew Foster assisted with editorial review and prepared the glossary of terms. Diane Boisvert, executive officer to the Chief Justice, was an invaluable liaison, and judicial assistants Priscilla McLeod, Verla Sharp, Michelle Lindberg and Lorri Jukic helped with numerous tasks.

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Finally, the stylish book before you is the product of the hard work and dedication of portrait photographer Noel Zinger, Peter Enman, editor, and Mieka West, designer.

INTRODUCTION

History in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.

– Benjamin Cardozo[1]

On a sunny July day in 1918, a situation unprecedented in Canadian legal history arose in Alberta. The army had refused, despite a writ of *habeas corpus* issued by the Appellate Division of the Supreme Court of Alberta, to produce several conscripts in court. In response, Chief Justice of Alberta Horace Harvey ordered the sheriff of the court in Calgary to proceed to the Sarcee military barracks and produce them, if necessary by force. As astonishing as this sounds today, the Court and the Canadian military seemed poised on the brink of armed confrontation, even as war raged in Europe. Harvey was not a man to back down in the face of a challenge to his authority. In addressing what the Court should do in response to the government's failure to comply with the Court's order, Harvey said:

This Court is the highest Court of this province. It is duly and legally constituted for the purposes of protecting the legal rights of all persons who may come before it....

Upon this situation two courses are open to this Court. It can either abdicate its authority and functions and advise applicants to it for a redress of their wrongs and the protection of their legal rights that it is powerless... the consequence of which could scarcely mean anything less than anarchy or it may decide to continue to perform the duties with which it is entrusted for the purpose of guarding the rights of the subjects and not prove false to the oath of office which each member of it took....

There can be only one answer to the question, which way will this Court act? It will continue to perform its duties as it sees them, and will endeavour in so far as lies in its power to furnish protection to persons who apply to it to be permitted to exercise their legal rights.[2]

Harvey's stirring words continue to resonate in the twenty-first century as courts and government spar over constitutionally protected rights and freedoms, national security, privacy and especially over what does – and does not – constitute reasonable limits on guaranteed rights in a free and democratic society.

Harvey's fight with the Canadian army is just one dramatic anecdote from the history of the Alberta Court of Appeal. This book is a history of that Court, the highest court in the province's judicial system. The head of the appeal court is the Chief Justice of Alberta. The Court occupies the top of the judicial hierarchy in Alberta. It has the power to reverse or affirm decisions made in the province's trial courts and those courts must follow the appeal court's pronouncements on the law. Today, only the Supreme Court of Canada (SCC) sits above the Court of Appeal. And since only a very tiny percentage of cases are appealed to the SCC, the Court is usually the final word on the law in the province.[3]

Given the Court's prominent position, it might seem peculiar that not much has been written about it as an institution. While the Court's jurisprudence has been dissected from time to time in law journals, no one has

NORTH-WEST TERRITORIES COUNCIL MEETING, 1884. L–R: FREDDIE PINGLE; JUSTICE HUGH RICHARDSON; JAMES D.H. MACDOWALL; J.G. TURRIFF; LIEUTENANT-GOVERNOR EDGAR DEWDNEY; PASCAL BRELAND; JUSTICE JAMES F. MACLEOD; COLONEL A.G. IRVINE; FRANK OLIVER; JIM MCARA; J. CLAUDE HAMILTON; T. JACKSON; A.E. FORGET, CLERK OF THE ASSEMBLY; J.D. GEDDES. GLENBOW ARCHIVES, NA-3668-1.

probed its history extensively.[4] This is not surprising. Although the SCC has been well studied, that has not been so for other Canadian appeal courts. There is only one fully developed history of a provincial appellate court and several collections of essays on other courts, concentrating on jurisprudence.[5]

This book aims to rectify the situation with a comprehensive treatment of the history of the Court. It examines the Court's development as an institution; its jurisprudence; the background, personalities and legal perspectives of its judges; how the Court has fit into broader developments in the law and the evolving role of appellate courts; and how it has responded to, and reflected, societal changes. This history is intended to be accessible and interesting to a general reader, not only to lawyers, judges, law professors, and legal historians. In a time of increased public scrutiny of the courts, it is useful to provide the public with an insight into how and why courts function as they do. History can provide that insight.

Just How Old Is the Court?

In approaching the Court's history, the first question is simple but important: Just how old is the Court? There are several possible answers. The founding date could be 1907, when the two-year-old province of Alberta established the Supreme Court of Alberta, with five trial judges who met periodically to hear appeals. It could be 1914, when the Court's founding statute was amended to create a separate Appellate Division but with a rotating appeal court, with four of the Court's judges, as selected by the judges themselves, sitting on appeals for the year. Or the date could be 1921, when further amendments created a separate Trial Division and provided that for each of the Trial Division and Appellate Division, there would be a roster of permanently assigned judges, all appointed by government, and with the head of the Appellate Division designated Chief Justice of Alberta. Or it could be 1979, when a new provincial statute created the current Court of Appeal of Alberta, although no one would likely advance that date as a starting point. The date chosen to celebrate the Court's one-hundredth anniversary is 1914, since that was the year in which a separate Appellate Division of the Supreme Court was created to hear appeals from trial judges.

Each possible answer, however, marked a milestone in the Court's development. One of them, the poorly drafted 1921 amendments, led to a lawsuit between two of the province's most respected jurists to determine who was the real Chief Justice of Alberta. This improbable spectacle was not only the result of bruised egos; it also involved an issue of judicial independence. As this incident suggests, the story of the Court is rich and fascinating. But a historical study also serves to help understand the evolution of a crucial institution.

What Should a Review of the Court's History Consider?

Courts are fundamental to the rule of law – the forum where disputes are solved between individuals, and between individuals and the state. Canadian courts, with long-standing traditions of judicial independence, are defenders of the rule of law and protectors of individual rights and liberties, a bulwark of the state but also a countervailing influence against its power. Canadian judges have the crucial role, obviously, in how the law is applied, but less obviously, at least so far as the public is concerned, in how law is created.

This book combines several different approaches to the history of Alberta's appeal court, looking at institutional development, judicial biography, and jurisprudence. Of the three, institutional development might appear, at first blush, to be the least important historically. But this first impression would be wrong.

Until quite recently, Canadian appeal courts (with the exception of the SCC) were simple organizations, consisting of the judges, some judicial officers, and a few support staff. In Alberta, even that large a complement

did not exist until the 1970s. The most obvious organizational function – the policies and procedures for handling appeals – was sorted out in the early years of the Court and did not change for over fifty years. More recently, this situation has reversed. Since the late 1970s, the Court has made very long strides as an institution, as the work of appeal judges has become much more demanding and complex.

The development of the Court institutionally is a central topic for the later chapters in this book. Its importance cannot be overstated. It goes far beyond simply ensuring that high-calibre court processes and procedures are in place. It extends to the role of a court of appeal in contemporary society and to the quality of the delivery of justice that the court offers to the citizens it serves. Fair and equal justice in Canada requires a strong and independent judiciary. And fair and equal justice is key to maintaining public trust and confidence on which rests the very foundation of a democracy: the rule of law.

A court is generally the sum total of its judges, and judicial biography has a long tradition in common law countries. This has become more sophisticated in more recent years. Scholars now look not only at the life and contribution of individual judges but also the broader socio-economic background of the judiciary: who they are and where they came from. In Canada's legal tradition, judges strive to be impartial and unbiased, but their backgrounds still matter. Judges in Canada start out their careers as lawyers. Historically, they have been drawn from a small professional elite not representative of society, which has changed, but, some would argue, not dramatically, even today. Yet even with a degree of homogeneity, judges are different, bringing their particular life and professional experiences, and their personalities, to the exercise of their duties. One way the judiciary in Canada has evolved is the greater awareness, including among the judges themselves, of the influence of these factors even as judges do their duty.

While trying to provide some insight into the court via its members, this aspect of the book also seeks to capture some of personality of Alberta's appellate judges. The province of Alberta has contributed its share of accomplished, brilliant, and occasionally eccentric personalities to the bench. The early justices of appeal were frontier lawyers who acted as both trial and appeal judges. Some had a fondness for all-night poker games and whisky. The province's first chief justice, Arthur Lewis Sifton, was a man of few words who often put his boots up on the bench and smoked a cigar while listening to counsels' arguments. William "Daddy" Walsh made and lost a fortune in the Yukon gold rush and left the bench to become Alberta's Lieutenant-Governor. Chief Justice Clinton Ford kept chickens at his Calgary residence. Milt Harradence was a flamboyant criminal lawyer known for his sartorial elegance who flew vintage warplanes. The celebrated Alexander Andrew McGillivray, who might have become chief justice, had his career on the bench cut short by a heart attack. His son, the equally talented Bill McGillivray, later became Chief Justice of Alberta, only to die prematurely of a heart attack.

The third, and perhaps most readily analyzed, aspect of the history of an appellate court is its jurisprudence. After all, the judgments are timeless, permanent records of another day, which speak for themselves. Since appeal courts spend their time considering law, it would be a thin history indeed if the Court's decisions were not discussed. For appellate courts, the process of reaching decisions is very much a reflection of their evolution. Because it is a collective process, how judges work together can, in turn, influence their jurisprudence.

It is, however, a daunting prospect to analyze and comment on a court's jurisprudence. As one law professor has explained, it is nearly impossible to find meaningful trends in the hundreds of decisions that an appellate court makes every year, in disparate areas of law, each with its own unique features.[6] That said, a study of the Court's judgments will still often show certain views of

the judges or their approach to legal problems and permit some conclusions about their jurisprudence. In addition, the Court's collective judgments can demonstrate where it stood in comparison to larger trends in the law and life. And, all too often, a provincial appellate court's contributions to the law are overshadowed by a subsequent Supreme Court decision. This history is an opportunity to rectify that oversight.

The jurisprudence of the Court includes landmark decisions influential in Canadian law that benefited the lives of many Canadians. Over a decade before the Privy Council's decision in the famous *Persons* case, Justice Charles A. Stuart declared in *R v Cyr* that women were persons capable of legally holding office.[7] In *Re Norton*, the Court stood firm in defence of *habeas corpus* and ancient civil liberties.[8] Decisions such as *Borys* and *Turta* laid down the bedrock foundations for Canadian oil and gas law.[9] In the 1970s, the Court, drawn into constitutional battles with decisions such as *Reference re Natural Gas Export Tax*, expressed principled statements of provincial rights in Canada's federalist state.[10] In that decade too, in *Trueman v Trueman*, the Court used the constructive trust to rectify inequities in outdated property division laws, presaging the reform of matrimonial property laws not only in Alberta but across Canada.[11] *R v Big M Drug Mart* eliminated religious-based Sunday closure laws in Canada and helped breathe life into the *Charter of Rights and Freedoms*.[12] Later, in *Levesque and Birmingham*, the Court's guideline judgment on child support endorsed higher levels of child support for children, and helped impel the federal government to implement national child support guidelines.[13]

Capturing the Story of the Court Over One Hundred Years

Themes also emerge which can be used to examine the Court's evolution in its first one hundred years. This book is organized chronologically, and most chapters roughly correspond to the tenure of each chief justice. Within each chapter, the Court's development institutionally is discussed, especially its practices and procedures in the delivery of justice. The judges of that era are profiled, with discussion of their judicial predilections as discernible in their reported judgments. Trends and developments in the Court's jurisprudence are identified and analyzed. Each chapter also discusses a selection of decisions. These are not intended as a representative sample of the Court's jurisprudence. Instead, they have been chosen because of their larger resonance for each era, sometimes because of the legal issues discussed, and sometimes because of the social, economic, or political developments involved, making these cases examples of how law and society are intertwined. And occasionally, an appeal is considered because it is a gripping story of the times.

CHAPTER ONE, "Antecedents," is first intended to give the reader unfamiliar with legal history a short primer on appellate courts. The chapter then traces the development of law and courts in what would become Alberta up to the founding of the province in 1905. This discussion centres on the Supreme Court of the Northwest Territories (Territorial Court), which not only preceded, but largely became, the Supreme Court of Alberta (Supreme Court). The appellate practice of the Territorial Court is described in some detail since it is the ancestor of Alberta's appeal court.

CHAPTER TWO, "The Supreme Court of Alberta *En Banc*," discusses the first fourteen years of the Supreme Court, from 1907 to 1921, during which time it sat *en banc* – in the whole – for appeals under two chief justices, A.L. Sifton and Horace Harvey. Previously Chief Justice of the Territorial Court, Sifton left the bench to become Premier of Alberta. Harvey then embarked on what would become a remarkable thirty-four year stint as Chief Justice of Alberta, broken into two separate blocks of time. Harvey provided strong leadership, was a stalwart defender of judicial independence, and pushed to establish a separate appellate court, achieved in part in 1914 and with finality in 1921. Although himself a judicial conservative, Harvey's court produced

some strikingly progressive and innovative judgments, addressing women's rights, freedom of speech, and protection of civil liberties, thanks to imaginative judges such as Charles Stuart and Nicolas Beck.

CHAPTER THREE, "Who is the Real Chief Justice of Alberta?", is given over to the controversy that ensued in 1921 when the Supreme Court was reorganized to create a separate Trial Division, as well as an Appellate Division, with judges appointed permanently to each. Harvey was made Chief Justice of the newly created Trial Division, thus losing the title of Chief Justice of Alberta. David Lynch Scott was appointed Chief Justice of the Appellate Division and with it the title of Chief Justice of the province. The litigation that Harvey launched to reclaim the title is examined in detail, especially Harvey's position that he was defending judicial independence.

CHAPTER FOUR, "The Harvey Era," examines the twenty-five years of the Court after Harvey's reappointment as Chief Justice of the Appellate Division in 1924. Through this period, Harvey was, for better and worse, the Court's dominant figure in a time of judicial quietism. Two outstanding jurists, Frank Ford and A.A. McGillivray, joined the Court but remained in Harvey's shadow. The Court maintained a conservative character reflecting its Chief, as demonstrated in its reaction to some of the social and political tensions of the Depression. The Court was drawn into the political scandals that struck the ruling United Farmers of Alberta and struggled in its response to the social upheaval of the age. Like courts elsewhere, it responded to the protests of those disenfranchised through the Depression in a heavy-handed fashion that upheld the existing order. However, at the same time, the Court gave spirited support to traditional civil rights of individuals.

CHAPTER FIVE, "Gushers, Leases and Liens," starts with Harvey's death shortly after the discovery of oil in central Alberta ushered in the province's postwar economic boom. This chapter covers the tenures of two chief justices, George Bligh O'Connor and Clifton Ford, who served from 1949 to 1957 and 1957 to 1961 respectively. Ford had the unfortunate distinction of being the first Canadian chief justice to step down due to a new mandatory retirement age for judges, the first judicial reform since Confederation. O'Connor and Ford headed an appellate bench that was deeply pragmatic. The primary challenge for the Court was the litigation arising from the oil boom, which created some unique legal problems requiring quick solutions to keep the rigs drilling.

CHAPTER SIX, "Crime and Punishment," covers the era of Chief Justice S. Bruce Smith from 1961 to 1974. This was perhaps the most parochial of Alberta's appeal benches. Although the idiosyncratic Marshall Porter and thoughtful Horace Johnson provided some intellectual heft, the Court was very much of an older, traditional order, content to continue the Court's decades-old procedures despite the rapidly changing practice of law in Alberta. And while competent, the Court, like others in Canada at the time, seemed adrift in responding to changing social mores and public demands for more transparency and accountability. The Court's reaction in response to a major criminal justice issue – drug crimes – is instructive and indicative of the state of Canadian appeal courts in the 1960s.

CHAPTER SEVEN, "Boom Times Again," begins with the appointment in 1974 of a charismatic chief justice, William A. McGillivray. He was emblematic of the federal government's new approach to judicial appointments, emphasizing merit over age-old patronage considerations. McGillivray's court was quickly stacked with talented barristers, including one who was later appointed to the SCC. The judges of the Court, faced with a surge of litigation, also undertook a number of changes to its procedures and explored others in a burst of judicial creativity in court processes, strongly influenced by contact with American appellate practice. The Court found itself considering a great deal of constitutional law, something of a novelty after nearly

fifty years of relatively peaceful federal and provincial relations. McGillivray's greatest contribution, however, was breathing new life into the Court's traditions of collegiality. During McGillivray's ten-year tenure, the Appellate Division formally became the Court of Appeal of Alberta.

The tenure from 1985 to 1991 of McGillivray's successor, James Herbert Laycraft, is the subject of CHAPTER EIGHT, "The *Charter* Court." Possibly the best legal mind to sit as chief justice, Laycraft set new standards for judicial excellence for the Court. In many ways, his Court was a continuation of McGillivray's, in personnel and outlook. Aside from his formidable powers as an appellate judge, Laycraft brought to his leadership an intense interest in the Court's law-making role, one shared with several other judges. The Court was well positioned, in terms of talent and outlook, to tackle litigation arising from the *Charter of Rights and Freedoms*. The *Charter* took Canadian judges into unfamiliar territory, requiring them to weigh competing social and political values in a way never seen before in Canada.

Finally, CHAPTERS NINE, "Fraser's Historic Court" and TEN, "A Court Transformed" cover the two decades of the present incumbent, Catherine Anne Fraser, as chief justice. Her appointment was a historic milestone for the Canadian judiciary, followed soon by another, as her court became the first in Canada to achieve gender parity. The dynamic Fraser proved to be the right person at the right time, remaking the Court for the twenty-first century, aggressively pursuing technology and the resources the Court required to keep abreast of increasingly difficult and complex litigation. A major figure in rethinking the nature of judicial independence in contemporary Canada, Fraser advocated for, and secured, greater administrative control over the Court budget and organization. She was a powerful proponent for a better-educated judiciary and was instrumental in building the necessary national consensus for judicial education on a wide range of social issues. During her era, the Court became much more diverse. Perhaps as a result of this, and perhaps because of the generational change in the Court, it was a court that understood that access to justice is about more than process and better procedures: it is about substance and the quality of the justice provided to people.

Chapter Nine examines Fraser's fight for greater independence, improved judicial education, and enhanced transparency and accountability in the Court's delivery of justice, with greater consideration given to the larger social, economic, and political context. Chapter Ten, meanwhile, highlights her continued efforts to modernize court administration and use information technology to improve the justice system. It also explores how the traditions of appellate judging have been impacted, as well as some of the manifest challenges facing the Court as it enters its second century.

Change in Law and Society, and the Court's History

From these chapters, several themes emerge. By far the most significant, dominating the Court's history over its first one hundred years, is change. In this sense, the Court's story is part of the changes in Canadian society over the last century. It is trite, but true nonetheless, that changes in the law are intimately connected to changes in society. When laws become outdated and no longer reflect social realities, then legislatures – but also courts – step in. At other times, new laws or modifications of existing laws bring about social transformations. The decisions of courts, both trial and appeal, reflect change, inspire change, try to keep up with change and sometimes lead change. The very way judges view, interpret, and apply the law is fundamentally a part of this process. The process is an evolutionary one; it is never finished. Appellate courts, a relatively modern invention, are part of that evolution, and play an instrumental role in how courts and judges apply and settle the law. Making sense of the evolution in how the courts work and the work of judging requires a historical perspective.

As the Court opened its first century as Alberta's appeal court, the judicial system was essentially a closed, hierarchical one designed to resist change. This was not inconsistent with the attitudes and expectations of that era. But that resistance to change would eventually lead to problems on several fronts as Canadian society changed. As it did, the persistence of that resistance would itself be the catalyst for change, in part because the judicial resistance to change succeeded. And, because it did, it made the case for change in the judiciary and its role more compellingly than all the legitimate public and legislative criticism could ever do.

Looking back, it is not difficult now to understand why the roots of judicial resistance to change ran deep. That is the great advantage of being able to assess events through the lens of history long after they have occurred. And yet, when events happen that may signal a real difference for the future, they are often not recognized as significant even by the people involved. Typically, it is only with the passage of time that their final shape – and influence – are revealed. What, then, has the past one hundred years of the Court revealed?

In the early decades of the Court's existence, by both education and training, the judges were not inclined towards change, whether in the law or in their role in interpreting the law. Parliament was supreme. Lawyers were indoctrinated to this role. Indeed, that did not change in law schools in Canada until the *Charter* era began. In fact, prior to the adoption of the *Charter*, a number of lawyers resisted the concept of a written bill of rights, instead lauding the status quo. The emphasis in legal education was on "interests," that is, on what a person had, and not on "rights" and what that person might be entitled to. The courts were there to enforce laws, not review them. There were exceptions but they had to be stunningly egregious before the courts would step in. Inequality in Canada existed. But for those in positions of authority, that inequality was often not seen or, if seen, not felt.

By experience too, the judiciary were hands-off. Given their training, there was no perceived need to step in even when dealing with cases where the outcome was so unfair that it provoked strong public opposition. The rallying cry amongst the judiciary was one of "our hands are tied." And they largely were.

By temperament, the judiciary were disinclined to change. The legal profession then, and even now, tends to attract those who prefer the comfort of known structures and limitations. This dovetails with the attitude of the common law towards change. Its celebration of incremental change is both the common law's greatest weakness and greatest strength. Its weakness lies in the fact that changes in the justice system can be frustratingly difficult to achieve. But its strength lies in the fact that it provides stability by minimizing extreme swings and unpredictability. It must also be said that incrementalism affected the SCC long before it reached the courts of appeal. Indeed, it was the primary prescription that the SCC gave as to how the appeal courts should behave.

By social status, the judiciary were resistant to change. Many judges came from comparatively privileged backgrounds.

By structure, the judiciary was institutionally resistant to change. For decades, it remained strongly hierarchical in organization and operation. Challenging the status quo was difficult under this governance structure. The overwhelming attitude among the judiciary to any calls for change was one of stand and defend.

And by gender, the judiciary was resistant to change. Until the late 1970s, it was virtually a male monopoly, one in which issues involving women or others not represented in judicial corridors were sometimes imbued with the kind of thinking that eventually attracted heavy public criticism. These were issues that the judges found difficult even to address. Equality rights often challenged deeply held personal beliefs – and mind-sets – and especially so on the gender front. Nor was there

any incentive to change, as it would threaten the status quo. And if this was the state of affairs, it was also attributable to the limited number of women and minorities in law.

Then came calls for change. Change came fast and furious on many fronts. World War II exposed many abuses in human rights. The civil rights movement in the United States brought issues of unfair discrimination to the fore. Many were called to account as profound change swept across society and its institutions. Legislators passed human rights laws across Canada that focused on discrimination and disadvantage. The legal profession and judiciary were not immune to these changes and increasing challenges to the status quo. In fact, many judges rose above prevailing social pressures to step up in defence of human rights.

Then came the *Charter* and women in large numbers, most of whom were baby boomers. And the relatively closed, comfortable world of the judiciary met real change. That included technological change, with better reporting of court decisions, which led to more transparency. No longer was there a safe hideout for poor judgments. Judicial education became available for new judges and seasoned veterans alike when the National Judicial Institute was created to offer education to federally appointed judges. That education later went beyond skills training and education in substantive law to include education on social issues. This considerably broadened judges' knowledge base and also introduced judges to the emerging influence of international law. This all led in turn to more exchanges between courts nationally and internationally.

There would be conflicts and clashes among judges of the Court, most of them behind closed doors. But those disputes would be ironed out and edges softened as the Court, like other appeal courts, did its best to cope with change. In the composition of the judiciary. In its relationship to government. In the effects of technology. In changing public expectations and demands for more accountability and transparency. In new internal governance structures. In increased complexity in cases. In the need for better judgments. In changes in the courts' operations like judicial dispute resolution. And above all, in the new role of the judiciary as defender of constitutional rights. All of these changes would lead in turn to improvements in the delivery of justice by Alberta's appeal court, and the enhancement of public trust and confidence on which the rule of law depends.

Other Themes

Through all this change, the Court has developed certain characteristics and traditions that inform its history. One is independence: this history begins and ends with chief justices strongly dedicated to the constitutional principle of judicial independence. Although judicial independence has not been an issue through most of the Court's history, when it was the Court was quick to defend this principle on which the rule of law depends.

Pragmatism has been another defining characteristic of the Court over its hundred years. In the Court's early incarnation, it demonstrated some flexibility with the law, reflecting the outlook of men and women building what they saw as a new society on the frontiers, and it left a mark. While Alberta's Court of Appeal has not been eager to explore the wild frontiers of jurisprudence, equally, it has rarely succumbed to dry formalism. A pragmatic streak has always existed on the Court, making it amenable to change and creating a concern for fairness over correctness, even in periods of judicial conservatism.

All courts would say that their jurisprudence is about fairness, but this quality has gone hand in hand with pragmatism in a profound way with the Alberta Court. In its decisions, the Court has generally focused on the litigants first, seeking to give them their due. But it has also been very much alive to the wider implications flowing from its decisions. In criminal law, although the Court has long had a "law and order" reputation, there

have always been voices on the Court speaking out as defenders of rights and freedoms. As a Court, its members have been quick to identify substantive abuses of individual liberty. This is easily connected to the existence, perhaps somewhat of a cliché, of a robust individualism in the province. As a consequence, it is also possible to identify a persistent streak of libertarianism ebbing and flowing through the Court.

In addition, the Court has enjoyed great collegiality. All appellate courts are collegial in nature, with a panel of judges hearing and deciding appeals. Judges have to work together, which may sound straightforward. But in reality, it can be a fraught exercise. With judges trained in the adversarial tradition, usually highly intelligent, and frequently very independent, it is easy to see why they could sometimes clash intellectually and otherwise. Creating a collegial atmosphere is essential if divisive fallout from otherwise inevitable clashes is to be avoided. While no one expects judges to be friends, necessarily, part of the collegiality equation is the social atmosphere.

Alberta's Court has generally had a tradition of strong collegiality. While there has been waxing and waning of bonds as the Court's leadership and personnel changed, there has been, with one famous exception, little conflict. And this despite the fact that Alberta's Court has contended with a unique challenge to collegiality caused by the judges being split between the two primary cities in the province, Edmonton and Calgary. Because of this reality, the Court has always been conscious of the importance of collegiality, perhaps beyond most other Canadian appellate courts, and has taken steps to cultivate and nurture it.

And finally, through the years, the Court has reflected larger developments in Canadian appellate courts and jurisprudence. At the same time, it has had its own peculiarities and idiosyncrasies unique to the province. And therein lies some of the usefulness of this book. Through the storied history of the Court, a picture emerges of how one appellate court has evolved in Canada, a picture that can be compared to other provinces as their court histories are written. Alberta's portrait celebrates the dedicated men and women who undertook a noble and difficult task and their efforts to provide fair and equal justice for all.

Endnotes

1 Benjamin Cardozo, *The Nature of the Judicial Process* (1921), 53.

2 *Re Norton*, [1918] 2 WWR 865, at paras. 1 and 10.

3 Before 1949, Canadians could appeal a Supreme Court decision to the Judicial Committee of the Privy Council, a British Imperial court, and could bypass the Supreme Court entirely on appeal from a provincial court of appeal in favour of the Committee.

4 There have been some short judicial biographies and several articles on the more dramatic incidents in the court's history: see Wilbur F. Bowker, "Which is the Chief Justice of Alberta – David Lynch Scott or Horace Harvey?" *Alberta Law Review* 30, no. 4 (1992), or Wayne N. Renke, "The Power of Law: Judicial Independence and the Supreme Court of Alberta, 1918," in *The Alberta Supreme Court at 100: History and Authority,* ed. Jonathan Swainger (Edmonton: University of Alberta Press, 2007), as examples.

5 The first history of a provincial court of appeal was Christopher Moore's *The British Columbia Court of Appeal: the First Hundred Years* (Vancouver: UBC Press, 2010). John S. McLaren and Hamar Foster edited a collection of essays for the summer 2009 issue of *BC Studies* dedicated to the court's history, as a scholarly companion piece. Ian Bushnell's *The Federal Court of Canada* (Toronto: Osgoode Society, 1997), is an institutional history. Dale Braun's *The Court of Queen's of Manitoba: A Biographical History* (Toronto: Osgoode Society, 2006), looks at the history of Manitoba's superior trial court, but from the perspective of the judges' socio-economic background. Christopher English and Christopher Curran contributed "Silk Robes and Sou' Westers," a short essay on the history of Newfoundland's court system. There are also two collections of essays, *The Supreme Court of Nova Scotia 1754–2004*, ed. Philip Giraud and Jim Phillips (Toronto: University of Toronto Press & Osgoode Society, 2004), and *The Alberta Supreme Court at 100*: *History and* Authority, ed. Jonathan Swainger. These last two volumes look at a mix of topics, mostly jurisprudence, although the former does present two overviews of the institutional development of Nova Scotia's court system and the latter the early years of the court.

6 "Must be willing to relocate," *Alberta Report*, July 30, 1990

7 *R. v. Cyr*, [1917] 3 WWR 849.

8 *Re: Norton*, [1918] 2 WWR 865.

9 *Borys v. Canadian Pacific Railway* (1952), 4 WWR (NS) 481; *Turta v. Canadian Pacific Railway* (1953), 8 WWR (NS) 609.

10 *Reference re Questions set out in O.C. 1079/80*, [1981] 3 WWR 408.

11 *Trueman v. Trueman*, [1971] 2 WWR 688.

12 *R v. Big M Drug Mart*, [1984] 1 WWR 625.

13 *Levesque v. Levesque*, [1995] 8 WWR 589.

CHAPTER 1

ANTECEDENTS

The law embodies the stories of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[1]

The best place to begin the history of the Alberta Court of Appeal is with what came before. The Court did not spring fully formed from the ether but was the culmination of two chains of development. The first was the evolution of appellate courts generally, which ultimately began in medieval England but was primarily a development of the nineteenth century. The other chain was the growth of legal institutions in western Canada, stretching back to the first permanent European presence. Justice J.W. "Buzz" McClung, in his short history of the Court, argued that its "DNA" included the land grant to the Hudson's Bay Company in 1670 and everything up to the formation of the province of Alberta in 1905.[2]

While fascinating, the pre-Confederation legal history of what is now western Canada is tangential to Alberta's appeal court. The Court's history arguably began with the Supreme Court of the Northwest Territories. Established in 1886, the Territorial Court's jurisdiction extended over a vast swath of territory, including what is now Alberta. Thus, it is very germane to any discussion of Alberta's appellate court. For its personnel, rules, procedures, and outlook, the Supreme Court of Alberta created in 1907 owed much to the court that preceded it. The Territorial Court in turn had its roots in the regime of stipendiary magistrates that preceded it, and it is worth exploring this evolution, after a short introduction to appellate courts.

A Short Primer on Appellate Courts

Most people intuitively understand the basic function of an appeal court: to examine a trial court's decision, affirm it if correct, and either modify it or order a new trial if the decision is not correct. This seems a logical and necessary part of the justice system. However, appellate courts and a broad-ranging right to appeal are actually relatively recent additions to common law jurisdictions such as Canada that derived their legal systems

^ VIEW OF FORT EDMONTON, SHOWING SOUTHEAST BASTION, DECEMBER 1871. GLENBOW ARCHIVES, NA-1408-1.

< GALICIAN HAY MARKET, EDMONTON, 1903. PAA B5584.

from England.[3] Alberta's predecessor courts came into being not long after true appeal courts first appeared.

In the common law, there was no right of appeal. As one author put it, somewhat tongue in cheek, "judges presided and juries decided and that was that."[4] The best an unhappy litigant could do was petition the king to intervene. By the eighteenth century, some measures had evolved in English common law to challenge a trial decision in civil actions. But these were limited and expensive and not nearly equivalent to the modern right to appeal, while in criminal law there remained essentially no appeals, aside from a petition for clemency. Great Britain first established what might be recognized as a modern appeal court in 1851. Further reforms were carried out in the *Judicature Acts* of 1873 and 1875, which established a fully developed appellate court system, although interestingly there was still no full right of criminal appeal.

The appellate courts in England had their powers and jurisdiction spelled out in their establishing statutes. Thus, appeal courts are sometimes referred to as statutory courts. The government chose to define the powers of the appeal courts quite broadly. However, the new appeal courts, through either formal rules or informal practices, still restricted their scope of review, in order to prevent appeals from simply being new trials. Another innovation was that the judges on most of the new appeal courts did nothing but hear appeals, instead of being trial judges who spent some of their time doing so. The House of Lords was the ultimate court of appeal in the United Kingdom, and in 1833, the Judicial Committee of the Privy Council was established as the final appeal court for the colonies.

The New World

Ironically, Canada and the United States were quicker to create courts of appeal than England, the birthplace of the common law. Developments in the United States were relevant to Canadian courts. The American colonies had developed inferior and superior courts which became the state courts after independence, each with a supreme court with appellate powers.[5] Later, federal circuit courts were established, and by the end of the nineteenth century, most states and also the federal circuits had established permanent appeal courts. The 1787 Constitution included a Supreme Court of the United States. This was not only the ultimate court of review but also a full-time appeal court, a new innovation. In a famous 1803 decision, *Marbury v. Madison,* the US Supreme Court made itself the interpreter of the American Constitution and assumed broad powers to disallow laws.

By the late nineteenth and early twentieth centuries, American appeal courts had also established several practices that influenced the development of Canadian appeal courts. British appellate courts relied on oral presentation. Barristers argued for or against an appeal in front of the judges who had no knowledge of the case beforehand. American courts decided this was too time-consuming. Starting with the United States Supreme Court in 1849, lawyers were expected to provide a "brief" which summarized what the appeal was about, the grounds of appeal, and the arguments of the lawyer.[6] This way, the judges knew at least the basics before the hearing. At the same time, the US Supreme Court started to limit the time allowed for arguments. American judges also tended to write their decisions while British judges usually gave them orally from the bench. In Britain, the practice developed of significant decisions being "reported," that is, someone transcribed the judge's remarks and published them, which aided in establishing precedents. Nevertheless, in the earlier days, American judges provided a more efficient and probably more accurate record.

The Canadian Approach

Canada, as is often the case, looked to mother country England but also imitated America. Courts were rudimentary in the earliest years of British North America but quickly evolved. Nova Scotia was the first to set up duly constituted courts in the eighteenth century. Upper

and Lower Canada, as the two most populous regions, were the first to establish proper appeal courts – in 1849, Upper Canada created the Court of Error and Appeal.[7] After 1867 and Confederation, the *British North America Act* split control over the administration of justice between the federal and provincial governments.[8] The central government had the power to appoint judges to all superior courts but the provinces established and administered these courts. Until the twentieth century, only Ontario and Quebec had dedicated appeal courts. In other provinces, the trial court sitting *en banc* or "full bench" was the appeal court: the trial judges would meet and together decide on appeals. The power and jurisdiction to hear appeals were generally similar.

The *BNA Act* also allowed the federal government to set up a "general court of appeal" that would have authority over all the provincial court systems. Thus, the Supreme Court of Canada (SCC) was created in 1875. However, until 1933 for criminal appeals and 1949 for civil appeals, the SCC was an intermediate court. The Judicial Committee of the Privy Council, made up of the law lords from the House of Lords, remained the ultimate court of appeal for most of Britain's former colonies even after they became independent. Appeals from a Supreme Court decision could be taken to the Privy Council with its leave. The SCC could also be bypassed entirely in favour of the Committee, which significantly diminished the former's authority and prestige.

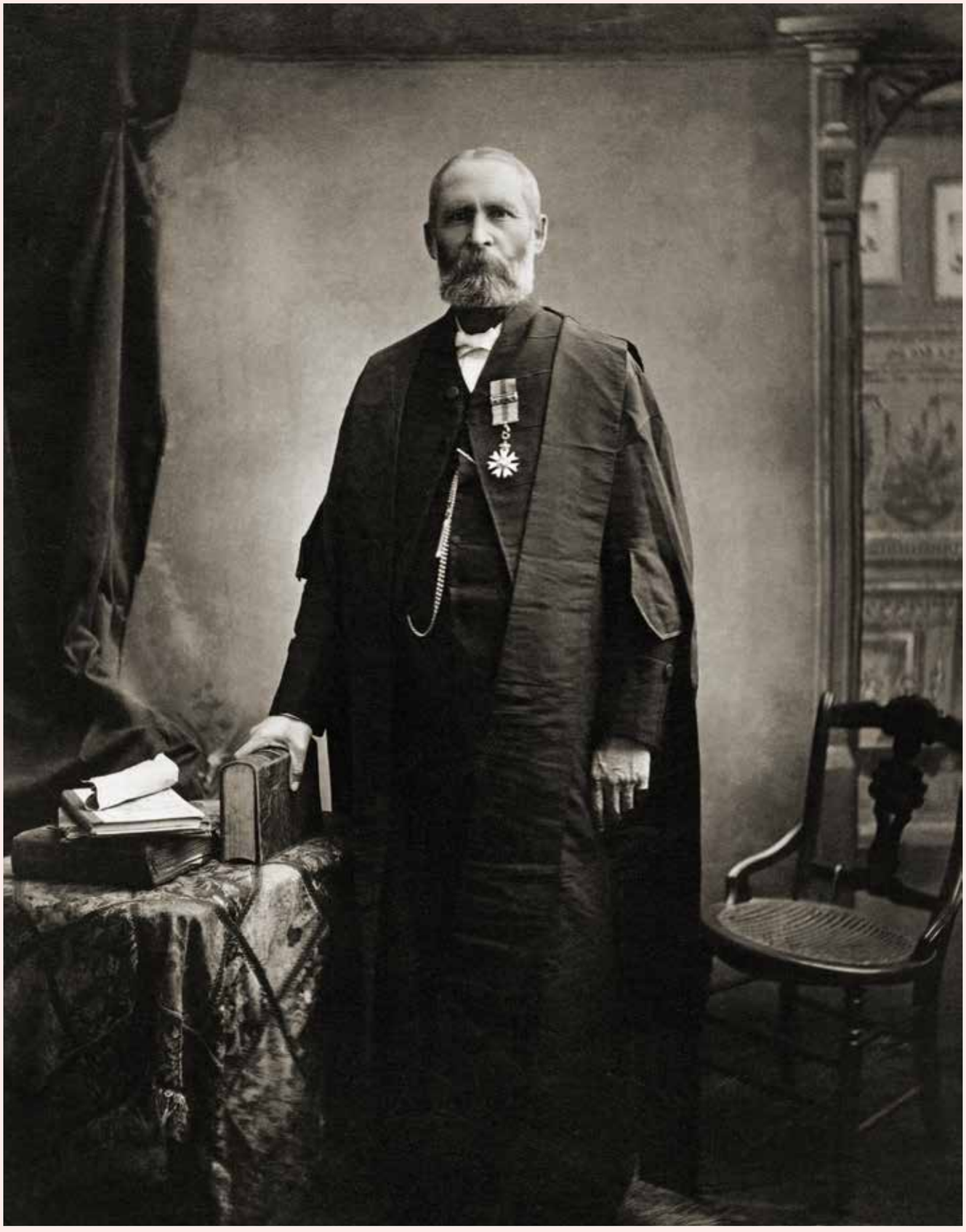
By the late nineteenth century, the appeal process in Canada had taken on most of its modern shape. Whether trial judges sitting *en banc* or judges of an appeal court, it was accepted that at least several judges should hear an appeal and then come to a consensus decision on allowing, partially allowing, or denying the appeal, based on majority vote. It was understood that a judge was entitled to dissent from the majority of the panel or agree with the disposition of the appeal but for different reasons. Civil litigants were generally allowed to appeal any judgment or order of a trial court, and the appeal court had broad powers of remedy, including ordering a retrial, substituting their own decision, changing part of the judgment, and so on. Criminal appeals were more circumscribed. The federal government, given control of criminal law in the *BNA Act*, set the scope and jurisdiction of criminal appeals in the *Criminal Code*, and, following English practice, those appeals remained limited until 1923.

Canadian appellate practice was similar to English but with American influence. The oral tradition remained strong in Canadian appellate courts: argument before the appeal panel was the heart of the appeal and appeal judges gave most of their judgments extemporaneously "from the bench," at or shortly after a hearing. However, for more significant or difficult appeals, such as when a new precedent might be set, Canadian judges would "reserve" their decision and later issue a written judgment. In Alberta, the courts early on required counsel to provide a record of the trial and a factum before their hearing. The factum was similar to the American brief, setting out the reasons for appeal and the relevant case law, that is, the precedents, and legal authorities, if any, to support their position. This, however, was not necessarily the same in other provinces.[9]

The Appellate Role: Review and Restraint

The powers of Canadian appellate courts were wideranging, but in practice these courts applied some principles to limit appellate review. One principle was not to retry cases: the primary role of the appellate court was to ensure there had been no serious errors and see that the law had been properly applied. Appellate judges were supposed to defer to the trial judge (and jury) particularly about findings of fact, as first-hand experience of the witnesses and evidence was considered a significant advantage in ascertaining the facts in a case. Appellate judges were also expected to exercise restraint in changing trial decisions in the absence of error simply because they might have reached a different conclusion. These principles were often honoured more in the breach than the observance, at both the level of provincial appeal courts and even the SCC. More

CITIZENS ON STEPHEN AVENUE (8TH AVENUE), CALGARY. THE CALGARY HERALD PUBLISHED AN ARTICLE ABOUT THIS UNSEASONABLY WARM DAY ON JANUARY 23, 1892, PG. 4: “THE DAY HAS BEEN LIKE A DAY IN JUNE.” FROM WEST OF CENTRE STREET, LOOKING EAST. LOUGHEED BLOCK, LEFT. HUDSON’S BAY COMPANY STORE TO LEFT OF CENTRE. HOTEL ROYAL TO RIGHT OF CENTRE. GLENBOW ARCHIVES, PA-3650-2.



COLONEL JAMES FARQUHARSON MACLEOD, CA. 1890. GLENBOW ARCHIVES, NA-18-5.

recently, these principles governing the scope of appeals are called standards of review, a guide as to when appellate intervention is appropriate and permissible. The restraint of appellate courts was pragmatic: limits on appellate inquiry helped discourage automatic appeals and kept case lists manageable.

Appellate Courts as Lawmakers

Appeal courts also took on a crucial role in "settling" the law, that is, clarifying or deciding on the proper interpretation or application of the law, whether statute or "judge-made," meaning precedents from previous decisions. This was a natural consequence of the review function of appellate courts. As the "higher" court, the appellate decision was binding on all the trial courts below. Appeal courts thus had a policing role, reconciling inconsistent trial decisions, making certain that trial judges followed precedent, and preventing overly radical departures from existing law but also giving approval to new interpretations of the law.

Appeal courts were well placed as well to note antiquated and ineffective laws and nudge judge-made case law or alert a legislature about a problem. Sometimes, courts flirted with public policy when changing the law. Ironically, the establishment of appeal courts coincided with the rise of what is often called legal formalism.[10] In response to the rapid expansion of statute law, judges were discouraged from broad interpretation or bold changes to law, instead deferring to legislatures. More latterly, many judges have come to explicitly acknowledge that larger societal consequences have a place in judicial decision making, a development spurred on in Canada by the *Charter of Rights and Freedoms*. This has not been without controversy and has certainly brought courts under greater public scrutiny, which is arguably a good thing.

The preceding has been only a short primer on appellate courts and their function. More will be discussed but in the framework of the history of Alberta's appellate court, which had its roots in a chain of legal institutions leading up to the establishment of the Supreme Court of Alberta in 1907.

Antecedents of Alberta's Appeal Court

Alberta's appellate court in its earliest form owed a great deal to the Supreme Court of the Northwest Territories, the Territorial Court. Four of the five judges of the Supreme Court of Alberta established in 1907 had been on the previous bench, and much of the Territorial Court's practice, jurisprudence, and outlook was adopted with little change. To understand the history of Alberta's appellate court, it is necessary to step back in time beyond its immediate predecessor, the Territorial Court, to the Territorial Court's predecessors, the stipendiary magistrates and the very first appeal court for the territory that became Alberta, namely the Court of Queen's Bench in Manitoba. The story begins shortly after Confederation, in 1869, when the new Dominion of Canada acquired Rupert's Land from the Hudson's Bay Company (HBC), a vast swath of lands that became the North-West Territories, including modern-day Alberta. Over the next twenty-five years, judicial machinery was gradually built up in the Territories, culminating in the establishment of the Supreme Court of North-West Territories in 1886.

The Stipendiary Magistrates: Law and Order Comes to the West

For the Canadian government, the state of law and order in the newly acquired HBC lands was an immediate concern, especially in the wake of the 1870 Manitoba Rebellion. An adventurous army captain, William Francis Butler, undertook a fact-finding tour of the Territories and wrote a report for Prime Minister John A. Macdonald describing the depredations of American whisky traders and enumerated crimes unsolved and unpunished: "the institutions of law and order, as understood in civilized communities, are wholly unknown in the regions of the Saskatchewan."[11] The captain recommended the formation of a force of mounted men for policing duties and police magistrates to hold courts,

LT. COLONEL HUGH RICHARDSON, CA. 1905. SASKATCHEWAN ARCHIVES, R-B1400-1.

assisted by local justices of the peace. Spurred on by the Cypress Hills massacre, in 1873 Parliament passed *An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories*.[12] The *Act* created the North West Mounted Police (NWMP) and a system of salaried stipendiary magistrates for the Territories.

The stipendiary magistrates, full-time salaried judges appointed by the federal government, were similar to the police magistrates found elsewhere in Canada who dealt with minor criminal offences. The 1873 *Act* limited the criminal jurisdiction of the stipendiary magistrates primarily to summary conviction offences. Serious criminal charges, such as murder, were tried in Manitoba's superior court, created in 1870 when Manitoba became a province. One unusual aspect of the legislation was that the Commissioner and Superintendents of the NWMP were *ex officio* (by virtue of their office) justices of the peace, and an amendment in 1874 gave the Commissioner the same judicial powers as a stipendiary magistrate. In the absence of sufficient civilian justices and judges, the Mounties did the job themselves: the police arrested, prosecuted and tried suspects, and acted as their jailers. It was an unprecedented arrangement for a democratic, common law nation, but remarkably it seemed to function without much abuse.[13]

The First Stipendiaries and Development of Their Jurisdiction

It was not until 1875 that the first civilian stipendiary magistrate was appointed. He was Matthew Ryan,

"KAMINETOSOCAK" FARM IN WINTER, LACOMBE, ALBERTA, FEBRUARY 1895. GLENBOW ARCHIVES, NC-22-55.

formerly an enumerator of the Métis. Colonel James Farquharson Macleod became the second in 1876. Six months later, he was made Commissioner of the NWMP, continuing his judicial duties by virtue of that position before resigning in 1880 to become a full-time judge once again. Hugh Richardson was appointed in October 1876 to bring the number to three. By the time Richardson was appointed, the judicial powers of the stipendiary magistrates had expanded, and they were steadily increased over the next ten years.

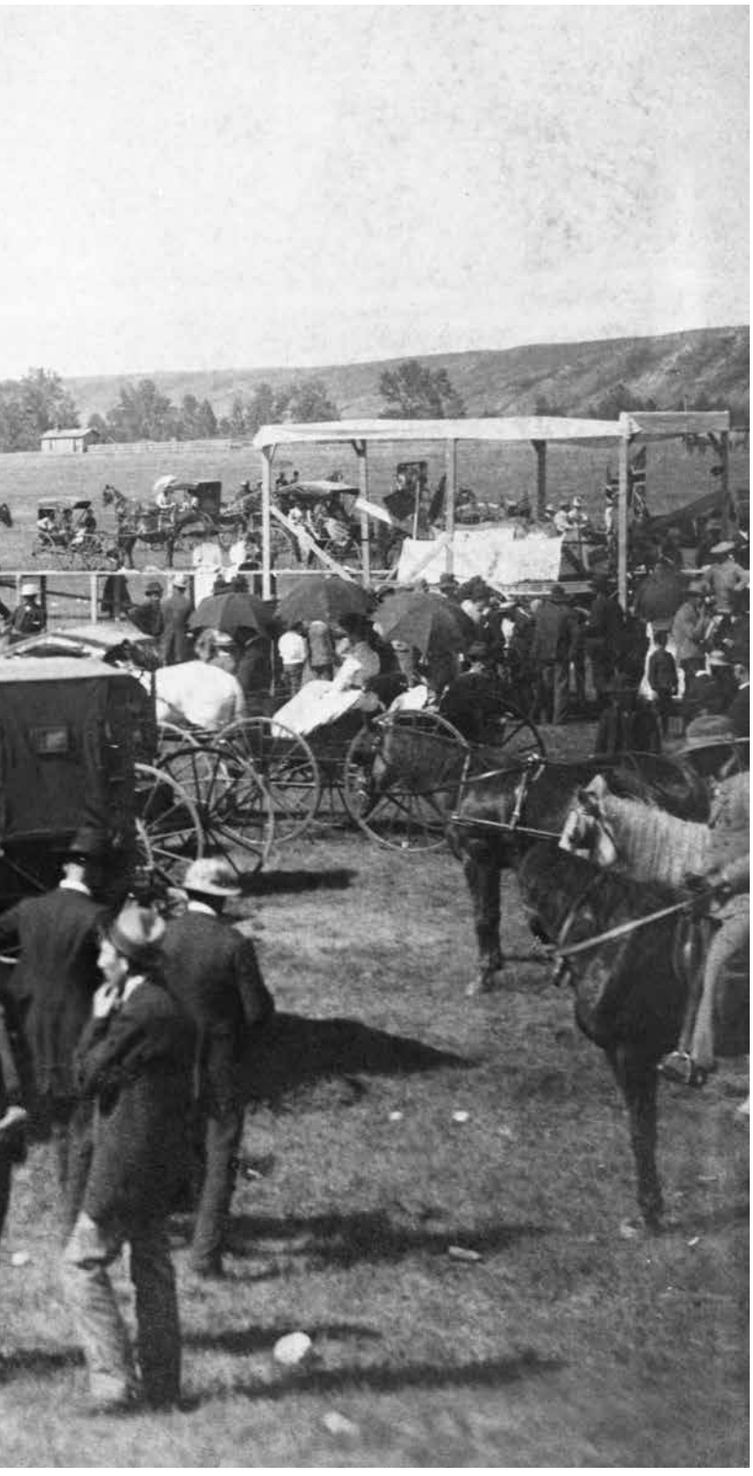
An 1877 *Act* made the magistrate's court a "court of record" and conferred on it limited civil jurisdiction.[14] In 1880, another amendment allowed a stipendiary magistrate sitting with a justice of the peace and a jury to try capital crimes. The amendment also required the stipendiary magistrates to be members of the bar of at least five years' good standing. The increases in the criminal jurisdiction reflected the Dominion's growing confidence in the ability of the magistrates. Ryan was a disappointment and dismissed in 1881, but Macleod and Richardson were excellent. Ryan's able replacement, Charles Borromée Rouleau, had already served as a police magistrate near Ottawa.

The stipendiary magistrates had extra-judicial duties, sitting on the Legislative Council for the Territories and lending their legal training to the drafting of statutes, known as ordinances, drawn up by the Council. Indeed, Hugh Richardson may have drafted many of the ordinances. This included the ordinances on civil justice, which prescribed the first rules of court and governed civil procedure. Like the provinces, as set out in s. 92 of the *BNA Act*, the territorial government nominally had responsibility for the administration of justice, including the establishment of courts. The Lieutenant-Governor for the Territories established and amended the judicial districts and governed the time and places of sitting (initially, the magistrates determined this) and even the name of the court. After judicial districts were first delineated, the magistrates were styled the "District Court." In 1884, it became the "High Court of Justice" and the magistrates were styled judges.

The life of the stipendiaries was hard, and their salary of $3,000 per annum, comparable to that of police magistrates elsewhere, was scarcely adequate for the trials of office. In the early days, while the work of the court was not overwhelming, the travel conditions were very difficult.[15] Their districts were huge and the stipendiaries traveled by dogsled in the winter and horseback or wagon in the summer. They might be forced to sleep under the stars, even in the bitter cold, since hotels and stopping places were few and far between. Facilities for court were almost always makeshift. Court might take place in a schoolhouse, a NWMP barracks, a church, or even a frame and canvas hotel. Colonel Macleod would later boast of holding court on the back of a wagon on the open prairie. Later, with the advent of the Canadian Pacific Railway and more settlement, travel became easier and facilities better, but then the court lists burgeoned.

Appeals to Manitoba's Court of Queen's Bench *En Banc*

In 1880, the Dominion government gave the North-West Territories, and thus the area that would become Alberta, its first appellate court – the Court of Queen's Bench in Manitoba, sitting *en banc*.[16] This was the nearest superior court to the Territories in terms of practicable travel. The right to appeal given the Territories was more limited than in the established provinces. For criminal cases, only convictions where the punishment was death could be appealed; the court could order a new trial or uphold the conviction. Civil appeals were broader, with a right to appeal decisions involving real property or valued more than $500 for tort and $1,000 for contracts, the limit of the stipendiaries' summary power of judgment. Once again, a new trial could be ordered or the original decision upheld. The Manitoba Queen's Bench decision could be further appealed to the SCC and, ultimately, the Privy Council in England.



HOLIDAY GATHERING IN CALGARY. AT ABOUT 9TH AVENUE AND 12TH STREET SE, LOOKING NORTHWEST, CA. 1887–88. GLENBOW ARCHIVES, NA-1744-10.

The Trial of Louis Riel

The treason trial of Louis Riel was a test of this system. Riel had returned from exile in the United States to lead the Cree and Métis in what became the Northwest Rebellion. After the rebellion was suppressed, Riel surrendered and was put on trial for treason. He came before Hugh Richardson and a jury of six in Regina on July 20, 1885. A future chief justice of the SCC defended Riel, while the prosecutor, David Lynch Scott, later became chief justice of Alberta. Riel was found guilty after a last-ditch defence (which Riel resisted) of insanity. The conviction automatically meant a sentence of death. However, the jury could, and did, recommend mercy.

Riel's conviction for treason and murder was appealed to the Manitoba Court of Queen's Bench. There were charges from Riel's sympathizers, especially in Quebec, that the judge and jury were biased and that Richardson did not have the power as a stipendiary magistrate to try a capital charge. This latter ground formed part of the appeal. The appeal panel from the Manitoba Court of Queen's Bench disagreed. In a scrupulous review, the judges examined in detail the statutory history of the stipendiary magistrates as well as the actual conduct of the trial and concluded that there were no grounds for a new trial.[17] Riel then appealed to the Privy Council, which rarely considered criminal appeals but made an exception in this politically important trial. The Privy Council upheld entirely the judgment of the Manitoba Court of Queen's Bench. This case was one of the few reported appeals from the Territories to the Queen's Bench in Manitoba.[18]

The stipendiary magistrate system came to an end shortly following the Riel trial. The court of the stipendiary magistrates functioned tolerably well, but as the appellate provisions made clear, it was justice for the frontier.[19] By 1885, complaints were common throughout the Territories that the stipendiaries were overloaded. Accused criminals were being acquitted or released because they could not be brought to trial quickly enough, and more importantly, litigation important to local business interests was being delayed.[20] There was also the embarrassment of the Travis affair in Calgary. The fifth magistrate appointed, Jeremiah Travis, had started a campaign to enforce territorial prohibition in a town where it was generally flouted, but he overstepped his authority so far that his judgment was suspect, and he had to go. The administration of justice was in danger of falling into disrepute.

The Supreme Court of the North-West Territories

Thus, in 1886, in the wake of the Northwest Rebellion and the completion of the Canadian Pacific Railroad, the Dominion government established the Supreme Court of the North-West Territories.[21] Anything before might be considered an ancestor, but the Territorial Court was the grandfather of today's appeal court in Alberta. Indeed, the province was two years old before the Alberta Supreme Court replaced the Territorial Court in 1907. The Supreme Court continued the *en banc* appeal procedure of the Territorial Court for over seven years. The first three chief justices of Alberta were members of the Territorial Court, and two of them would head the Appellate Division once it was established. Alberta's court was very much a continuation of the Territorial Court in personnel, practice and outlook.

A detailed analysis of the legislation establishing the North-West Territories Supreme Court is not necessary. It was straightforward. The court was to "possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction."[22] In other words, it was a court of inherent jurisdiction and had the same wide powers possessed by English courts. The court consisted of five puisne justices. Curiously, until 1900, there was no provision for a chief justice to head the new bench.[23]

Despite its wide powers, there was still, a colonial aspect to the Territorial Court. Unlike the provincial equivalents, the Territorial Court was still partly a creature of the Dominion government, established by an act of

CHARLES BORROMÉE ROULEAU, CA. 1891. LASA ACC. 2002-028.8.

Parliament. Even purely administrative elements, such as establishing judicial districts, were kept in Dominion hands, as was the appointment of officers of the court, the sheriffs and clerks, matters entirely handled by the provinces for their superior courts. The Lieutenant-Governor of the Territories had some of the same powers as provincial governments as to administration and maintenance of the court, and authorized sittings of the court and set civil procedure.

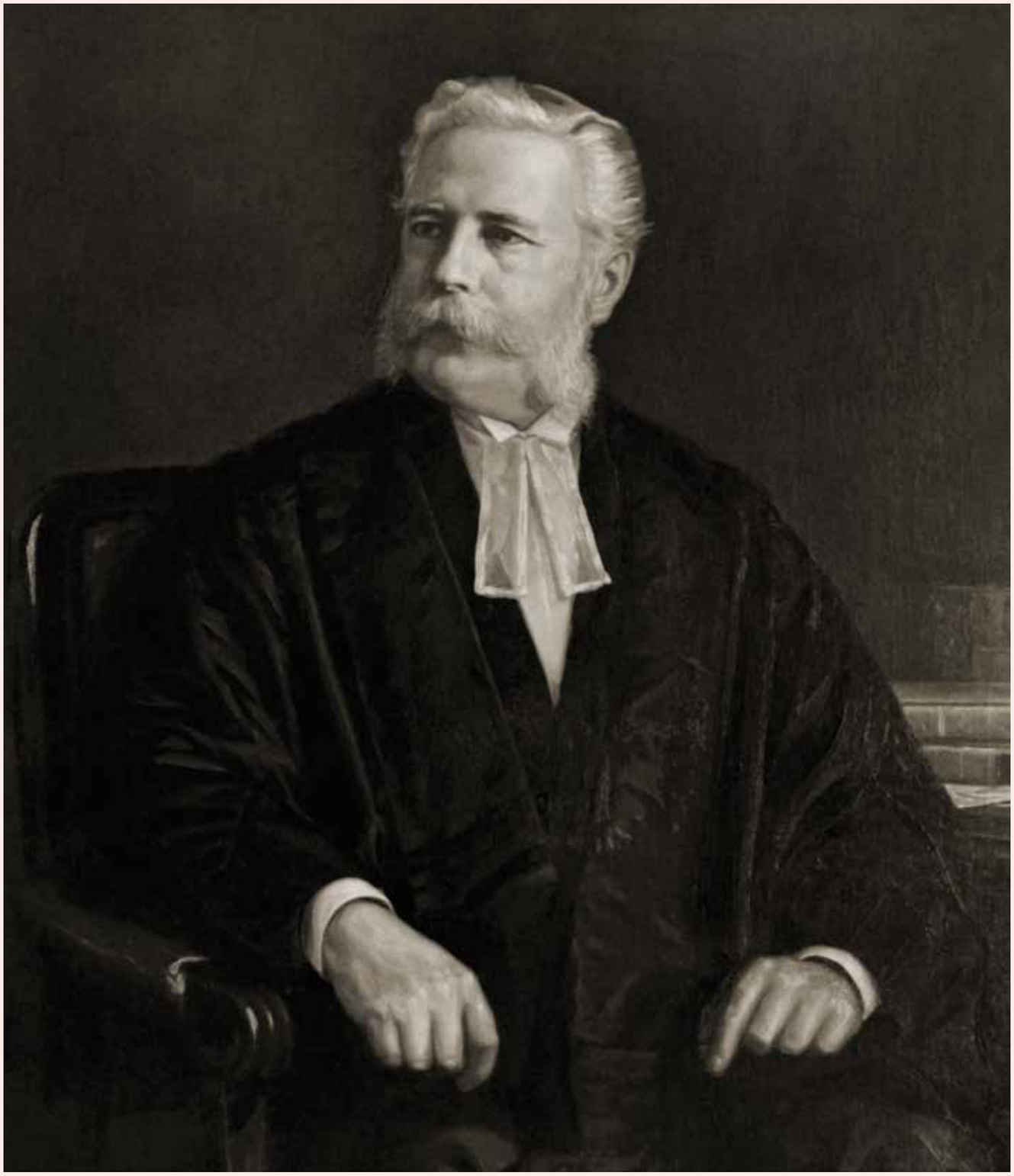
The new court gave residents of the Territories access to much the same justice as other Canadians. The stipendiary magistrates, having proved able judges with the exception of Travis, were appointed to the new bench. Richardson was based in Regina, the territorial capital. Charles Rouleau had already been moved to Calgary and took over the Northern Alberta Judicial District. Colonel Macleod remained Fort Macleod in the Southern Alberta District until 1894, when he was shifted to Calgary. Two new justices were added, Wetmore and McGuire, stationed in Battleford and Moosomin respectively. Although there was no chief justice, Richardson was considered the senior judge.

The Benefits of Common Law Reform

The Territorial Court was constituted at a propitious time. Just over a decade previously, Britain had reorganized and rationalized its courts with the *Judicature Acts*, setting an example for other common law jurisdictions. It has been claimed that the Dominion government used the Territories as a venue to experiment with judicial reform.[24] The Territorial Court certainly benefited from reforms carried out in England and elsewhere in Canada. The *Judicature Acts,* for example, had merged the courts of common law and equity in England, doing away

TRIAL OF LOUIS RIEL, 1885 ILLUSTRATION FROM THE *GRAPHIC MAGAZINE*. GLENBOW ARCHIVES, NA-826-8.

COURTROOM BEFORE RIEL TRIAL, 1885. COURT OF APPEAL COLLECTION.



THOMAS HORACE MCGUIRE, LASA ACC. 2007-021.

JUSTICE DAVID LYNCH SCOTT, SEATED CENTRE, WITH OFFICERS AND ADVOCATES OF THE TERRITORIAL COURT, FORT MACLEOD, NWT, 1896. GLENBOW ARCHIVES, NA-2380-8.

with a great deal of needless complexity.[25] Canada had inherited the distinction of law and equity, with different courts or, as in Manitoba, different procedures for a civil claim litigated as a matter of equity rather than a matter of law, and went through the same process of reform as England.[26] By contrast, the Territorial Court was a court of both law and equity from its inception.

There were other examples. The Territorial Court started with relatively simple civil procedure, whereas older jurisdictions in Canada had to eliminate the elaborate and cumbersome system of bills and writs inherited from England. The Dominion government also decided to institute a Torrens land registry system for the Territories. A title registry meant simplified real estate transactions and arguably far less fraud and less litigation. It also rendered a great deal of English real property law used in the rest of Canada irrelevant in the west.[27] Other provinces wrestled with eliminating grand juries, another common law institution that dated back to Middle Ages.[28] Due to the small, dispersed population of the Territories, there were no grand juries, and indeed, trial juries were a mere six persons. This remained the norm in Alberta until 1966 and created an Alberta tradition of trials without juries, almost always in civil litigation and frequently in criminal trials as well.

One last advantage turned on the date of reception of English law in the Territories. As Britain established colonies and Imperial possessions, the convention evolved that the legal system set up in each colony adopted the law of England as it existed at that time – the date of reception – with the exception of laws that were clearly not applicable. After the date of reception, the law developed locally with statutes and home-grown precedents. With the exception of decisions of the Judicial Committee of the Privy Council, subsequent English case law was not always binding although usually still authoritative. The *North-West Territories Act* in 1870 declared that English law as of that year was the received law. As a result, the Territories benefited from recent changes in British law, whether new precedents in case law or through the elimination of antiquated statutes.[29] The date of reception was not an academic point. It meant that certain laws and legal doctrines might apply and others might not. Indeed, as late as 1950, in litigation over federal oil and gas leases, the SCC debated whether archaic English property doctrines applied in Alberta because of the establishment of Rupert's Land in 1670.[30]

The Territorial Court *En Banc*

The new Territorial Court also had appellate jurisdiction. The section of the legislation detailing its powers of appeal was brief:

> The court sitting in banc shall hear and determine all application for new trials, all questions or issues of law, all questions or points in civil or criminal cases reserved for the opinion of the court, all appeals or motions in the nature of appeals, all petitions and all other motions, matters or things whatsoever which are lawfully brought before it.[31]

As with many provincial superior courts at the time, the judges periodically gathered and sat together "*en banc*" as an appeal panel. Three judges constituted a quorum, with the senior judge presiding. It could be any three: it was possible for a justice to sit on appeal of his own judgments.[32] While not uncommon on other courts, it was also a concession to frontier conditions in the Territories. With a small, dispersed bench, it was easy to imagine circumstances where one or more of the justices might not make a sitting. In 1894, an amendment stated that justices were not to sit on appeals from their own judgments or orders unless they were needed to make a quorum. Throughout the Territorial Court period, it was also acceptable for a panel of four judges to sit on an appeal, with a tie vote meaning failure of the appeal.

Regina and Its Distractions

Until 1899, sittings of the Territorial Court *en banc* were held exclusively in Regina. As it was the territorial capital, this made sense. The justices still had other duties, including sitting on the Legislative Council until the Territories Assembly replaced it, and then serving as special legal advisors. It was also the headquarters of Justice Richardson, who was the senior judge even if he was never given the title of chief justice. It was, however, an onerous burden on the puisne justices, even with the completed CPR. The five justices still had vast districts to oversee, with many days spent on circuit, and the extra travel to Regina for *en banc* sittings was wearing.

With only two sittings a year, the court *en banc* always had a full docket. The social circuit added to the exhaustion. Justice Macleod's letters to his wife Mary are replete with references to late nights after court or council. Dinner with the Lieutenant-Governor, balls and dances among what passed for high society in Regina, as well as less salubrious activities, are all mentioned, as are the peccadilloes of the other justices. Rouleau was something of a bon vivant. He loved poker and other card games, and might stay up all night playing cards. He also liked his whisky. "Poor old Rouleau was pretty bleary this morning," Macleod wrote in 1888, his brother judge having visited a friend and not returned to his hotel room until 4:00 a.m.[33] Macleod too was certainly not adverse to a "horn" or two of scotch at the end of the day. Frequently, Richardson and his wife would have his brother judges over for dinners.

New Judges

The small bench saw changes in the twenty-year life of the court. Justice Macleod died in 1894, shortly after moving to Calgary to help Rouleau with the workload. David Lynch Scott of Regina, the prosecutor of Louis Riel, replaced him. Later, Scott moved to Edmonton to give the city a resident justice. Rouleau died in 1901 and McGuire moved to Calgary to replace him, and J.E.P Prendergast was appointed. McGuire, despite being named chief justice in 1902, resigned within a year. A.L. Sifton of Calgary was named to the bench and also assumed the mantle of the head of the court, which was controversial and labelled crass patronage. Richardson retired in 1903 to be replaced by W.H. Newlands. In 1904, Horace Harvey became the sixth justice when Parliament provided for another appointment. Finally, in 1906, on the eve of the establishment of the Alberta and Saskatchewan courts, Charles A. Stuart and T.C. Johnstone were added to the Territorial Court.

< NWT COUNCIL, 1886. RICHARDSON, DEWDNEY, ROULEAU FRONT ROW.
GLENBOW ARCHIVES, NA-354-21.
EDWARD L.WETMORE, SASKATCHEWAN ARCHIVES, R-A624.

Scott, Sifton, Harvey, and Stuart would all serve on the Alberta Supreme Court, with the first three all eventually serving as chief justice of Alberta, while Stuart would emerge as one of the strongest voices on the new Alberta court, especially in appeals. Their link and loyalty to the Territorial Court was strong. Harvey, a dominant figure of Alberta's Court of Appeal, ably summed up the Territorial Court judges:

> Speaking with a personal knowledge of its first members, with all but one of whom I was brought frequently in contact and with one of whom I was subsequently a colleague, I feel no hesitation in stating that…there was no inferiority to the personnel of the Supreme Courts of the Provinces. This is also apparent from a perusal of its reported decisions.[34]

The Northwest Territories Supreme Court *En Banc* at Law

It is worth considering briefly the jurisprudence of the Territorial Court *en banc*. The judgments of a court in large part define it. In the case of the Territorial Court, it has been argued that "the justices' decisions emphasized finding new rules of law, fashioned for the new communities and novel situations of the Territories, while remaining true to English Common Law …the court gave voice to an astute mix of principle and unadorned practicality that, in time, resonated in almost every corner of this vast landscape."[35] Most importantly, in the person of the judges themselves as well as the body of jurisprudence they produced, the Territorial Court influenced its successors, the Supreme Courts of Alberta and Saskatchewan.

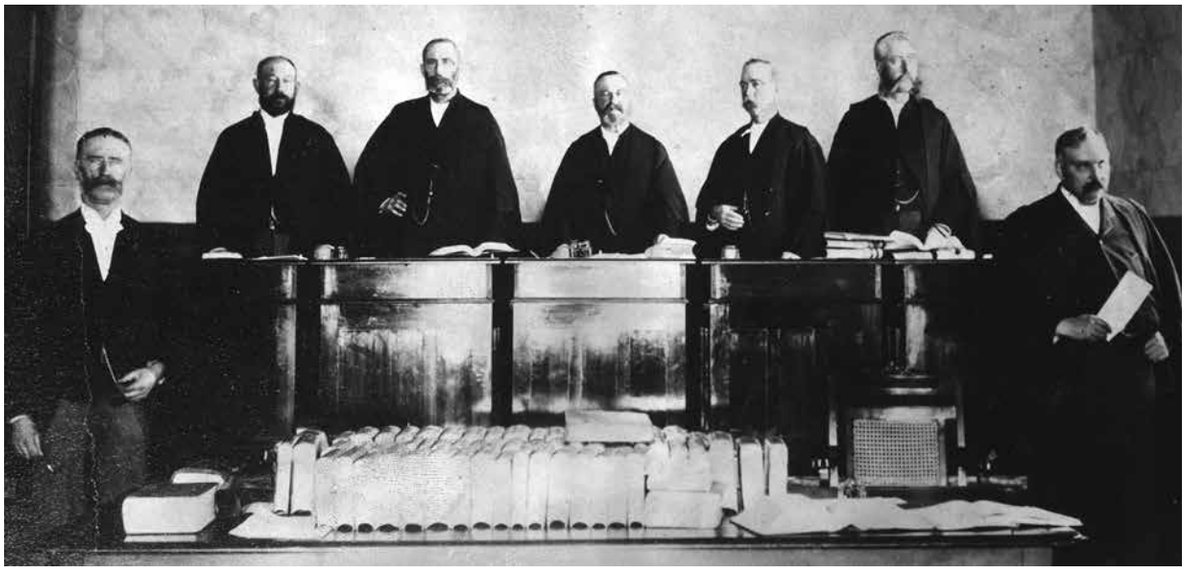
Delivery of Justice: Practice and Procedure

The procedure for appeals was simple. In civil matters, a motion to appeal had to be filed within fifteen days, unless varied by the judge. No petition for leave was necessary, though leave from the trial judge had to be given for "matters of controversy less than $200" unless real estate was concerned. Criminal appeals were very limited during the existence of the Territorial Court. Canada followed the English practice of allowing the trial judge, usually at the request of counsel, to ask for a review of his disposition, a procedure known as "stating the case." It was limited to points of law. The Territorial Court adopted this procedure for civil cases as well. A judge, if uncertain on a point of law, would refer his decision to the whole court for consideration. It reflected the frontier conditions and the newness of the court.

The court required appeal books and factums, perhaps surprisingly given the era and the frontier conditions. The appeal book contained the trial judgment and transcripts of testimony and evidence.[36] A factum in that era was simple, consisting of the grounds of the appeal, a very minimal summary of the argument, and a list of the case law the appeal relied on.[37] This requirement for appeal books and factums implies that the judges might have done some preparation before hearing appeals. But realistically, this would not likely have been much, perhaps a quick review of the factums, which they likely only saw on arrival in Regina.

In the tradition of the time, oral arguments of counsel to the court were crucial. As Macleod wrote in a letter to his wife in 1890: "We have been at it, hammer and tongs from 10 in the morning till after 5 in the evening—and I suppose it will be the same thing tomorrow. I expect we will get through the arguments tomorrow night but very likely it will take till Monday evening to get through—if then. We have two Calgary lawyers here who talk and talk till I feel inclined to choke them."[38]

There is not much description of how the justices set about deciding the appeals. Most judgments were likely given orally from the bench, shortly after argument and a brief conference. Interestingly, the judges sometimes collaborated closely in writing reserved judgments, if this passage in one of Macleod's letters is any indication: "We spent the whole day yesterday wrestling with the law books from 10 in the morning till 10 at night. In the evening we met at R's [Richardson's] house and gave



(TOP) NWT SUPREME COURT *EN BANC* IN REGINA, 1887. ON BENCH, L–R: E.L. WETMORE,
J.F. MACLEOD, H. RICHARDSON, C.B. ROULEAU, T.H. MCGUIRE. LASA 5-G-66.
(BTM) JUSTICE ROULEAU WITH THE EDMONTON BAR, 1891. NICOLAS BECK SEATED LEFT OF ROULEAU. LASA 53-G-5.

the old lady a dose of law."[39] For a knottier problem, Macleod and his colleagues sat down with authorities and case law, such as they had at hand in their limited library, and worked out the merits of an appeal.

As an aside, although he participated in such marathons, Macleod was apparently not very interested in appeal work: he only authored one *en banc* judgment.[40] A contemporary, C.C. McCaul, wrote that Macleod "did not profess to be a very well read lawyer. In fact the nicer distinctions and subtleties of law did not appeal to his type of mind at all."[41] McCaul, however, went on to laud Macleod's ability as a trial judge. McCaul's comments highlighted an important point. The desired qualities for a good trial judge and a good appellate judge are not necessarily the same. And while experience as a trial judge is very useful for an appellate judge, they are different jobs.

Judgment Writing and Reserving for the Court's Consideration

The Territorial Law Reports show that in the majority of cases, one judge authored the judgment of the Territorial Court *en banc*. This was not the usual practice for Canadian appellate courts, where judges wrote individual judgments, even when agreeing, often with little discussion or collaboration.[42] The reported judgments of the Territorial Court *en banc* were also short and to the point. The judges no doubt felt some pressure to tackle written judgments expeditiously. After an *en banc* sitting, access to a good library and time to write were in very short supply, given how often the judges were on their circuits. It is a reasonable supposition that the judges avoided any extraneous effort, coming to agreement on the appeal before turning out the decision and not writing concurring decisions unless they felt strongly that there was better reasoning to reach the same result. Practical demands produced a high degree of collegiality. There were, however, enough vigorous dissents to show that the judges were giving each appeal full consideration.

The practice of reserving decisions for the full court was interesting but made sense. Inevitably, the judges discovered in their trial work difficult points of law, often procedural and jurisdictional matters not addressed in the court's enabling act and civil procedure ordinance. The judges on circuit were removed from a proper law library – even towns designated as headquarters of judicial districts might only have a small collection available for judge and for counsel, thus making it difficult to properly research a point of law.[43] The members of the Territorial Court also did not have the benefit of colleagues handy for informal discussion, as they might in more populous areas. Under the circumstances, it is not surprising that the trial judges sometimes wished to have the benefit of the opinion of the court *en banc*. Other references came from the justices of the peace. These men, untrained in law, required much guidance. The practice of references over points of law, it might be noted, dropped off with time.

The Jurisprudence: Making the Law of the Territories

Despite less than desirable circumstances for appeal work, the judgments of the Territorial appeal court could be sophisticated and wide-ranging.[44] Civil litigation accounted for almost 85 percent of trials, and this was reflected on appeals, especially with the very limited avenue of appeal for criminal convictions.[45] Much of the jurisprudence of the Territorial Court *en banc* was relatively commonplace and routine, involving torts and contract disputes or rulings on procedure, questions of interpretation in ordinances and statutes, and so on. However, the Territorial appeal court also had to be to some extent creative, even innovative.

The Territories were a new jurisdiction, and through its decisions, the Territorial Court *en banc* was establishing a body of jurisprudence, essentially declaring what the law was in the Territories.

Much of the time, this was straightforward, applying well-settled principles and case law. Like most Canadian jurists at the time, the judges drew heavily on English case law as binding or persuasive. The decisions of Ontario courts were also influential, given the large body of developed law there and the Ontario backgrounds of most of the judges. At other times, the judges were required to strike out into novel territory. The reception of English law in Canada was not uniform, and it was a long-held principle that not all that law would apply. The judges had to decide whether particular English practice or English law applied to the Territories, or if it had been superseded by Canadian statutes and precedents that applied better, or whether a new statement of the law was necessary. Wetmore's judgment concerning the laws of marriage, discussed below, demonstrated this process. The Territorial Court *en banc* also considered the scope and jurisdiction of the Territorial Court, both at trial and on appeal, defining in practice the general terms of its founding statute.[46]

The judges clearly understood that the Territories was a frontier with its own particular social and economic conditions that had to be taken into account in settling the law. Essentially, the judges saw that the Territories was a society in development and that the law should sometimes be decided in accordance with that evolution. They were aided by the fact that in their time *stare decisis*, the doctrine of precedent, was not applied rigidly but with a degree of flexibility to take into account changing times and social conditions, what one commentator has labelled the "grand tradition" of the common law.[47] Like other common law judges of the era, the territorial bench did not depart from accepted law quickly or needlessly but were nevertheless sensitive to the fact that sometimes they had to move it in different directions.

Aboriginal Marriage Customs: *R v Nan-E-Quis-A-Ka*

R v Nan-E-Quis-A-Ka illustrated this point.[48] The issue was whether Indian marriage customs constituted valid marriages. The judge at trial, and the Territorial Court *en banc*, both held that they did. Wetmore, considered the leading judge of the Territorial Court, delivered the judgment for the court *en banc* (he had also been the trial judge). He challenged the validity of any reference to English laws of marriage, stating: "I have great doubt if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience."[49]

Wetmore did not hesitate to discard English matrimonial law and was quite ready to acknowledge those of another culture. Guided by an earlier decision in the courts of Lower Canada, Wetmore forcibly argued that Indian customs fulfilled the description of marriage and that the HBC had recognized this in Rupert's Land. He also showed that statutes such as the *Indian Act* implicitly assumed marriage existed among aboriginals. Precedent existed for this stance, so Wetmore was not being boldly original. However, given the strong anti-aboriginal sentiment that could be found in the Territories, it did show some sensitivity, in legal terms, towards aboriginal society. Ironically, this decision was not helpful to Nan-E-Quis-A-Ka. Facing criminal charges, his wife Maggie had testified in his defence. Once it was decided that Maggie was indeed his wife, the common law principle that a person cannot testify for or against their spouse came into effect, to the detriment of the accused. Wetmore's judgment was one of several for the Territorial appeal court that demonstrated some understanding of, and accommodation for, aboriginals.

CALGARY TERRITORIAL COURTHOUSE. GLENBOW ARCHIVES, NA-1693-2.

Territorial Conditions: *Eggleston v Canadian Pacific Railway*

Interestingly, even a later addition to the Territorial Court, Horace Harvey, demonstrated an attitude that might be called "Territorial exceptionalism." Harvey, appointed only shortly before Alberta was created, had a more conservative attitude towards precedent, but he also expressed the belief that existing law had to adapt to the different circumstances of the Territories. In *Eggleston v Canadian Pacific Railway*, Harvey, on behalf of the Territorial Court *en banc*, upheld the trial judge's finding of negligence against the CPR after a train went through a herd of horses at night and killed a large number.[50] Harvey addressed the CPR's contention that the horses were trespassers on the railroad's right of way and therefore there was no duty for the railroad to be on the lookout and avoid collisions:

> Even if such a rule of law were established in England or in the eastern provinces, where the railways travel through a country which is fenced, and where they have a right to expect…their track will be free from trespassers, I apprehend that such

CREE WITNESSES FOR KING MURDER TRIAL, EDMONTON, 1905. PAA B970.

a rule might not be applicable to the conditions existing there, where the railway passes through a country where large numbers of cattle and horses have the right to and do roam at large, and the railway company makes no provision by fencing to keep them off the track.[51]

Harvey finished by referring to case law to the effect that trespass is not automatically a defence to negligence. However, the SCC preferred his colleague Wetmore's dissent, and did not agree that the realities of Territorial ranching placed extra onus on a railway to watch for animals.

A Matter of Seduction: *R v Lougheed*

One final case, *R v Lougheed*, demonstrated how the appeal court took changing social attitudes into account.[52] The stated case from Sifton dealt with a conviction for seduction, an offence under Canada's *Criminal Code*, which had no English equivalent. A man could be charged with the offence if he seduced a woman under the age of twenty-one of "previously chaste character" with a promise of marriage. At its heart, it was a law designed to prevent illegitimate children. The question was what "previously chaste character" really meant, since the accused and the victim had had a sexual history that went back well over a year before the incident for which he had been charged with seduction. With no precedents, the court turned to American jurisprudence, where state laws on seduction were common.

Prendergast, a recent appointment writing for the court, concluded there had to be an acquittal. The offence had a limitation period of a year, but the accused and the victim had had fifteen months of regular sexual relations. He decided that although this activity took place under the promise of marriage, the victim could not be seen, in light of the statutory limitation, as having a "previous chaste character." In his analysis, however, Prendergast also concluded that chaste character was not the same as virginity. He opined that a woman might regain a chaste character if a decent interval took place between carnal activity during which she conducted herself in a morally acceptable fashion, and she could then be a possible victim of seduction.[53] This might be viewed as a glimmer, tiny though it may be, of changing legal attitudes towards women, presaging both enlightened legislation and judicial decisions concerning women's rights that would feature in the early history of the province of Alberta.

The appeals noted here are a handful of the court's reported decisions. The work of the Territorial appeal court has been discussed more extensively elsewhere.[54] As the court matured, a body of jurisprudence specific to the Territories was created. Through their particular interpretations, and applications, of the common law, federal statutes, or territorial ordinances, the judges of the appeal court were creating a body of law particular to the Territories, and they seemed quite aware of their role and responsibility.

Alberta's First Appeal Court

The Territorial Court *en banc* was the first appeal court to actually sit in Alberta. By the end of the century, Calgary was the most populous city in the Territories, with the busiest courts. It wasn't long before the necessity of taking appeals to Regina became a point of contention in the western reaches of the Territories and lobbying began for sittings in Calgary.[55] In 1898, a sitting for Calgary was gazetted, set for January 23, 1899.[56] It was a moment of some ceremony: the Calgary Herald reported that not only the entire local bar but also "many ladies occupied seats in the court room." Senator James Lougheed gave a welcoming address, stating by way of compliment that the legislation creating the court had a serious deficiency in not naming the senior judge, namely Richardson, Chief Justice. The Territorial Court *en banc* returned to Calgary, and in 1903, with provincial autonomy looming, twice-yearly sittings were set for the city.[57]

More important than the physical presence of the Territorial Court was its legacy to Alberta. Four of its judges became the justices of the Alberta Supreme

Court. Even though three – Sifton, Harvey and Stuart – had been relatively late additions to the Territorial Court, they were still representative of the frontier lawyers who had served on that court. Wilbur Bowker, long-time Dean of the University of Alberta Faculty of Law, adroitly summed up the contribution of the Territorial Court: "The Territories bequeathed to each of the two new provinces an efficient and well-organized court with able judges and a sound body of jurisprudence. Indeed, the new provincial supreme Courts were in large measure a continuation of the Territorial Court in personnel and structure."[58]

Endnotes

1 Oliver Wendell Holmes, Jr., *The Common Law* (1881), 1.

2 J.W. McClung, *History of the Alberta Court of Appeal* (Edmonton: Court of Appeal of Alberta, n.d.), 2.

3 A standard text for a more comprehensive overview of the evolution of the common law courts is John H. Baker, *An Introduction to English Legal History* (London: Butterworths, 1974). The monumental work of Sir William S. Holdsworth, *A History of English Law*, 3rd ed. (Boston: Little, Brown, 1922), although old-fashioned, gives as much detail as anyone could absorb. A good short discussion can be found.

4 John McLaren and Hamar Foster, "For the Better Administration of Justice: The Court of Appeal for British Columbia, 1910–2010" *BC Studies*, no. 162 (Summer 2009): 5.

5 Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* (Buffalo, NY: William S. Hein, 1990), 23.

6 Ibid., 109.

7 Margaret A. Banks, "Evolution of the Ontario Courts 1788–1981," in *Essays in the History of Canadian Law,* ed. David H. Flaherty (Toronto: Osgoode Society, 1983), 519. Upper Canada also legislated criminal reserve in 1851 and in 1857 allowed an accused to ask for a new trial and also allowed further appeal to the Court of Error and Appeal. The court initially used trial judges, but in 1874 a new act mandated appointment of appeal judges, although these judges also had some trial duties and judges from the trial courts still sat on the appeal court.

8 *British North America Act*, 1867, 30–31 Vict., c. 3 (UK).

9 British Columbia, for instance, only started using facta in the 1930s. Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910–2010* (Vancouver: UBC Press, 2010), 31.

10 Also referred to as legal positivism.

11 Wilbur Bowker, "Stipendiary Magistrates and the Supreme Court of the Northwest Territories, 1876–1907," in *A Consolidation of Fifty Years of Legal Writings, 1938–1988 by Wilbur F. Bowker,* ed. Marjorie Bowker (Edmonton: University of Alberta, Faculty of Law, 1989), 712.

12 *An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories*, SC 1873, c. 35, s. 1.

13 Ibid., 701–2; Rod Macleod and Nancy Parker, "Justices of the Peace in Alberta," in *Forging Alberta's Constitutional Framework*, ed. Richard Connors and John M. Law (Edmonton: University of Alberta Press, 2007), 278.

14 Action in tort with claims up to $500 and of contract to $1,000 without a jury unless requested.

15 Bowker, "Stipendiary Magistrates," 694.

16 *An Act to amend and consolidate the several Acts relating to the North-West Territories*, SC 1880, c. 25, s. 4.

17 *R v Riel (No. 2)* (1885), 1 Terr L R 23.

18 Several NWT appeals to Manitoba are reported in the first published year of the Territorial Law Reports (hereafter Terr. L.R.), 1885. An examination of the Manitoba Reports may show even earlier ones, but this is not essential for this history. See *Steele v Ramsay*, 1 Terr L R 2, and *R v. Connor*, 1 Terr L R 4, as examples.

19 Perhaps in recognition of this, in 1884, the authorities created the first direct appeals in the Territories. The stipendiary magistrates were empowered to hear appeals of convictions and orders of justices of the peace in the Territories.

20 Glenbow Archives, James F. Macleod Family Fonds, M776, file 7, correspondence and petitions, March 5, 1885.

21 *An Act further to amend the law respecting the North-West Territories Act*, SC 1886, c. 25, s. 4.

22 *Northwest Territories Act*, SC 1886, c. 50, s. 48.

23 63–64 Vict., 1900, c. 44, s. 1.

24 Macleod and Parker, "Justices of the Peace in Alberta," 268.

25 *Supreme Court of Judicature Act*, 1873, 36 & 37 Vict. c. 66, *Supreme Court of Judicature Act*, 1875, 38 &39 Vict. c. 77.

26 Dale Brawn, *The Court of Queen's Bench of Manitoba, 1870-1950: A Biographical History* (Toronto: University of Toronto Press, 2006), 16. Nova Scotia passed a *Judicature Act* in the 1880s that fused courts of law and equity: see Girard, "The Supreme Court of Nova Scotia: Confederation to the Twenty-First Century," in *The Supreme Court of Nova Scotia, 1754–2004*, ed. Philip Girard, Jim Phillips and Barry Cahill (Toronto: Osgoode Society and University of Toronto Press, 2004), 152. Ontario did the same in 1881: see Banks, "Evolution of the Ontario Courts," 523.

27 Bruce Ziff, "Warm Reception in a Cold Climate English Property Law and the Suppression of the Canadian Legal Identity," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. J. McLaren et al. (Vancouver: UBC Press, 2005), 104.

28 Desmond Brown, "Ambiguous Authority: The Development of Criminal Law in the Canadian North-West and Alberta," in *Forging Alberta's Constitutional Framework*, ed. Richard Connors and John M. Law (Edmonton: University of Alberta Press, 2005), 49–51.

29 Jean E. Côté, "The Introduction of English Law into Alberta," *Alberta Law Review* 3, no. 2 (1964): 270, mentions (in a different context) that "a certain number of archaic rules of English law had been remedied by legislation before 1870." In "The Reception of English Law," 84, Côté also mentions that beginning in 1869, the Stationery Office in London published an annual indexed list of all English statutes still in effect. I don't know to what extent Canadian and particularly Albertan lawyers would have referred this list, but it likely made its way even onto the Prairies.

30 See *Huggard Assets Limited v. Attorney-General for Alberta and Minister of Lands and Mines for Alberta*, [1950] 1 WWR 69, which is discussed in Chapter 5.

31 *Northwest Territories Act*, SC 1886, c. 50, s. 50.

32 This was a practice that was gradually changing. In Ontario, it was forbidden only in 1874. Banks, "Evolution of the Ontario Courts," 520.

33 Glenbow Archives, James F. Macleod Family Fonds, M776-14a, Series 1, 1888.

34 Horace Harvey, "The Early Administration of Justice in the North West," *Alberta Law Quarterly* no. 1 (1934): 15.

35 Roderick G. Martin, "The Common Law and Justices of the Supreme Court of the North-West Territories: The First Generation,

1887–1907," in *Laws and Societies in the Canadian Prairie West, 1670–1940,* ed. Louis A. Knafla and Jonathan Swainger (Vancouver: UBC Press, 2005), 226.

36 "Consolidated Rules of the Supreme Court of the Northwest Territories," in N.D. Beck, ed., *Territories Law Reports*, vol. 1 (Toronto, Carswell, 1900), ii–v. It is not clear if the rules applied when the court was established in 1886. Bowker, "Stipendiary Magistrates," 724, writes, "The practice and procedure on appeals seemed to be much like it is today. Appeal books were printed and so were factum." See note below.

37 *Pacific Investment Co. v Swan* (1898), 3 Terr L R 125, , at para. 3: "It is conceded in the plaintiff's factum that by the practice in England."

38 Glenbow Archives, Macleod Family Fonds, M776-14a, Series 1, 1890/2.

39 Glenbow Archives, Macleod Family Fonds, M776-14a, Series 1, 1888/06.

40 Roderick G. Martin, "Macleod at Law: A Judicial Biography of James Farquharson Macleod, 1874–94," in *People and Place: Historical Influences on Legal Culture* ed. Jonathan Swainger and Constance Backhouse (Vancouver: UBC Press, 2003), 51.

41 C.C. McCaul, "Precursors of the Bench and Bar," *Can. Bar Rev.* 25, no. 3 (1925): 39.

42 James G. Snell and Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985), 35.

43 Bowker, "Stipendiary Magistrates," 722 and 724.

44 The following generalizations were formed from an examination of the *en banc* decisions of the NWT Supreme Court as found in the Territorial Law Reports, published from 1885 to 1907.

45 Martin, "The Common Law," 211.

46 Ibid., 224–225, citing *Re Edmonton By-law* as one example.

47 Bowker, "Stipendiary Magistrates," 725–26, has some interesting comments on the attitude of the territorial judges toward precedent.

48 *R. v Nan-E-Quis-A-Ka* (1889), 1 Terr L R 211, , at para. 9.

49 Ibid., para. 9.

50 *Eggleston v Canadian Pacific Railway Co.* (1903), 6 Terr L R. 168,, at para. 6.

51 Ibid., para. 6.

52 *R v Lougheed* (1903), 6 Terr L R 77.

53 Ibid., para. 7.

54 Martin, "The Common Law." This essay concentrates on *en banc* decisions, as the more definitive statements of law. Louis A. Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada," in *Law and Justice in a New Land: Essays in Western Canadian Legal History*, ed. Louis Knafla (Toronto: Carswell, 1986); and Bowker, "Stipendiary Magistrates," both discuss to some degree some of the characteristics of the judges of the court and their approach to law.

55 *Calgary Herald,* January 23, 1899. In his address welcoming the court, J.A. Lougheed makes reference to "the representation that has been made for many years in this regard."

56 *North-West Territories Gazette,* vol. 15, no. 23, 3.

57 *North-West Territories Gazette,* vol. 17, no. 11, 7; vol. 20, no. 16, 3. See also *Calgary Herald*, July 17, 1900.

58 Bowker, "Stipendiary Magistrates," 730.

SANDISON BLOCK, JASPER AVENUE, EDMONTON, THE EDMONTON COURTHOUSE WAS ON THE SECOND FLOOR. COURT OF APPEAL COLLECTION.


McDermid 50

CHAPTER 2

THE SUPREME COURT OF ALBERTA *EN BANC*, 1907–1921

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.[1]

When Alberta officially came into existence on September 15, 1905, it was a province without even a provincial court. Such was the monumental task of setting up a new government – including a department of the attorney general – that it took a year and half before the administration of Premier A.L. Rutherford could establish new courts. Until then, the Territorial Court soldiered on. Finally, on February 11, 1907, the Alberta legislature gave assent to the *Supreme and District Court Acts*.[2] The *Acts* did not come into effect until September, and the new Supreme Court of Alberta did not finally sit until October.[3]

The founding of the Supreme Court of Alberta coincided with a tremendous boom in the newly minted province, which saw a doubling of population in barely five years and a consequent explosion of economic activity and social upheaval. Like other new institutions, Alberta's superior court was a work in progress as the province transformed from frontier to settled society. In the first dozen years, the Supreme Court experienced substantial changes, including leadership, as its first chief justice, Arthur Lewis Sifton, departed to politics, and Horace Harvey began his remarkable tenure as head of the court. The Supreme Court bench nearly doubled in size to meet a seemingly ever-growing caseload. The first steps were taken towards a separate appeal court when the Court abandoned *en banc* proceedings in 1914 in favour of a rotating appeal bench titled the Appellate Division of the Supreme Court of Alberta.

The judges of the Court demonstrated the same awareness, as they had on the territorial appeal court, that flexibility, and even creativity, were sometimes necessary in determining and applying the law in a new, raw society. The Court was founded as a new orthodoxy, often termed legal formalism, took hold, which encouraged judges to limit their role to interpreting of the law as it existed. In its jurisprudence, the Alberta Supreme Court showed the growing influence of formalism while still maintaining an

ALBERTA LEGISLATURE UNDER CONSTRUCTION, 1912. GLENBOW ARCHIVES, NC-6-50.

older tradition in the common law of judicial law-making that responded to the needs of society. Two of the Court's leading lights, Charles Allan Stuart and Nicolas du Bois Dominic Beck, approached their law-making role with a broad perspective that contrasted with more orthodox judges, like Harvey, to create a fascinating blend of the progressive and the conservative readily seen in famous decisions such as *R v Cyr*, *Board v Board*, and *R v Trainor*.[4] And, in a moment of deep crisis, played out against the backdrop of a world war, Alberta's appellate justices issued a ringing defence of the courts as protectors of individual freedoms and the rule of law in *Re Lewis*.

THE SIFTON-HARVEY COURT

Establishing the Court

In the two years before Alberta established its own superior courts, the Territorial Court judges were consulted on the proposed legislation and Horace Harvey even helpfully commented on Saskatchewan's draft legislation.[5] The Alberta judges were completely in the dark, however, as to when their court would be established. Harvey was compelled to write the Deputy Attorney General, Sidney B. Woods, to find out. Woods replied:

> The latest information I have concerning the Courts Act would indicate that they will not be brought into force until August or perhaps early in September. However, I see by the daily press that the Saskatchewan Act will come into force on July 1st. I do not know how this is or how it will work out, unless the new appointments are made by the Federal authorities, nor do I know what effect this will have, if any, upon the action of the Federal authorities in the premises.[6]

As Woods' response made clear, negotiations with the Dominion government over new judicial appointments delayed enacting the legislation. Alberta and Saskatchewan, like all provinces, were at the apparent mercy of the federal government for appointments to their superior courts, known as "s. 96 courts" after the section of the *BNA Act* that assigned the power of appointment to Ottawa. This constitutional arrangement was a constant thorn for Alberta's administration of justice, as it was in most provinces.[7] During the territorial period, the Dominion had dragged its feet over nearly every request for more judges, pleading a need to economize or disputing the need for another justice, for the simple reason that the federal government paid the salary as well as making the appointment. Provincial status did not change this in Alberta, and expansion of the provincial superior courts was usually delayed by tardy appointments, a situation that continues to this day.

The first sitting of the Supreme Court of Alberta was in Alberta's new capital city, Edmonton, on October 8, 1907.[8] The Court sat *en banc* for its inauguration, exercising its appellate function. But there was no pomp and ceremony, no flowery speeches, and no dignitaries attending to mark the moment. Nor did the makeshift courtroom in the Sandison Block on Jasper Avenue lend itself to the occasion. Edmonton did not have a proper courthouse, and the courtroom – a small drafty room with cracked plaster – was not much of a setting. The new Chief Justice of Alberta, Arthur Lewis Sifton, was also not a man who encouraged fripperies, and, given that all but one of he and his colleagues had been members of the Territorial Court, there was perhaps a feeling of business as usual. And that it was, as the court got right down to work, considering the appeal of *Robertson v Town of High River*.[9]

The Structure and Powers of the New Courts

The creation of the new Supreme Court caused hardly a flutter in the press or with the public. The profession was eager to see another justice appointed, but with a familiar bench the new court took up where the Territorial Court had left off.[10] Like its predecessor, the Supreme Court of Alberta claimed the same jurisdiction, powers, and prerogatives as the superior courts of England as of July 15, 1870, and assumed all the jurisdiction, powers, and authority of the Territorial Court, which was

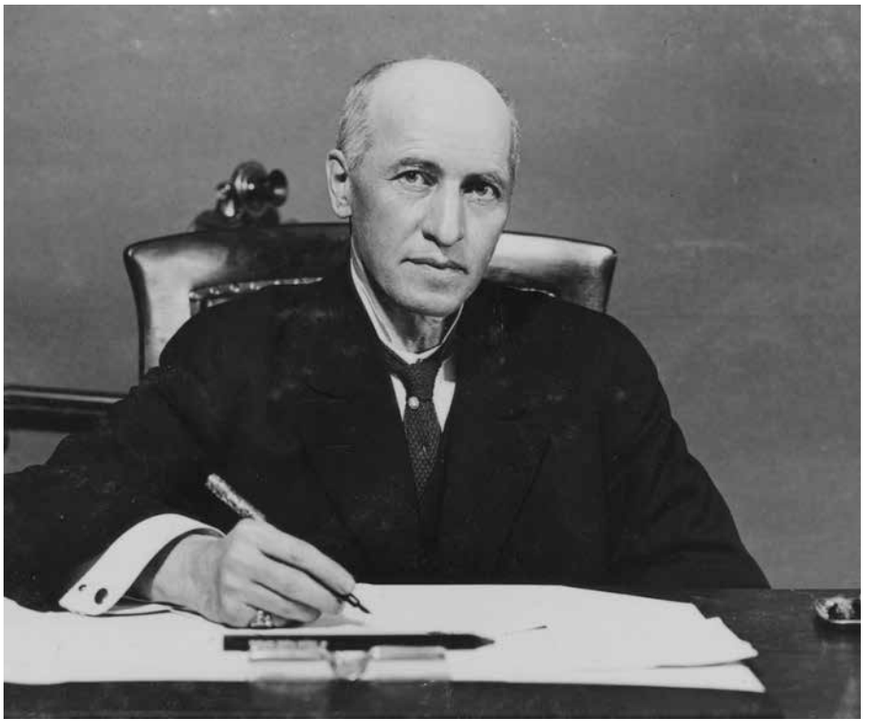
LAWYERS' PICNIC, BOWNESS PARK, CALGARY, 1912. LASA 46-G-1.

abolished in Alberta. The *Judicature Ordinance* of 1898, as amended and consolidated to 1905, was adopted wholesale to govern practice and procedure of civil litigation and provide the Rules of Court. The *Act* creating the new court made allowances for changes to the Rules, but instead of giving this responsibility directly to the bench, as in territorial days, it left it with the Lieutenant-Governor in Council, who could authorize the judges to make changes as necessary.

The *Supreme Court Act* also spelled out the appellate powers of the court, which are discussed in detail below. Like its territorial predecessor, the Supreme Court of Alberta continued to sit *en banc* to hear appeals, so in essence the court was both a trial court and an appeal court. For a new province with a small population, it was a sensible arrangement.[11] Initially, appeal sittings were set for four times a year, twice in Calgary and twice in Edmonton, with the judges from the other city travelling to allow the full court to sit. This established a tradition that continues to this day, where judges resident in each city regularly sit in the other city.

The provincial government also created, by a separate act, the District Court of Alberta. The province was initially divided into five judicial districts, with more added later. The judges of the Supreme Court were centralized in Calgary and Edmonton and visited the judicial centre of the other districts on circuit. Each district, however, had a resident District Court judge who then did a circuit to smaller centres within the district. The District Court was still a s. 96 court, though with lesser jurisdiction than the Supreme Court. It dealt with minor civil matters, including small debts, but had wide criminal jurisdiction, including almost all indictable offences with the consent of the accused. Only capital crimes were absolutely reserved for the Supreme Court. Like county and district courts in other parts of Canada, Alberta's District Court was intended to provide quick access to a judge outside the province's major centres.

The *Supreme Court Act* provided for a bench of five, a chief justice styled the Chief Justice of Alberta and four puisne judges. Four members of the Supreme Court came directly from the Territorial Court: David Lynch Scott, Arthur Sifton, Horace Harvey, and Charles Stuart. To their number was added Nicolas Beck, a prominent Edmonton lawyer and editor of the *Territorial Law Report*. He was the new appointee for whom the province had been waiting. As the former head of the Territorial Court, Sifton, not surprisingly, was named the first Chief Justice of Alberta.



ARTHUR LEWIS SIFTON, CA. 1910. GLENBOW ARCHIVES, NA-1328-62394.

Arthur Lewis Sifton, the Sphinx

Arthur Sifton was born in 1859, near London, Ontario.[12] Along with his brother Clifford, he came of age in Winnipeg, where the family had moved in 1874 after their father John Sifton, a railway contractor, obtained a major contract on a government-sponsored line that later become part of the Canadian Pacific. The family's Liberal connections had helped land the railroad contract and the two Sifton boys were always party men to the core. Arthur Sifton attended Victoria College in Toronto and earned a BA, then articled in a Winnipeg law office and joined the Manitoba bar in 1883. He practised briefly in Brandon with his brother before heading west to Prince Albert, Saskatchewan, and then to Calgary in 1889. Acting as town solicitor, Sifton drew up the 1894 city charter for Calgary. He became a partner with James Short, and went into territorial politics as the member for Banff. Sifton served in Frederick Haultain's territorial government as commissioner of public works and then as treasurer.

His appointment as territorial chief justice in 1903, straight from politics and an undistinguished legal career, was controversial even at a time when patronage was a major factor in naming judges. The criticism did not seem to bother Sifton. Contemporaries, both political and judicial, spoke of Sifton's "sphinx-like countenance." Sifton was noted for his sardonic humor and cynicism, often mocking the public life he participated in so successfully. Returning to politics in 1910 as premier of Alberta, he demonstrated a strong progressive streak as well as sound political judgment.

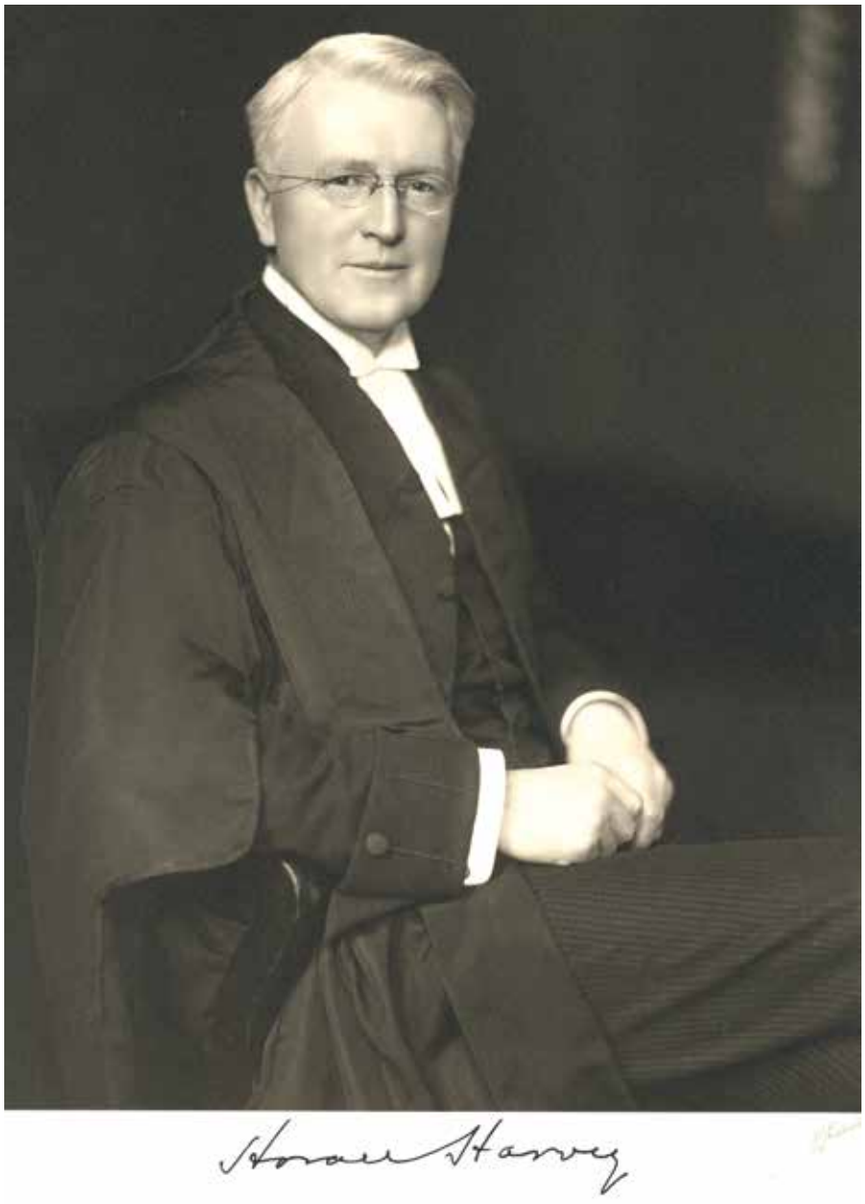
As a trial judge, Sifton was the scourge of horse and cattle thieves, handing out severe sentences. At trial, he generally gave short, oral verdicts and seldom reserved to craft a written judgment, and he rarely cloaked his decisions in case law or legal principles. And as chief justice, Sifton did not seem much interested in leaving his mark on the court's jurisprudence. The early appellate work of the Supreme Court was primarily left to Harvey, Stuart, and Beck. Sifton rarely wrote the judgments for the court and almost never provided concurring reasons, unlike his opinionated colleagues. He supposedly liked to put his feet up and smoke a trademark black cigar while listening to counsel give their arguments, rarely speaking up.

Horace Harvey, a Natural Appellate Judge

Horace Harvey, by contrast, had a great intellectual interest in appellate work. Harvey was a farmer's son from Elgin County, Ontario, born in 1863. His father, William, spent a term as the Liberal MP for Elgin East, a political legacy that served Horace well. Harvey attended the

University of Toronto and earned a BA and then LLB before joining the Ontario bar in 1889. After four years eking out a living in Toronto, he answered the call of the west and went to Calgary, joining Peter McCarthy, a former partner of Senator James Lougheed. The young lawyer had difficulty getting established in Calgary and took the position of registrar of land titles for southern Alberta in 1896. This led to his appointment as deputy attorney general of the territorial government in 1900. Harvey pursued his duties with a quiet competence and genial demeanour that won him many supporters. He was intimately familiar with the Territorial Ordinances, having drafted many of them.

Harvey had higher ambitions. In 1901, he sounded out his political friends about the bench, hoping for the position on the Territorial Court that James Prendergast filled in 1902.[13] After Sifton received the next appointment, Harvey considered returning to private practice in Calgary, but friends encouraged him to continue lobbying. Sifton, Frederick Haultain, Walter Scott, the future premier of Saskatchewan, and even C.A. Magrath, a leading citizen of Lethbridge and a prominent Conservative, supported Harvey. In 1904, he was appointed to the Territorial Court as the resident judge for southern Alberta, based in Fort Macleod. The climate there did not suit his wife Louise, and Harvey was able to move to Calgary in 1905,

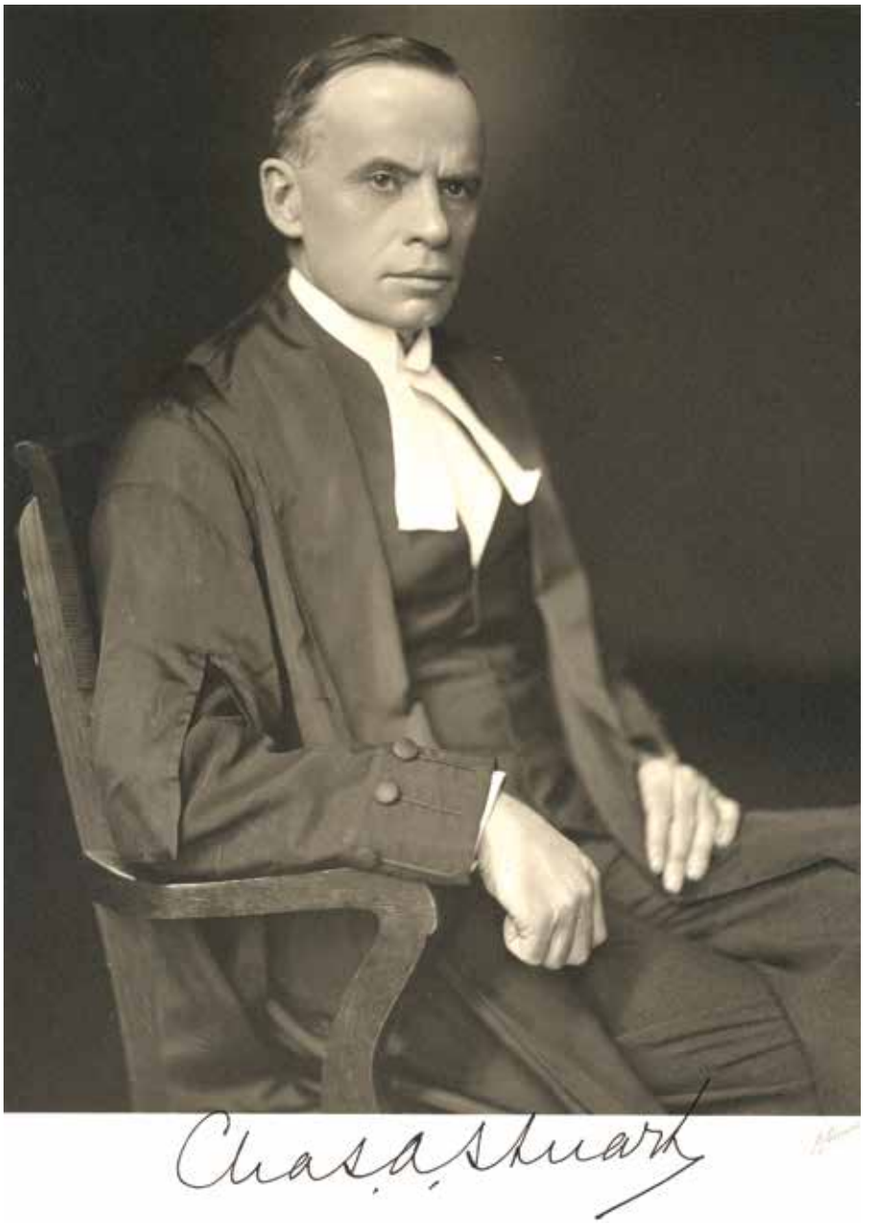


HORACE HARVEY, CA. 1920. LASA 5-G-60.

and then Edmonton in 1907. Harvey was destined to be a central figure of the Supreme Court of Alberta for almost four decades, and much more will be said about him.

Charles Stuart, the Philosopher

Charles Stuart was sometimes described as a philosopher. He had been a very late appointment to the Territorial Court in 1906, and for all intents, since he did not serve on the Territorial Court, he can be considered the first



appointment to the Supreme Court of Alberta. Born in Caradoc, Ontario, in 1864, Stuart was another graduate of the University of Toronto, where he won a gold medal in classics. After obtaining his law degree from Osgoode Hall in 1896, he briefly taught constitutional history at his *alma mater* before becoming seriously ill. To recover, Stuart went to Mexico for a year and then moved to Calgary in 1897 to further recuperate on his brother's ranch, joining the local bar the following year and going into partnership with Harvey's former colleague, Peter McCarthy.

After McCarthy's death in 1901, Stuart teamed up with Sifton and James Short. He was politically active, running unsuccessfully against R.B. Bennett for the territorial legislature and then getting elected to the first provincial legislature as the Liberal member for Gleichen. His appointment to the bench cut his political career short. Stuart was very much a progressive on social issues like women's suffrage. Of all the first Supreme Court judges, he was, in modern parlance, the "activist" judge, and was not afraid, within the limits of precedent, to adapt or develop the law to deal with changing economic and social conditions. Stuart showed a flair for appeal work almost immediately and was responsible for the most interesting of the early judgments of the Supreme Court *en banc*. His other great love was the University of Alberta, an interest he shared with Harvey. Stuart was the chancellor of the university from its inception in 1908 until 1926, when he died suddenly of a heart attack.

Nicolas Beck, the Humanist

Nicolas Beck was the individualist on the new court. He too was from Ontario, born in Cobourg in 1857. He attended the University

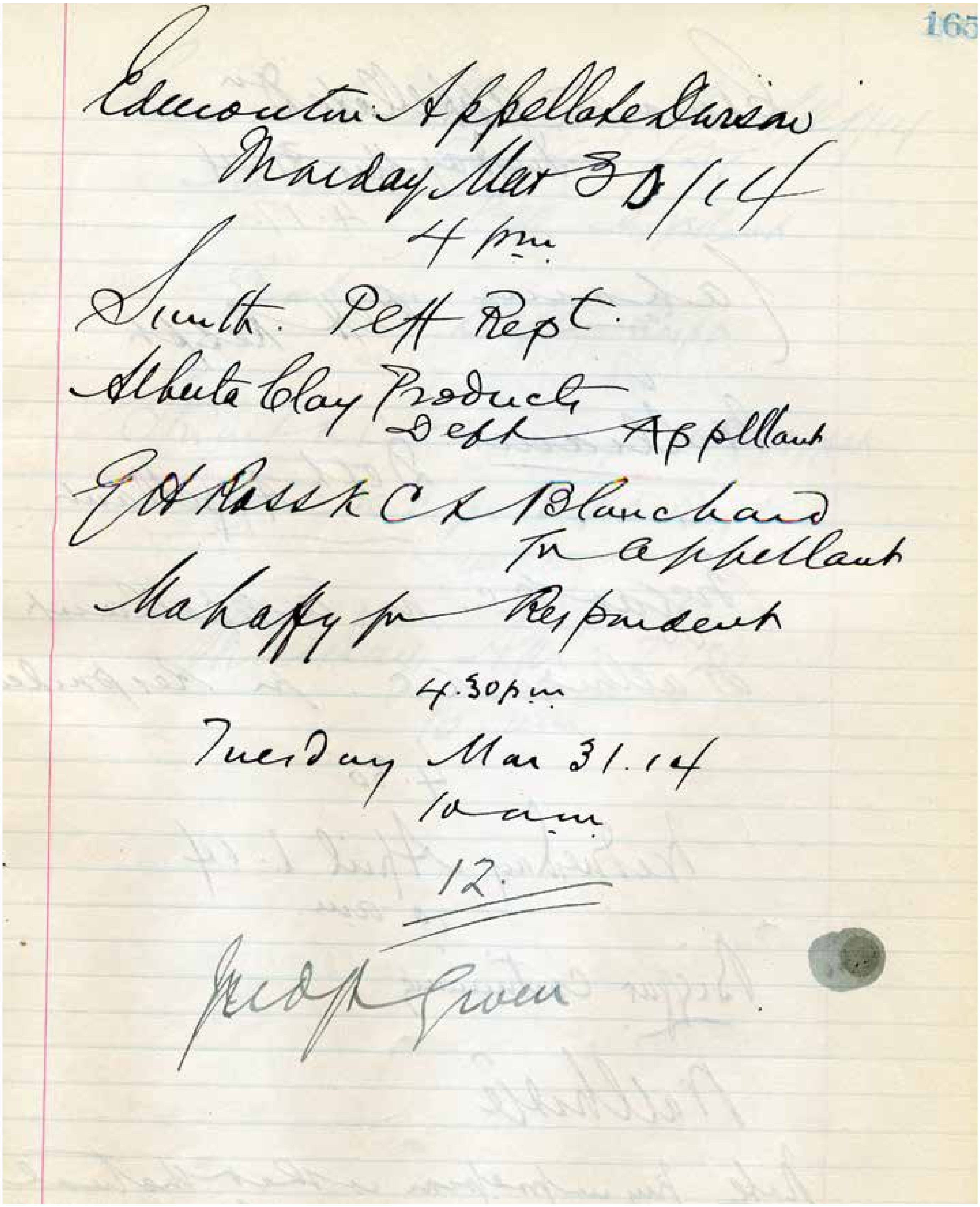
CHARLES ALLAN STUART, CA. 1920. LASA 5-G-62.

of Toronto and then Osgoode Hall, joining the Ontario bar in 1879, and came west after several years in practice in Peterborough. Arriving in Winnipeg in 1883, he practised for six years before going to Calgary and entering a partnership with James Lougheed and Peter McCarthy. Finally, in 1891, he established himself in Edmonton, becoming the town solicitor while also frequently acting as the local Crown prosecutor. Recognized as an authority on criminal law, Beck served as the editor of the *Territorial Law Reports* and was a legal scholar. He actively pursued an appointment to the Territorial Court, and was quite disappointed when his friend Harvey got the job.[14]

Beck's less than certain political convictions did not help him. He had been a Conservative but went to the Liberals around 1900 over the issue of separate schools. He had converted to Roman Catholicism in 1883, which in the end aided his cause for appointment to the bench. Long-standing federal policy, rooted in historic religious and political strife between Protestants and Catholics, ensured representation of the latter on the courts. This only ceased to be a consideration in the 1960s. Beck's efforts to preserve Catholic education rights made him an obvious candidate to be the "papist" on the Alberta bench. Indeed, his faith was fervid enough that his brother judges worried that Beck might be biased in cases where Catholic interests were at stake. To quell such whispering, Beck penned a powerful defence of his impartiality in the court's famous *Board v Board* decision, dealing with divorce law. Beck put justice and morality first in his jurisprudence, reflecting his strong faith.[15] Like his brother judge Stuart, Beck was quite ready to strike off into new territory and develop the law.

NICOLAS DU BOIS DOMINIC BECK, CA. 1920. LASA 5-G-59.

NICOLAS D. BECK AS LAWYER, CA. 1890S. PAA B6884.



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Edmonton Appellate Division
Monday Mar 30/14
4 pm.

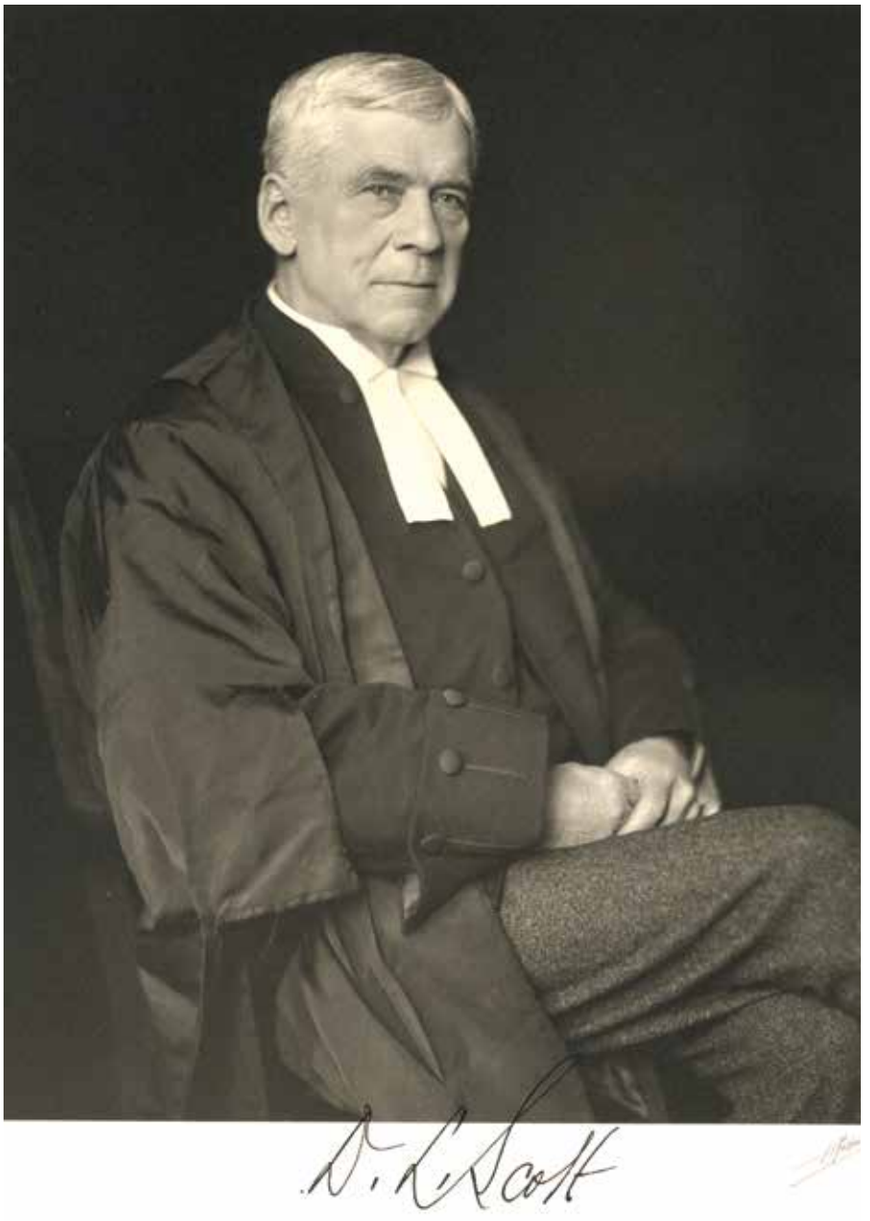
Smith. Pltf Respt.
Alberta Clay Products
Deft Appellant
J A Ross K C & Blanchard
for appellant
Mahaffy for Respondent

4.30 p.m.
Tuesday Mar 31.14
10 a.m.

12.

[illegible]

BECK NOTEBOOK, FIRST SITTING, APPELLATE DIVISION, 1914. LASA FOND 12.



Despite Beck's humanism, he had detractors. Journalist and humorist Bob Edwards of Calgary's popular satirical tabloid the *Eye Opener* intensely disliked the judge and frequently lampooned him as a humorless, pompous jurist – but Edwards had been the loser in a lawsuit Beck adjudicated. As an aside, Beck outlived two wives, and his third was several decades younger. In fact, Beck died on his honeymoon. He may have had qualities that Edwards didn't appreciate.

David Scott, the Veteran

David Lynch Scott was the veteran jurist, a strong member of the Territorial Court. Born in Brampton, Ontario, in 1845, Scott had studied law at Osgoode and articled with his brother. He practised in Brampton and Orangeville after joining the bar in 1870 and was mayor of Orangeville for two years. Scott was a true western pioneer, coming out to Regina in 1882, before it was the territorial capital, and was elected its first mayor. He was the first advocate enrolled when the Territorial Law Society was formed in 1885. Scott served as the junior prosecutor in the trial of Louis Riel and the Cree chiefs Poundmaker and Big Bear.

After Colonel Macleod's death in 1894, Scott was named to the Territorial Court, a position he had sought, and he moved to Calgary. By 1900, he was the resident judge in Edmonton, where he was well liked, actively participating in the town's social and cultural life. He was generally respected as a jurist, though not as universally as Harvey or Stuart.[16] One legal historian has said that "he became a master of the short, incisive judgment."[17] Scott was less active on the Supreme Court *en banc* than his brothers Harvey, Stuart and Beck, and was perhaps a little eclipsed by these prolix and opinionated judges. Poor health may have played a part. Scott was off work for several months in 1909, for instance, and was frequently absent

DAVID LYNCH SCOTT, CA. 1920. LASA 5-G-58.

through the next decade. This did not prevent Scott from being appointed Chief Justice of Alberta in 1921, however, ending his career at the pinnacle of the province's judiciary but not without great controversy, the subject of the next chapter.

In 1908, the Alberta legislature amended the *Supreme Court Act*. It enlarged the bench to six, although it was to be another four years before the Dominion appointed the additional judge. The amendment also required that the bench be split evenly between Calgary and Edmonton, with the justices to make their homes in the two cities, or very near. Special leave of the Lieutenant-Governor was required if they wished to live elsewhere. The judges were therefore concentrated in the two busiest courts, though they still went on circuit to outlying judicial districts in their role as trial judges. The amendment reflected the existing living arrangements of the judges – Scott, Harvey, and Beck resided in Edmonton, Sifton, and Stuart in Calgary, thus guaranteeing a future appointment for that city.

The 1908 amendment to increase the Supreme Court's complement, just a year after the court had finally been established, demonstrated how Alberta's remarkable growth quickly created a press of judicial business that threatened to overwhelm the small bench. Among other things, it quickly became obvious that sitting *en banc* for appeals was completely inadequate. Fortunately, political events brought about a change of leadership for the

FIRST ALBERTA LEGISLATURE, ON STEPS OF MACKAY SCHOOL, 1906. PAA B6662.

Supreme Court, and an efficient administrator to the position of chief justice. Two of the new chief's preoccupations were expanding the size of the Supreme Court and establishing a separate appellate bench.

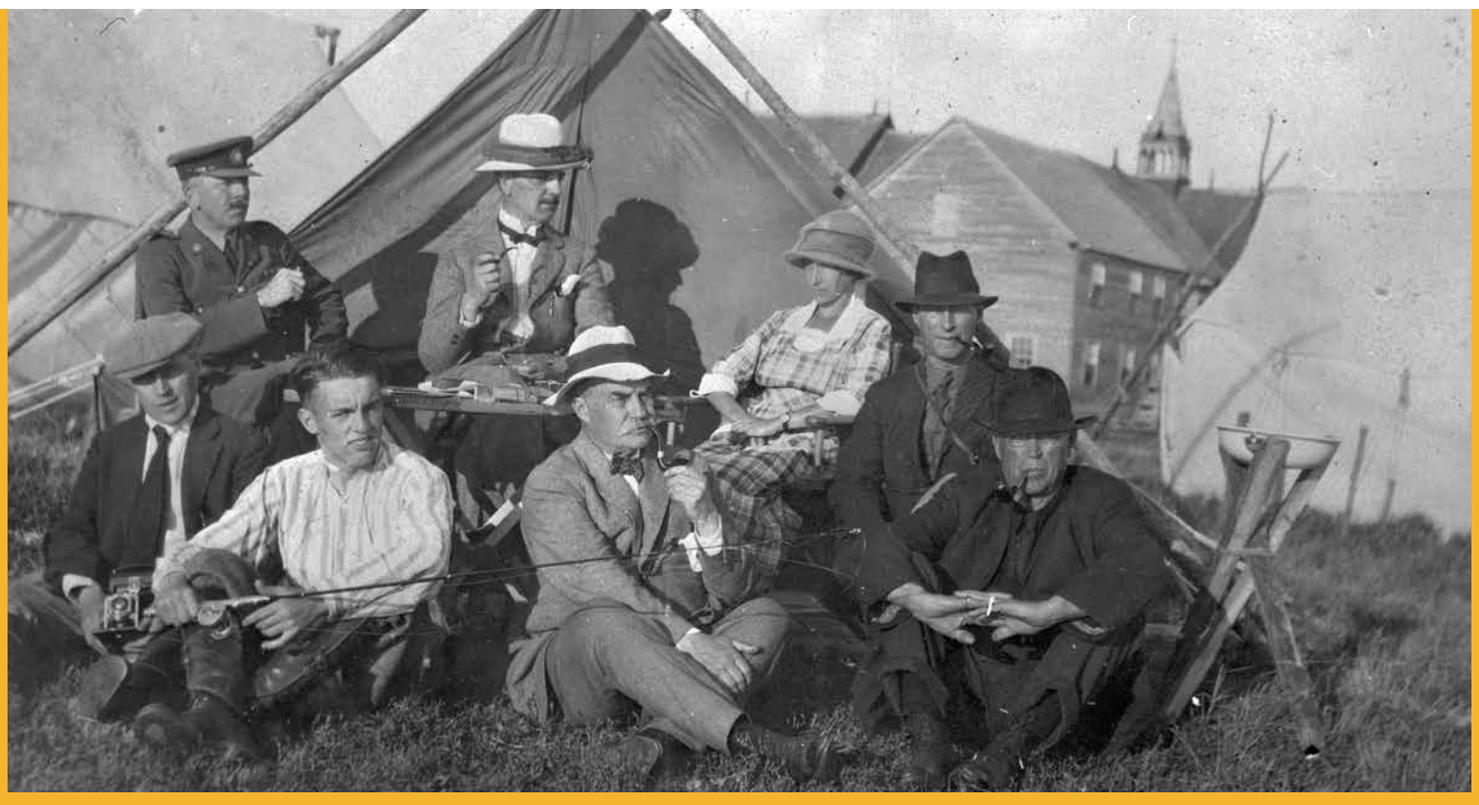
Harvey Takes Over

In 1910, Premier Rutherford's Liberal government faced a mounting controversy over the Alberta and Great Waterways Railroad. His was not the first government to run afoul of railway politics in Canada, and like other politicians before, the premier saw his career abruptly terminated. At issue was the province's guarantee of the railway's bonds. When the company defaulted, it created an uproar that soon involved allegations of conflict of interest and rumours of corruption.

With Rutherford's administration tainted, his own party decided he had become a liability, and Alberta's first premier soon resigned. He was later cleared, more or less, by a Royal Commission consisting of Justices Harvey, Scott, and Beck. Rutherford's replacement was none other than the Chief Justice of Alberta. Sifton left the bench to return to the hurly-burly of politics and became the second premier of Alberta. Sifton's resumption of his political career ended with a federal cabinet seat and appointment to the Imperial Privy Council. Unlike his younger brother Clifford, he never received a knighthood.

Sifton's successor as chief justice was Horace Harvey. He was a good Liberal and undeniably very able. And while he had relative youth on his side at the

JUDICIAL PARTY, FORT PROVIDENCE, NWT, 1921. ALBERTA DISTRICT COURT JUDGE LUCIEN DUBUC SEATED AT TABLE. PAA A3665.



age of forty-seven, he had been on the bench long enough to be seasoned. It was the start of a remarkable tenure. On paper, the other likely candidate was Scott. He was the senior judge, a solid member of the court and well liked in Edmonton.[18] Like Richardson on the Territorial Court, however, Scott was passed over. With a Liberal government in place both provincially and federally, it was very unlikely that an old Conservative had much of a chance. Scott no doubt knew his chances were poor. Although he did not appear to harbour any resentment, events in 1921, when the reorganization of the court saw Scott become Chief Justice, may have indicated otherwise.[19]

The New Chief: A Man of Contradictions

The new Chief Justice was quite different from Sifton. Harvey can be described as modest, quietly self-confident, gracious, and generous – but also obstinate and unforgiving. As an appellate judge, he was engaged in the courtroom, asking sharp questions and keeping counsel on point. Secure in his judgment and experience, especially as he got older, it was hard to change Harvey's mind, but quite properly he also did not expect his brother judges to agree with him. Harvey himself said that he was probably the sternest judge on the court and frequently handed out harsh sentences. Paradoxically, Harvey's humanity came out when he was dealing with criminal offenders. On many occasions, he interceded on behalf of those he had incarcerated, supporting requests for parole and pardon. Sometimes, he felt that they had been rehabilitated; other times he felt obligated to give offenders a tough sentence but felt there were extenuating circumstances that favoured early release. Remarkably, in the case of one unfortunate family, Harvey provided money out of his own pocket for a number of years to help support them while their father was in prison.[20]

ALBERTA HOTEL IN WETASKIWIN, 1905. PAA A5264.

This was even more remarkable given Harvey's customary frugality. He seemed to have deep anxieties over money. Even as chief justice, Harvey maintained a large portfolio of mortgage investments that he looked after personally. There are many letters extant from the Chief Justice of Alberta to immigrant farmers inquiring about their mortgage arrears and threatening legal action, though he was usually too soft-hearted to do more. Much of Harvey's voluminous correspondence was devoted to quarrels over his gas or electric bill, or car repairs, or with tradesmen, all of which expenses he could well afford. And when the Court travelled for sittings, Harvey supposedly asked the CPR to move up the time of departure of the late train between Calgary and Edmonton so that it left just before midnight and the judges could collect another day of per diem. Harvey was an indefatigable lobbyist for better pay, expenses, and pensions for judges, arguing that better pay meant better judges.

Harvey was also exceptionally dedicated – he claimed that the lawyers in Edmonton knew that he could be reached at his home on Saturdays if they needed a judge.[21] But the law was not Harvey's entire life. He read widely and kept up a large number of magazine subscriptions. He was a keen hobbyist. Harvey loved stamp collecting and built up quite an enormous and valuable collection, which he very willingly showed to young collectors. Gardening was a passion, and Harvey was especially obsessed with gladiolas. He ordered bulbs far and wide and bred his own. As well as the garden around his house, Harvey owned some vacant lots nearby that he worked on. Another passion was bridge. Most of the judges were bridge players, and for the Chief Justice the game was clearly an opportunity to socialize and relax.

Harvey was a serious man and not noted for his sense of humour, but he had an ironic view of the world, reflected in occasional humorous asides. Recommending a colleague for promotion, Harvey wrote the prime minister: "Mr. Justice Ives was before his appointment a Conservative but, of course, that was his misfortune and I have never heard a suspicion of it having affected his judgment."[22] Although often seen at social functions, Harvey was not gregarious and preferred small gatherings.[23] As chief justice, he was solicitous of the well-being of his brother judges and quite accommodating in matters such as assigning sittings. He always strove to have a collegial atmosphere on the Court. Harvey was quietly affectionate in his regard for many of his colleagues on the bench, but he was not a man of obvious charm and winning personality.

Much more could be said about Harvey. As Chief Justice for nearly four decades, he would exercise tremendous influence over not just the appellate

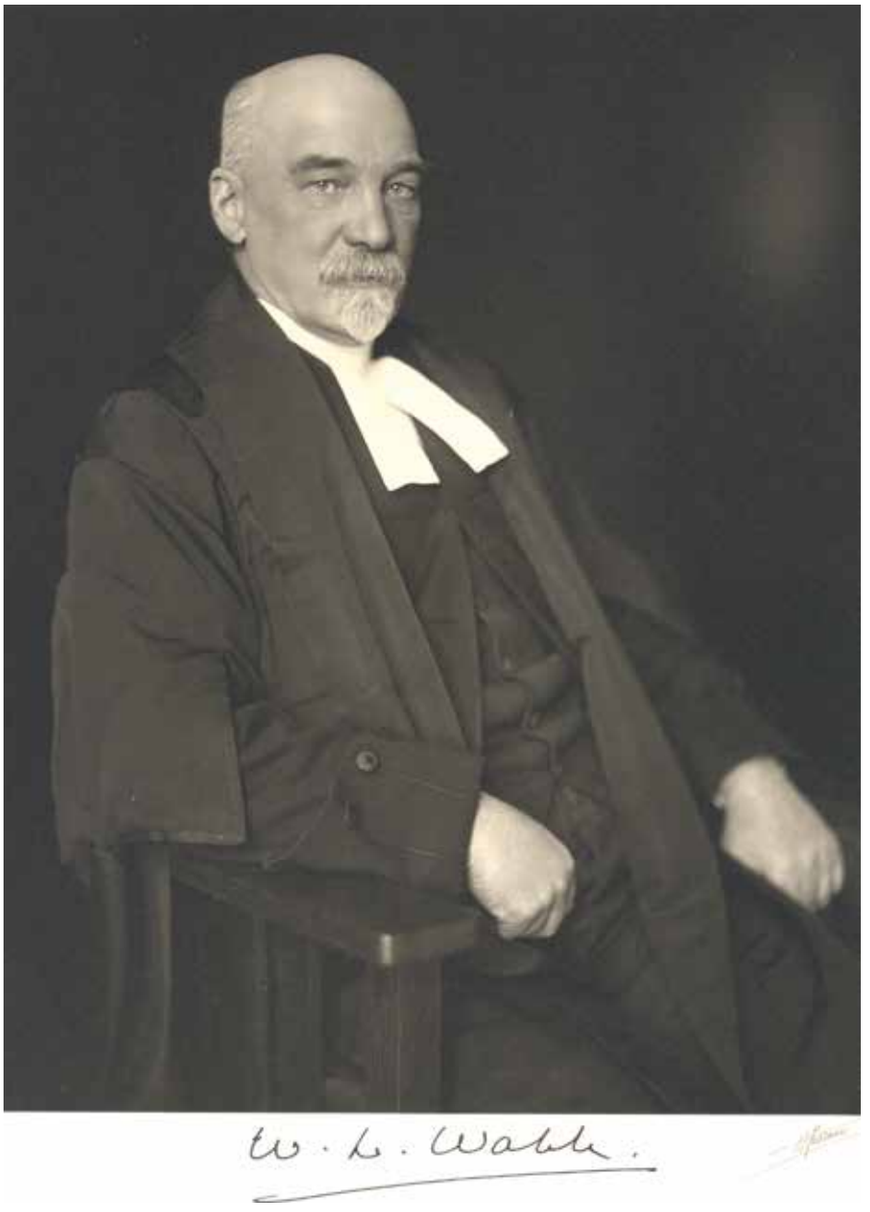
court but all the courts of Alberta. Though not a brilliant jurist, he was much more than merely competent. More importantly, Harvey provided strong and consistent leadership over thirty-six years, in a judicial career that spanned forty-five. He evolved from respected peer to father figure among his colleagues, and it has been said that his last appeal judgments, issued barely three months before his death at eighty-six, were as sound as his first.[24]

William Simmons, Country Judge

With Sifton's departure, another judge was needed. William Charles Simmons was the last Laurier appointment to Alberta's superior court. He had been a Liberal member for Lethbridge in the first provincial legislature. Simmons had a late start in law. Born in Tara, Bruce County, Ontario, in 1865, Simmons earned a BA from the University of Toronto in 1895 and came west as a teacher, taking a position as Principal of Schools in Lethbridge. In 1899, he dropped teaching in favour of law and took up articles with R.B. Bennett in Calgary, joining the territorial bar in 1900. Simmons practised in Cardston and then Lethbridge with S.J. Shepherd, taking his run at politics in the first provincial election. He ran for Parliament in 1908 but lost.

Simmons had just barely completed ten years in practice when he was appointed to the bench. His appointment marked the first from the Alberta bar outside of the major centres. He would have a long judicial career, serving twenty-six years and becoming Chief Justice of the Trial Division of the Supreme Court in 1924. Despite this achievement, Simmons was not considered a particularly good judge among the bar. Nor was he a strong appellate judge, choosing instead to take his lead from his brother judges, especially Stuart and Beck.[25]

WILLIAM CHARLES SIMMONS, CA. 1920. PAA P5225.



William "Daddy" Walsh, a Judicial Conservative

In 1912, Robert Borden's Conservative government finally filled the spot created in 1908 after strong lobbying by members of Calgary bar, such as R.B. Bennett, Senator James Lougheed, and William Legh Walsh, all Conservative Party mainstays in Alberta. The appointment went to the latter, the first Conservative appointed to the bench since Scott in 1894. Walsh had one of the most colourful careers of any member of the Alberta court. Born in Simcoe, Ontario, in 1857, he went to Toronto for his education and received a degree in 1878. He joined the bar two years later. After several years back in Simcoe, he joined the firm of prominent Conservative politician D'Alton McCarthy in Orangeville. Over the next nineteen years, Walsh was elected mayor three times as well as serving on the school board. He tried his hand, unsuccessfully, at provincial politics.

Then, at the age of forty-three, Walsh tossed over his comfortable existence in Orangeville and went to the Yukon at the height of the gold rush. He practised law and was counsel in a civil litigation case concerning the largest mining claims of the gold rush, purportedly pocketing a record fee. Walsh's own mining speculations, however, balanced his legal successes. In 1904, he left the Yukon for Calgary and entered into a partnership with Maitland McCarthy, D'Alton's nephew. The partnership prospered and also became a major force in local Conservative politics, with Walsh acting as the chief party organizer for several years. However, in 1906, his own attempt at the provincial legislature ended in disappointment. Walsh retired from the bench in 1931 to become Lieutenant-Governor of Alberta.

A popular lawyer and well-regarded, Walsh was a welcome appointment. Harvey was pleased and felt Walsh would make a good judge. He was

WILLIAM LEGH WALSH, CA. 1920. LASA 5-G-61.

> LETHBRIDGE CITY STREET, 1920. PAA P4006.

always enthusiastic and hard working.[26] Walsh was not an intellectual and seemed more comfortable as a trial judge than in the more scholarly role of an appeal judge. He was a strong believer in capital punishment and was known as a "hanging judge," never flinching from the necessity of pronouncing capital sentence and viewing it as a powerful deterrent. His other main judicial attribute was a strong belief in the efficacy of English common law and of *stare decisis*. Walsh was a judicial conservative as well as a political one.

The Appellate Division

It did not take long for dissatisfaction to build among the judges and the legal profession with the Supreme Court sitting *en banc* on appeals. It was impossible to schedule sufficient appellate sittings to cover the work without disrupting the trial court's schedules. The Law Society struck a committee to lobby for an appeal court and passed a resolution at the 1912 convocation calling on the government to establish one at the earliest opportunity.[27] The Chief Justice was all in favour. The primary difficulty in doing so was obtaining sufficient judges to staff it.

The expansion of the bench in 1914 allowed the next step in the evolution of Alberta's appeal court. The *Supreme Court Act* was amended to create an Appellate Division. It is the one hundredth anniversary of the creation of this separate Appellate Division that the Court of Appeal celebrates in 2014. It was a significant refinement of the court *en banc*, intended to allow the appeal court to be more efficient and to better handle an increasing work load. In December, the justices would meet and designate a four-judge panel, the members of which only heard appeals for the upcoming year and did not sit on trials. All the justices remained *ex officio* members of the appellate and the trial courts. But now, instead of "the inconvenience of completely stopping trial work" to sit *en banc*, a full-time panel was available through the year for deciding appeals.[28]

The Appellate Division was still not a permanent appeal court because the personnel might change every year. And it usually did, with the exception of Beck and Stuart, who became more or less full-time appellate judges. Harvey, for one, liked that arrangement. "It is an advantage for a trial judge to have some experience as an appellate judge, as it is for an appellate judge to have experience at trials," he once wrote.[29] Having a panel of judges working on appeals full-time, however, allowed them to give more attention to the judgments, something that Harvey and other justices thought was lacking because of the rush of work.[30] The change allowed consideration of more appeals. The Court soon instituted continuous appellate sittings, alternating monthly between Calgary and Edmonton, two weeks in each location, which very much expedited appeals.

WILLIAM CARLOS IVES, CA. 1920. LASA 5-G-78.

Panel Size: What Was the Right Number?

The choice of a panel of four, with the quorum remaining at three, seems odd to modern eyes; it is now always an odd number.[31] A tie vote of the full panel meant the appeal was dismissed. In accord with many judges of the era, Harvey thought that this was better, more respectful of the trial judge's decision. A bare majority of two to one or three to two seemed to his mind less conclusive of an appeal's merit. It fit with the prevailing belief that a trial judge's findings should only be set aside carefully. Four-judge courts were not uncommon at the time. Indeed, for a period, the SCC had a bench of six.[32] Having a quorum at three, however, allowed flexibility: the Court generally sat with a full bench, but three-judge panels were fairly common.

The panel of four was also practical, requiring one fewer judge. As it was, the Appellate Division needed to add three more justices to the existing complement of six, if five judges were to remain available for trials. The federal government continued to be parsimonious with appointments. From 1909 onwards, the provincial and federal governments have had a running disagreement about the size of the Alberta bench. The provincial government pleaded for more judges to meet demand, the federal government disputed the need and delayed appointments on the grounds of economy. That disagreement continues to this date, as do the typical excuses by the federal government for failing to meet the province's identified needs.

Still More Judges Required

As Chief Justice, Harvey was an indefatigable lobbyist for more appointments. He gathered statistics and complained vociferously to the provincial attorney general that it was impossible to schedule sufficient sittings. He wrote the Minister of Justice directly to point out the impossibility of the judges clearing

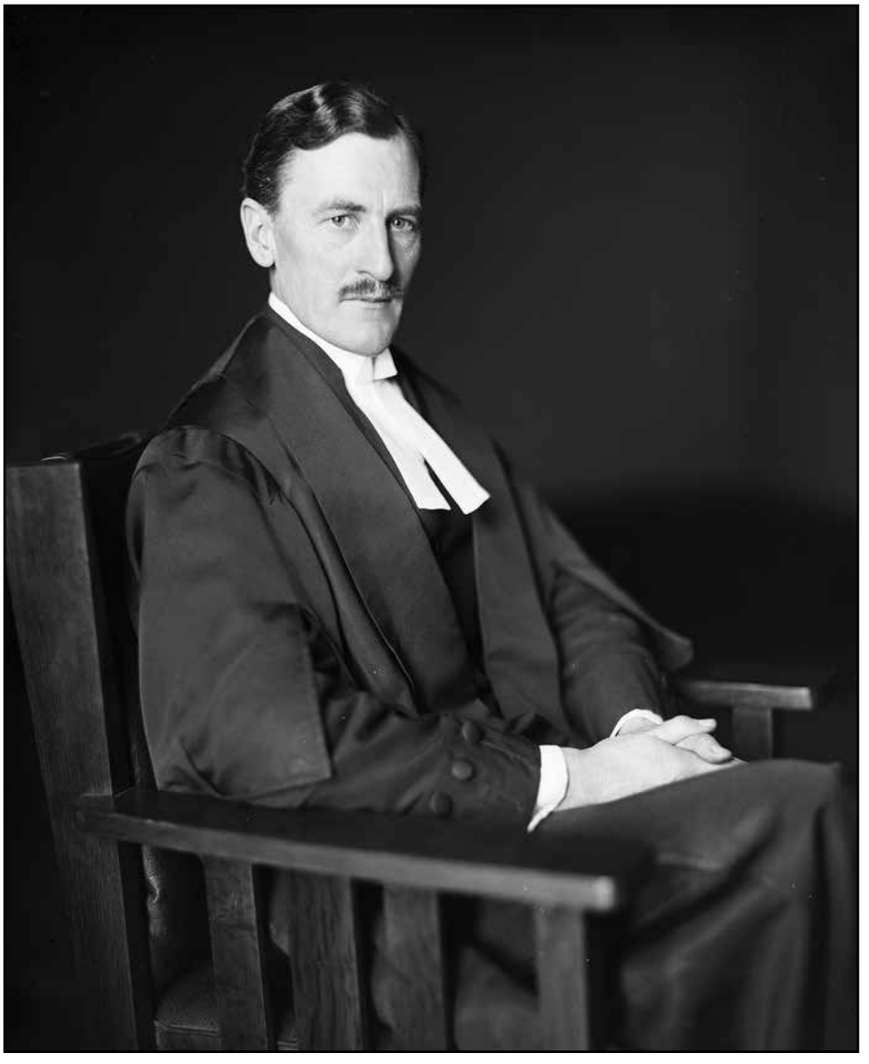
court lists for their sitting, and that the shortage of judges affected appeal as well as trial work. "At the last sitting of the Court *en banc* held in September...it was only possible to hear the arguments in about one half of the cases and of those heard judgments could be given in only a small proportion."[33] After the first *en banc* sitting of 1914, he informed Minister of Justice C.J. Doherty that it had not been possible to issue judgments in most of the appeals and the list would have to be finished at the March sitting before any new appeals were considered.[34] In April, Harvey told the provincial Inspector of Legal Offices that with four judges assigned to the new Division, he was left with Scott and Walsh to conduct trials and wouldn't be able to cover all the sittings for the spring.[35]

Presented with such a dire picture, the Dominion finally acceded to the province's request and, in July of 1914, Alberta received three more s. 96 judges: William Carlos Ives of Lethbridge, Maitland Stewart McCarthy of Calgary, and James Duncan Hyndman of Edmonton. Not surprisingly, given that they were appointed by the Conservative Borden administration, all three were solid Conservatives and all three had run for office, with varied success, as MPs or MLAs. All three served in turn on the new Appellate Division.

MAITLAND STEWART MCCARTHY, CA. 1920. PAA P5226.

Billy Ives, the Cowboy Judge

However, it was no accident that Ives and McCarthy were put in the Trial Division and Hyndman the Appellate Division when assignments were made permanent in 1921. Like his childhood neighbour, Colonel Macleod, Ives's virtues were those of a trial judge. He was the first of Alberta's "cowboy judges," growing up on a ranch near Pincher Creek, though he had been born in Compton, Quebec, in 1873. He worked as a hand of the famous Cochrane Ranch, and paid for his first year at McGill University in Montreal with money earned taking a shipment of cattle to England. Ives earned his law degree from McGill in 1899 and after articles and a short time practising in the east, he settled down in Lethbridge in 1901.



As a judge, Ives took after Sifton in many ways. Described as poker-faced on the bench, he preferred short, incisive, oral judgments, and used straightforward, common-sense language rather than relying heavily on precedent and authorities. Unlike Sifton, he listened very closely to counsel. Ives was the trial judge for many high-profile and often controversial trials, including the infamous MacMillan and Brownlee trials, the criminal trial of stock brokers Solloway and Mills, and the Powlett lawsuit against the University of Alberta.

Maitland McCarthy, Wasted Potential

Maitland McCarthy had an impressive political and legal pedigree. His father Thomas was an Ontario county court judge and he was the nephew of lawyer and politician D'Alton McCarthy. Like Walsh, his former partner, McCarthy often wore a distinguished goatee. Born in 1872, McCarthy attended school in Port Hope before attending the University of Toronto. Called to the bar in 1897, he practised in Ontario until 1903 when he came west to Calgary. With Walsh, McCarthy set up a firm and then got involved in politics. He was elected to Parliament in 1904 and returned there in 1908. Deciding not to run again in the 1911 election, he returned to practice.

Some of McCarthy's contemporaries thought he was a brilliant lawyer with great potential for the bench. Unfortunately, McCarthy was also a heavy drinker, which almost certainly led to his early retirement due to poor health in 1926 after only a dozen years on the bench. He died in 1930, not even sixty. As an appeal judge, he was not very successful. McCarthy annoyed Harvey on at least one occasion by taking his time in preparing judgments, and holding up the Court. He was apparently not an easy colleague. It was telling that McCarthy only served one full term on the Appellate Division in the seven years before assignments became permanent.

JAMES D. HYNDMAN, CA. 1920. PAA P5219.

James Hyndman, Soon to Ottawa

James Hyndman, however, became a strong appellate judge. He had the distinction of being the youngest appointment, at the age of forty, to the Supreme Court of Alberta. Hyndman was also the first Maritimer. He was born in Charlottetown, Prince Edward Island, in 1874. He attended Prince of Wales College in Charlottetown and then, after articling, earned his place at the Prince Edward Island bar in 1899. The west beckoned, and Hyndman first practised with an uncle in Portage La Prairie before heading to Edmonton in 1903 to become part of the firm of Kennedy and Hyndman. The year before, he married Ethel Davies, daughter of PEI Premier Sir Louis Davies, later Chief Justice of the SCC.

Hyndman was involved in federal and provincial politics as a Conservative, making two unsuccessful stabs at office. He did get elected to Edmonton city council in 1910. Hyndman retired from the court in 1931, relatively young, and continued his impressive career in Ottawa. He was appointed President of the National Pension Appeal Board and then during the war was Federal Rent Controller and afterwards Chairman of the War Claims Commission. From 1951 to 1954, he was deputy judge of the Exchequer Court of Canada (predecessor of the Federal Court) and later chairman of the *Great Lakes Security Act* board.

The formation of the Appellate Division was an important step forward. As well as removing an impediment to the timely holding of trials, it was a boon for appeal work. The hurried sittings *en banc* had not been conducive to careful consideration of appeals and well-thought-out, well-written judgments, something Harvey and his brothers realized. Arguably, some of the best and most important judgments produced by the court came after the creation of the Appellate Division. Harvey, Stuart, and Beck became essentially full-time members of the Appellate Division, the latter two serving every year after the division was set up, creating a great deal of continuity. With the Appellate Division, Alberta came one step closer to a separate court of appeal with permanent appointees to that court.

Appellate Powers of the Court

The newly formed Appellate Division exercised the same appellate powers as the Supreme Court *en banc*. Similar to the Territorial Court, the Court had a wide jurisdiction that was derived from three sources: the *Supreme Court Act*, the Court's establishing statute, which laid out its jurisdiction and general powers; the *Criminal Code*, which governed criminal appeals; and the Alberta *Rules of Court*, which more clearly defined the Court's jurisdiction and powers in civil appeals and set the procedure for filing and presenting appeals.

To start, the *Supreme Court Act* defined three judges as a quorum for appeals, but the whole court ordinarily heard appeals. A judge could not sit on an appeal from his trial court or chambers, so for high court matters the appeal panel was four, with ties meaning dismissal. In matters of special urgency, the trial judge could sit on the appeal if he was needed to constitute a quorum. Three other judges had to approve this course of action. There was a further special provision for the Court to order only two judges to hear an appeal, with leave of the appellant. This would allow the Court to function if most of the justices were somehow indisposed; the provision also allowed for expedited appeals. None of this changed for the Appellate Division, and, as described above, for practical and theoretical reasons, the Division continued to use a four-person panel.

The *Supreme Court Act* gave the Supreme Court *en banc* very broad powers like other established provincial appeal courts and indeed common law courts of appeal generally. An appeal could be taken from almost any judgment, order, or direction given at trial or in chambers of Supreme and District Court judges.[36] After deciding an appeal, the Court could vary the existing trial judgment, enter a new judgment, or order a new trial. The appellate court

could also decline to order a new trial if it decided errors in the first trial did not materially affect the outcome and there was no miscarriage of justice.

For criminal appeals, the Supreme Court's powers *en banc* were also defined by the *Criminal Code*. Under the *BNA Act*, criminal law had been made the exclusive domain of the central government, to promote uniformity. In 1892, Canada codified its criminal law, one of the first common law countries to do so. Rights of appeal in criminal cases were still restricted in 1908 and had not changed much since the introduction of the *Code*, closely following English practice prior to 1907. This included the procedure of "stating the case" also used by the Territorial Court. That meant that both prosecution and defence could ask the trial judge to reserve questions on points of law for the consideration of the appeal court.[37] The trial judge could refuse to reserve questions, in which case counsel could ask the appellate court to review the decision, and order the judge to state the case, at which point the matter would come back before the appeal panel.[38] Another simpler avenue of appeal was to apply, with the leave of the trial judge, to the appeal court for a new trial on the grounds that the evidence did not justify the conviction.

Either way, the appeal court could affirm the original verdict, direct a new trial or hearing, set aside a sentence, pass a new sentence, or direct the trial court to pass a new sentence, and, best of all (from the point of view of the accused), order a discharge if the court felt there should have been an acquittal. The appeal court could also determine that errors found in the trial did not constitute a miscarriage of justice, and dismiss the appeal. A unanimous decision of the appeal court was final. If one or more judges dissented, an appeal could then be taken to the SCC.

Delivery of Justice: The Court's Practice and Procedure

Alberta continued to use the *1898 Judicature Ordinance* for rules of court and civil procedure for a number of years. In 1914, new *Rules of Court* were brought into effect and finally replaced the 1898 Ordinance. Four years in the making, the Rules were drawn up by a panel of five, including Chief Justice Harvey.[39] It had been heavy going. Harvey pointed out that Ontario had used a commission of sixteen for a simple consolidation of their Rules, while the Alberta panel had done a great deal of work to make them as complete as possible.[40] The rules of England and Ontario were the standard of comparison.

Provisions for appeals made up only a small part of the *Rules of Court*. The 1914 Rules expanded considerably on the 1898 Ordinance, but largely in setting out procedure, such as proper preparation of the counsel's factum (which contained their arguments) and the appeal books, setting time limits on making appeals, and so on. For the most part, the 1914 Rules followed the 1898 Ordinance in limiting the broad power of appeal in the *Supreme Court Act*. For matters where a cash value of less than $200 could be assigned to a dispute, leave of the trial judge was required for appeal, as it was for a dispute concerning court costs. Otherwise, all that was necessary was filing a notice of appeal.

The procedure for appeals did not change in any significant way from that of the Territorial Court, closely resembling the procedure used even today in Alberta. Once a notice of appeal was filed, counsel prepared appeal books, with the appellant and respondent agreeing on the contents. The books included copies of the original judgment, transcripts of important testimony, and evidence. Counsel then provided factums stating the facts, the grounds of appeal, a very short précis of their arguments, and references to relevant cases, statute law, and authorities. These were provided to the Court shortly before the hearings. Once factums had been filed, the

CALGARY 1914 COURTHOUSE. GLENBOW ARCHIVES, NA-1667-1.

"perfected" appeals were scheduled to be heard at the next available sittings, generally in the order received.

Interestingly, the use of factums was not then universal in Canada. The British Columbia Court of Appeal, for instance, did not introduce factums until the 1930s.[41] It was, however, a long-standing practice for Albertans: the Territorial Court had also used them. The factums of that era were very short, and they presented only a bare summary of the argument for and against an appeal. Even so, the use of factums established the tradition in Alberta for appellate judges to prepare before hearing an appeal, unlike the English practice of going into hearings completely cold, the theory (now rejected by modern appeal courts) apparently being that the appeal judges would then be unbiased. The precise expectations of the judges in reviewing the appeal material is not clear, but some certainly did so, and regularly. Horace Harvey, for example, was known to be well-prepared and often familiar with the evidence in the appeal books and the case law involved in the appeal to the extent of being able to quote it during discussion with counsel.[42]

Given the sparseness of factums, oral argument before the full Court remained the centrepiece of an appeal. There are no eyewitness accounts of hearings for the *en banc* Court, but later practice and also general appeal practice in Canada allow informed speculation. Counsel did not assume the justices knew anything about the appeal and generally gave a full presentation of the dispute being litigated, the trial decision, and then their arguments on the appeal. The judges asked questions and there might be considerable back and forth on a point. After hearing, the justices usually retired, had a short conference, and for simple or straightforward appeals gave an immediate oral judgment "from the bench." For more complex matters, particularly if a change to the law was contemplated, they reserved their decision and prepared written judgments, which in that era usually only took several days or at most several weeks.

One Voice or Many: Writing Judgments

In presenting judgments, the Court *en banc* returned largely to the *seriatim* tradition, meaning judges usually wrote their own reasons even if substantially in agreement. This marked a departure from the Territorial Court's habit, in which written judgments were usually the product of one author unless there were dissents, much like modern practice. Freed from the constraints on time

and geography that had faced the Territorial Court, the Alberta judges reverted to what was still general appellate practice of the time, even if individual opinions often added little but confusion. Multiple concurring and dissenting judgments, all saying something a little different, raised a major point of criticism of the SCC in that era, and this was probably also true of provincial appellate courts.[43] Interestingly, this was probably not Harvey's preference: his correspondence left the impression that the Chief Justice would have preferred the Court to speak with one voice and present more concise and clear statements of the law.

Certainly, the return to *seriatim* judgments was surprising given that the Alberta Court also established a strongly collegial tradition. In one sense, all appellate courts are collegial, but in Alberta the adjective had more meaning because the judges collaborated to a large degree in their work, perhaps to a greater degree than was common on other Canadian courts.[44] As Chief Justice, Harvey put a great deal of value on discussing the appeal after the hearing. "There is no doubt each Judge is entitled to the time necessary to consider the cases, but the theory of an Appellate Court is that the consideration can be better had in conference than otherwise," Harvey wrote in a letter to McCarthy, intended to hurry the latter along in submitting his judgments.[45] This no doubt reflected Harvey's view that the discussion of the appeal should show, to some degree, where each judge stood and how he was likely to decide.

When they turned to writing, the Alberta judges discussed their judgments readily with each other, including exchanging drafts. Often they remarked that they had had "the advantage" of seeing a brother judge's decision before writing their own. Stuart, in a 1917 letter to Harvey, remarked about his dissent: "My chief difficulty will arise owing to my knowing before hand something about how the case strikes my brother judges after they have worked on it considerably. This will embarrass me somewhat."[46] Presumably, Stuart thought it somewhat unsporting to have this advantage in honing his argument.

The degree of collaboration was all the more remarkable, given that the judges were separated in two cities when not sitting. Harvey had Beck and Scott close at hand for informal discussion, but the Chief Justice and Stuart frequently discussed the appeals by correspondence as they were in Edmonton and Calgary respectively.[47] There was little deference between

Stuart and Harvey; they were clearly intellectual equals. "Dear Harvey, There is a good deal in that, too. But it is too late now as my judgment has gone forward. It may be needless, therefore to keep up the discussion but perhaps you will let me say a word more."[48] Stuart then goes on for three pages.

Clearly, they enjoyed the intellectual exchange, especially as they often took opposing views. Their frequent – and often profound – disagreements on law were all the more interesting because the two men greatly liked each other. Harvey's letters reveal a bond of affection and friendship between himself and Stuart, often light-hearted even in arguing points of law. "But I think it was despicable of you to try to force me to decide about section 220 when I had turned the thing off to my own satisfaction. I just won't decide it," Stuart wrote in mock aspersion in one letter.[49] Their later exchanges make it clear they looked forward to seeing each other in the course of the appellate court's business. They shared a passion for bridge, and meetings of the Court usually meant at least one evening of cards among the judges.

If written judgments are an accurate gauge, Harvey, Beck, and Stuart were the heart of the court at appeal, never at a loss for an opinion, which also may explain the *seriatim* judgments. Hyndman in his turn showed a flair for appellate work and was a strong voice. Walsh, although not as scholarly as his brothers, was diligent and often wrote concurring opinions and dissents. The aging Scott was much less inclined to write, almost certainly due in part to poor health. The other judges seemed less engaged with appellate work. Sifton, as stated earlier, rarely said anything in court or wrote judgments, while Simmons was not a frequent contributor, often concurring with little comment. Ives and McCarthy, did not seem enamoured of appellate work either and did not leave many written opinions. McCarthy, as mentioned above, only sat one term on the Appellate Division.

It has been said that Harvey, a strong and opinionated judge, bullied his colleagues to follow his views.[50] While Harvey may have been domineering later in his tenure as Chief Justice, this was not the case in his earlier years. Beck, Stuart, and Scott had no hesitation in disagreeing with the Chief on appeals, or reversing his trial decisions. Sometimes, they even seemed to take pleasure in doing so. The Court may have had great collegiality, but the judges were far from uniform in their view of the law. There were some considerable differences in their approach to the law-making role of the Court and even the proper application of precedent. Not surprisingly, the views and predilections of Harvey, Stuart, and Beck largely defined the Court's jurisprudence, especially the dynamic tension between Harvey, a judicial conservative, and the more liberal-minded Stuart and Beck.

THE COURT *EN BANC* AT LAW: REMARKABLY PROGRESSIVE

The jurisprudence of the Alberta Supreme Court *en banc*, over its first ten years or so, reveals a lively Court. It is not easy to summarize in a meaningful way more than a decade of appellate decisions. The Court's judgments were mostly routine, simple error correction and the application of settled law on matters primarily of concern to the litigants. From the reported judgments of the Court, however, patterns emerge and a sense of the character of the justices in appeal. That character was seen in certain landmark decisions, revealing a great deal about how the different members of the Court approached the law. To a remarkable degree, the Alberta Supreme Court *en banc* seems, to modern eyes, a progressive court in the sense of law-making to address changes in society.

Striking judgments, such as *R v Cyr*, *R v Trainor*, and *Board v Board* demonstrated a deep understanding of the way that law and society interacted and the role of judges in directing the development of the law. These judgments were the work of Charles Stuart, who emerged as a leader in the Court's jurisprudence. He and Nicolas Beck showed a propensity for developing the

EDMONTON 1912 COURTHOUSE. GLENBOW ARCHIVES, NC-6-324.

law in response to changing circumstances. It reflected their experience as frontier lawyers and judges, but also the long tradition of judicial law-making in the common law.

By the early twentieth century, however, reflecting developments in England, Canadian courts had increasingly adopted legal formalism, characterized by the doctrine of *stare decisis,* the strict adherence to precedent regardless of the circumstances; literal statute interpretation; and deference to legislatures, which minimized the law-making role of judges. This new orthodoxy, often called "black letter" law, discouraged judges from looking beyond applying

INTERIOR OF EDMONTON COURTHOUSE, 1912 COURT OF APPEAL COLLECTION

the letter of the law and left it to legislatures to respond to social and economic changes. Harvey increasingly subscribed to this viewpoint, and the Court thus had something of a philosophical divide in its jurisprudence, revolving around three strong, opinionated judges.

Harvey, however, was not blinkered and hidebound. He had also been part of the frontier in Alberta and shared some of his colleagues' sensitivities, just as Beck and Stuart largely followed what had become accepted canons for judges. Their differences were to some extent a matter of degree. And in a moment of crisis, all three judges and their brethren were immovable in defending traditional rights and freedoms and the rule of law even if it meant taking on the Canadian Army.

Law for a New Land

As with the Territorial Court, the judges of the appeal court had a strong sense that they were setting the law in a new society, even if it was no longer the frontier.[51] Often, the Court still had to determine what English common law was applicable to the province and apply both existing case law and an evolving statutory regime to local conditions, as the provincial government continued to legislate. This, of course, could be said of judges for any common law jurisdiction, but it was arguably more so in a place of relatively rapid change. Even Harvey, with his formalist predilections, was conscious of local particularism and the need for the judges to mould the law accordingly, sometimes creatively. It is not hard to find instances where judges expressed this awareness. Stuart, for instance, was forthright about the need to adapt the law, writing in 1921:

> For my part I have no doubt whatever, if there had been in England during the eighteenth and early nineteenth centuries such a method in vogue of dealing with land as has grown up in this new rapidly growing country… the Judges in England would not have hesitated at all to apply a special rule to the case and would have decided the question…upon some just principle which would have been quite a modification of the principle applied in the cases.[52]

For existing case law, the judges drew mainly on three sources – England, Ontario, and the preceding Territorial Court. The first seven justices appointed to the Alberta Court were from Ontario. They had all taken their legal training there except for Simmons: he had articled in Alberta. So it is not surprising that the justices referred frequently to the case law of Ontario as persuasive. The Alberta judges were also partial to Manitoba and Saskatchewan decisions, where local conditions were similar and there was common legal heritage. The Maritime provinces were mostly ignored. It was rare to see judgments from the Atlantic courts utilized, but even decisions of the British Columbia courts did not feature prominently in *en banc* deliberations.

This is not to say the Albertan judges slavishly followed English and Ontario precedent, especially given their feeling that local context was often quite different. If necessary, they would look farther afield to find useful law. Australian and American sources were utilized, especially when there wasn't sufficient jurisprudence in English and Canadian sources. *Miner v Canadian Pacific Railway*, in 1911, involved a suit for damages for mental suffering when the railroad delayed in shipping a body for burial.[53] Harvey, delivering judgment, referred to several American cases "bearing on the exact point."[54] In the 1917 decision *Makowecki v Yachimyc*, Stuart in his dissenting opinion preferred American authorities over weaker and contradictory English decisions in dealing with a question of the common law governing surface waters.[55]

The Key Judges: Their Approach to Law-Making and Precedent

Harvey, Beck, and Stuart were the three most influential judges of the early Court. The Chief Justice was a complex study. He was considered a formidable judge and intellectually inclined, and his judicial traits have been well documented.[56] Harvey believed strongly in

the doctrine of *stare decisis*, so much so that he extended great respect, even deference, to the rulings of other appeal courts even though these were not binding, thereby creating some friction with his brother judges. This approach reflected Harvey's desire for greater consistency between Canadian courts, especially in criminal law. Like most jurists of the time, Harvey was also inclined to be a strict "constructionist" – using the most literal reading of statutes and other legislation and avoiding any inferences as to the intent of the legislature beyond what the text actually said. Not surprisingly, he held that the authority of the legislature was near-absolute and not for judges to gainsay, even if it led to injustice. As he said in one judgment:

> That however is a matter for the legislature and not for the Courts. If the legislation is, in the opinion of a Judge, unjust that in no way absolves him from enforcing it, and to hold that it cannot have intended what the words plainly mean because the Judge thinks it causes injustice is not in my opinion exercising the function of a Judge but is assuming that of the legislature.[57]

For Harvey, the letter of the law was paramount. He was not inclined to look for ways to bend precedents or interpret statutes to get a better result, although there were some notable exceptions. He was, however, not shy

CALGARY DOWNTOWN INTERSECTION, 1912. PAA P3971.

about pointing out a desirable alternative in instances where the existing law was not functioning, perhaps in the hope that the legislature would deal with this in due course. But the Chief Justice was also intellectually lively enough to appreciate that the Court sometimes had to break new ground. Harvey also showed considerable awareness and concern about the proper role of the appellate court: his judgments were peppered with comments to that effect. Harvey was on the bench so long that some of his views changed, such as the proper degree of deference to be given to the trial judge. However, underlying his jurisprudence throughout his tenure on the bench was a profound belief, in the best British tradition, in the importance of an independent judiciary.

Beck was probably best characterized as a maverick. He was as outspoken as his brother judge Stuart, but seemed stuck in the role of a dissenter, rather than as a crafter of striking judgments. At the same time, he was quite willing to engage in judicial law-making and was not afraid to find a novel reading of statute or common law to support an equitable outcome. While giving due deference to the authority of higher courts, Beck felt strongly in "placing justice before precedent," writing in one decision:

> I have little respect for the maxim *stare decisis*, and, on the contrary, think that unless in exceptional cases the sooner a Court rejects a decision, whether of its own or of another Court whose decision is not that of a Court which has jurisdiction on appeal from itself, the better.[58]

Beck placed great importance on individual rights and liberties. Harvey said of his fellow judge, "there has never been a Judge in this province more insistent upon the Court according the fullest protection possible to an accused person."[59] Although his contributions spanned all areas of law, Beck has probably been identified more with criminal law than any of his contemporaries on the bench. Beck, who had been a Crown prosecutor for years, showed great concern for due process and proper use of evidence. Like Stuart, he was a strong believer in British constitutional liberties, which may have been the source of his concern for the criminally accused.

On several occasions, Beck sharply criticized the police. In *R v Marceau*, he lambasted the presiding magistrate and the Calgary city police because "evidence at best is slight and inferential and depends on the evidence of disreputable witnesses, who out of their own mouths admit the practice of immoral methods in connection with the case."[60] The police had used a paid informant who had sex with a prostitute, with all expenses picked up by the force, to lay charges of keeping a bawdy house. Beck's view: "My former criticism has evidently had no influence upon the Calgary police, who continue the hypocritical and pharisaical pretence of being zealous in extirpating public vice by the secret adoption of the same vice." Though Beck did not use the word "entrapment," he clearly felt that the police were using unacceptable methods.

As has been noted, Charles Stuart emerged as the Court's most progressive voice. He was truly an intellectual, a winner of a gold medal in classics and a former lecturer in constitutional law and history. One historian has argued that, for Stuart, local custom was the true basis of the common law, which informed his desire to mould the law to circumstances.[61] Stuart understood that historically there was a great deal of flexibility in the common law, and he sometimes referred to the willingness of judges in previous eras to adapt the law to changing social and economic realities. Unlike most of his colleagues, Stuart was willing to go beyond the literal letter of the law to inquire as to its true purpose, and examine the broader social context in which the law operated. This was particularly notable in Stuart's opinions in matrimonial law, starting with his famous judgment in *Board v Board*. He also understood that the Court could find itself ahead of the lawmakers, and the judges sometimes were literally making the law.

> I would allow the appeal and dismiss the action. But in view of the fact we

are now practically for the first time laying down the law for this province and in effect legislating I think there should be no costs....The matter is clearly one which demands the attention of the legislature.[62]

Stuart, however, also exercised due caution. Although he recognized that the courts fulfilled a legislative function in developing the law, including statutes, he clearly felt it should be exercised carefully and sparingly. And he understood the Court's limits in interpreting and applying statutes. As he said in *Board v Board*, "The question is not what Parliament meant or intended to say, but what Parliament meant or intended by what it said."[63] Although Stuart's decisions clearly showed he was a political and social progressive, he did not create unreasonable interpretations of law to further an agenda. His opinions were always models of research and well crafted, and he often tried to pull general principles out of both statutes and case law. In other words, his relative boldness was tempered by the inherent conservatism of the common law.

Stuart did sometimes overstep the bounds of judicial propriety. He was not a friend to business interests, and in his judgments, he frequently let loose scathing criticisms of the business practices common for the day, especially the frenzy around real estate speculation, in a way that would be considered unseemly now. One biographer recounted an encounter at trial with R.B. Bennett when Stuart seemed determined to give the lawyer and his corporate client a rough ride.[64] His judgments were often lively, with interjections of sardonic humour. Stuart was a strong believer in individual liberty, but, unlike Beck, he did not generally extend his humanism to the criminal law. He could be very tough in this area.

Conflict in the Principle of *Stare Decisis*

Not surprisingly, the more conservative Harvey and the more liberal Stuart and Beck clashed over several issues. One was the extent of *stare decisis*. All the judges recognized that the Court was bound to follow the decisions of higher courts, which for the Alberta Court meant the SCC and the Privy Council. However, much more contentious issues were whether the Court was always bound by its own decisions or those could be changed given changing times, and the extent to which the Court should follow the decisions of other provincial appeal courts.

Harvey's great respect for precedent extended to what he clearly regarded as senior if not binding courts, such as the Ontario appellate court, the English Court of Appeal, and the House of Lords. Harvey thought that Alberta should also try to follow other provincial appeal court decisions when applicable, in the interest of greater uniformity in law, especially in criminal law or other federal statutes.[65] Harvey certainly believed the Court should be bound by its own decisions and felt strongly on the point: "It must be quite apparent that if the Court does not show respect for its own decisions it can hardly be surprised if no one else does."[66] Harvey feared a plague of counsel demanding a re-argument in the hope that the Court might rule differently, and thought it might create too much uncertainty for trial judges.

Stuart and Beck both disliked the idea of following any kind of doctrine in this regard. The issue came to a head with two decisions, *R v Schmolke* and *R v Hartfiel*, in 1919 and 1920 respectively.[67] In *Schmolke*, the Court held that a magistrate should be able to consider a charge of keeping a still. Harvey had followed a decision of Nova Scotia's Court of Appeal, feeling bound to do so as it was a matter of criminal law. Beck and Stuart disagreed vehemently with Harvey's reasons and the contention that their decision bound the Alberta Court. Stuart protested against such a doctrinaire pursuit of uniformity, feeling that it was "pushing the rule of *stare decisis* to an absurd extreme."[68] He attacked the proposition that a decision of two out of three judges on a panel in one Court could bind "30–40 others" across Canada "simply because those two Judges happened to speak first." Beck believed that each

appeal had to be approached on its merits and felt he had the freedom, as a justice, to change his mind, even if it meant contradicting an earlier decision, especially in the face of an unjust result. As he wrote:

> Sitting as a member of the Appellate Division I repeat what I have said on more than one occasion that I feel bound not to refrain from expressing my real opinion upon questions of substantial importance notwithstanding a decision of this division to the contrary.[69]

When the same issue came up in *Hartfiel*, Stuart and Beck persuaded the majority to depart from the earlier decision, putting Harvey in dissent. Interestingly, Harvey, Beck, and Stuart could all find authorities to support their positions. The debate between the three judges on this point also represented a larger development in law. Beck and Stuart's approach to *stare decisis* reflected an older tradition among common law judges, which allowed them more freedom and flexibility to develop the law. Harvey was influenced by the stricter application of precedent that developed in the late nineteenth and early twentieth century and came to dominate English and Canadian jurisprudence, promoting uniformity and consistency. Just six years after *Hartfiel*, Harvey was once again able to convince the Court that it was bound by its own previous decisions, the generally held doctrine for most Canadian courts for several generations.

More recently, modern appeal courts, including the Alberta Court of Appeal, have adopted a middle ground between the two extremes. While recognizing that courts of appeal have the jurisdiction to change their own precedents, and should do so where circumstances warrant, courts of appeal also recognize that this ought not be done *ad hoc* with individual judges ignoring otherwise binding precedent. In other words, the question for modern appeal courts is no longer whether precedent can or should be overruled, but rather how it is to be done. Today, appeal courts, like the Alberta Court of Appeal, typically require counsel to apply on motion for reconsideration of otherwise binding precedent. This allows appellate courts the best of both worlds: certainty in the law unless and until the circumstances warrant a change, if not outright rejection, of that precedent; and a proper method of ensuring that precedent is not overruled willy-nilly by two members only of an appeal court.[70]

Deference to Trial Judges: Begging to Differ

Another area where the Court had its idiosyncrasies was the degree of deference to be given to fact findings by trial judges. By the time the Supreme Court of Alberta came into being, there were several commonly accepted guiding principles for appellate courts. One was that the findings of fact of a trial judge should not be disturbed unless in clear error, and this went double for jury verdicts. There were many practical as well as philosophical reasons for the principle. Yet, the Supreme Court's founding statute, like most others from that time, also gave it broad powers of review, including the ability to make its own inferences of fact as required.[71] The Supreme Court bench was often inconsistent in applying this power of review, with different judges putting different weight upon it. One biographer of Horace Harvey has noted that up to the early 1920s, the Chief Justice strongly believed in not disturbing findings of fact, but then reversed course and became much more cavalier. Then, in the later 1930s, he swung back to his original opinion.[72] The Supreme Court *en banc* seemed equally inconsistent. Perhaps the fact that all the judges spent time on trials made it difficult for them to resist interfering with their brothers' decisions.

Although the judges on appeal solemnly professed to affirm the principle of deference on matters of fact, in reality Stuart was the most consistent. Harvey and Beck had a propensity to meddle. One interesting example was *Kalmet v Keiser* in 1910, where the defendant had vehemently denied signing a promissory note. Harvey, as trial judge, ruled the defendant had signed after examining the signature and other

samples of the defendant's handwriting. Beck was quite scathing about his colleague's conduct of the trial, especially his assumption of the role of handwriting expert. Stuart and Sifton, however, dismissed the appeal because they could not positively say that Harvey as the trial judge was wrong, even though they also had qualms about the handwriting analysis. Those qualms were outweighed in their opinion by Harvey's privileged position in appraising the testimony and evidence.

However, Alberta's appellate court attracted some harsh censure from higher courts for not abiding by the principle. In *Jones and Lyttle v Mackie*, involving a dispute over a contract, the Appellate Division overturned Justice Ives's verdict and went so far as to additionally find fraud in the conduct of Jones and Lyttle, a building concern. The SCC was unimpressed with the judgment, as evident from Justice Idington's comments:

> The first question raised herein is whether or not the Court of Appeal had any right or power to start an objection to the appellant's right of recovery which had neither been taken by the pleadings nor in the course of trial, and make a finding of fact of its own, especially so when the issue thus started is one of fraud.... Doing so seems such a violation not only of the well-known and recognized principles governing an Appellate Court's jurisdiction as to require little to be said.[73]

Even in Harvey's later years, when he considered himself more respectful of the trial judge, it is not hard to find examples where he was quick to interfere. It was a common failing of appellate judges of the era.[74]

By contrast, all the judges, even a maverick such as Beck, had a strong respect for the primacy of the legislature, whether provincial or federal. Debate might rage over the proper interpretation of the legislature's actions and intentions, but deference to its will at this time was absolute.

The Work of the Appeal Court: Private Law Reigned Supreme

The Supreme Court *en banc* was overwhelmingly a forum for deciding private law disputes – that is to say, civil litigation. At least among reported judgments, criminal appeals were far less common. A rough count of reported appellate decisions in 1909 shows twenty-four civil matters, none criminal. Even in 1917, the proportion was six to one in favour of civil appeals. Criminal appeals may not have been as important to the profession and hence not reported as much, but the numbers reflected the fact that it was generally harder to launch a criminal appeal.

The booming real estate market before World War I provided much of the work, which continued even after the boom collapsed in 1914 as litigants sorted out the aftermath. As land speculation rose to a frenzy, many issues arose that provided grist for the legal mills. The Court had to consider all manner of disputes concerning real estate contracts and mortgages. There was also a great deal of construction activity, and thus the areas of contract law and mechanics' liens were thoroughly worked over. Much of the litigation resulted from the way litigants assigned mortgages taken on both land and on chattels. A mortgage debt might end up due to a third party several times removed, creating complex relationships and many disputes as to who owed what to whom and who had the actual legal ownership of land and goods.

The manner in which real estate speculators transferred their interests in lands or used them as security for other investments also created difficult lawsuits. Justice Stuart's judgment for the Court in *Reeve v Mullen* made for entertaining reading as he untangled the web of dealings ultimately involving a single house lot in Edmonton. Ewing sold a lot to Mitchell, whose

MAGISTRATE EMILY MURPHY OF EDMONTON, COURT OF APPEAL COLLECTION.

son sold the same lot to Nelson with Mullen, the real estate agent negotiating the deal. Nelson asked Mullen to resell the lot, and Mullen sold other lots to Nelson owned by one Seabrook on the condition that he sell Nelson's lot. Mullen sold the lot to one Mouncey, who then backed out, to be replaced by Reeve, who, in order to buy the lot, needed to sell other lots. Armstrong decided to buy Reeve's lots, then Nelson assigned his interest in his lot to Reeve and Reeve assigned his lots to Armstrong, with a large amount of money finally exchanging hands. Somehow Mullen, the real estate agent, ended up with $2,000 and a horse. Reeve claimed the money, though not the horse. As Stuart put it, "Such is the delicious mess which the wild scramble of a number of men for a handful of what is popularly called the unearned increment has cast into the Court for examination."[75]

Those were the days when interest-based litigation was the primary focus of the courts, including Alberta's appeal court. But while the Court spent much of its time on private law matters which were necessarily of more concern to the litigants than society at large, some early Court decisions did take on wider significance. It is time to turn to a more detailed look at four notable decisions of the Court, which embodied the sometimes progressive spirit of the bench and also reflected the tension between Harvey the traditionalist and Stuart the activist. Three of these decisions, namely *R v Cyr*, *Board v Board*, and *R v Trainor*, exemplify the Court's strong conviction that the law must adapt to the peculiarities of Alberta. The last, *Re Lewis and Norton*, was Harvey's chance to shine in an almost surreal situation involving the Appellate Division and the Canadian Army, in which Harvey produced a splendid defence of the rule of law.[76]

R v Cyr: Alberta Takes the Lead in Women's Rights

Few judgments from the early years of the Court are referred to as much as *R v Cyr* from 1917. This is understandable. The Appellate Division's decision, written by Stuart, foreshadowed the famous "Persons" case of 1929 in which the Privy Council confirmed that women were legal persons able to sit in the Canadian Senate. Yet, ironically, the point in dispute in the appeal – whether women were qualified to hold public office as a magistrate – could easily have remained a side issue in an otherwise pedestrian case except that Stuart saw in it a matter of legal principle he felt must be addressed. Stuart resolved this issue in a way that was arguably more scholarly and compelling than the Privy Council decision twelve years later on a similar point.

Lizzie Cyr was a street prostitute. After a customer complained to police that he had contracted gonorrhea from her, Cyr was arrested and charged with vagrancy. Although Cyr couldn't have had any money for a high-powered lawyer, somehow when she appeared before Magistrate Alice Jamieson, she was represented by J. McKinley Cameron, one of the city's leading practitioners of criminal law.

Jamieson was a well-known local suffragette and woman's activist, who kept company with the likes of Nellie McClung and Emily Murphy. Jamieson had been made a magistrate of the province's Juvenile Court in 1914, the first such appointment of a woman for any British dominion. Then in 1916, she and Murphy made history as the first female police magistrates in the British Empire, Murphy in Edmonton, Jamieson in Calgary. Both women experienced resistance from the bar, and their ability to hold judicial office was questioned because they were women and lacked legal standing. However, Cameron was the first to voice this criticism in court.

Jamieson was still finding her feet as a magistrate. After hearing the prosecution's case, she gave Cyr a six-month sentence, without pronouncing her

guilty or giving her counsel a chance to speak. After pointing this out, Cameron refused to enter a defence, knowing he had ample grounds for appeal. The conviction was reviewed by Justice Scott of the Supreme Court Trial Division on a *certiorari* application. Cameron advanced several different grounds for the appeal, including that the vagrancy offence by its wording could not apply to women; the conviction was irregular and should be quashed; and the magistrate as a woman was incompetent to hold such office and therefore the conviction was invalid.

Scott quickly disposed of the application. On the objection to Jamieson's competence to hold office, he ruled on ample precedents that the conviction would be valid even if it were subsequently decided she should not be a magistrate because of her sex. He declined to resolve whether she could hold that office, stating: "While I entertain serious doubt whether a woman is qualified to be appointed to that office, I am of opinion that the legality of such an appointment cannot be questioned or inquired into on this application."[77]

Cameron appealed to the Appellate Division, and Harvey, Stuart, Beck, and Walsh heard the appeal. In his judgment for the Court, Stuart seized upon Cameron's objection that Jamieson was incompetent to hold office as the important issue. "It would seem...to be advisable,

MRS. ALICE JAMIESON, 1913. GLENBOW ARCHIVES, NA-2315-1.

however, for this Court to decide the point directly raised by the objection in view of the fact that convictions are being made quite frequently at the present time by two women who have been appointed police magistrates."[78] However, Stuart's judgment went beyond this pragmatic goal to address more fundamental issues: not just the role of women in contemporary society, but also to what degree the courts should adjust the law to prevailing social conditions.

Stuart conceded that, unlike other provincial legislation that allowed women to hold government office, the *Act Respecting Police Magistrates and Justices of the Peace* appointing Jamieson did not specify that women could be magistrates. Thus, he decided to examine the common law doctrine at the time that held that women were not capable of holding public or judicial office. He enumerated the many earlier historical examples of women holding high office in England, sometimes including judicial functions. He then looked at the decisions of the English courts of the nineteenth century that established the supposed tradition that women could not hold office. Of one, *R v Harrald*, Stuart commented: "It reveals how reluctant the English Courts were to extend political rights to women."[79] He found that decisions like this showed a hardening of attitudes against women in public life.

Stuart concluded that before the nineteenth century, if anything, it was well established that women could hold office, including as justice of the peace. The authorities for a long period of time did not appoint any, he argued, likely because the idea that women were generally unsuitable had become a prevailing belief. This reluctance – rather than any actual decisions, precedents or statutes that spelled it out – became the basis upon which the notion of woman's incapacity in the common law was introduced into the courts.

Stuart found, by contrast, that the situation in Alberta was much different, pointing out that "at a very early stage in the history of our law in the Territories it was recognized that women should be put in a new position."[80] Exploring the status of common law, and English law, in Alberta, Stuart expanded greatly upon the doctrine that a British colony accepted English law except as inapplicable to that place. Repeating the position he had expressed in his dissent in *Makowecki v Yachimyc*, he stated: "We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question."[81]

Stuart pointed out that in the case of women, the law of both the Territories and the province gave them more rights, such as holding property, and, in 1916, the vote as well. Women could also in theory join the Law Society of Alberta or the Canadian College of Physicians and Surgeons and practise in both law and medicine. In his view, Albertans approved of a much greater role for women in society. Therefore, Stuart concluded:

> I therefore think that applying the general principle upon which the common law rests, mainly that of reason and good sense as applied to new conditions, this Court ought to declare that in this province and at this time in our presently existing conditions there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex. And in doing this I am strongly of opinion that we are returning to the more liberal and enlightened view of the middle ages

J. MCKINLEY CAMERON, 1942. GLENBOW ARCHIVES, NB-16-240.

in England and passing over the narrower and more hardened view, which possibly by the middle of the nineteenth century, had gained the ascendancy in England.[82]

This judgment showed Stuart's progressive views expressed in a well-reasoned analysis of the law. The decision also solidified a principle that western jurists had adhered to since the territorial days – the west was a unique society and the law should reflect that fact.

While Stuart's judgment struck a huge blow for the rights of women, it could also be said to have reinforced many prejudices.[83] Jamieson's summary attitude toward Cyr's guilt did not bother Stuart. He took Cameron to task instead for not helpfully pointing out the magistrate's mistake at the time, rather than using it for grounds of appeal. He also had no problem with Cyr's arrest on the charge of vagrancy. The fact the vagrancy law was used to criminalize what was arguably only immoral conduct did not count. The law was the law and there was no way round it. As a fallen woman, Cyr was shown little sympathy.

Nevertheless, this decision rightly holds a place of prominence in the jurisprudence of the Alberta Court, and likely always will. It seems entirely fitting that it was the judges of Alberta's appeal court who defended the rights of women to be appointed as magistrates, since Alberta was the first jurisdiction in the British Empire to appoint women to these offices. It remains a source of justifiable pride that Alberta and its appellate judges led the way on both counts.

Board v Board: Responding to Changing Social Mores with Divorce

Board v Board was a fine example of the productive tension of the Court between its conservative side, chiefly

MUG SHOT OF STREET PROSTITUTE BABE JOHNSON, CALGARY, 1917. JOHNSON, LIKE LIZZIE CYR, WAS ARRESTED AND CHARGED WITH VAGRANCY. GLENBOW ARCHIVES, NA-625-11.

Harvey, and the more liberal one, chiefly Beck and Stuart. A reference from Justice Walsh, it dealt with the question of whether there was a law of divorce in the province, and whether the Alberta Supreme Court had the jurisdiction to apply such law.

While not unknown, divorce had been very uncommon in Canada until the twentieth century. This began to change as more and more people started to seek a way out of their marriages. By the terms of the *BNA Act*, matrimony and divorce were under the control of the Dominion government, which had never created any law governing divorce. Indeed, it would take until 1968 and the government of Pierre Trudeau for it to do so. For most people in Canada, a divorce meant asking Parliament to pass an authorizing private act. A number of provinces, however, used the existing English law for divorce and marriage, which allowed individuals to petition the courts for a divorce. In British Columbia, a 1908 decision of the Privy Council in *Watts v Watts* had declared the law of divorce used in England operative in that province. Thus, the courts there had jurisdiction. A similar case soon followed in Manitoba. In 1918, the Appellate Division in Alberta considered the same question in *Board v Board*.

The *Divorce Act* of 1857 had reformed divorce law in England and established a civil court to hear divorce and matrimonial matters. The Northwest Territories and subsequently Alberta had adopted English law as of 1870, except that which was inapplicable. The Northwest Territories Supreme Court and the Alberta Supreme Court, in their respective statutes, were given the same powers and jurisdiction as the superior courts of England, and the statutes listed certain courts. However, for whatever reason, both of the relevant statutes neglected to specifically list the English Court for Divorce and Matrimonial Causes. By contrast, in British Columbia, the corresponding statute had granted the province's superior court the same jurisdiction as all English courts with no attempt to identify them by name.

To Harvey, the issue was cut and dried. Because the Court for Divorce and Matrimonial Causes was not specifically listed in the *Supreme Court Act*, the Alberta Supreme Court did not have jurisdiction. He inferred from the fact that no one had tried to bring a divorce through the courts in the Territories or Alberta and had instead resorted to private acts of Parliament that it followed that neither the Territorial Court nor the Supreme Court ever had jurisdiction. He also suspected that the Dominion never intended to allow the 1857 law reforming divorce in England to be introduced into new provinces and thereby interfere with the federal power over matrimonial law. But Harvey did not think he needed to resolve this point, given what he viewed as the fatal objection to the Supreme Court having any power in the matter of divorce.

Stuart took a much broader approach, concluding:

> In my view the question of applicability of a law is to be decided from a consideration of the general conditions of settlement and society and that it was not intended by Parliament that the existence or non-existence of a Court with the requisite jurisdiction should be considered as affecting the matter one way over another.[84]

Stuart pointed out in his judgment that one reason why it might not have occurred to anyone to specify the Court for Divorce and Matrimonial Causes in either the *NWT Act* or the *Alberta Supreme Court Act* was that divorce itself was extremely uncommon. But this had changed. As Stuart put it: "Passing one's memory back to the days before 1907...one can well recall how startling a proposition it would then have appeared if petition for divorce had been brought in that court."[85]

Stuart also found that by adopting the law of England as of 1870, the Northwest Territories and subsequently Alberta would have adopted the 1857 *Divorce Act*. Unlike several other English laws, it was not explicitly mentioned for inclusion or exclusion. Therefore, in his view, one had to assume that it was included unless it

obviously could not apply in the Canadian west. The mere fact that Parliament could pass private acts for divorces did not amount to a general law for divorce that replaced the 1857 law. Indeed, the fact that Parliament had not adopted its own law nationally, replacing the 1857 English law in the provinces where it was held valid, reflected, in his view, Parliament's tacit acceptance that the 1857 law could apply in any part of Canada.

Having determined that the law did apply in Alberta, Stuart concluded that the Supreme Court must then have jurisdiction. The judgment, a complex but compelling one, was vintage Stuart. It can be boiled down to three propositions. First, the *Supreme Court of Alberta Act* gave the Supreme Court the broadest power to try any action that might be brought in any English superior court as of 1870. Second, the fact that some courts were mentioned by name did not mean that Alberta's Supreme Court was limited to the jurisdiction of those mentioned. Third, new laws did not necessarily require new courts to deal with them. As it happened, when England created a divorce law, it also created a court to deal with it. But the former did not require the latter. In other words, if the law of divorce applied in Alberta, then there was nothing to prevent the province's superior court from dealing with divorces under its inherent jurisdiction.

Beck, Hyndman, and Simmons supported Stuart and all chimed in with additional arguments. Reading *Board*, it is difficult not to feel that Stuart worked very hard to make it possible for divorce law to apply in Alberta because this was the direction in which society was heading. More people were going to be approaching the courts for divorces. Therefore, it was important to determine once and for all if the Supreme Court could grant them, and, in Stuart's view, the answer should be yes in the case of Alberta. Even Beck, the Roman Catholic, chose to see it this way. Harvey for his part may not have had any agenda against divorce itself. Rather, he once again simply displayed his penchant for strict literal interpretation of statutes.

The last word in *Board* went to the Privy Council. Not surprisingly, considering the earlier B.C. decision, the Council upheld the Court's judgment, with Viscount Haldane writing of "the admirable opinion of Stuart, J. in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned Judges there, their Lordships have derived much assistance."[86]

R v Trainor: Freedom of Speech in Times of War

World War I had an immediate effect on Alberta. Even before the war, the province's boom had crested. With the outbreak of hostilities, there was something of a crash, especially in real estate. A great deal of the Court's work load vanished, which is not to say the judges were less busy. While civil litigation may have dropped off, there were more criminal appeals, in part reflecting Alberta's adoption of Prohibition. The war also contributed some unique issues for the appeal court.

Among the novel problems thrown up in wartime for the Court's consideration was the law of sedition. Remarkably, Alberta accounted for the single largest number of prosecutions for using seditious language in Canada. This has been attributed to the province's large immigrant population, including many Germans.[87] Some of these cases reached the appeal court. In dealing with these appeals, the Court made an important contribution to the law on free speech in Canada.[88] Justice Stuart's judgment in *R v Trainor* anticipated the "clear and present danger" doctrine of American jurist Oliver Wendell Holmes, Jr. This judgment, which marks another example of the conflict between Stuart's approach to the law and Harvey's, is recognized as another progressive Court decision that continues to resonate with civil libertarians to this day.

Using seditious language was an offence under Canada's *Criminal Code*. Seditious language included making statements calculated to cause public disturbance such

as riots, or to encourage people to be disloyal or create ill will and resistance towards the authorities, or, in case of war, to impede the war effort. However, as would become clear from two reported judgments of the Appellate Division, the definition of the offence was ambiguous. The first problem was deciding whether something said was in fact seditious or just offensive. The other point, more problematic, was whether the Crown had to prove that the speaker specifically intended his comments to cause trouble or merely that trouble had arisen because of the comments made. As Justice Walsh put it, the appellate court had to sort out whether "every fool with a wagging tongue and an empty head" should be prosecuted.[89]

R v Felton was the first appeal to come before the Court. Oscar Felton of Okotoks, originally an American, made a number of outrageous comments in a hotel bar, to the effect that he'd like to see the Germans "wipe England off the map" and accusing the English of involving Russia in the war but allowing them to "get licked." Walsh, the trial judge, convicted him but reserved the decision for the consideration of the appeal court, asking whether the evidence supported the conviction. The main issue was whether Felton's statements were indeed seditious in the circumstances.

Chief Justice Harvey gave judgment for the Court. Dryly noting that the opinions of the trial judges in two leading English cases were contradictory on the intent issue, and the *Code* itself ambiguous, Harvey offered the following interpretation. Referring to a longstanding principle of the criminal law, he held that it was a reasonable principle that an individual can be presumed to intend the natural consequences of an act they undertook. Therefore, if Felton was uttering words judged seditious in their effect, it was reasonable to assume he meant them that way. Harvey then concluded that Felton's exact words were capable of being seditious and that a trial judge or jury could convict him of the crime. Walsh's conviction could therefore stand.

Interestingly, Harvey, normally reluctant to invoke context over the letter of the law, nevertheless felt that the war was an important circumstance to consider:

> In this present day of the great war when all our people are in a state of nervous tension and excitement, and intense feeling against the enemy due to the struggle in which we are engaged, words which, in ordinary times, would have no effect in creating disorder cannot be used now without much greater danger.[90]

Harvey's departure was not entirely out of character. But it showed a side of his judicial character that became more evident later – a certain inconsistency when it suited him.

Beck and Scott agreed with the Chief; Stuart did so as well but with reservations. He was not entirely convinced that intention could be presumed on the basis Harvey laid out. Stuart suggested that if the circumstances could lead a jury to conclude that the words would cause sedition – such as using seditious words in public and with an audience – the jury could forgo worrying about intent. But if the words were spoken in a more private setting, he would invite the jury to determine actual intention. Stuart was willing to concede, however, that Felton's words certainly were capable of causing sedition and the conviction should stand.

But, as matters would unfold, Stuart would, upon reflection, come to a different conclusion than Harvey had in *Felton*, and one that reflected his more liberal viewpoint.

The German sinking of the British liner *Lusitania* in 1915 was the catalyst for a number of charges of sedition in Alberta, spawning debates and loose talk over the military justification of the torpedoing of the vessel. Most Canadians were outraged, and rejected attempts to excuse the action as a legitimate act of war. However, there were some sympathizers, many of German background, who thought that Britain's naval blockade of Germany justified the sinking. The arguments in

taverns or country stores inevitably led to more sedition charges.

R v Trainor started when Arthur Trainor, in a drug store in Strathmore, was told by the proprietor's wife that the *Lusitania* had been sunk. He replied along the lines of, "So they have got her at last, have they?" When Edward Lambert, the store proprietor, objected, Trainor went on to argue that the sinking was a justified act of war, and that to deny that was hypocritical because "the British are killing women and children by trying to starve them." At Trainor's trial, his counsel, leading criminal lawyer J. McKinley Cameron, asked Justice Simmons to reserve several questions, which Simmons refused to do. Cameron appealed. The case came before Stuart, Scott, Beck, and Walsh, but not Harvey, who was not on the Appellate Division that year.

Cameron raised a number of points, such as whether the actual seditious words the accused had said had to be laid out in the formal charge, earning an exasperated diatribe from Justice Walsh about the use of "technicalities."[91] Stuart, delivering the judgment of the Court, was not perturbed and dealt quickly with four of Cameron's "technical" points of appeal, ruling against him. He then zeroed in on what he felt was the heart of the matter.

Stuart had obviously been thinking about the whole issue since *Felton*.[92] His misgivings in that case had grown to the point that he seized the opportunity to resile from his earlier view, concluding that there was a real difference between merely expressing disloyal sentiments and attempting to undermine the government:

> I think it is about time that the distinction between entertaining disloyal and unpatriotic sentiments and giving utterance to them in a chance expression, and the crime of uttering seditious words, on the other, should be adverted to. There was a long struggle in British legal history to establish the righteous principle that to convict of treason you must prove some overt act. So with sedition, it is not the disloyalty of the heart that the law forbids....It is the utterance of words which are expressive of an intention to bring into hatred or contempt, or to excite disaffection against, the person of His Majesty or the government.[93]

Stuart decided that, under the law as framed, the speaker's intent was the vital factor in differentiating between a detestable opinion and uttering seditious words. Invoking the need for a common-sense appraisal of circumstances in which the words were spoken, he stated:

> I am bound to say that I cannot understand how a declaration of an opinion in an argument in a country store... can be said to have been calculated or expressive of an intention to stir up discontent or disaffection among His Majesty's subjects.[94]

Pointing out that there had been more prosecutions for sedition in two years in Alberta than in the last hundred years in Britain – a period which had included major wars and civil unrest and that the latter had all involved public meetings and speeches – Stuart expressed the opinion that the country's institutions were surely stable enough to withstand talk such as Trainor's. "What I fear in this case is that the accused is being punished for his mere opinions and feelings and not for anything which is covered by the criminal law."[95]

Interestingly, Beck and Scott, who had concurred with Harvey in *Felton*, now agreed with Stuart. Walsh dissented. While he agreed with Stuart's reasoning, he felt that Trainor's comments about Britain's blockade were made with seditious intent, crafted to create opposition to Allied war policy. And like Harvey, he felt that in wartime, standards were different, especially "in a province so cosmopolitan in its make up as this," and that it would be "exceedingly dangerous to permit unbridled liberty of speech to every hot head in the community upon the subject of the war."[96] Walsh's patriotism and pro-British bias perhaps showed through a little more than they should have.

CANADIAN SOLDIERS IN CAMP OVERSEAS, CA. 1916. PAA A6741.

Legal scholars have declared that Stuart's judgment anticipated American Supreme Court Justice Oliver Wendell Holmes, Jr.'s famous "clear and present danger" doctrine, which defined the limits of free speech in wartime in the United States and adopted a line of reasoning much like Stuart's. The jurisprudential significance of the Court's judgment in *Trainor* was not immediately apparent though it did reduce the frequency of sedition charges in Alberta. It has been noted that, in the next war, the issues in *Felton* and *Trainor* were moot. The government, perhaps to avoid the need to prove specific seditious intent, simply made any negative comments about the war effort illegal.[97]

Re Lewis & Re Norton: Victory for the Rule of Law

Who is going to run this country, the Chief Justice or the Government?[98]

These words were uttered during a full-blown confrontation between the Court and the nation's military authorities. One of the Court's – and Horace Harvey's – finest moments took place on July 12, 1918. In a judgment handed down that day, Harvey gave a stirring defence of the rule of law, one which continues to have meaning to this day. Ironically, Harvey was called on to defend a Court judgment with which he had not agreed at all.

This case is an example of how the conscientious effort to properly interpret and apply the law can take judges to places they would never choose to go. And while it is also another example of the way the more liberal and more conservative viewpoints on the Court collided, it also shows how these labels do not always capture the nuances of how the law actually works in the real world. But above all, it exemplifies the heavy burden imposed on judges in Canada to defend the rule of law, sometimes even against government itself.

Canada experienced a severe manpower shortage towards the end of World War I, with the army desperate for reinforcements. The government had already brought in conscription in 1917, which had caused a major political crisis and much bitterness, especially in Quebec. As the need for men grew acute, the federal government decided to cancel various exemptions granted under the 1917 *Military Services Act*. One of the exemptions cancelled was for farmers. This was deeply unpopular. The agricultural community was facing its own manpower crunch. On many family farms, the sons and farmhands given exemptions were desperately needed to grow the crops – ironically, for the war effort.

Rather than have Parliament review and change the *Military Services Act* to end the exemptions, the federal government decided to cancel the exemptions with an Order in Council. This was an order from the cabinet under the aegis of the general powers granted to the government by the 1914 *War Measures Act*. This was done as

a time-saving short cut. Parliament also passed a quick resolution in both houses approving the order. However, some of the individuals called up for service did not intend to go and fight without a fight.

In Alberta, a young farmer named Norman Lewis had his exemption cancelled and reported for service. His father, furious, went to R.B. Bennett. The future prime minister played a fascinating role in the uproar that followed. He was pro-conscription and as a parliamentarian had voted for the *Military Services Act*. But he was also Director of Mobilization and knew very well the labour problems facing farmers.[99] Given that Bennett must have suspected that the course of action he undertook for the Lewis family would cause an uproar, he also likely acted from other convictions, convictions mirrored by the justices of the Supreme Court, regarding the sanctity of the law.

Bennett applied to the Supreme Court for a writ of *habeas corpus* for Norman Lewis. Literally meaning "to produce the body," the writ embodied an ancient common law principle that the sovereign can inquire into the circumstances under which his subjects are detained. In modern terms, it is an order of the court to release a person if the court determines they are not being held legally. Bennett argued that the Order in Council canceling exemptions was invalid. Although itself an act of Parliament, the *War Measures Act* did not explicitly give the Governor General in Council, that is to say, the federal cabinet, the power to overrule or change the *Military Services Act*, another act of Parliament.

Due to the seriousness of the matter, Justice Stuart directed the application to the full Appellate Division. Harvey, Beck, Hyndman, Simmons, and Stuart were the panel. After a week of deliberation, they handed down their judgment on June 28, 1918, declaring the Order in Council *ultra vires* and ordering Lewis's release, with Chief Justice Harvey dissenting.

MEMBERS OF 31ST BATTALION, COEF, AT VICTORIA BARRACKS, CALGARY. GLENBOW ARCHIVES, NA-2962-1.

Harvey found that the *War Measures Act* was in essence a delegation by Parliament of its authority to the executive, well within its powers and with ample precedent. The *Act* itself gave the cabinet the widest possible general powers to prosecute the war, and enumerated a number of categories of subjects in respect of whom these powers might be exercised, but without limiting the government to those categories. To the Chief Justice, the language was clear and unambiguous. The fact that another act of Parliament, the *Military Services Act*, had been subsequently enacted was irrelevant. Furthermore, the resolution approving the order, he argued, was clear evidence that Parliament considered the government to be acting properly, though the resolutions also were not necessary. The terms of the *War Measures Act* alone were enough to make the order legal.

His colleagues did not agree. Stuart, Beck, Hyndman, and Simmons objected to an interpretation of the *War Measures Act* that allowed the executive to override other acts of Parliament. Simmons argued that only an act of Parliament could override an act of Parliament, and that it could not be assumed that Parliament intended to change this time-honoured tradition even in dire circumstances. Hyndman agreed, stating "I know of no authority for the proposition that a statute can be altered, amended or repealed by an order in council unless express statutory authority is so given."[100]

Beck and Stuart further concluded that delegations of legislative power are always open for review of the courts. It was also clear that both men were also concerned that important and fundamental liberties were at stake. Stuart could not resist throwing in some fine rhetorical flourish:

> So far as I have been able to discover it was never attempted in Great Britain where bombs are dropping from Zeppelins and the guns of the war can be heard…to make orders and regulations in order to infringe upon and modify the specific Acts of Parliament which dealt with the question of the compulsory calling of men into the army. And the reason is, I think, that Great Britain is the home of constitutional liberty.[101]

Without a doubt, part of the uneasiness Harvey's colleagues felt was due to the prospect of the government invading the legislative prerogatives of Parliament under the excuse of wartime necessity. Their general respect for the primacy of the legislature, mentioned previously, came into play. Stuart demonstrated the same unease as he had in *Trainor* at the infringement of traditional freedoms and rights. All the justices felt the weight of their decision, but there was a principle at stake. As Hyndman summed up:

> It is hardly necessary to refer to the very serious responsibility resting upon the Court in considering a question of this character which may possibly have a far reaching effect on the war. Nevertheless, as a Court of law it is incumbent upon us to decide the matter upon purely legal principles and to extend relief to the applicant if in the opinion of the court his rights have been invaded.[102]

The Court ordered Lewis's release and put into motion a chain of events that no one probably expected.

Counsel for the federal government, James Muir, asked that the Court grant a two-week stay of proceedings to allow an expedited appeal to be made to the SCC. This was a happy compromise Harvey was glad to make. The Alberta Court's decision was sent on to Ottawa. On July 5, the bomb was dropped, so to speak.

Another Order in Council was issued. Following up on a statement from the Solicitor General several days before giving the Canadian government's opinion that its actions were legal, the order referred specifically to the Lewis decision and then stated that the military would process men with cancelled exemptions, "notwithstanding the judgment and notwithstanding any judgment, or any order that may be made by any court, and that instructions be sent accordingly to the generals and

other officers commanding military districts in Canada."

The judges in Alberta were not immediately aware of the new Order in Council, but they soon would be. The *Lewis* decision created more applications in the province for writs of *habeas corpus*. Lawyer J.E. Varley did so for a client, Norton, while Leo Miller represented fully eleven conscripts on applications. When the applications were brought before Justice Stuart on July 5, the total number had grown to twenty. Counsel for the new applicants intimated that they feared military authorities were going to remove their clients from the jurisdiction of the Court – that is to say, out of the province – and persuaded Stuart to give them an order restraining the local military authorities, specifically the district commanding officer, Colonel Macdonald and Lieutenant-Colonel Moore, commander of the recruit depot, from doing so. The *habeas corpus* applications were adjourned until the following Monday.

Now in front of Harvey, counsel for the applicants told the Chief Justice that they thought Stuart's order had been disobeyed. Harvey did not hesitate. Although he personally believed the government had acted legally, his Court had held differently. He issued an order for Lieutenant-Colonel Moore to produce the *habeas corpus* applicants at court on Wednesday, July 10. The day came and neither Moore nor the conscripts were present at the Court. Instead, local lawyer Major J.M. Carson, the assistant judge advocate general, came in front of Harvey and stated that Moore was under orders not to obey the Court. An application was immediately made for a writ of attachment for Moore – essentially, an arrest warrant compelling him to appear in court. Harvey referred the application to the appellate court and, with Beck and Stuart, issued the writ.

The situation then became surreal. The Deputy Sheriff in Calgary, John MacCaffary, went to the depot barracks in Victoria Park to find Moore, and was greeted by what Harvey would later call "armed military resistance." The *Calgary Herald* described it vividly:

> Victoria Park Barracks…has been turned into an armed camp. The Strathcona Horse has been brought in from Sarcee Camp to guard headquarters. Armed guards have been placed at every vantage point…. Partitions have been torn down and two machine guns placed that will sweep the open space in front of the buildings.[103]

The sheriff was informed by Major Frank Eaton, another local lawyer, that Moore was not there, and he was not allowed to search the premises. With fine rhetorical flourish, the major asked the sheriff just who was running affairs – Harvey or the government?

Back in court, the government counsel, James Muir, applied for a stay in all the *habeas corpus* proceedings until the SCC issued a ruling. The lawyers for the applicants were agreeable, as long as the military agreed not to remove them from the province and hence the Alberta Court's jurisdiction. Major Carson, however, who was present at court, admitted that some had already been sent away. At Muir's request, the Court adjourned until Friday, in expectation of a telegram from the Minister of Justice in response to the imbroglio in Alberta.

Finally, late Friday afternoon the telegraph came. Invoking the July 5 Order in Council, the Minister refused to order the military to hold the conscripts in Alberta and thus "paralyze general operations." There were, after all, similar *habeas corpus* proceedings flooding the courts in other parts of the country. Obviously, the fear was growing in government that this was creating a new conscription crisis, and that opponents to the measure would use the courts to attack the policy.[104] But in taking this action, the government was defying the order of the Appellate Division of the Supreme Court.

Once again, Harvey did not hesitate. With the support of his colleagues, Beck and Stuart, he delivered the Court's judgment. It was quite a statement, worth repeating at length:

137 BATTALION SARCEE CAMP, 1916. GLENBOW ARCHIVES, PA-3476-7.

This Court is the highest Court of this province. It is duly and legally constituted for the purposes of protecting the legal rights of all persons who may come before it. It has all the powers substantive and incidental of all the common-law Courts of England.

These Courts grew up and acquired their powers not merely by legislation but through exercise for centuries. During these centuries those powers have had to be exercised in times of turmoil and in times of stress as well as in times of peace and quiet and more than once in the past, although happily not in recent years, these Courts have had to exercise those powers in the face of hostile opposition and even as against hostile force.

It would be surprising then if machinery did not exist for such an emergency. Such machinery does exist. The Court's officers in carrying out the decrees of the Court have the legal right and authority to call upon all able-bodied men within their jurisdiction to assist in the execution of the Court's orders and it is not merely the right, but the duty of everyone so called to furnish such assistance and what he does in giving such assistance is legal and justifiable while any opposition to the Court's officers and those assisting is illegal and punishable, no matter from whom it comes.

This Court is now confronted by a situation which is most astounding arising as it does in this twentieth century. Orders have been issued out of the Court directed to one Lieutenant-Colonel Moore, a military officer, which orders have been disobeyed; an order for a writ of attachment against the said Lieut.-Col. Moore has been granted and a

writ issued and the sheriff has been met by armed military resistance in his effort to execute the writ.

Counsel for the military authorities of Canada has appeared before us and stated that Lieut.-Col. Moore has disobeyed the orders of the Court and is prepared to use force to resist arrest under the direct orders of the highest military officer in Canada, and it appears that these orders have been issued with the approval of the executive government of Canada. This seems to me that the military authorities and the executive government of Canada have set at defiance the highest Court in this province.

…Upon this situation two courses are open to this Court. It can either abdicate its authority and functions and advise applicants to it for a redress of their wrongs and the protection of their legal rights that it is powerless, which, of course, means there is no power except that of force which can protect their rights, the consequence of which could scarcely mean anything less than anarchy or it may decide to continue to perform the duties with which it is entrusted for the purpose of guarding the rights of the subjects and not prove false to the oath of office which each member of it took when he solemnly and sincerely promised and swore that he would duly and faithfully and to the best of his skill and knowledge exercise the powers and trusts reposed in him as a Judge of the said Court.

There can be only one answer to the question, which way will this Court act? It will continue to perform its duties as it sees them, and will endeavour in so far as lies in its power to furnish protection to persons who apply to it to be permitted to exercise their legal rights.[105]

There was steel behind the words. The sheriff was ordered to find as many of the *habeas corpus* applicants as he could, with a posse of able-bodied citizens if necessary, and bring them to court. Harvey believed with great conviction in the independence of the judiciary, as did his colleagues. Once the government defied the Court, he was unflinching in pursuing the matter – but not, as it turned out, unreasonable.

Calgary's civic leaders were alarmed at the prospect of a physical showdown between the army and the sheriff. City council had sent H.P.O. Savary, a respected lawyer, to the Friday court as their representative. Savary quickly brokered a compromise.[106] He convinced Harvey not to immediately issue the Court's order, and organized a meeting that night with Frank Freeze, the acting mayor, Colonel Macdonald, Major Carson, the sheriff, and the Chief Justice. Macdonald gave a personal undertaking not to remove any of the conscripts without giving the sheriff twenty-four hours' notice and Harvey immediately agreed to put the Court's order in abeyance. Finally, the acting Minister of Militia agreed by telegraph to respect Macdonald's undertaking. The situation had been defused.

It is tempting to say the Court had won the standoff. It is more accurate to say that all the concerned parties jumped at a face-saving compromise, realizing how difficult the situation had become. Ironically, within a week the SCC passed judgment on an Ontario *habeas corpus* case. It found the original April Order in Council valid, vindicating Harvey's dissent in *Lewis*. It was a measure of the man and his unfailing commitment to the rule of law that he backed his colleagues without hesitation, despite thinking they were wrong.

The first ruling of the appeal court in this affair once again shows how the Court often divided: Harvey taking a close reading of legislation and going no further, with Beck, Stuart, and in this case, Simmons and Hyndman, looking at broader implications. That said, all the judges believed in the supremacy of Parliament, though they had different interpretations regarding two pieces of legislation. Further, all the judges believed in the English, and Canadian, tradition of an independent judiciary and the rule of law, and in the judiciary's role in protecting the liberties of individuals.

COLONEL D. GEORGE MACDONALD, CA. 1915. GLENBOW ARCHIVES, PB-84-5.

CONCLUSION

The judgments of the Court in the *habeas corpus* affair exemplify the first twelve years of Alberta's appellate court. Over this short period, an appeal court of some stature and uniqueness had developed. The Alberta Supreme Court had started with the time-honoured tradition of *en banc* appeals, continuing seamlessly from its predecessor, the Territorial Court. As the work demanded, the Supreme Court modified its arrangements for appeals, pragmatically aiming to maintain flexibility while moving towards a permanent appeal court. Thus, the Appellate Division created in 1914 gave the Court the advantage of having a full-time appeal court while maintaining the participation of the whole bench in appeals, just not all at the same time.

Even without permanent members, the Court produced judgments striking in their originality, several of which have been discussed here at length. While it is certainly debatable whether these reflect the main body of the Court's judgments, they do capture an important, progressive element. They also demonstrate the lively intellect of Charles Stuart, often contrasted to the more literal-minded Chief Justice. But in a moment of crisis, that same Chief showed his mettle in defending the independence of the judiciary and the rule of law, principles he and his colleagues believed in so strongly.

That belief in judicial independence would feature prominently in the next controversy about to embroil the Court. In 1919, Alberta would once again reorganize its Supreme Court, establishing trial and appellate divisions which were not only separate but manned by permanent appointees selected by the government. From this initiative, an unprecedented crisis developed in 1921 once the legislation came into effect, one that would pit two judges, colleagues for many years, against one another as each laid claim to the highest judicial office in the province.

PARADE OF 31ST BATTALION, VICTORIA PARK, 1914. GLENBOW ARCHIVES, NA-3245-1.

Endnotes

1 Oliver Wendell Holmes, Jr., in *Lochner v New York* (1905), 198 US 45 at 76.

2 *An Act Respecting the Supreme Court,* Statutes of Alberta (hereafter SA), 1907, c. 3; *An Act Respecting the District Court,* SA 1907, c. 4.

3 Chambers started on September 16, according to the *Albertan*, Sept. 17, 1907.

4 *R v Cyr*, [1917] 3 WWR 849; *Board v Board*, [1918] 2 WWR 633; *R v Trainor*, [1917] 1 WWR 415.

5 LAC, MG 30 E87, vol. 6, file E,F,G,H 1907, letter, Harvey to Ford, Feb. 22, 1907. Interestingly, in another letter Harvey mentions that he drew up the *Alberta Act* establishing the province. This makes it likely he played a large role in the court *Acts*.

6 Ibid., file A, 1907, letter, Woods to Harvey, June 1, 1907.

7 Peter Russell, *Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill Ryerson, 1987), 62, 121–23. Russell discusses in general terms the unresponsiveness of the federal government to provincial requests for s. 96 appointments. Christopher Moore, *The British Columbia Court of Appeal: The First One Hundred Years* (Vancouver: UBC Press, 2010), 14, concludes that the delay in British Columbia in setting up their appeal court was likely due to federal tardiness.

8 *Morning Albertan,* Oct. 10, 1907.

9 *Robertson v. Town of High River*, [1907] 6 WLR 767.

10 Wilbur Bowker, "Stipendiary Magistrates and the Supreme Court of the Northwest Territories, 1876–1907," in *A Consolidation of Fifty Years of Legal Writings, 1938–1988 by Wilbur F. Bowker,* ed. Marjorie Bowker (Edmonton: University of Alberta, Faculty of Law, 1989), 730.

11 Saskatchewan had the same arrangement, and in Prince Edward Island superior court sat *en banc* until 1987, when a trial and appellate division were established.

12 Louis A. Knafla and Rick Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997). Except where otherwise noted, the judicial biographies in this chapter are based on this volume.

13 LAC, MG 30 E87, vol. 3, various letters.

14 LAC, MG 30 E87, vol. 3, file A,B 1900–1903, letter, Beck to Harvey, Aug. 1, 1903; vol. 4, file A,B, 1904, letter Beck to Harvey, June 20, 1904.

15 Wilbur Bowker, "The Honorable Horace Harvey," in *A Consolidation of Fifty Years of Legal Writings by Wilbur F. Bowker*, ed. Majorie Bowker (Edmonton: University of Alberta Faculty of Law, 1989), 102.

16 Louis Knafla, "David Lynch Scott," *Dictionary of Canadian Biography*, vol. 15 (Toronto: University of Toronto Press, 1981–). According to Knafla, Scott's performance at the rebellion trials was sharply criticized, and a political rival, Nicholas Flood Davin, derided him as "a flabby mass of decided mediocrity." There was no hint, however, that his brother judges felt he wasn't up to the job.

17 Knafla and Klumpenhouwer, *Lords of the Western Bench,* 163.

18 There was, and is, no clear Canadian tradition regarding seniority and appointment as Chief Justice, but judging from the criticism that often arose when the senior judge of a court was bypassed, there was also an expectation that the senior judge of a court should be considered.

19 One author claimed that Scott refused to sit *en banc* for the next decade. However, the reports show him on many panels, and also concurring with Harvey, his supposed rival, in appeal judgments. Such correspondence that remains between Harvey and Scott also seems to be fairly friendly. Harvey himself remembered their relationship as very cordial until the controversy over who was Chief Justice, discussed in the next chapter. See Knafla, "David Lynch Scott," and LAC, MG 30 E87, vol. 27, file U,V,W,Y 1935, letter, Walsh to Harvey, Oct. 31, 1935.

20 LAC, MG 30 E87, vol. 14, file K,L,M 1917, letter, Muckelle to Harvey, Dec. 10, 1917.

21 LAC, MG 30 E87, vol. 27, file I,J,K 1935, letter, Harvey to Edwards, May 17, 1935.

PARADING MEMBERS OF THE 50TH BATTALION, CALGARY. GLENBOW ARCHIVES, NA-3419-3.

22 LAC, MG 30 E24, vol. 31, file K,L,M 1941–1942, letter, Harvey to Mackenzie King, Sept. 12, 1942.

23 Bowker, "The Honourable Horace Harvey," 106.

24 Ibid., 63.

25 Lawyers who remembered Simmons as a judge were generally not very complimentary about his abilities, and Sifton allegedly called him "Simple Simmons." These are generally second-hand stories, however. See LASA, fond 09, series 5, Calgary Bar Association Oral History Project.

26 After his appointment was officially announced, Walsh lost no time writing to Harvey, volunteering to immediately go to Red Deer to cover for Scott, who had taken ill. LAC, MG 30 E87, vol.10, file W,Y 1912, letter, Walsh to Harvey, April 12, 1912.

27 LASA, fond 05, series 1, Benchers Minutes, Convocation, July 1912, 41.

28 Bowker, "The Honorable Horace Harvey," 66.

29 Ibid.. It is interesting to note that the present-day Court of Appeal uses *ad hoc* justices from the Court of Queen's Bench, with a more formal arrangement for sentencing appeals from 1985 to 2009.

30 LAC, MG 30 E87, vol. 11, file I,J 1914, letter, Harvey to Deputy Minister of Justice, March 16, 1914.

31 In chapter 4, there is a discussion on the issue of the size of appeal panels.

32 James G. Snell and Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985). A quick perusal of the *Canadian Law list*, 1920, shows BC had a six-member of appeal court, while Manitoba and Saskatchewan had four.

33 LAC, MG 30 E87, vol. 35, file H,I,J 1908–1911, letter, Harvey to Minister of Justice, Nov. 11, 1911.

34 Ibid., vol. 11, file I,J 1914 letter, Harvey to Doherty.

35 Ibid., vol. 30, file A 1912–1914, letter, April 3, 1914, Harvey to Hunt.

36 *Act Respecting the Supreme Court*, SA 1907, c. 4, s. 32

37 *Criminal Code*, Statutes of Canada (hereafter SC) 1906, c. 146, s. 1014.

38 Ibid., s. 1015.

39 Sifton, Harvey, Beck, S.B. Woods, and A.Y. Blain were on the original committee formed in 1909. Sifton presumably dropped it upon becoming premier.

40 LAC, MG 30 E87, vol. 11, file A 1914, letter, Harvey to Cross, Jan. 10, 1914.

41 Moore, *British Columbia Court of Appeal*, 31.

42 Bowker, "The Honorable Horace Harvey," 102; LASA, fond 09, series 5, vol. 8, file 56, Martland interview, 14.

43 Snell and Vaughn, *Supreme Court of Canada,* 34.

44 Unfortunately, there are few studies of early Canadian appellate practice for comparison. Moore's description of the early British Columbia Court of Appeal implied that the judges were not very collaborative in producing decisions, and this was also Snell and Vaughn's conclusion on SCC practice.

45 LAC, MG 30 E87, vol. 15, file L,M,Mc 1919, letter, Harvey to McCarthy, March 29, 1919.

46 LAC, MG 30 E87, vol. 14, file S,T 1917, letter, Stuart to Harvey, May 27, 1917.

47 Many letters are found in Harvey's correspondence, LAC, MG 30 E87. Stuart may have also corresponded with Edmonton judges such as Beck over appeals, but if so, nothing has survived.

48 LAC, MG 30 E87, vol. 8, file R,S 1909, letter, Stuart to Harvey, April 3, 1909.

49 Ibid., letter, Stuart to Harvey, March 30, 1909.

50 Louis A. Knafla, "The Supreme Court of Alberta: The Formative Years, 1905–1921, in *The Alberta Supreme Court at 100: History and Authority*, ed. Jonathan Swainger (Edmonton: University of Alberta Press, 2007), 37.

51 This is a point compellingly argued by Martin and Knafla. See Roderick G. Martin, "The Common Law and Justices of the Supreme Court of the North-West Territories: The First Generation, 1887–1907," in *Laws and Societies in the Canadian Prairie West, 1670–1940*, ed. Louis A. Knafla and Jonathan Swainger (Vancouver: UBC Press, 2005), and Louis Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada," in *Law and Justice in a New Land: Essays in Western Canadian Legal History*, ed. Louis Knafla (Toronto: Carswell, 1986).

52 *Travis-Barker v Reed*, [1921] 3 WWR 770, at para. 8.

53 *Miner v Canadian Pacific Railway* (1911), 3 Alta. L R 408.

54 Ibid, at para. 42.

55 *Makowecki v Yachimyc*, [1917] 1 WWR 1279. Stuart's dissent is also interesting because he develops an argument about the adoption of English common law that he uses again shortly after in *R v Cyr*, discussed below in depth.

56 Bowker, "The Honourable Horace Harvey." This article, which has been referenced frequently in this chapter, is a jurisprudential biography.

57 *Armstrong v Bradburn Printing*, [1917] 2 WWR 867, at para. 4.

58 *Streamstown (Rural Municipality) v Reventlow-Criminil*, [1920] 1 WWR 577, at para. 62.

59 Bowker, "The Honourable Horace Harvey," 102.

60 *R v Marceau* (1915), 7 WWR 1174, at para. 9.

61 Louis A. Knafla, "The Supreme Court of Alberta: The Formative Years, 1905–1921," in *The Alberta Supreme Court at 100: History and Authority*, ed. Jonathan Swainger (Edmonton: Osgoode Society and University of Alberta Press, 2007), 45.

62 *Makowecki v Yachimyc*, [1917] 1 WWR 1279, at para. 24.

63 *Board v Board*, [1918] 2 WWR 633, at para. 27.

64 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 177.

65 See *R v John Irwin Co* (1919), 14 Alta. L R 600, at para. 3, *Hudson's Bay Co. v. Peters,*[1937] 1 WWR 787, and Bowker, "The Honourable Horace Harvey," 95.

66 Bowker, "The Honourable Horace Harvey," 96. The following paragraph on *Schmolke* and *Hartfiel* is based on Bowker's account.

67 *R v Schmolke* [1919] 3 WWR 409, *R v. Hartfeil* [1920] 3 WWR 1051.

68 *R v. Hartfeil* [1920] 3 WWR 1051, at para. 35.

69 Ibid., at para. 50.

70 See chapter 10 for a discussion of the continuing debate.

71 *Alberta Rules of Court*, 1914, 54–55. Rule 326 stated the appellate court had the power to make its own inferences of fact if necessary.

72 Bowker, "The Honourable Horace Harvey," 87.

73 *Jones and Lyttle v Mackie*, [1918] 2 WWR 668, at paras. 25–26.

74 Indeed, this failing would continue for decades until the SCC set out firm standards for review by an appellate court of a trial judge's fact findings.

75 *Reeve v Mullen* (1913), 5 WWR 128, at para. 7.

76 *Re Lewis*, [1918] 2 WWR 687 and *Re Norton*, [1918] 2 WWR 865.

77 *R v Cyr*, [1917] 3 WWR 849, at para. 8.

78 Ibid., at para. 22.

79 Ibid., at para. 35.

80 Ibid., at para. 45.

81 Ibid., at para. 43.

82 Ibid., at para. 46.

83 David Bright, "The Other Woman: Lizzie Cyr and the Origins of the Persons Case," *Canadian Journal of Law and Society* 99, no. 13 (1998): 114–15.

84 *Board v Board*, [1918] 2 WWR 633, at para. 37.

85 Ibid., at para. 47.

86 *Board v* Board, [1919] 2 WWR 940, at para. 20.

87 Jonathan Swainger, "Wagging Tongues and Empty Heads: Seditious Utterances and the Patriotism of Wartime in Central Alberta, 1914–1918," *Law, Society and the State: Essays in Modern Legal History*, ed. Louis. A. Knafla and Susan W.S. Binnie (Toronto: University of Toronto Press, 1995), 278–79. This article looked at a number of reported and unreported trials and appeals related to seditious language charges in central Alberta and is an excellent in-depth exposition on this topic.

88 Ibid., 283.

89 *R v Trainor*, [1917] 1 WWR 415, at para. 47.

90 *R v Felton* (1915), 9 WWR 819, at para. 30.

91 *R v Trainor*, at para. 40.

92 There had been several other sedition trials, two of which were appealed but not reported. See Swainger, "Wagging Tongues," 267–76.

93 *R v Trainor*, at para. 29.

94 Ibid., at para. 31.

95 Ibid., at para. 36.

96 Ibid., at para.47.

97 Bowker, "The Honourable Horace Harvey," 70.

98 Ibid., 59.

99 James H. Gray, *Talk to My Lawyer* (Edmonton: Hurtig, 1987), 46.

100 *Re Lewis*, [1918] 2 WWR 687, at para. 79.

101 Ibid., at para. 45.

102 Ibid., at para. 77.

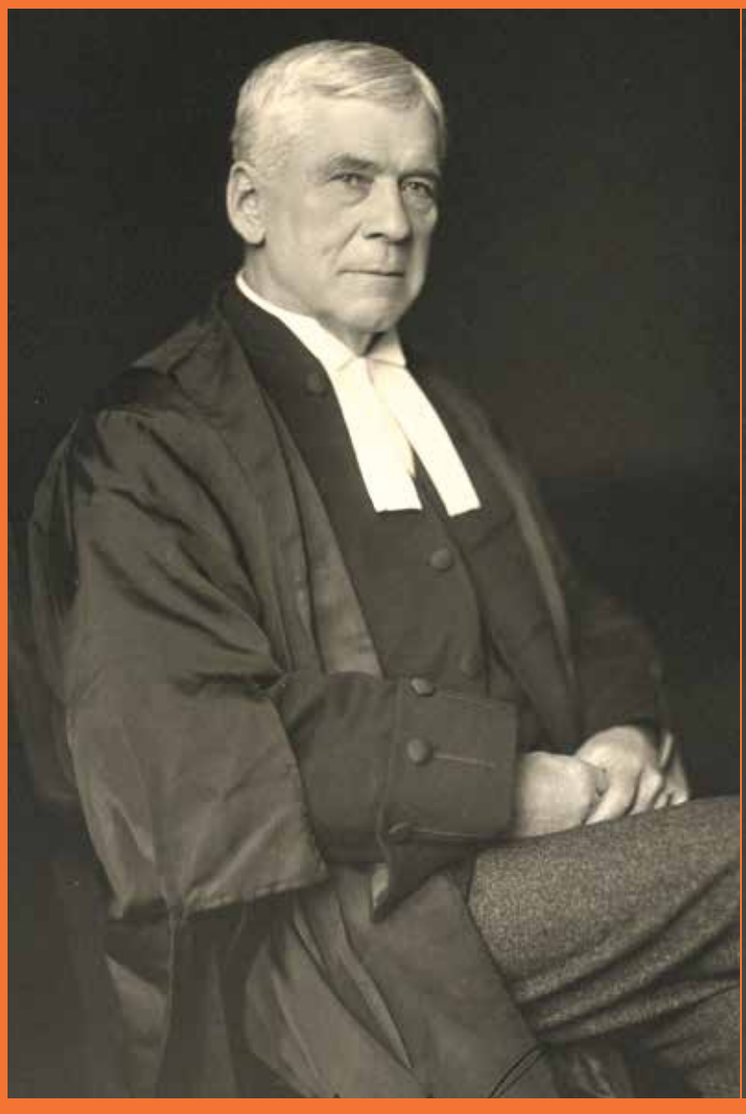
103 *Calgary Herald*, July 11, 1918.

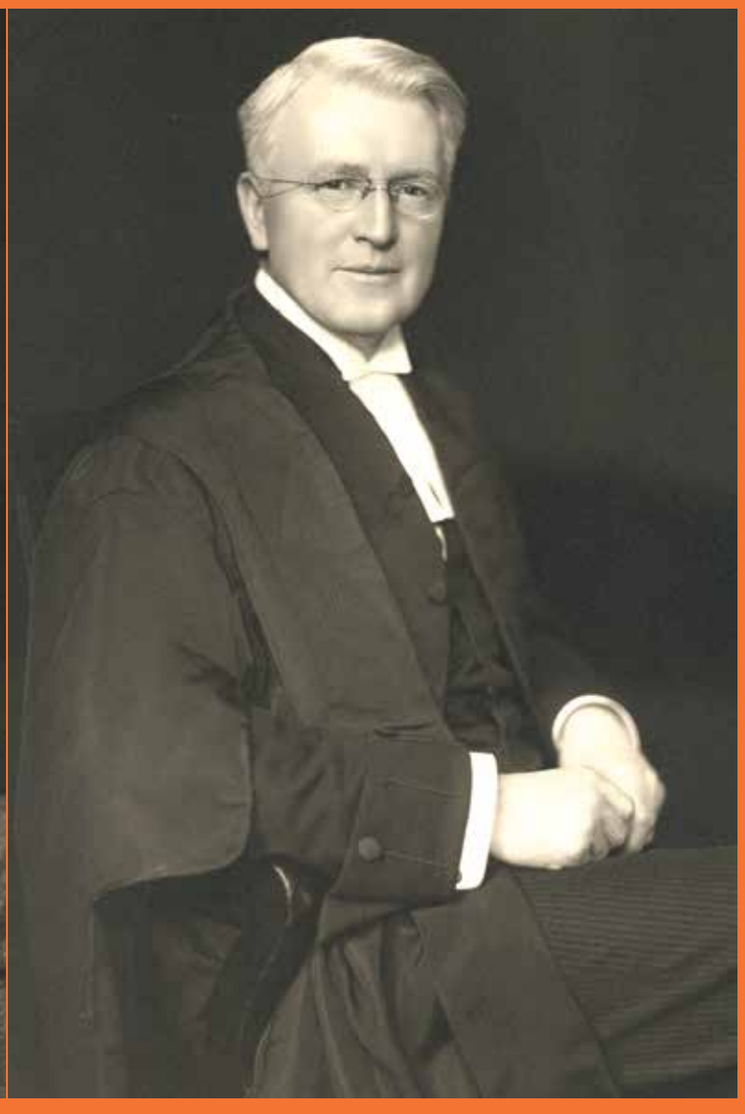
104 *Calgary Herald*, July 13, 1918. Reports in the *Herald* mentioned "a flood" of applications in Quebec but also many in Toronto.

105 *Re Norton*, [1918] 2 WWR 865, at para. 1.

106 *Calgary Herald,* July 13, 1918. The newspaper carried a detailed report of the conference.

CROWD OUTSIDE THE EDMONTON JOURNAL OFFICES FOLLOWING THE WORLD SERIES SCORE, 1926. GLENBOW ARCHIVES, NC-6-11909Z.





CHAPTER 3

WHO WAS THE REAL CHIEF JUSTICE OF ALBERTA? 1921–1923

Who made thee a prince and a judge over us?[1]

On September 19, 1921, an extraordinary scene played out in a crowded courtroom in the Edmonton courthouse. For several days, Alberta's legal community had been abuzz with the news that David Lynch Scott had been appointed as Chief Justice of the Appellate Division and Horace Harvey as Chief Justice of the Trial Division of the Supreme Court of Alberta. What had particularly raised eyebrows was that this made Scott the Chief Justice of Alberta, under the terms of the 1919 *Act to Amend the Supreme Court Act*. Or did it? Rumours had been flying that a confrontation was in the works, as the bar waited to see how Harvey would react to his apparent demotion. He did not disappoint and came to court that day to claim what he considered his rightful title, plunging the Alberta Supreme Court into three years of controversy and uncertainty, all to answer the question of who was the right and proper Chief Justice of Alberta – Harvey or Scott?[2]

The cause of this unprecedented incident was the statute that split the Supreme Court into a trial division and an appellate division, with permanent benches appointed to each division by the government, not by the judges themselves. Or more accurately, it was two amendments to this *Act* in 1920 that were to throw the Court into disarray.

The division of powers between federal and provincial governments, partisan politics, egos, and genuine concern over judicial independence came together to create high drama in Alberta. The Chief justice controversy is one of the most compelling stories of Alberta's appellate court, and worth considering in some detail. This controversy was also a unique occurrence in the history of common law courts, even among various famous judicial rivalries. It was Harvey who took a stand to defend judicial independence, but the incident also throws a light on the complex interplay of patronage and politics that historically operated behind the façade of impartiality of Canada's courts.

THE PROTAGONISTS: SCOTT AND HARVEY, CA. 1920. LASA 5-G-58, 5-G-60.

The Judicature Act, 1919

In 1906, Manitoba established a court of appeal, separate from the trial court, as did British Columbia three years later.[3] In 1918, it was Saskatchewan's turn. The following year, Alberta followed suit, but took a different path from other western provinces. Instead of creating a new and separate appeal court, Alberta's legislation modified the existing arrangement of the Supreme Court by dividing the court into permanent appellate and trial divisions. The Alberta approach, however, created a potential problem that might not have arisen but for a crucial amendment to the original statute.

By 1919, it was clear that the time had come to make some changes to the Supreme Court. Chief Justice Harvey, and most of his colleagues, felt that more judges were needed. Business had slowed, but absences due to illness made it tough to stay on top of the court lists. The province decided that, in addition to increasing the number of judges, it would provide for their permanent assignments as either appeal or trial judges. It was clear to Harvey that not all his brother judges were suited to, or enjoyed, appeal work, while others were very good at it and preferred it.[4] Stuart and Beck had been sitting almost continuously in the Appellate Division since 1914, and Harvey had not done trials for several years. Trial judges would now become the Trial Division. In addition to assigning judges to one Division or the other, both benches would be enlarged, and the position of Chief Justice of the Trial Division established. The new arrangement promised to be more efficient. Harvey thought that it was time to split up the administrative work of the Supreme Court by creating the position of Chief Justice of the Trial Division.[5]

At the government's request, Harvey drew up the changes in the new *Judicature Act*, which also amended some other aspects of the court and court practice.[6] Section 3 of the *Act* stated that the Alberta Supreme Court would continue as established. In ss. 6 and 7, the new organization was laid out. The head of the Court, the Chief Justice of the province, was to be the chief justice of the Appellate Division. That Division would consist of a chief justice and four puisne judges. The Trial Division would have a chief justice and five puisne judges. The chief justice of the Trial Division would be ranked second in the Court's hierarchy.

THE APPELLATE DIVISION, 1922. L–R: HYNDMAN, STUART, SCOTT, BECK, AND A.H. CLARKE.

Crucial to the controversy that followed was the wording Harvey used in s. 6:

> The Appellate Division *shall continue to be presided over by the Chief Justice of the court*, who shall continue to be styled the Chief Justice of Alberta, and should consist of the said chief justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal. [Emphasis added.]

Harvey's phrasing clearly left him as Chief Justice of Alberta, stepping into the position as head of the Appellate Division. This may have been in his mind, not just to protect his own position as head of the court but also because it must have seemed logical. His appointment was as Chief Justice, and judicial appointments were for life, barring any unseemly scandal. Therefore, as the chief justice of a province was traditionally the head of the appeal court, his drafting assumed the obvious, namely that the current Chief Justice of the province would head the permanent division for appeals. That also suited his preference for appellate work.

Though the judges would now sit permanently for the separate divisions, they would be *ex officio* members of both. This would allow them to sit as necessary if a judge was needed in one division or the other. It also reinforced the idea – certainly in Harvey's estimation – that there was only one court. This was something Harvey stated time and again, right up to his death. The Appellate and Trial Divisions were not two different courts. As the names themselves suggested, they were to be two divisions of the same court. Harvey believed the new *Act* merely put the existing organization of the court on a better-defined footing. Long after the fight with Scott, Harvey argued that the Dominion government drew up the commissions of the Alberta judges incorrectly, by implying there were two courts.

Why did Harvey and the Attorney General's department choose to set up divisions of the court instead of a newly constituted and separate appeal court, such as in the other western provinces? Harvey himself later said Alberta's 1919 *Judicature Act* was modelled on legislation in Ontario, where a reorganization of the courts had taken place in 1909, creating a Supreme Court with an appellate and trial division.[7] There was apparently a consensus that this was the best course. "We were all agreed that the method of having only one Court and developing in it, was preferable to having a separate Court of Appeal."[8] Harvey did not list specific reasons as to why it seemed a superior arrangement, but likely it was to allow judges to sit in the other division when needed. In the months to come, he may have regretted the decision.

The Amendments

The Attorney General sent the draft bill to the federal Minister of Justice, as was customary when new appointments were requested. As usual, the federal government was unsympathetic to increasing the Alberta bench. Worse yet, it was in an obstructionist mood. An objection to s. 6 soon followed. Later, the federal deputy minister, E.L. Newcombe, claimed that, as worded, s. 6 violated s. 96 of the *BNA Act,* which gave the federal government the right to appoint judges. By stating that the Chief Justice of Alberta would become head of the Appellate Division, the draft bill was essentially appointing the head of that Division. Newcombe thought that the divisions had to be considered new courts. Thus, on this thinking, the head of the Appellate Division was a new appointment, requiring new letters patent from the Governor General.

The Alberta Attorney General's office changed s. 6 to address Newcombe's criticism. The amendment received assent on April 10, 1920.[9] After the rewrite, s. 6 read:

> The Appellate Division *shall be presided over by a Chief Justice, who shall be styled the Chief Justice of Alberta,* and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency

the Governor General in Council and to be called Justices of Appeal. [Emphasis added]

The meaning had been subtly but significantly changed, from the particular – *the present chief justice* would preside over the Appellate Division – to the general – *a* chief justice would do so, who could presumably be someone different.

Harvey knew about the amendment. While in Ottawa as part of a delegation on judges' salaries, the Chief Justice heard that there might be a problem with s. 6. He saw Newcombe and they discussed it.[10] The deputy minister supposedly told the Chief Justice that this was the first time he had heard any complaint that the section was *ultra vires*. He agreed with Harvey that there should be no difficulty with the section as Harvey had first written it. Harvey's remembrance of this conference raises the question whether Newcombe was being disingenuous. Newcombe would later adamantly defend the opposite position. And while he might have changed his mind, the reality was that even by the time of this meeting, pressure had already been brought on the provincial government to change the wording of s. 6.

Returning to Alberta, Harvey found that the provincial government had already amended this section. Calling on the Attorney General, J.R. Boyle, Harvey pointed out to Boyle that the amendment essentially wiped out the office of Chief Justice of Alberta, as currently held by himself.[11] The solution was another amendment, quickly added during the same session. It read:

The Appellate Division *shall be presided over by a Chief Justice, who shall be Chief Justice of the court* and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal. [Emphasis added]

Harvey probably never saw the new amendment, since it still did not make it clear that the present chief justice would necessarily become chief justice of the new Appellate Division. The amendment was a bomb, armed and ready. All it required was detonation.

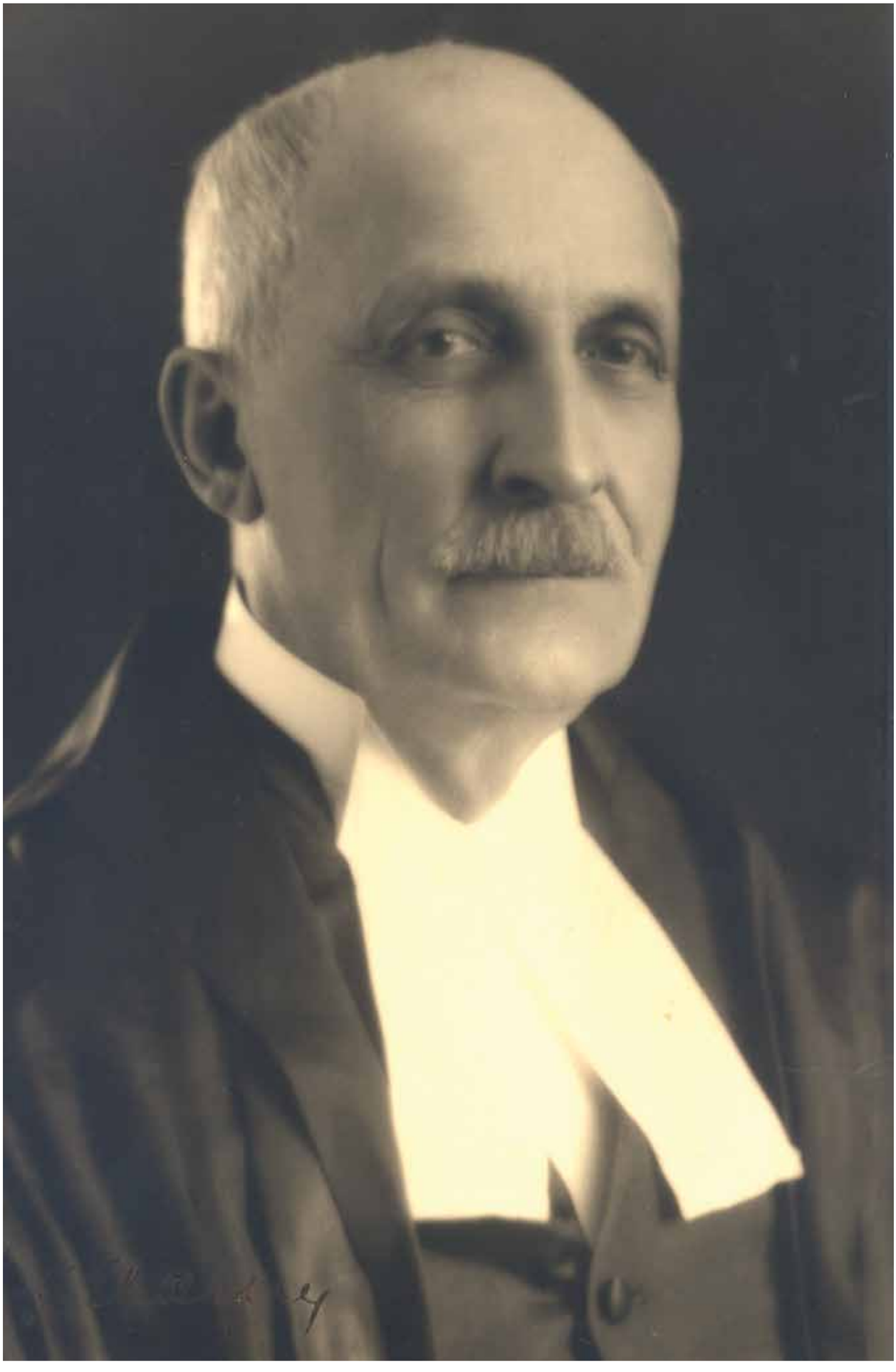
The New Appointments: Battle Is Joined

The explosion came on September 15, 1921. The government of Alberta finally proclaimed the *Judicature Act* as law on August 11, to take effect on September 15, and the federal government had its appointments ready for that day. On September 15, Scott was named head of the Appellate Division; Beck, Hyndman, and Stuart puisne judges; and a new justice added, A.H. Clarke. Harvey was made head of the Trial Division, joined by veterans Simmons, Walsh, McCarthy, Ives, and a new appointment, T.M. Tweedie. Most importantly, Scott was now also Chief Justice of Alberta.

Harvey first saw the news of the appointments in his morning newspaper. He immediately sent a shocked telegram to the federal deputy minister: "Press reports appointment Scott Chief Justice Supreme Court and me Chief Justice Trial Division. Presumably mistake." It was no mistake. Newcombe immediately replied. Not only were the appointments correct, but the deputy minister also confirmed the federal government's position. The *Judicature Act* had created two new courts, and the chief justice of each was a new judicial office, over which the federal government had full discretion in making appointments. This was in response to Harvey's argument in his telegram that he had to be confirmed as Chief Justice of the Appellate Division because he was already Chief Justice. Thus the battle lines were immediately drawn.

Harvey was at a disadvantage, as he was at the mercy of an unfriendly political climate. Robert Borden's Conservatives had been in power

ALFRED HENRY CLARKE, LASA 5-G-7.



since 1911. The war-time Union administration elected in 1917 and still in power might have contained many Liberals, but was clear that Conservative supporters were now favoured for the bench. The previous four appointments in Alberta had all been from party ranks. Scott was an old Conservative as well as the senior judge of the Supreme Court. Thus, if the federal government had free rein to make a new appointment as Chief Justice of Alberta, Scott's promotion would have been considered likely. This may be why Harvey, no fool about patronage, was so careful to create continuity in the 1919 *Act*.

Unfortunately for Harvey, the provincial government had also changed. The Liberals had been unexpectedly removed from office in July. The new United Farmers administration was aggressively non-partisan. John E. Brownlee, a prominent Calgary lawyer, was made the new Attorney General. He was very competent and established a cordial relation with Harvey. His government brought in the *Judicature Act*, but it likely never occurred to Brownlee that there was any problem with the amendments. If he knew about the changes, Brownlee might very well have agreed with their necessity in order to meet the objections of the Dominion. If he knew that Scott was slated to take over the role of Chief Justice of Alberta, he probably thought he had no reason to interfere. His official stance in the following controversy was one of neutrality.

The new court divisions were supposed to open in Edmonton at ten in the morning on Monday, September 19, 1921. The changes in the bench had not gone unnoticed. The bar and interested members of the public crowded the courtroom, anticipating a confrontation.[12] In the judges' chambers, Harvey told the gathered appellate judges, including Scott, that he insisted on his right to sit as the Chief Justice of the Appellate Division. Aghast, the judges did the only thing they probably thought they could do. The clerk, at half past ten, told the audience waiting in the courtroom that the opening was postponed to Wednesday.

The other four appellate justices fired off a telegram to Newcombe, the deputy minister. "We the puisne judges desire to prevent unpleasant difficulty and cannot proceed with duties until arrangements made to have matter settled."[13] They stated that if the government would put a reference to the SCC for a ruling, the Alberta court could open. Harvey had agreed to act in the Trial Division on this condition. The four asked Newcombe to agree. Harvey sent his own telegram requesting the same course of action.

But Newcombe, speaking for the federal government, proved stubborn. "Government considers its authority to nominate President of Appellate Division sufficiently plain and not disposed to refer to Supreme Court of Canada."[14] Wednesday came and the clerk once again postponed the courts until the following day. The Lieutenant-Governor did swear in Scott, Stuart, Beck, and Clarke at the legislature. Harvey refused to come and take his oath, saying it was unnecessary. He was not the only one. Walsh, although sworn in with his brothers, protested it was unnecessary as he was already a member of the Supreme Court, an expression of tacit support, possibly, for the old Chief.[15]

Finally, on Thursday morning, the Appellate Division filed into the courtroom – accompanied by Horace Harvey. Before court was officially opened, Harvey rose and read a short statement. He outlined the situation and the issue and stressed that there was nothing personal between him and Scott – it concerned the correctness of the actions of the federal government. Until the matter was settled, he consented to sit in the Trial Division and leave Scott to run the Appellate Division, but without renouncing his claim to the title of Chief Justice of Alberta. Determined to take the high road, Harvey complimented his brother judge on his appointment as head of the Appellate Division, as "well merited." Harvey then left for another courtroom where he opened sittings for the criminal court.

CHARLES STEWART, FORMER ALBERTA PREMIER, CA. 1921. PAA A436.

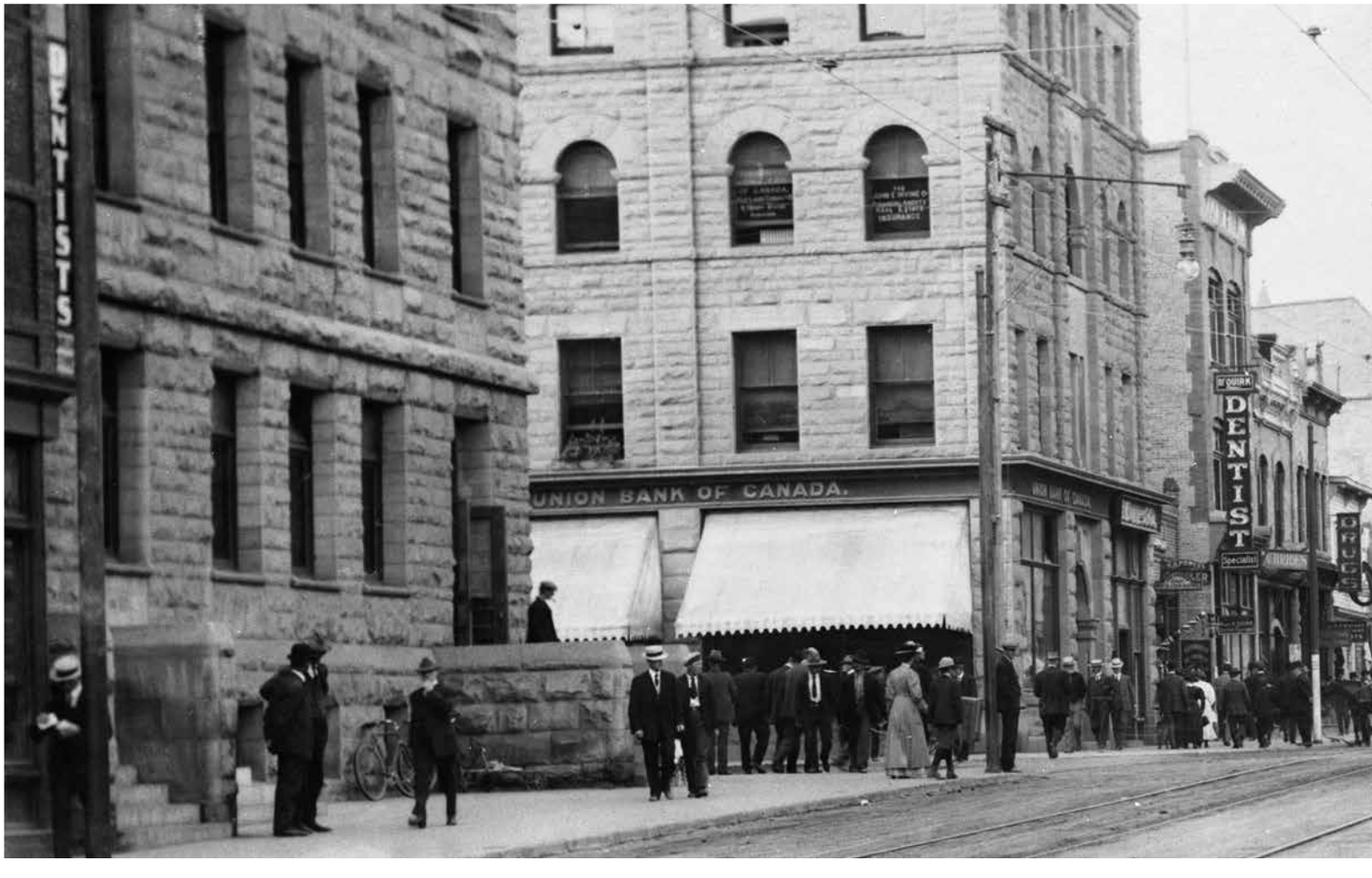
Judicial Independence on the Line

What led Horace Harvey to take this extraordinary and very public course of action? If one is to believe his letters, Harvey's motivation came primarily from his conviction that the federal government's actions were incorrect and unconstitutional. It may have been a personal injustice, but more importantly it was also a serious infringement on judicial independence. Under s. 99 of the *BNA Act*, judges of the superior courts were appointed for life on "good behaviour," meaning they could only be removed for criminality or incompetence, which required a Parliamentary review.

Security of tenure was accepted as a fundamental element of judicial independence. Although Harvey remained a judge, he argued that the federal government had effectively removed him as Chief Justice of Alberta – essentially, a demotion – without cause or review, thereby violating s. 99. It raised the unacceptable possibility that governments could interfere with, and even end, judicial tenure, through administrative reorganizations. At least one SCC justice later sympathized with this argument and agreed that there were very important constitutional issues involved.[16] Harvey also took issue with the federal Department of Justice's interpretation of the *Judicature Act*. Even as amended, he argued the Supreme Court was one court, not two. The legislation did not create a new court but rather continued the existing court in the two divisions, and the only new appointments necessary were the extra judges and the chief of the Trial Division.

Harvey had already shown himself very sensitive to encroachment on the independence of the judiciary and the need for government to respect proper dividing lines. He had crossed swords with the provincial Attorney General, J.R. Boyle, when the latter's department made a change to the *Rules of Court* requiring the Lieutenant-Governor to approve any amendments to the Rules.[17] Harvey sent a blistering letter to Premier Charles Stewart, asking what the judges had done to cause the lack of confidence in their ability to set practice and procedure in the courts. Boyle replied, by way of apology, to explain that his department merely wanted to safeguard against any conflict or contradiction in the Rules, and there was no criticism of the bench implied.

STEPHEN AVENUE, CALGARY, CA. 1910. GLENBOW ARCHIVES, NA-5329-27.



The Chief Justice was also a man of great certainty. Reading through his judgments from the bench, one quickly forms the impression that Harvey rarely changed his mind on legal questions. As a judge, he understood that he might be overruled and was prepared to abide by that (as the events of 1918 had shown) but that didn't mean he had altered his view. Many years after the events of 1921–1923, safe and secure as Chief Justice, Harvey continued to insist that there was only one court in Alberta, the divisions did not constitute separate courts, and the federal government's reading of the amended *Judicature Act* was incorrect. In short, Harvey was convinced the federal Department of Justice was completely wrong.

Of course, even if he avoided discussing it, there was also wounded pride. Harvey does not seem to have been a particularly egotistical man, but neither was he ever described as humble. When correspondents addressed him without his proper title, Harvey would usually make a point of correcting them, often by telling them their letters would be more certain of reaching him if they were sent to the Chief Justice of Alberta. He was very particular, meticulous, and more than a little stubborn. His personal correspondence abounds with complaints of being overcharged, sometimes for trivial amounts, complaints of work not done, or not done well enough. Harvey hated anyone taking advantage of him, and would argue a point to ridiculous lengths at times – obviously on the principle of the thing. It is not surprising that on an issue with real stakes, he would not give in easily.

A Lull in the Controversy

After the September debacle, Harvey and his supporters spent the next several months trying to change Newcombe's mind about the Supreme Court reference. In the meantime, Harvey scrupulously avoided any of the prerogatives of his office and did not acknowledge his new position. When correspondents wrote to him as Chief Justice of the Trial Division, he replied to say he did not possess that title. When his letters patent arrived from Ottawa in October, he immediately wrote back, "I do not desire to treat this commission as in any way affecting me as I consider myself to be Chief Justice of the Supreme Court of Alberta."[18] Harvey sat on trials and fulfilled the administrative duties of the head of the Trial Division, but did so, in his mind, as rightful Chief

Justice of the whole court and an *ex officio* member of the Trial Division, not as the Chief Justice of that division.

While the question was in limbo, with Scott and Harvey running their respective divisions in fact but not necessarily in law, the atmosphere around the courthouse in Edmonton must have been strained. Stories later made the rounds that the two judges, now bitter rivals, would enter court or ceremonial proceedings shoulder to shoulder and even got jammed in a doorway once. These tales were likely apocryphal. As mentioned above, Harvey worked strenuously not to allow the situation to become a personal conflict with Scott, as he did not see it that way himself. Opening the new Trial Division, he stated that his brother's appointment was merited due to his long service on the bench. Scott's attitude was less clear. But if Scott felt animosity, it was not disclosed publicly. Given the situation, it was remarkable, especially compared to other clashes of judicial personalities. Inevitably, however, there was a showdown between the two men.

THE SCOTT COURT

The question of who was properly the Chief Justice of Alberta remained to be decided, but even Harvey recognized that Scott was, for the moment, the head of the Appellate Division. The opening of court was delayed for a few days, but once it was obvious that the government was not going to change its mind, the Court returned to work.

Scott was not destined to put much of a mark on his court. His health had been poor for a number of years and the stress of the controversy didn't help. He was often away ill and consequently he did not have much of a presence in his Court's jurisprudence. In fact, the Court, which had been expanded to five judges, often sat with just three.[19] This was ironic, as one of the changes in the *Act* establishing the Appellate Division was the requirement that the whole court sit on appeals. The old quorum of three judges was now only supposed to be used in special circumstances.

Once the Appellate Division was expanded to five judges, the government decided to appoint someone straight from practice, rather than elevating another member of the existing Supreme Court, a novelty for the Court. Alfred Henry Clarke was another Ontario transplant who had come to Calgary in 1910 after a long career in law and politics, becoming a star barrister at a prominent Calgary firm. Clarke proved an able addition to the court, which, given Scott's frequent absences, was important.

Not surprisingly, in Harvey's absence, Stuart and Beck dominated the Court's law-making. Hyndman and Clarke were active, but their senior colleagues did most of the writing, while poor Scott hardly seemed to put pen to paper as Chief Justice. Interestingly, although Harvey was not there to be a foil to his more liberally inclined brother judges, they did not embrace unfettered activism. It demonstrated that Beck and Stuart, like most Canadian judges of their generation, remained largely orthodox despite their broader and more liberal approach to the Court's law-making role.

The SCC Weighs In

The Court continued on, as it had to, but hanging over both divisions was still the question of how the contretemps would finally be resolved. It was not for lack of energy on Harvey's part. After the federal government refused to ask the SCC for an opinion, Harvey looked at other options. Newcombe had told him to challenge Scott's appointment via *quo warranto* proceedings. This essentially meant taking Scott to court and requiring him to prove he had the right to his office. Harvey was dead set against this course, even when friends urged him to consider it. He did not want to involve Scott personally.

PRIME MINISTER WILLIAM LYON MACKENZIE KING, 1940. PAA P5347.

Harvey did approach Brownlee about having the provincial government put a reference before the Appellate Division. Its opinion would not have sufficient authority to end the dispute, but it might allow further appeal to the SCC or the Privy Council. Harvey even suggested that the appeal court could make a *pro forma* judgment in favour of the federal government to allow him to appeal.[20] There was some uncertainty about the effectiveness of this route. Counsel for the Attorney General's department was not certain if any appeal could be taken from such a reference, though Harvey thought he would just need the leave of the appeal court. However, it would have been awkward for the Alberta judges. Although no one said so directly, Scott might also choose to oppose a reference to the Appellate Division, almost certainly dooming the plan.

A timely change of administration in Ottawa made this avenue unnecessary. In December, 1921, only three months after Scott was appointed Chief Justice of Alberta, William Lyon Mackenzie King and the Liberal Party took power. Harvey received a sympathetic hearing from the Prime Minister. Lomer Gouin, the new Minister of Justice, asked the SCC to hear a reference on the question, despite continued resistance from Newcombe. An Order in Council was signed on February 10, 1922, asking the SCC to answer five questions: whether Scott's 1921 commission made him Chief Justice of Alberta; whether Harvey's made him Chief of the Trial Division; to what extent either might be ineffective; whether Harvey's 1910 commission made him Chief Justice of the Appellate Division; and what office he held beyond his 1921 commission.

Harvey was not entirely happy with the phrasing of the reference, mostly because he was worried, and justifiably so, that the matter was turning into a contest between himself and Scott. He lobbied hard for the federal government to provide counsel for both sides in order to make the reference a neutral question about the administration of justice. He was also understandably worried about the costs of the reference, costs he might have to shoulder.

The reference came before the six justices of the SCC on March 14, 1922. Eugene Lafleur of Montreal, considered one of Canada's leading advocates and an expert on constitutional law, was acting for Harvey thanks to Sidney B. Woods, former Alberta Deputy Attorney General, and a close friend of both men. Newcombe represented the federal Minister of Justice. Scott did not retain any counsel, but this was not necessary. Newcombe in effect defended Scott's right to be Chief Justice by defending the government's interpretation of the *Judicature Act*. Lafleur, writing to Harvey later, said that the deputy minister hardly took a neutral stance, and for all intents and purposes was Scott's counsel.

The judges of the SCC ruled for Harvey four to two. Justice Islington and Chief Justice Davies dissented. In their estimation, the *Judicature Act*, as amended, did indeed create two new courts, even if they were called Divisions of the Supreme Court. Islington pointed out, for instance, that the 1914 amendment that first created an Appellate Division never referred to a Trial Division, but only created a new name for the Supreme Court *en banc*. Thus, the creation of a separate Trial Division in the later *Act* showed the intention was to have two separate courts. Davies felt that the amendments demonstrated a clear change of heart of the Alberta legislature and that the new court was not a continuation of the old one.

The other judges took the opposite view. Justice Brodeur argued that the original 1919 s. 6 was not *ultra vires*, nor did it interfere with the federal appointment power. Two of the judges argued that even the amendment to s. 6 did not necessarily rule out Harvey's claim. Surely, the Alberta legislature had not envisioned demoting Harvey or entirely relieving him of office given the rules in s. 99 of the *BNA Act* for the dismissal of judges. As Justice Mignault put it: "I would not, for the reasons stated above, give the preference to a construction that would deprive the

existing Chief Justice of the Supreme Court of his high office, and possibly leave the Governor in Council free not to reappoint him to any judicial office."[21]

All the judges, however, for or against, found themselves trying to divine the intent of the legislature from the *Judicature Act*. As Chief Justice Davies sharply remarked, "the difficulties of reaching a firm and clear conclusion... are very great owing to the slipshod and inartistic manner in which the amendments...were framed and passed."[22] The clumsy amendment was fingered as the ultimate cause of the debacle.

The SCC had vindicated Harvey except for one small problem. The SCC's opinion on a reference was not a legally binding judgment. While a reference opinion was usually treated like a judgment, this was not necessarily so. The federal government, the province, and Scott could disregard it. Now the question became: Was anyone going to do anything about the SCC opinion?

Scott was in Victoria when the decision came down. Harvey wrote to him to suggest they should continue to preside over their respective divisions for the moment. His tone can be read as friendly but perhaps a bit patronizing. There was an ominous silence from Scott. The latter made no attempt to see Harvey when he returned from the coast. As the end of June approached, fall sittings had to be decided upon. If Harvey continued to preside over the Trial Division, he was admitting defeat. With the SCC decision to back him, Harvey decided once again to declare his claim to the office of Chief Justice.

So on June 21, 1922, he went into the judges' chambers and told Scott he planned to take his "proper place" on the Appellate Division that fall. Scott promised Harvey a fight. As Harvey recounted: "He said that if I did, there would be an unholy row."[23] With the other judges as appalled witnesses, Harvey retorted: "It never occurred to me that either of us would fail to show respect to the Supreme Court if a reference were made as the judges requested." Scott shot back that he had never agreed to be bound by the opinion, which Harvey had to concede. The uncomfortable interview ended on that inconclusive note. It was clear that Scott, too, was not going to give up his office without a fight.

The Privy Council Has the Final Say

Chief Justice Scott now put into motion the next act. The SCC reference opinion gave him a route to appeal to the Privy Council, and he had prominent Calgary lawyer and politician R.B. Bennett apply for leave. Scott did not waste much time trying to persuade the government to undertake the appeal on his behalf. He was prepared to do it in his own name. The Department of Justice sent Newcombe to represent the Government of Canada. Harvey and the Attorney General of Alberta were named the respondents on the appeal. Eugene Lafleur, representing Harvey, was assisted by the firm of Blake and Redden, which specialized in Privy Council appeals.

Harvey was becoming weary of the contest. He once again lobbied the federal government to pay the costs of appeal for both himself and Scott, partly on the grounds that it was a constitutional matter, partly because he continued to be worried about the bill. The Privy Council, granting leave, had already said no party would recover costs. Harvey was convinced that the federal Minister of Justice was actively working against him, probably because of the way Newcombe had argued the government position at the SCC. Harvey wrote to his friend and supporter, Charles Stewart, the Minister of Interior (and former Premier of Alberta): "In fact, I sometimes feel so disgusted over the whole affair that I feel like throwing it all up and getting out."[24]

The situation was also telling on Scott. In increasingly poor health, he was unable to work at all for most of the year. Harvey declined to take advantage of this, leaving the other

appellate judges to handle the work and sticking with his duties in the Trial Division. Rumours began to circulate that Scott wanted to retire. This gave Harvey no peace, since the same rumors named Nicolas Beck as Scott's likely successor![25] Now Harvey began to suspect a conspiracy to keep him from ever reclaiming his title.

A Conspiracy?

Harvey has left behind his correspondence, which gives some idea of his motivation in contesting the title of Chief Justice. That advantage does not exist with David Lynch Scott, and to what degree Scott was responsible for his appointment is an open question. One historian has claimed that Scott and R.B. Bennett together planned the coup, but there is no direct evidence to support this contention.[26] Bennett and Harvey supposedly did not like each other: Bennett allegedly blamed Harvey for getting the University of Alberta established in Edmonton and not Calgary.[27] The two men may have had differences, but there is no evidence that Bennett had a particular vendetta against the Chief Justice, or that he saw the appointment of Scott as a way of getting even. Shortly before the controversy, Bennett and Harvey had

BARE-FISTED BOXERS IN THE CROWSNEST PASS, CA. 1915. GLENBOW ARCHIVES, NC-54-536.

worked together cordially to lobby for increases in the salaries of judges. Bennett was actually out of government when the changes to the Alberta court were made, although he became Minister of Justice shortly thereafter. The Calgary lawyer likely had some role or influence in Scott's appointment, but there is nothing to suggest a Bennett plot against Harvey.

This is not to say that Bennett was sympathetic to the Chief Justice. A close friend of Harvey's, O.M. Biggar, formerly a prominent Edmonton lawyer and then Chief Electoral Officer of Canada, interviewed Bennett on Harvey's behalf shortly after the controversy erupted. Bennett claimed that the federal government had no intention of dispossessing Harvey. According to Bennett, now Minister of Justice, when creating an appeal court, other provinces had included a provision to protect the incumbent Chief Justice's position. Bennett told Biggar that when Scott had been appointed head of the Appellate Division, he had been surprised to learn that the *Judicature Act* had been written in such a way as to force the government to make him Chief Justice of Alberta as well. At the same time, Biggar told Harvey this about Bennett: "He would not, I think, consider it unfair to say he was not particularly disappointed that this was the legal position."[28]

Bennett's comments raised two questions. The first was why the Conservative Meighen government decided to appoint Scott head of the Appellate Division instead of Harvey, especially given that the latter had been sitting as head of the Supreme Court for over six years. The obvious answer is that Meighen, along with Bennett, who may have had great influence in the choice, surely wanted to promote one of their own in Alberta. In the atmosphere of patronage at the time, no administration would likely pass up the opportunity. The appointment may have been made innocent of, or oblivious to, the fact it would effectively remove Harvey from the post of Chief Justice of Alberta.

And thus the second question: Why did no one see the obvious problem regarding Harvey's position, given that several provinces had already easily dealt with it? When Ontario and British Columbia created appellate courts – the former as two divisions of the superior court, the latter as an entirely separate court – the respective governments had simply included a clause to say the sitting chief justice of the province would carry on and the title would then devolve onto the head of the appeal court once the sitting chief justice left that office.[29] Manitoba managed to do so as well. Harvey has to shoulder some of the blame. When he drew up the original 1919 legislation, he did not take this route, clearly thinking his wording looked after it, and probably because he wanted to be on the appellate court, not just have the title of Chief Justice for the province. It does seem a stretch to posit that no one in the federal cabinet realized what the implications would be of appointing Scott as Chief Justice of Alberta, but it has to be asked whether, even in the age of patronage, the government would have wanted the controversy it got.

As for Scott, it is not surprising that he fought to keep the title. It was the pinnacle of his career. Scott had his opportunity to be magnanimous in victory. The Judicial Committee met on July 13 and again the following day to decide the appeal. The Committee ruled in Scott's favour. Lafleur, Harvey's counsel, felt that Lord Atkinson and Lord Haldane were clearly in favour of Bennett's arguments, but that Lord Sumner and Lord Shaw leaned towards him. The fifth, Lord Buckmaster, wavered, but in the end held for Scott. The case thus decided, Lord Atkinson gave the judgment, unanimous in allowing the appeal. The Committee pointed out that the Chief Justice had not been a necessary part of the Appellate Division which had been set up in 1914 nor did he have any special right to be head of the division unless he happened to assign himself there for the year. They decided that the *Judicature Act*, as amended, in essence set up a new court, and thus two new positions of Chief Justice. Sending Harvey to the secondary

position did not, in their estimation, infringe on any right or privilege he had possessed.

The Privy Council did not really address the argument raised about s. 99. It made no difference. It had spoken and there was no further appeal. As far as Harvey was concerned, that ended the matter. He wrote to Lafleur:

> Whatever the ground there is nothing to be gained by further consideration and I feel no cause for concern because during the interval I have preserved my own self-respect and I believe I have kept the respect of the profession which is much more important than the actual question of the office.[30]

Some Wounded Feelings

Not that Harvey merely shrugged his shoulders and went back to work. He seriously thought about resigning and moving to Ontario. He inquired of his political friends about an appointment to the SCC. Charles Stewart had told Harvey earlier that the federal government planned to appoint him Chief Justice of Alberta when Scott retired, which looked likely to happen in the near future. This probably kept Harvey from leaving, though the possibility of Beck being appointed instead worried him greatly, and he made it clear that he would resign if that happened. If anything demonstrates Harvey's true emotional stake in the position, this may be it. The thought of being passed over again was unbearable.

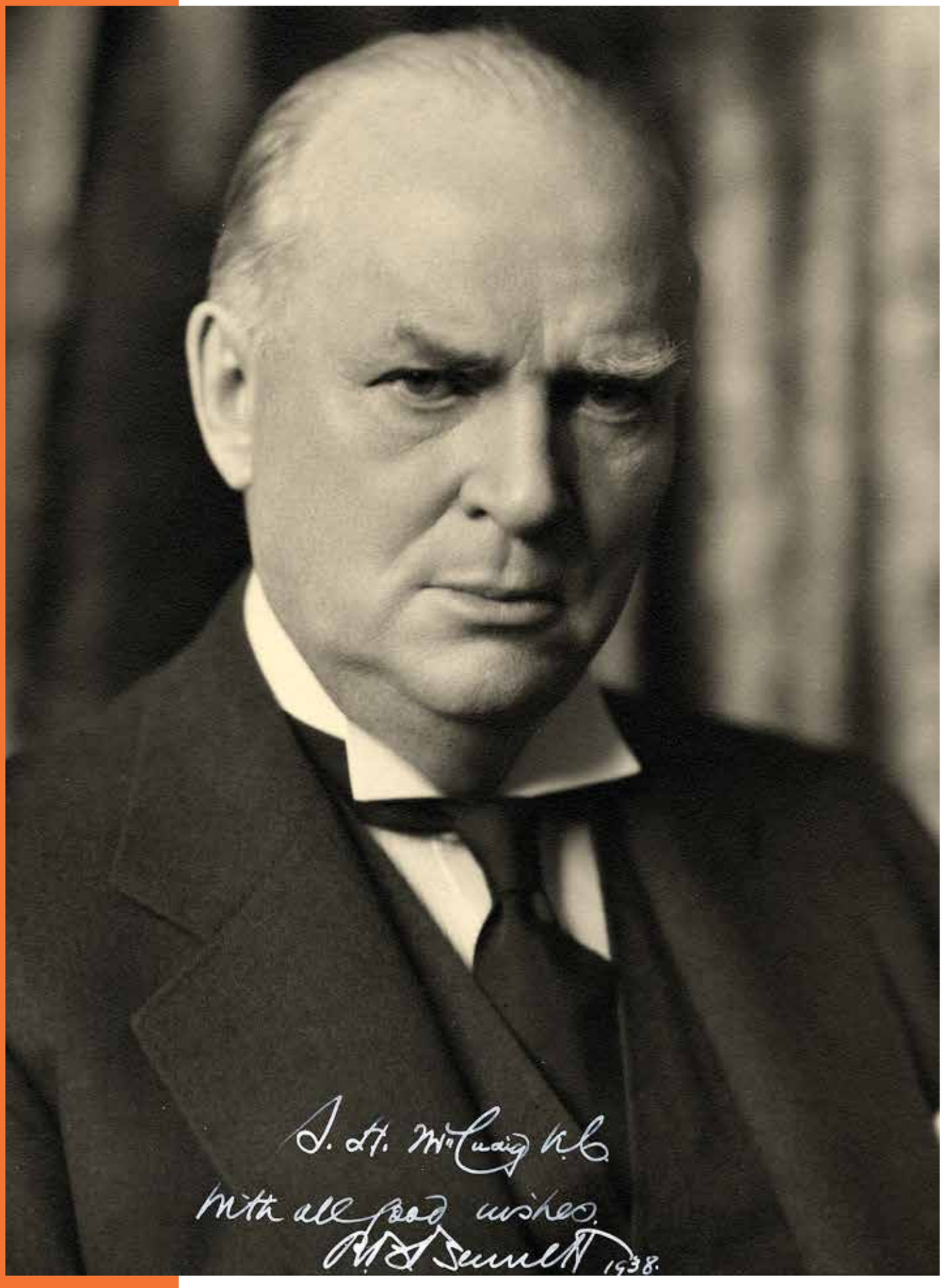
Harvey, even in his correspondence, tried to keep a stiff upper lip. But in a letter to J.E. Atkinson, an old friend and editor of the *Toronto Star*, the toll of the controversy was evident.[31] In his view, the Privy Council decision was politically motivated to save face for the federal government; King's Liberals had let him down and the provincial Liberals had stabbed him in the back; Sir Lomer Gouin was plotting with Beck to promote the latter; and so on. Some unkind things about Beck, dwelling on his Catholicism, were also said. Clearly, Harvey had been deeply wounded.

Harvey, however, declined to partake of any bitterness towards Scott for accepting the Chief Justice position. He may have thought of his own elevation before Scott in 1910. Certainly, as noted, Harvey tried very hard not to make the dispute a personal one between himself and Scott. As far as he was concerned, the issue at stake was judicial independence, and the injustice was his wrongful demotion at the hands of the government. Had Beck or Stuart been appointed, he would have fought just as hard.

Strangely enough, the Privy Council decision may have cleared the air between Scott and Harvey. Several months after the decision, according to Harvey, Scott told him directly that if he could get an increase in his pension, he was ready to retire, and that he had nothing to do with any plans for Beck to succeed him. This confidence showed that they were again on speaking terms. Years later, in a letter to Walsh, Harvey remarked: "The tension that existed between Scott and me for a time was entirely [eliminated] before his death when he again showed the same friendly spirit that had existed between us for many years."[32] This may have been nostalgia brought on by the passage of time, but it also seems consistent with Harvey's perceptions, at least, of his relationship with Scott.

Harvey may not have felt personal *animus* towards Scott, but the same could not be said for his opinion of J.R. Boyle, the Attorney General who had superintended the ham-handed amendments. Harvey evidently blamed Boyle for the entire debacle. The exact nature of Harvey's complaint is not known, but the strength of his feelings was clear. In response to a letter from Harvey, Boyle replied: "I read your letter with both surprise and sorrow – surprise that one so successful could be so bitter in the hour of greatest triumph – sorry you have allowed yourself to be persuaded into thinking that I have in some way done you an injustice."[33] Harvey's original letter to Boyle is gone, but it is not hard to fill in the content.

RICHARD BEDFORD BENNETT, 1938. LASA 66-G-1.


S. Lt. McCuaig R.C.
With all good wishes.
1938.

After Boyle became a judge, a number of his decisions were reversed by the Appellate Division with not-so-subtle rebukes.[34] However, on Boyle's death, Harvey graciously pointed out that in the matters that went on to the SCC, most of Boyle's decisions were upheld.

CONCLUSION

An incredible situation had been created in Alberta due to the change of a few words in one section of one statute. But this was not the sole cause of the chief justice controversy. Patronage and politics played a part, even if not necessarily through malign intent. If Horace Harvey had been appointed the Chief Justice of the Appellate Division in September 1921, there would not have been a controversy. Harvey might well have pointed out, in a missive to the Minister of Justice or his deputy, the very same point that he pursued relentlessly right up to the Privy Council, but it would have been a purely academic argument. Instead, the uncomfortable sharing of powers in the administration of justice between province and federal government, along with the games of patronage politics typical of the times, produced a much different outcome. One of the longest judicial careers in Canadian history was nearly ended prematurely, the collegiality of Alberta's superior courts was affected, and much time and energy was wasted on what should have been an unnecessary fight.

Some may view Harvey's role in the affair as a matter of ego. But there was much more at stake. The independence of the judiciary has long been one of the underpinnings of democracy. Although a layperson might not readily understand, there were two issues of judicial independence raised in the turmoil over the office of chief justice. One was the spectre of judges being demoted or even losing their commission through administrative reorganization. While Chief Justice of Alberta versus Chief Justice of the Trial Division may seem like splitting hairs, Harvey's appointment to the latter position arguably altered the meaning of judicial tenure. The other issue was the influence of patronage in the affair. Some might consider it disturbing if Scott was indeed made Chief Justice at the expense of Harvey because of on patronage. And yet, patronage in judicial appointments was a barely disguised fact of life in Canada in the first part of the twentieth century, and continues to be cause for concern even today. It might be noted that Harvey benefited too from that patronage, first when a change of government allowed him to pursue the matter further, and later when he was again appointed Chief Justice of Alberta.

If there was one positive note that came out of the whole affair, it was that the collegiality of the Supreme Court could – and did – survive the dispute. Unlike other judges in some clashes on Canadian courts, Harvey and Scott tried not to let it become personal. The other judges on the Trial and Appellate Divisions did not take sides and the Supreme Court did not descend into chaos. Even if their tempers became frayed at one point, Scott and Harvey managed to stay civil. Perhaps Harvey was right and the friendship between himself and Scott somehow survived through it all.

Endnotes

1 Exodus 2:14.

2 This story has been explored before. See Wilbur Bowker, "Which Is the Chief Chief Justice?," *Alberta Law Review* 30, no. 4 (1992), for another account of the episode.

3 The BC government passed the *Court of Appeal Act* in 1907, but it was not brought into force until 1909. Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910–2010* (Vancouver: UBC Press, 2010), 14.

4 LAC, MG 30 E87, vol. 38, file A 1920–1925. In a letter to John Boyle, the provincial attorney general, Harvey stated his preference that the three senior judges with the most appeal experience should be the ones to handle three-judge appeals. In another letter to Justice McCarthy, he turned down the latter's request to sit on the appellate division because he thought three of the justices should be very experienced in appeals, with one junior, and Hyndman had been picked for that year to give him experience.

5 LAC, MG 30 E87, vol. 18, file K,L,M 1923, letter, Harvey to Lafleur, March 25, 1923.

6 Ibid.

7 LAC, MG 30, E87, vol. 18, file K,L 1922, letter, Harvey to Lafleur, Feb. 6, 1922. Ontario replaced the Supreme Court of Judicature, consisting of the Court of Appeal and High Court of Justice, with the Supreme Court of Ontario consisting of the Appellate Division and the High Court (trial) Division. See Margaret A. Banks, "Evolution of the Ontario Courts 1788–1981," in *Essays in the History of Canadian Law,* ed. David H. Flaherty (Toronto: Osgoode Society, 1983), 523–29, for more details.

8 LAC, MG 30 E87, vol. 18, file K,L,M 1923, letter, Harvey to Lafleur, May 25, 1923.

9 Statutes of Alberta (hereafter SA), 1920, c. 3, s. 2.

10 LAC, MG 30, E87, vol. 17, file K,L,M 1921, letter, Harvey to Mathers, Oct. 7, 1921.

11 Ibid.

12 *Edmonton Bulletin,* Sept. 20, 1921.

13 LAC, MG 30 E87, vol. 17, file H,I,J 1921, copy, telegram to Newcombe, Sept. 19, 1921.

14 Ibid., telegram Newcombe to Harvey, Sept. 20, 1921.

15 *Edmonton Bulletin,* Sept. 22, 1921. Simmons and some of the other trial judges also never took a new oath of office, maintaining it was unnecessary, perhaps as a show of support for Harvey.

16 *Scott v. Canada*, [1922] 2 WWR 289, paras. 141 and 160. Chief Justice Mathers of Manitoba also agreed with Harvey: "It appears to be an invasion of the independence of the bench and I trust will not be allowed to pass without a most vigorous kind of protest." LAC, MG 30 E 87, vol. 17, file K,L,M 1921, letter, Mathers to Harvey, Oct. 17, 1921.

17 PAA, acc. 83.212, box 4, file 131.

18 LAC, MG 30 E87, vol. 17, file S 1921, letter, Harvey to Asst. Under Secretary of State, October 17, 1921.

19 See Westlaw Carswell, reported judgments for 1921–23. Although not conclusive as a biased sample, a perusal of the reported judgments of these years supports the claims above. Scott seemed to do best in 1922, but even here it appears that an *ad hoc* judge often replaced him at sittings.

20 LAC, MG 30 E87, vol. 17, file K,L,M, 1921, letter, Harvey to Chief Justice Mathers, October 21, 1921.

21 *Scott v. Canada*, [1922] 2 WWR 289, at para. 163.

22 Ibid., at para. 7.

23 LAC, MG 30 E87, vol. 17, file A,B 1922, letter, Harvey to Newcombe, June 21, 1922.

24 LAC, MG 30 E87, vol. 18, file P,R,S 1922, letter, Harvey to Stewart, Oct. 21, 1922.

25 LAC, MG 30 E-87, vol. 19, file A 1924, letter, Harvey to Atkinson, March 8, 1924.

26 James Gray, *Talk to My Lawyer* (Edmonton: Hurtig, 1987), 33.

27 Ibid., 32.

28 LAC, MG 30 E-87, vol. 16, file B,C 1921, letters Biggar to Harvey, Oct. 5, 1921.

29 Moore, *The British Columbia Court of Appeal,* 18.

30 LAC, MG 30 E87, vol. 18, file K,L,M 1923, letter, Harvey to Lafleur, Oct. 20, 1923.

31 Ibid., vol. 19, file A 1924, letter, Harvey to Atkinson, March 8, 1924.

32 LAC, MG 30 E87, vol. 27, file U,V,W,Y 1935, letter, Walsh to Harvey, Oct. 31, 1935.

33 Ibid., vol. 19, file B,C 1924, letter, Boyle to Harvey, Sept. 23, 1924.

34 Bowker, "Which Is the Chief Chief Justice?," 1198.

OPEN AIR STALLS IN EDMONTON'S MARKET SQUARE, CA. 1910. GLENBOW ARCHIVES, NA-1328-64814.

UNEMPLOYED DEMONSTRATION, 1932. GLENBOW ARCHIVES, NC-6-13014D.


Evening
in Paris
BOURJOIS

CHAPTER 4

THE HARVEY ERA, 1924–1949

When kings the sword of justice first lay down,
They are no kings, though they possess the crown.
Titles are shadows, crowns are empty things,
The good of subjects is the end of kings.[1]

David Lynch Scott died on July 27, 1924. One month later, Horace Harvey was appointed Chief Justice of Alberta and the Appellate Division of the Supreme Court of Alberta. He had come back into his own. It was the beginning of a remarkable twenty-five-year tenure as the undisputed head of the province's appeal court. Other judges came and went, some strong, some not, but Harvey was the constant presence who defined over two decades of the Appellate Division. It increasingly became a court in Harvey's image, conservative and orthodox in its approach to law. In his second term as the chief justice, Harvey was the dominant figure of the court in a way he had not been in the first.

There was both strength and weakness in this continuity, and Harvey's leadership, that can be seen in the Court's reaction to a cataclysm no one had dreamed possible: the Great Depression. The social, economic, and political upheaval of the Depression produced many challenges. Appeals concerning the civil unrest of the unemployed, the constitutionality of radical legislation of a radical new government, William Aberhart's Social Credit administration, and even the political scandals of the predecessor United Farmers of Alberta government tested the Appellate Division. The more rigid, formalist approach to law under Harvey made the Court unresponsive to some extent to the upheaval of the times, but it also provided a way of navigating the turmoil and preserving stability.

THE HARVEY COURT: AN OVERVIEW

A man is wise with the wisdom of his time only, and ignorant with its ignorance. Observe how the greatest minds yield in some degree to the superstitions of their age.

– Thoreau, Journal[2]

From a perspective eighty years on, Harvey's reappointment as Chief Justice of Alberta had an air of inevitability. But it was far from clear at the time. Unhappy with

HOUSE ON GRIERSON DUMP, 1934. GLENBOW ARCHIVES, ND-3-6613B.

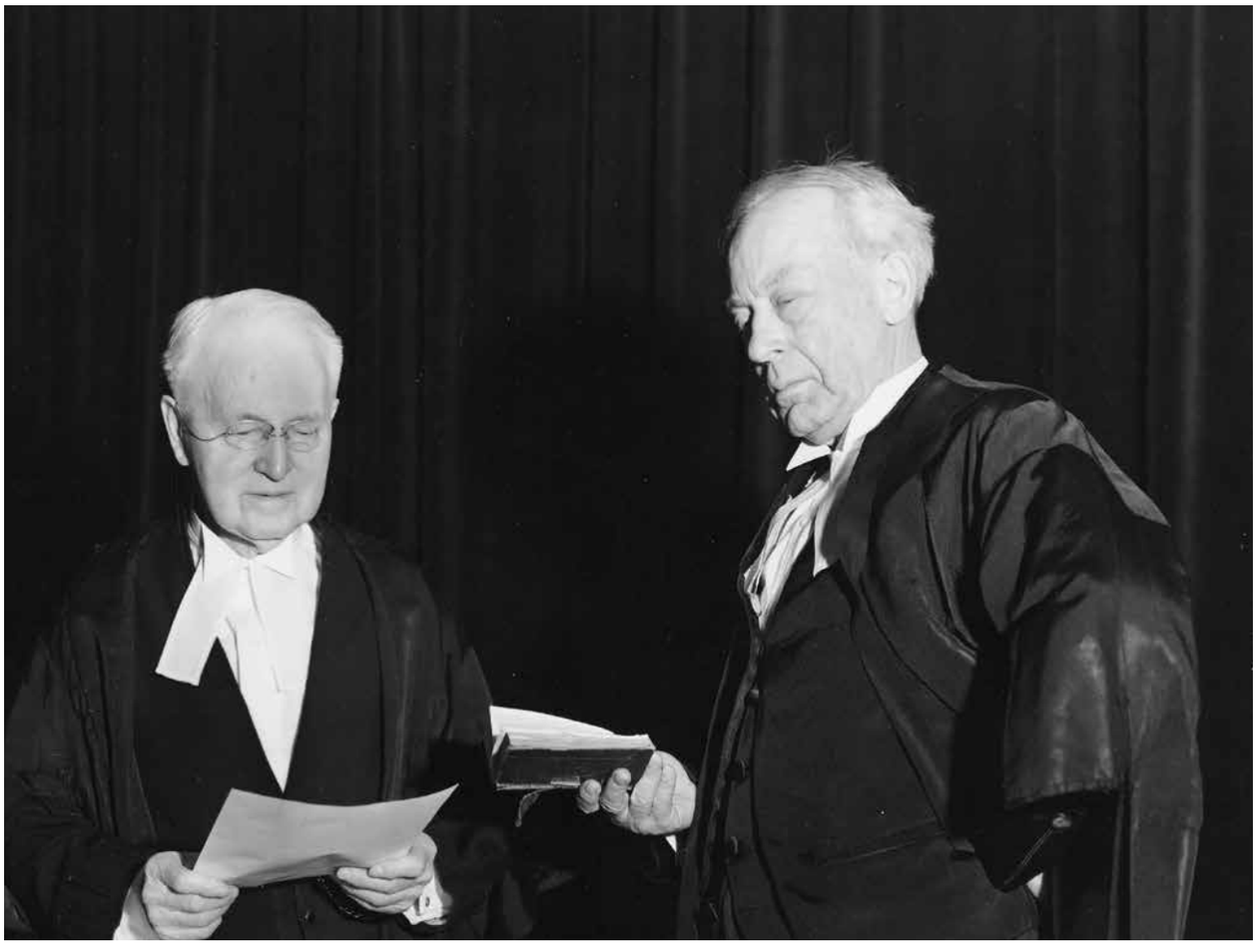
his perceived demotion to the Trial Division, Harvey had considered retirement. Even as it became clear that Scott was not likely to hold the office of chief justice for long, Harvey entertained doubts that he would be named head of the Court. Harvey informed his chief supporter in Ottawa, Charles Stewart, that he would resign if another judge was appointed.[3] Harvey had other friends in high places, however, including Prime Minister Mackenzie King. Aside from his previous record, there was likely some sense in Ottawa that an injustice had been done to Harvey that should be righted. Whatever the ruminations in cabinet, Harvey was elevated again to the top judicial post in Alberta.

The Judges: Harvey the Senior Jurist

For two generations or more of Alberta lawyers, Harvey *was* the Court of Appeal. Longevity played a role, but so did personality. Many members of the Alberta bar liked and admired him. Ronald Martland, an Edmonton lawyer and future justice of the SCC, said of Harvey's presence in the courtroom: "He was almost akin to the Almighty when he was sitting up there."[4] Another practitioner thought that "he was the absolute epitome of what a judge should look like."[5] Other lawyers had kind things to say about Harvey's ability. S. Bruce Smith, himself destined to be Chief Justice of Alberta, claimed he was "brilliant" and "thought like lightning."[6] Harvey apparently did have a remarkable memory. Smith recalled one incident when the Chief Justice left the courtroom and shortly returned with an old notebook with a reference relevant to the appeal under consideration.

Many lawyers were afraid of Harvey, who had a reputation for being stern and not suffering fools. He also had some perhaps not ideal qualities. Like any good Victorian, Harvey was a moralist. He had high personal standards that made him sometimes intolerant of the failings of others. J.J. Saucier, a prominent Calgary counsel, once said: "Horace Harvey was a bundle of virtues without a single redeeming vice."[7] Saucier had been closely associated with R.B. Bennett, and he thought it ironic that Bennett and Harvey didn't get along, since they were both such prigs. He recounted that he and his colleagues from Bennett's old firm had much rough handling from Harvey because of Bennett's support of Scott in the Chief Justice dispute.[8]

Undoubtedly, Harvey suffered a problem common among very able individuals – the conviction he was always right. Martland, for instance, thought that the Chief Justice was very thorough and well prepared in hearings but, because of this, generally had already made up his mind before counsel made their presentations. "You had scant hope of changing his mind, and



not much hope of winning with the others if Harvey went the other way."[9] While capable of flexibility, when Harvey had made up his mind, he was certain he was right and was sometimes prepared to go to extraordinary lengths in defence of his position.

Harvey's Stubborn Streak: The Gallagher Trial

Outside the chief justice controversy, probably nothing illustrated his obstinacy more than the Gallagher trial, also known as the Carbon murder mystery. Harvey, at this point still in exile in the Trial Division, sat with a jury on the second trial of former NWMP officer John Gallagher, owner of a small coal mine in Carbon, Alberta. Gallagher was tried for the murder of another mine owner, John Coward. A jury convicted Gallagher but he successfully appealed for a new trial. Thanks largely to the mysterious – and

CHIEF JUSTICE HARVEY GIVING H.H. PARLEE OATH OF OFFICE, 1946. LASA 62-G-20.

convenient – death of a crucial Crown witness from the first trial, Gallagher was acquitted. Harvey's conduct of the trial was impeccable. After pronouncing the verdict, Harvey quietly added that only Gallagher knew the truth of what had happened in Carbon.[10]

Gallagher's legal troubles were not over. He was investigated but never charged in another murder. Then, in 1924, he was before Harvey again on charges of arson and perjury. His mine had burnt down and the police had decided it was a scam to collect the insurance. Gallagher was found guilty – and the courtroom was shocked when Harvey sentenced him to life imprisonment. Clearly, this was the sentence for the murder that Harvey was convinced Gallagher had committed. Inevitably, there was an appeal. "The trial Judge must have proceeded upon some wrong principle or given too great weight to particular circumstances," wrote Stuart, knowing full well Harvey's game.[11] The appeal court reduced the sentence to ten years.

Doubtless Harvey knew the sentence was unlikely to stand. He opened himself to criticism, even ridicule, in order to send a message to Gallagher. Like the chief justice controversy, it illustrated Harvey's stubborn certitude. Paradoxically, the same confidence in his judgment made Harvey a strong leader of the Court. This strength was also a weakness, as will be seen, when Harvey's judicial opinions became perhaps more influenced by his personality than he might have realized.

Alfred Clarke, Pithy and Astute

Over Harvey's long tenure, not surprisingly the appellate bench saw a complete turnover of personnel. In an age where judicial postings were for life and most never retired, the Chief Justice outlived many of his colleagues, even some appointed well after him.

There was one new face that greeted Harvey on his return to the Appellate Division, Alfred Henry Clarke. Born in Manilla, Ontario in 1860, Clarke had studied law at Osgoode Hall and had his call to the bar in 1883. He settled in Essex, Ontario, and practised there and in Windsor for nearly thirty years. In addition to his practice, Clarke was also the local master of the Supreme Court and the County Attorney. After being elected four times as a Bencher for the Law Society of Upper Canada, Clarke was given a life appointment. Very active politically, he was elected in 1904 to Parliament as the Liberal member for South Essex and was returned in the next two elections. After Laurier's defeat in 1911, however, Clarke resigned his seat and headed west.

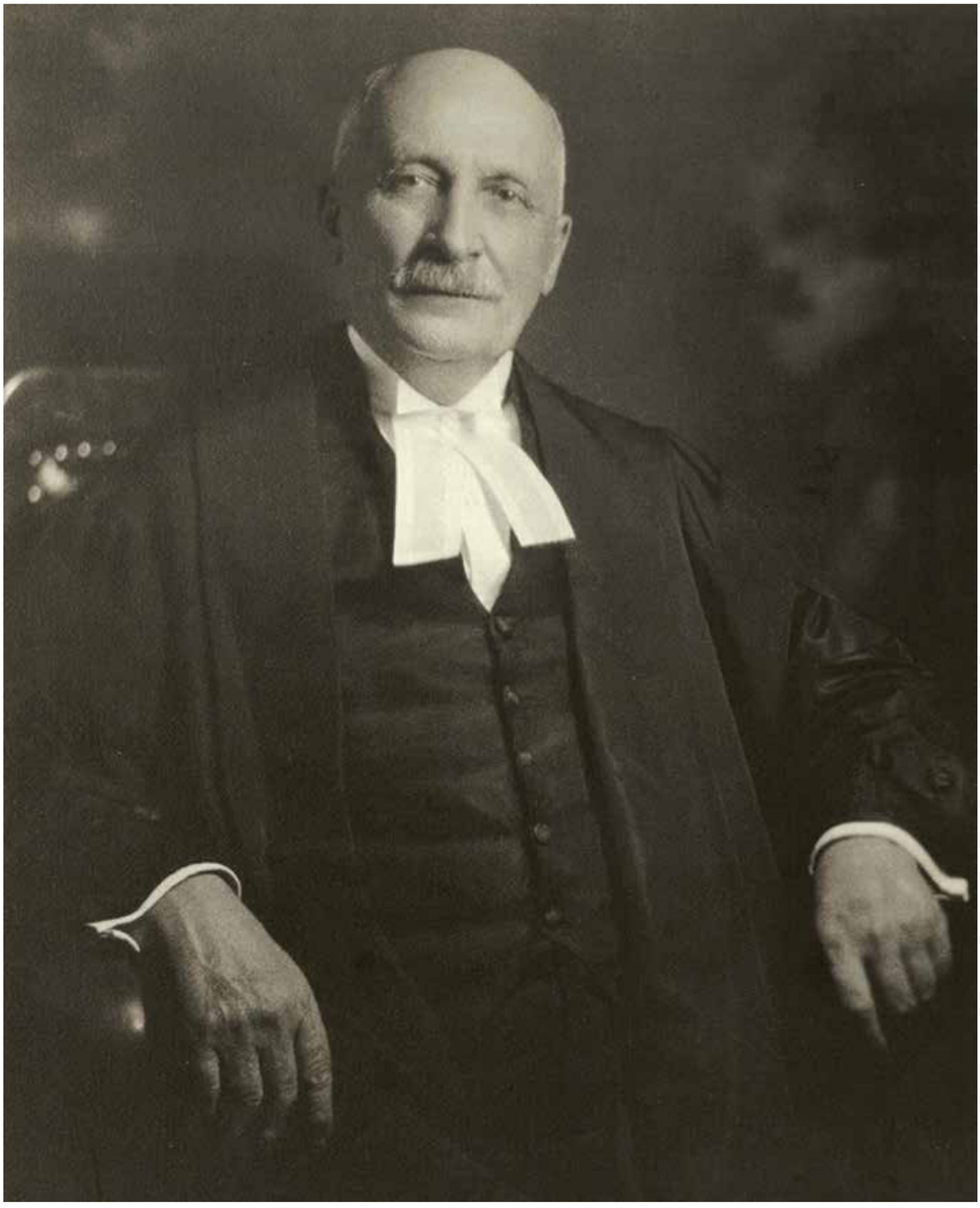
Why Clarke decided, at the age of fifty-two and presumably well established, to leave Ontario is not known. But the leading Calgary firm of McCarthy, Carson and Macleod (now Norton Rose Fulbright) soon recruited Clarke to replace Walsh, who had just been appointed to the Supreme Court. Clarke quickly became a mainstay of the Calgary bar and was elected a bencher of his new law society.

Clarke's appointment to the Appellate Division must have been a bit of a surprise, as he was a relatively elderly sixty years old and had practised in Alberta for less than a decade. He was also a Liberal while a nominally Conservative government was in power.[12] Clarke became the first Alberta appellate judge not to have served as a trial judge, since all the previous appointees had joined the *en banc* court. As a three-time MP, however, Clarke was in line for some sort of reward. As it turned out, he was a good appeal judge, getting off to a strong start on Scott's court. He wrote frequently and was not afraid to dissent. He has been described, reasonably accurately, as a "strict constructionist" and therefore got along well with Harvey.[13] Clarke, however, also preferred to err on the side of equity, as shown in some of his judgments in negligence cases.[14] Overall, he proved to be a solid addition to the Appellate Division.

Charles Mitchell, Judge to Politician to Judge

After Clarke in 1921, the next appointments followed on the loss of two of the original members of the Court. In 1926, Charles Stuart died. He had not enjoyed robust

ALFRED HENRY CLARKE, LASA 5-G-7.



health and suffered from heart problems. When he took sick with what seemed like a case of the flu, however, no one expected him to be dead within two weeks. Game to the end, Stuart wrote Harvey shortly before his death to say that he would probably need a little more time off before getting back to work, but if they needed him, he would come in the next week.[15] Stuart left a widow and three children. Judges' pensions did not settle on their wives; widows were given an award of only two months' salary. The judges took up a collection, and Harvey persistently lobbied the government for an extra allowance of money for the Stuarts.[16]

Stuart's replacement was Charles Richmond Mitchell, an easygoing man known far and wide as Charlie. Mitchell was the second Maritimer, after Hyndman, to join the appeal court. He was born in Newcastle, New Brunswick, in 1872. His uncle, Peter Mitchell, was considered one of the Fathers of Confederation. After a private school education, Charles Mitchell attended the University of New Brunswick and then went to King's College in Nova Scotia for his law degree. After getting his call to the New Brunswick bar and practising a year, Mitchell headed west in 1898 and set up shop in Medicine Hat. He became the city solicitor as well as the local Crown prosecutor and agent of the federal attorney general. When the District Court of Alberta was established in 1907, Mitchell was named to the bench in Calgary.

At the behest of Arthur Sifton, Mitchell resigned after only three years and ran for provincial office. He was initially the member for Medicine Hat and joined Sifton's cabinet, but lost his seat in a contentious, closely fought election in 1913. Mitchell was too useful to Sifton as a lieutenant, and a safe seat was found for him. He served as provincial treasurer, attorney general, and minister of health, public works, education and municipal affairs. Surviving the Liberal rout of 1921, Mitchell inherited the leadership of the party three years later. In 1926, with the Liberal Party clearly struggling, Mitchell took his reward for long political service and went to the appeal court. Mitchell, however, never came close to filling the shoes of Charles Stuart.

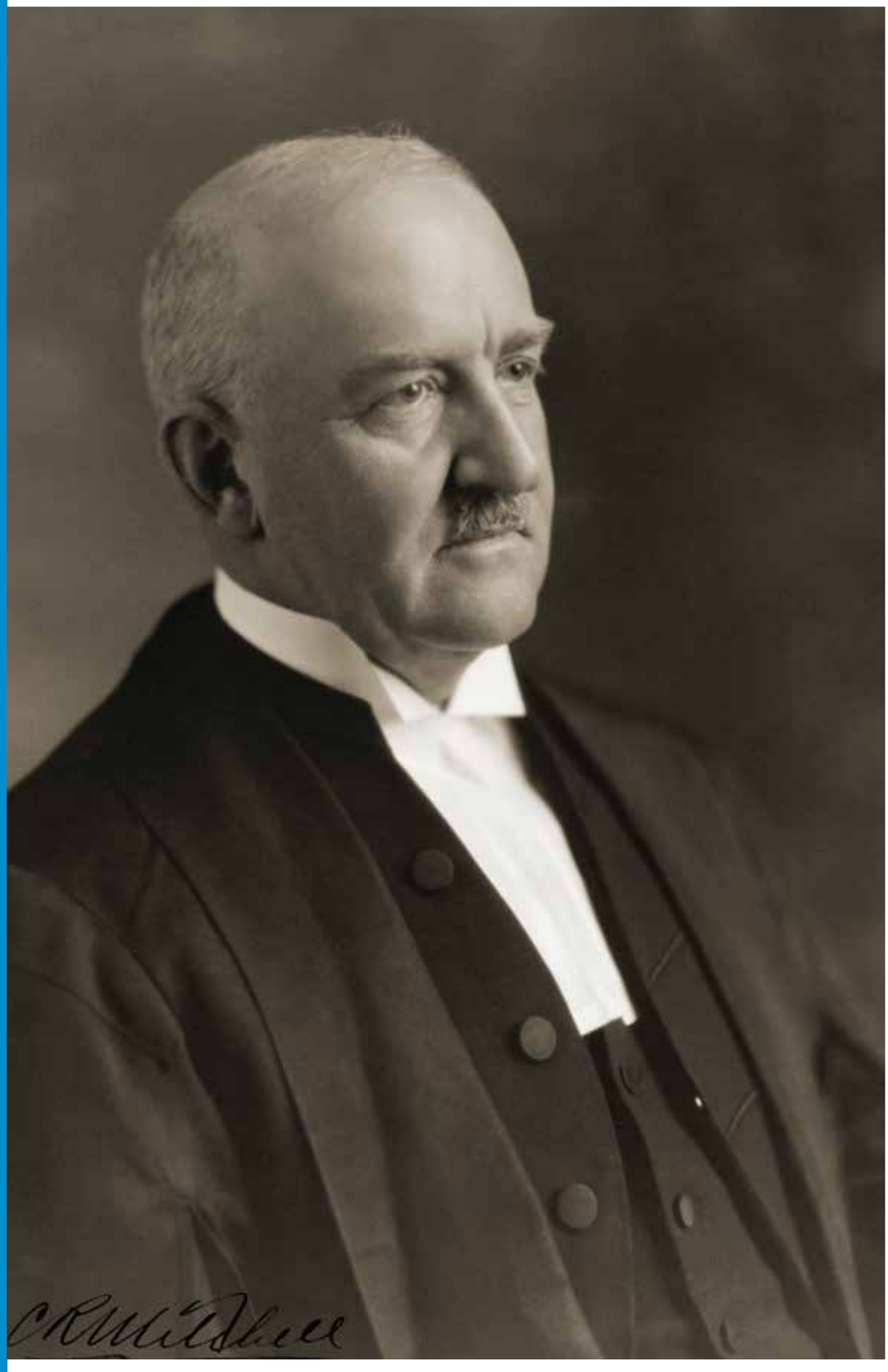
Henry Lunney, the Individualist

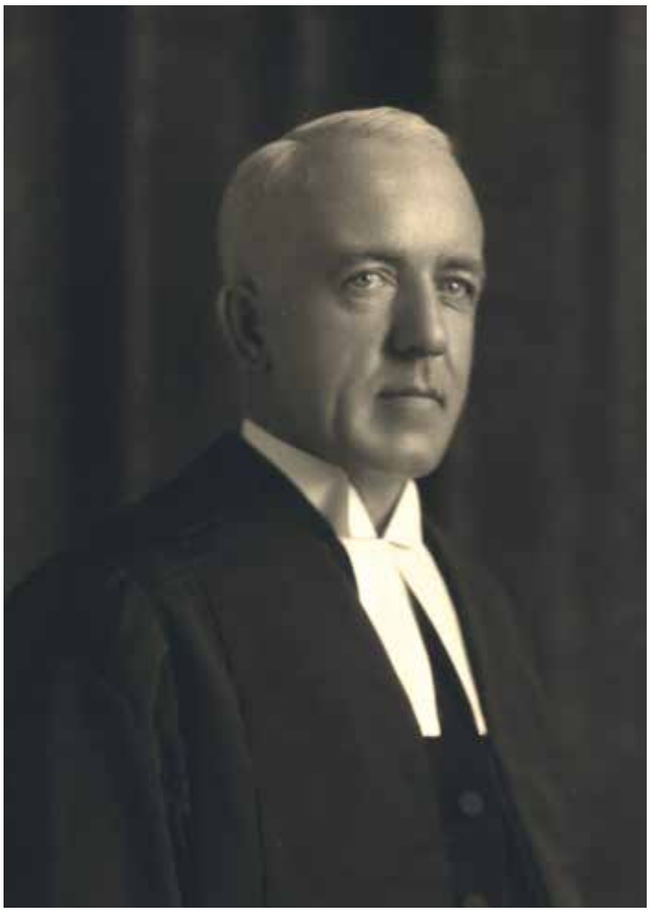
The same was true of Beck's replacement, Henry William Lunney. Beck was in Seattle in 1928 and on his honeymoon with his third wife when he died of a heart attack – after a game of golf. Although Beck's health had not been hale for a number of years, his death, like Stuart's, came a bit suddenly. The loss of the "Great Dissenter," fully the equal of Harvey and Stuart, was a blow to the Court.

Henry Lunney was in some respects a fitting replacement for Beck. He was independent minded as a judge, called the "quintessential individualist" by one authority.[17] Another Maritimer, Lunney hailed from Saint John, New Brunswick, born there in 1885. A large number of lawyers from the Atlantic Provinces had come to Alberta during the boom years before World War I. Lunney received his education from the University of New Brunswick and then King's College for his law degree, joining the bar of his native province in 1910. Interestingly, Lunney worked as a newspaper reporter in Saint John and briefly joined the *Montreal Star* before coming west in 1911 to work for the *Calgary News-Telegram*.

The following year, he was called to the Alberta bar and went into partnership with Clifford P. Reilly. They were joined by Alphonsus Lannan, who articled with Lunney, and the firm eventually became Lunney and Lannan. The latter developed quite a divorce practice, still considered a little disreputable at the time.[18] The partnership did a fair amount of litigation, and Lunney acted as agent for the Attorney General for liquor act prosecutions, was involved in some noteworthy trials, and was appointed a KC in 1921. Lunney was also involved in Liberal party politics, running unsuccessfully against R.B. Bennett in 1926. Although a respectable lawyer, Lunney had one of the thinner resumés of appointees to the Court to that date. However, he was a Roman Catholic as well as a good Liberal. With Beck's death,

CHARLES RICHMOND MITCHELL, LASA ACC. 2002-028.





there was no Catholic on the Appellate Division, and it was still considered necessary to ensure Catholic representation in judicial appointments.

A.A. McGillivray, the Consummate Barrister

If Mitchell and Lunney were not the strongest members of the Court, the same cannot be said for the next two additions. Hyndman decided to retire from the Appellate Division in 1931 to go to Ottawa. Walsh moved to the appeal court to replace Hyndman but was almost immediately named Lieutenant-Governor. The government replaced him with one of the brightest lights of the Alberta bar, Alexander Andrew McGillivray. He became a member of Harvey's court in 1931, and except for his early death, he might have succeeded the chief or possibly even gone to the SCC. His son, William Alexander McGillivray, became Chief Justice of Alberta in 1974.

"A.A." as the elder McGillivray was known to his colleagues, was from London, Ontario, born there in 1884. He received his legal education in Nova Scotia at Dalhousie University after attending St. Francis College in Quebec. Shortly after receiving his law degree in 1906, he journeyed to Alberta and was one of the last advocates admitted to the Law Society of the Northwest Territories. He practised in Stettler for three years before moving to Calgary and forming a partnership with Thomas Tweedie, which lasted until the latter's appointment to the bench. He then partnered with a brilliant young Jewish lawyer, Sam Helman. Once in Calgary, McGillivray's career took off, and by the early 1920s, he was considered a leading member of the city's bar. McGillivray showed himself to be a versatile lawyer, even in an age where most practitioners were generalists. While primarily a barrister, he also did some top-notch solicitor work, laying the legal framework for the Alberta Wheat Pool.

It was in the courtroom that McGillivray really shone. He was a talented litigator but his public fame came from his criminal work. A.A. "worked both sides of the street" as a defence counsel and as a Crown prosecutor, particularly during Prohibition. The provincial government handpicked him to prosecute the *Picariello and Lassandro* murder trial in 1922. He then led the defence team in the notorious *Solloway and Mills* stock fraud trials. His successful defence of Sam Bronfman, a notorious bootlegger and founder of the Bronfman family fortune, catapulted McGillivray into the national spotlight. Frequent appearances before the SCC and the Privy Council in England solidified his reputation as a leading member of the bar in western Canada, if not the country.

Not everyone liked McGillivray. One prominent lawyer remembered him as an egotistical dandy.[19] McGillivray did take great care over his appearance, dressing to the

HENRY WILLIAM LUNNEY, LASA 5-G-6.

ALEXANDER ANDREW MCGILLIVRAY, LASA 48-G-73.

nines and never seen on a workday in anything less than a formal suit, complete with top hat.[20] He was deeply involved in the Conservative Party on the provincial level, serving as an MLA for three years and leader of the party for four. His appointment to the bench was no surprise, except that he gave up an exceptional career as counsel. With the deepening of the Depression, however, his decision might have been a canny move financially.

Frank Ford, the Academic

In 1936, Mitchell became the first Appellate Division judge to move to the Trial Division, replacing Simmons as chief justice.[21] Frank Ford then moved from the Trial Division to replace him on the Appellate Division. Ford was a prominent Edmonton barrister practising with the Emery firm when he was named to the Trial Division in 1926. Born in Toronto in 1873, Ford had his education at the city's university and then Osgoode Hall. He had an accomplished career before he came to Alberta in 1910. After joining the bar in 1895, he became the private secretary to Ontario politician D'Alton McCarthy and joined his law firm, McCarthy Osler, Hoskin and Harcourt, and was made a partner. Ford was also secretary and solicitor to Ontario's premier and attorney general, and then in the provincial treasurer's office.

A.A. MCGILLIVRAY AS A BOY, 1895. LASA 48-G-62.

In 1904, Ford left for the west, settling in Saskatchewan, where he practised for two years before taking the job of deputy attorney general for the new provincial government in 1906. Four years later, he moved to Edmonton, where he established a large litigation practice which included appearances at the SCC and two visits to the Privy Council. Ford lectured at the University of Alberta law school and was made a professor in 1923. A bencher for both prairie law societies, Ford also had the unusual distinction of being appointed a KC in three different provinces – Alberta, Ontario, and Saskatchewan.

On both the Trial and Appellate Divisions, Ford had a reputation as a stickler for form and proper decorum. He was exacting with applications to the Court and was very hard on young practitioners, but the consensus was that it was probably for their own good. He loved the protocol of the English courts. When King George V died, Ford insisted that the Court wear "weepers," white over-sleeves symbolizing the need to wipe one's eyes clear of tears of grief.[22] Ford also possessed an amazing store of arcane legal knowledge. Another story concerned a time in chambers when Ford and a counsel of Scots origin descended into a heated discussion about the proper formula for administering an oath in the Scottish fashion.[23]

Ford had a very academic approach to the law, no doubt rooted in his teaching. He meticulously researched the case law. And as with so many of the judges appointed to the Appellate Division in this period, he was very solicitous of the rights of the accused. Ford was also a good constitutional lawyer, who tended towards a centralist federal approach as opposed to one focused on provincial rights. He had ambitions to go to the SCC and learned French in his seventies just in case he was asked even at that advanced age.[24]

Albert Ewing, the Respected Trial Judge

McGillivray died of a sudden heart attack in 1941, cutting short his lustrous career. He was replaced by a promotion from the Trial Division, Albert Fleming

FRANK FORD, COURT OF APPEAL COLLECTION.

Ewing. Considered one of the best trial judges of that era, Ewing was another transplant from Ontario, born in Elora in 1871. He went to teacher's college in Toronto and taught in Milverton, Ontario, before coming west and entering into articles with Sifton, learning his law the old-fashioned way. Ewing started practice in 1902 in Calgary but moved to Edmonton and formed a partnership with Alan D. Harvie, which became the firm of Ewing, Harvie and Bury. Active in politics, Ewing was elected a Conservative MLA in 1913 and was house leader, setting himself up well for the bench, and receiving an appointment after R.B. Bennett became prime minister. Ewing also served as the chair of the board for the *Farmers Creditor Arrangement Act* and headed the royal commission on the Nordegg mine disaster. Ewing had an interesting personal life, first married to a much older woman and, after being widowed, to one much younger.

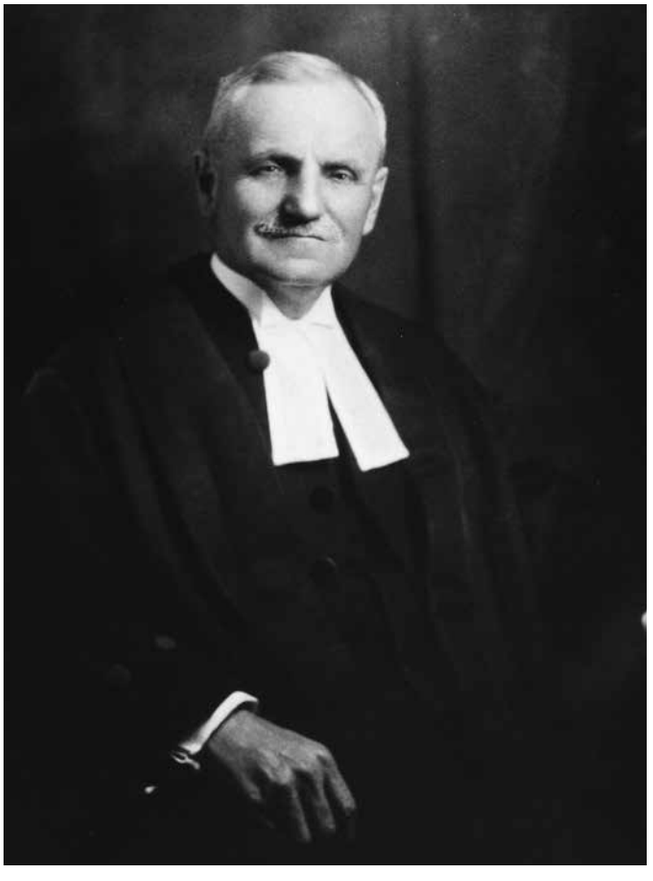
Although the author of several influential judgments while on the Trial Division, Ewing's short tenure limited his impact on the appellate court. He died in 1946, only a week after retiring due to ill health. Clarke died in harness in 1942. He collapsed at work and two colleagues carried him home, where he suffered a fatal heart attack. His replacement, William R. Howson, came from the Trial Division but only spent two years on appeals before moving back as Chief Justice of the Trial Division. William Alexander MacDonald, Harold Hayward Parlee, and George Bligh O'Connor joined the Court in a short two-year span at the end of World War II. Their careers, however, largely belong to the years after Harvey.

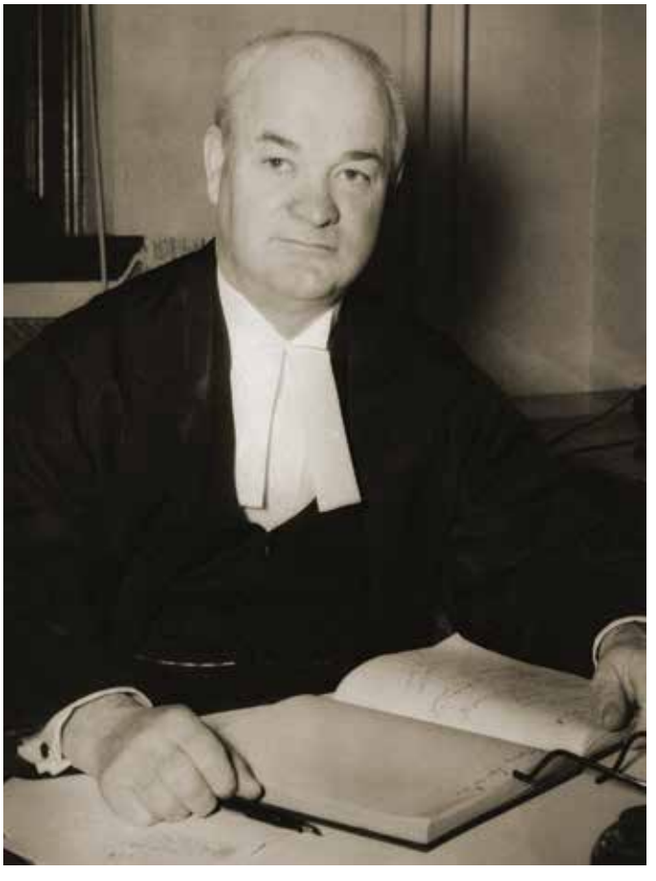
Delivery of Justice: Practice and Procedure of the Court

The Right Number of Judges

One item high on Harvey's agenda upon his return was redefining a quorum for the Court. When the Appellate Division was founded, s. 6 of the *Judicature Act* also required that it sit as a full court of five. Previously, a quorum of three had been sufficient for an appeal. Provision remained for a panel of three in special circumstances – for instance if a judge was sick or had recused himself and time was of the essence for the appeal – but it was clear this was for extraordinary conditions. Further, under no circumstances was an appeal to be considered by an even number of judges.

Harvey considered this amendment requiring the Court to sit as a full court another mistake and spent a year trying to undo it. Scott too had disliked the amendment. Both preferred an even-numbered panel, which was still common in Canada, believing this approach was more





respectful of the trial judge's decision. Harvey thought a bare majority of two to one was less conclusive of an appeal's merit. Since ties on even panels resulted in a dismissal, a larger majority was required to overrule the trial judge.[25] Scott had also foreseen that the requirement for a full panel would be impractical because one judge could often be away ill or on leave, and he pointed out that none of the eastern provinces restricted their appeal courts in such a way.[26] During his brief tenure as Chief Justice, Scott complained about this provision and, supported by the other appellate justices, asked the provincial government for an amendment to allow flexibility in setting panel size.

Given that the judges did not like the amendment requiring the whole court to sit on an appeal, the obvious question is this: Why was it made? The record is silent. Two distinct possibilities exist. One might be the belief that the whole court should give a decision whenever possible, to avoid any question whether the decision had the same weight and authority if only some judges, rather than all, decided it. Another is that barristers preferred a hearing before the full court. It was considered more prestigious, and especially in criminal appeals, it created more chance for success. There does seem to have been some pressure from the profession. Harvey pushed back from this, remarking some years later:

> I am rather disposed to agree with you that the work of the Trial Court is of sufficient importance to disregard the wish of any counsel for a five Judge Appeal Court. I never have felt that it is the right of counsel to claim any such privilege. If the case seems of sufficient importance I endeavor to have five judges if possible, but where that is not convenient I think counsel will have to take what they can get.[27]

Through Harvey's efforts, the quorum of three was restored and other restrictions dropped in 1925. Harvey increasingly favoured using three-judge panels instead of the full court on appeals. While he thought that the full Appellate Division should hear most appeals from the Trial Division, he considered three judges enough for appeals from the District Courts and magistrates' courts. He saw potential to use smaller panels regularly, noting that it was much more efficient. "My own experience has been that never have we had more satisfactory results in our appeal work than in one term when three of us had to do it all," he wrote to Attorney General J.F. Lymburn in 1929.[28] He dryly noted that the English courts managed quite well with panels of three.

Later, in the 1930s, with some of the justices seconded to other work, such as royal commissions, Harvey often set three-judge panels for sittings.[29] It anticipated modern practice, where provincial appeal courts use panels of three for nearly all appeals, with larger panels reserved for matters of particular importance.

Broader Appeal: Amendments to the *Criminal Code of Canada*, 1923

A much more far-reaching change than quorum size was the expansion of criminal appeals, inspired by and largely emulating English reforms of 1907.[30] An amendment to the *Criminal Code* in 1921 allowed appeals from sentence. Then, in 1923, further amendments greatly broadened the grounds for conviction appeals while simplifying procedure. For indictable offences, an accused could now appeal on any question of law, and, with the leave of the appeal court or the trial court, on a question of fact or mixed law and fact. The stated or reserved case was relegated to summary offences heard in the police magistrates' courts. The appellate courts were also given a general power to allow an appeal if there were any reasonable grounds for doing so.

Although following England's lead, Canada also started forging its own path. It differed from both the United Kingdom and the United States in allowing much more latitude for the prosecution to pursue appeals.[31] A prosecutor had always been able to ask for a question of law to be reserved. Further, unlike in British law, the Crown could appeal a sentence and the court could increase it.[32] While the 1923 *Code* ended the Crown's ability to

ALBERT FLEMING EWING, LASA ACC. 2002-028.
WILLIAM ROBINSON HOWSON, 1946. LASA 61-G-24.

appeal more than sentence, after only a short interval, a 1926 amendment allowed the Crown to appeal issues of law too.

Another sign that Canada's legal establishment was starting to assert itself was the ending of criminal appeals to the Privy Council in 1933. This change represented a step forward for Canadian sovereignty and enhanced the authority of the SCC and, by extension, the provincial appeal courts. It was mostly symbolic, since the Privy Council had not granted leave to hear a criminal appeal from Canada for many years.

As a consequence of the changes in the *Code*, it was now much easier to appeal, and defence counsel took advantage of this fact. Criminal appeals started to comprise much more of the Court's caseload. Previously, civil litigation had dwarfed criminal appeals as a share of the work. Appeals dealing with serious crimes, however, remained scarce, mostly because such crime remained a rarity in Alberta in the period between the wars.

A Slower Pace in the Post-War and Depression Years

While criminal appeals made up a greater proportion of the Court's list, the number of appeals before the Court dropped off precipitously between the wars. During the second part of Harvey's tenure, the Court went from being one step away from being overwhelmed to cutting back on sittings. Only ten years after lobbying hard for more judges, Harvey was of the opinion that Alberta could do with fewer. Indeed, he felt that probably half the District Court judges could go.[33] The decline in the judges' workload was one of the most marked aspects of the Court in the 1920s and 1930s.

The end of Alberta's boom at the start of World War I had already affected the flow of litigation into the courts. There was a significant depression after the war, and then, after a few years of prosperity, the Great Depression. In the period right after the war, the courts were still busy. At the appeal level, Prohibition kept the list crowded, as did the wave of foreclosures and other defaults brought on by the post-war depression and drought. In 1922, for example, the law reports published 120 reported appeals, and both the trial and appellate judges still complained about not being able to keep up. But even before the start of the Depression, however, the situation had changed dramatically. In 1929, there were only 60 reported appeals, and by the mid-1930s, only about 30 per year as the Depression took hold.[34]

Harvey mentioned in his letters that business was slow. Writing Hyndman in Ottawa in 1935, Harvey told him that the last sittings had seen only a few appeals, nothing of importance, and they were dispatched in a few days. Exchanging letters with the federal deputy minister of justice discussing judge's travelling expenses, Harvey conceded that the Court was much less busy: "In the recent past one week has been sufficient for the sittings in each place in most cases. But that was not so some years ago when we almost invariably had to repeat the sittings in the second week."[35]

The radical reduction in litigation was not unexpected. The business of law was affected in the Depression like every other business, and perhaps worse than some. Clients became scarce: the leading firms in Calgary and Edmonton, with their list of corporate clients, managed best. Other firms just scraped by, and some small partnerships or solo practitioners barely survived. This perhaps accounted for some of the astonishingly trivial appeals the Court sometimes considered during the Depression years – minor disputes and appeals of paltry fines from the magistrate's court. No one was too busy to say no to work, any work, including the judges, who likely welcomed something to do. More inexplicable, however, was the decline in appeals before the Depression, during a time of relative prosperity.

Inquiries and Commissions Keep Judges Occupied

The lack of pressing work did make it easier for judges to perform other duties. It was a Canadian tradition to use superior court judges for royal commissions and other government inquiries. Beck, Harvey, and Scott,

for example, had conducted the provincial inquiry into the Alberta and Great Waterways affair in 1911.[36] In the early days of the Court, with litigation booming, it had been highly inconvenient to lose a judge to extra-judicial work, though they rarely refused to serve. In the slower-paced 1920s and 1930s, the appellate judges welcomed the distraction.

Harvey, for instance, ran the inquiry into the McGillivray Mine disaster in 1927 and participated in the Dominion Commission regarding the Administration of Justice in 1934. The federal government also asked him to head the inquiry into the sinking of the *Gypsy Queen* during the war. The owners of the schooner had claimed it was torpedoed and had received compensation. Then allegations surfaced that the claim had been fraudulent. The inquiry took Harvey away for some months. McGillivray regarded the commission as a holiday for the chief, advising Harvey, tongue in cheek, that a thorough job should mean visiting England and Germany.[37]

Some of this extra-judicial work, however, had lasting value. McGillivray sat on a royal commission convened by the provincial government to look into the depletion of the oil and gas fields in Turner Valley, then the heart of the industry. Immersing himself in petroleum engineering, McGillivray spent months studying every aspect of the industry in Turner Valley. The commission recommended conservation measures that became the foundation of Alberta's much-admired oil and gas regulatory regime.

The appellate judges were also available to help the trial court, which was busier and short-handed in the 1930s, with two judges working nearly full-time on *Farmers Credit Arrangement Act* claims after 1936. Since all the judges were *ex officio* members of both Divisions, it was a simple matter for an appellate judge to spend a few days conducting trials and even go on circuit. In 1936, Harvey took the sittings in Peace River and area.[38] As an aside, this resulted in several four-judge panels, once again allowed after the 1926 amendment, where one of the appellate judges had sat on the trial.[39] Trial judges would also sit with the Appellate Division if it was shorthanded.

The easy exchange between the trial and appellate courts must have seemed like vindication to Harvey given his firm belief that it was one court. Under Harvey, it was. He very much ran the whole show. Simmons and Mitchell both looked to him for direction, and Howson, who became Chief Justice of the Trial Division in 1944, practically idolized Harvey and constantly sought approval from the older man.[40] Harvey truly was the Chief Justice of Alberta, wielding authority over all the province's courts in a way scarcely imaginable today.

THE APPELLATE DIVISION AT LAW

Harvey's long tenure as Chief Justice encompassed times of great upheaval, including the Great Depression. Social unrest in the form of protest marches, political scandals of a tired and strained provincial administration, and the legislation of a new, radical political party with authoritarian leanings produced appeals that tested the Court's acumen and judgment during the 1930s. These decisions cover a range of legal issues. For example, *R v Jones*[41] and *R v Stewart*[42] required the Court to consider the boundaries of illicit mass protest brought about by desperate economic conditions. *Macmillan v Brownlee*[43] dealt with one of the most famous scandals involving sex and politics in Alberta history, involving the Court in a politically charged drama that threatened to undermine public confidence in the courts. Finally, the Court confronted the sometimes radical legislation of the new Social Credit government that struck at basic tenets of capitalism and finance, as well as inflammatory propaganda that, in the conditions of the day, seemed likely to breed violence.

The key to how Harvey's court handled these challenges is deceptively simple. The Appellate Division, true to its generally orthodox character, did its best to handle each appeal within the constraints of the law as it existed.

It was for the legislature, not for the judges, to deal with the social upheaval of the times. Such legislative efforts might come into the purview of the courts, but only within the accepted constitutional arrangements of the country. The judges clearly valued peace and order. The Court viewed itself as a bulwark of the rule of law, tempered by continued strong regard for traditional civil rights and liberties. The decisions discussed below represent the range of difficulties the Depression years presented. They also demonstrate the strengths and weaknesses of an orthodox, "black letter" court as well as some of the idiosyncrasies of Horace Harvey as Chief Justice.

Predilections of the Individual Judges: A Court in Harvey's Image

Harvey's presence loomed large over his Court in the second half of his tenure as the Appellate Division became moulded much more in his image. This reflected the growing conservatism of the judiciary, however, as much as Harvey's direct influence. The judges appointed from Clarke onward, even when independent and opinionated like Ford or McGillivray, were simply more conservative than predecessors such as Scott or Beck. Unsurprisingly, the Court did not produce the landmark judgments seen in its first decade.

After the deaths of Stuart and Beck, Harvey dominated the bench in a way he had not previously. Hyndman, of course, was an able judge, but he left in 1931. Neither Mitchell nor Lunney was a particularly strong jurist. Mitchell was much like Simmons – not considered a great legal mind, he generally followed Harvey and contributed relatively few judgments of the Court.

Lunney, Beck's replacement, was more independent, but his judicial writing did not leave an impression of deep thinking. His judgments might be called quirky rather than weighty, in contrast to Beck's decisions, which were rich in analysis of authorities, the case law, and principles of natural justice. Like his predecessor, Lunney, with his experience in criminal law, was concerned with

DEMONSTRATORS AT THE ALBERTA LEGISLATURE, 1929. GLENBOW ARCHIVES, NC-6-124001.


WE WANT WORK
AT UNION RATE
OF WAGES
OR FULL MAINTAINANCE.
WORKERS OF
THE WORLD
DEMAND YOUR RIGHTS
More Immigration
More Starvation

the preservation of due process and proper consideration of the rights of the accused. Along with Clarke, he disliked the state of law on negligence and contributory negligence, reflecting a concern for equity over law. However, Lunney offered only the occasional interesting or insightful judgment rather than a large body of jurisprudence, and he rarely wrote the opinion of the Court.

Clarke, meanwhile, was a supremely practical judge. His primary focus was in solving the problems of the litigants before him rather than delving into legal principles. Clarke was not prolific and practised economy of effort. His judgments were generally short, to the point, and not overburdened either with references to case law or detailed analysis. It was not uncommon for him to enter a concurrence *dubitante*, without additional reasons. Occasionally he would make the comment that he did not agree with the majority but, as it was clear the appeal was decided, he declined to dissent. Although careful in his interpretation of statutes, Clarke often preferred a common-sense reading over a strictly literal one if it made more sense in the real world.

McGillivray had an immediate impact on the Court. He was an active writer and a frequent and aggressive dissenter. Though his decisions displayed his legal acumen, he did not display the same flair as Stuart for striking, original judgments. McGillivray was much more orthodox. But he had a real feeling for the human circumstances concerned in an appeal's issues, and like many Alberta judges, he clearly thought justice and equity as important as strict adherence to the law. Reflecting his profound knowledge of criminal law, McGillivray could be counted on for an incisive analysis of criminal appeals, where he tended to favour the rights of the accused.

Like Stuart, he combined an independent mind with an affectionate regard for the Chief Justice, and the two were close friends. McGillivray frequently had the Chief over for dinner, sometimes with the other Edmonton appellate justices, sometimes not, when the sittings were in the south. They had a common love for bridge. Occasionally, McGillivray made buttery comments about Harvey in his judgments, for example: "I state this conclusion with very great respect

and with the hesitancy which I always experience in putting forward an opinion opposed to the considered opinion of the distinguished jurist who presides in the court."[44] McGillivray had a penchant for flowery language, but one suspects the slavish respect was some sort of joke between the two.

The addition of the scholarly Ford to the Court created a new triumvirate, with three opinionated judges of considerable intellectual capacity. It was, however, a more like-minded bench than it had been previously. Where Stuart and Beck had been a strong contrast with their more conservative chief, Ford, McGillivray, and Clarke were all were much more black letter lawyers. They were firmly set in the orthodoxies of legal formalism, with its almost complete deference to the legislature, which by this point dominated Canadian jurisprudence. The creative law-making of Stuart and Beck was no more. While there were certainly still disagreements over particular legal points, the outlooks of the Court's members were similar. Rarely was Harvey in dissent as he often had been in the Stuart-Beck days. This could be seen in the settling of one debate from the previous era: the observance of precedent. In a 1926 decision, *Dowsett v Edmund*, the Court declared that it was bound by its own decisions.[45]

If anything, Harvey sometimes looked less conservative when compared to his new brothers. In settling the law, his occasional invocation of social context, conditioned by his years on the Territorial Court, seemed more pronounced next to his new colleagues on the bench. Clarke, Ford, and even McGillivray put a great deal of weight, for example, on English case law even when this was not binding; Harvey preferred some local context. With respect to fact findings of trial judges, the other judges, in particular Clarke, strove to show deference. On the other hand, Harvey, while solemnly intoning as to the desirability of not disturbing the fact findings of judge or jury, or lightly overturning their verdict, continued to take full advantage of the powers of the appeal court to do just that – when it suited him.

The Court retained its collegial working habits. The judges continued to travel between Calgary and Edmonton to hold sittings, and consequently spent at least a week every month together in the same city, excepting the summer break. It was likely an opportunity to share drafts, and there are frequent references to doing so. On one appeal considered to have constitutional import, McGillivray even made a special trip to Edmonton to confer further on the Court's opinion.[46] At the same time, there was no equivalent to the exchange of correspondence between Stuart and Harvey on appeals and the law among the new judges.

Trends in Law: Criminal Justice to the Fore

With the *Criminal Code* changes, criminal appeals became a much greater part of the Court's work. Even after Prohibition was repealed in 1924, appeals concerning *Liquor Act* offences remained common. While there were many prosecutions concerning gaming houses, far fewer involved brothels and prostitution. Although these were summary offences for the magistrates' court (and often only involved fines), the appeals that reached the higher court often concerned jurisdiction, rules of evidence, confessions, and other issues of interest.

In these appeals, McGillivray and Lunney demonstrated their extensive criminal law experience and, notwithstanding their frequent past appearances as prosecutors, insisted on very high standards of fairness for the accused. This was a continuation of the great respect the Court had shown towards traditional legal rights and what was often called the English tradition of justice and fair play. The judges took very seriously their role as protectors of individual rights, especially in a time when legal rights were not explicitly protected by statute. As Hyndman observed:

> It is not a question of the deserts of the accused but of their legal right to a fair trial according to well-established rules of law.[47]

APPELLATE DIVISION, L-R: LUNNEY, CLARKE, HARVEY, MITCHELL, MCGILLIVRAY, CA. 1931. LASA 79-G-9

The relative scarcity of crime, especially serious crime, may have disposed the appellate judges towards liberty over security. The judges themselves thought the rate of crime was low in Alberta, and perhaps counter-intuitively, this was even more true during the Depression. Moreover, Harvey and his colleagues seemed satisfied with the balance between deterrence, punishment, and rehabilitation in sentences, which were generally much longer then than now. Repeat offenders, at least involving serious crime, were rare.

Contributory Negligence: The Automobile Brings Change

The increased availability of automobiles after World War I had an enormous impact on society, and the law was no exception. Much of the litigation concerning automobiles was not particularly novel. However, with cars also came car accidents, and the litigation around personal injury was very significant, especially as it affected the evolution of the doctrine of contributory negligence.

Auto accidents were likely the catalyst for a major change in the law of contributory negligence in Canada during the 1930s. Under the common law, with certain exceptions, a plaintiff's action for injuries would fail if there was contributory negligence on their part. If it could be shown that there would have still been an accident even had the plaintiff not been negligent, the action might be successful, but this often entered into realms of conjecture. There was an increasing dissatisfaction with this doctrine on the Court because it offended the judges' sense of fairness. A defendant might be partly or mostly responsible but get off scot-free. Since motor vehicle accidents often involved some degree of contributory negligence, these cases brought the issue of needed reforms to the fore.

Jeremy v Fontaine, in 1931, showed the Court's frustration. A pedestrian sued a driver after being hit and severely injured. Frank Ford, as trial judge, ruled in favour of the pedestrian, holding that although there had been negligence on the pedestrian's part, the driver's excessive speed was the sole cause of the accident, a judgment with which the Court agreed. The judges acknowledged, however, that the law was in a state of confusion. Clarke was one of the most vocal. "No good purpose will be served by attempting to survey the labyrinth of bewildering cases bearing on the subject," he wrote in his dissenting judgment.[48] Clarke felt the appeal should succeed under the existing law, but he had a solution to what he saw would be an unfair result:

I would be better satisfied if the law permitted the Court to apportion the damages according to the degrees of negligence of the interested parties, which seems to me more equitable and better suited to present conditions of travel, but until the Legislature adopts this view all of the Court can do is apply the law which exists.[49]

Clarke got his wish. In 1937, Alberta passed the *Contributory Negligence Act*.[50] Ironically, in a dissenting judgment he wrote in 1940 in *Foster v Kerr*, Clarke was still unhappy, this time with what he saw as the misapplication of the new principle: "I think it was never intended by the *Act* to make the injured party liable to contribute in cases where before the *Act* he would have been entitled to recover the whole amount of his damage."[51]

As is apparent, in this era, the ubiquity of the automobile had a profound effect on tort law and the composition of the Court's workload. Even venerable areas of the law, such as estates, suddenly became much more prevalent on the Court's lists as the pioneer generation began to pass away in large numbers in the late 1920s. In addition, there was the appearance of entirely new subject matters. None was more significant for Alberta than the rise of the petroleum industry.

In 1914, oil was discovered in Turner Valley, south of Calgary, inaugurating the petroleum age in Alberta. After World War I, exploration and development began in earnest in the valley. Inevitably, litigation came before the courts. Much of this was not novel, but some decisions were significant. Several Court judgments, such as *Knight Sugar Co. v Alberta Railway and Irrigation Company*,[52] dealt with the definition of petroleum and related substances within the mineral rights clauses in titles to land. *Spooner Oils v Turner Valley Gas Conservation Board*[53] concerned the powers and jurisdiction of the board, and by extension the government, to regulate the industry. These decisions, however, along with some very famous oil and gas law, will be considered in the next chapter.

The Harvey Court and the Great Depression

With the Great Depression, a host of ills came to plague Albertans: drought, unemployment, and civil and political unrest. The economic cataclysm also produced litigation and appeals that were a challenge to the judges of the Court. Not unexpectedly, some of the earliest involved the limits of civil protest.

Protests, Strikes, and Riots: *R v Jones* & *R v Stewart*

The Great Depression was marked by social upheaval. In retrospect, it was remarkable how little serious civil unrest occurred in Canada. But there were exceptions. The Regina Riot is the most famous, yet there were many smaller outbreaks across the country. Often this sprang from legitimate protests – marches, demonstrations, or strikes. Such incidents were often handled in

PG. 126 CHIEF JUSTICE HORACE HARVEY RESIDENCE, 1929. GLENBOW ARCHIVES, ND-3-4894.

PG. 127 MAIN STREET IN AIRDRIE, ALBERTA, 1929. GLENBOW ARCHIVES, NA-3600-1.

DEMONSTRATION OF UNEMPLOYED, 1932. GLENBOW ARCHIVES, NC-6-13014D.

a heavy-handed fashion. This was the case in Alberta. The authorities and the press blamed agitators, especially communists, and the spectre of revolution was ever-present. In reality, the demonstrations were mostly comprised of desperate men, not looking for revolution, just better treatment. Although most were peaceful, sometimes there were arrests, convictions – and then appeals.

Two such appeals came before the Court. *R v Jones et al*,[54] in 1931, was actually several appeals considered together, as they arose from the same incident and involved the same charge: being a member of an unlawful assembly. The second, *R v Stewart*[55] in 1934, involved a large, unauthorized protest march in Edmonton. The charge was the same as in *Jones*, but the situation different. In both cases, the conviction appeals were dismissed, and as explained below, the judgments reveal a court that hewed to a narrow, legalistic approach which, by default, meant a bias towards maintaining order. However, even in the face of a challenge to authority, the Court also upheld the ideal of fair treatment and a fair trial for an accused, demonstrating again the attachment of the Alberta appellate judges to the idealized tradition of "British justice." Thus, as seen in *Stewart*, even an accused preaching revolution had to be given all the due process protections.

R v Jones et al: Promoting Order

On June 29, 1931, there was a major disturbance in Calgary. City officials had designated several points for relief workers to gather for their daily assignments. The previous day, a pamphlet had circulated calling for a strike, put out by *ad hoc* protestors with an impressive title, the Executive Committee of the National Unemployed Workers' Association, Calgary Branch. Crowds formed at three points, and relief workers were urged to go on strike in protest against the low wages and humiliating conditions. Witnesses reported hearing threats. Some of the protesters carried makeshift weapons, and there was a general air of intimidation but no violence. Police later arrested several men who were then

convicted of being members of an unlawful assembly. *R v Jones* was actually a consolidation of several appeals arising from the incident.[56]

In *Jones*, Chief Justice Harvey gave the Court's judgment, upholding the convictions and dismissing leave to appeal the sentences. He had no difficulty deciding that what had occurred had been an unlawful assembly. Harvey cited case law that laid down principles for deciding when an assembly should be considered unlawful. He was satisfied those conditions had been met:

> It appears clear that in the present case there was ample evidence to warrant the finding that the assembly of which the appellants were clearly members had developed into an unlawful one within the definition of the *Code* and but for the arrival of the police might have developed into a serious riot.[57]

As Harvey pointed out, persons assembled lawfully can become an unlawful assembly if they subsequently conduct themselves in a manner or for a purpose that would have constituted an unlawful assembly in the first place. Harvey used the example of a party of friends gathered to watch a football game, who then, because of dissatisfaction with the game, become sufficiently unruly to become a threat to the peace, thereby crossing the boundary from the lawful to the unlawful.

This was an important difference, he wrote, which distinguished unlawful assembly from much more serious charges of unlawful association and riot. With unlawful association, people gathered with intent to engage in violence, and with a riot, the threat of breaking the peace had become breaking the peace. Punishment for both these offences was very serious – up to life. By contrast, unlawful assembly carried a maximum penalty of one year. Harvey's careful consideration of the law showed that he wanted to make clear the lines between lawful civil assemblies – which might include protest meetings – and those that crossed the line. It might be seen as consideration of the right of citizens to protest.

BOY SCOUTS PICKING UP TOYS, 1930. GLENBOW ARCHIVES, NA-4487-8.

PG. 132 CHRISTMAS PARADE IN FRONT OF CALGARY COURTHOUSE

PG. 133 VIVIAN MACMILLAN ENTERING EDMONTON COURTHOUSE, 1934. GLENBOW ARCHIVES, ND-3-6747H.

This is not to say, however, that he had any sympathy for the appellants.

The sentences had ranged from six months to the maximum one year allowed, which seem harsh in modern terms given that there was no violence. Order was apparently more important than protest. Harvey and his court obviously feared the potential for revolution, and felt there was nothing wrong with making an example of the protestors. Harvey had, of course, years earlier shown in the sedition appeals and the *habeas corpus* appeals a willingness to allow such considerations to influence his interpretation of the law. In this case, the rest of the Court agreed with him.

R v Stewart: Protecting Rights

At the same time, however, the Court continued to be very scrupulous of the rights of the accused. This is clearly shown in *R v Stewart*, an appeal on the same charge as *Jones et al*, but arising from more dire circumstances. In December of 1932, several groups in Edmonton decided to organize a "hunger-march."[58] Some of the organizers were doubtlessly Communists, others simply the unemployed at the end of hope. The city had brought in a policy of no parades in response to earlier, unauthorized demonstrations. When a parade permit was refused, the organizers held several protests demanding a permit. The appellant, Stewart, had made speeches at two demonstrations in somewhat inflammatory language, calling for the march to go ahead. On December 20, a large crowd – up to 4,000 people, newspapers estimated – gathered and after more speeches, tried to put on the march. A large force of RCMP and city police attempted to prevent the march. The situation degenerated into something of a riot.

Stewart was later arrested and charged with participating in an unlawful assembly contrary to s. 89 of the *Code*. He was tried by Ives and a jury and convicted, along with Arthur Irvine, chairman of the protest organizing committee. Stewart got a year in the penitentiary, while Irvine received two months. Stewart appealed conviction and sentence, the former on the grounds that he was not actually at the unlawful assembly, the latter on the grounds that it was excessive and there should not be such a disparity in sentences for convictions on the same offence.

McGillivray gave the judgment and was condemnatory of the trial verdict. He found there must be an

acquittal. Stewart had been charged under s. 89 of the *Code* with being a "member of an unlawful assembly." But since Stewart had not actually been at the unlawful assembly, the Crown was driven to rely on s. 69 of the *Code*, dealing with parties to offences, alleging Stewart was a party to the unlawful assembly because he had counselled others to commit that offence. As McGillivray pointed out, the Crown could have easily charged and convicted Stewart of the substantive offence of "counselling an unlawful assembly." For this charge, it would be immaterial whether the persons counselled actually committed the offence. However, given the way the Crown had proceeded, it had to prove that the unlawful assembly here was committed by persons who had actually been counselled by Stewart, that is, who had heard him speak. The Crown had failed to do so.

Therefore, there was no evidence on which a jury could have convicted Stewart as a party to the unlawful assembly on the basis that he had counselled others to commit that offence. As McGillivray explained:

> It has been suggested that it would be strange justice if the agitator should escape whilst those to whom he appealed suffered the penalty. As to this I must say with great respect that it would seem to me much more strange and entirely contrary to well-established principles of our criminal law for the Court to countenance sustaining the conviction as an offence of counseling with which the accused was not charged and on which he was not tried, or for the Court to supply an important link in the chain of proof which the Crown has through inability to provide it, or through carelessness, failed to supply.[59]

McGillivray was replying to his brother judge Clarke, who had written in his dissent that "it would be strange justice if one of the chief agitators should escape while those answering the appeal should alone bear the brunt."[60] Clarke argued that Stewart's speech should be viewed as incitement of everyone and anyone who made up the unlawful assembly, and that it was completely reasonable for a jury to conclude that there must have been people at the riot who had been at the earlier meetings, even if there was no direct evidence identifying specific individuals.

The rest of the Court concurred with McGillivray and his scrupulously fair decision. McGillivray's remarks made it clear that there was no sympathy for the accused and his aims. Acquittal was necessary – but not necessarily desirable.

Jones and *Stewart* demonstrated that the justices of the Appellate Division were inclined to be upholders of order, but fortunately through being upholders of the rule of law. The Court's judgment in *R v Jones* was not sympathetic to the strikers. Even though there was no violence, Harvey saw it as beyond the bounds of lawful protest. The sentences were harsh by modern standards. Harvey in his argument provided a definition of what constituted an unlawful as opposed to a lawful assembly that clearly aimed at maintaining order and public peace. However, he was also careful to distinguish unlawful assembly from much more serious but related offences. In *R v Stewart*, McGillivray for the Court insisted on strict compliance with the criminal law and reminded both the Crown and trial judge of their duty to respect the rights of the accused and not be swayed by other considerations. Thus, while the Court promoted order and supported authority in limiting marches and strikes, the judges also insisted that anyone who then broke the law be accorded all the traditional protections available.

The seemingly unsympathetic attitude of the Court towards marchers raises the question of whether the Court had concern for the travails of their fellow citizens. The short answer is yes. Aside from his personal charity, Harvey, in *Jones*, took "judicial notice" of the magnitude of the unemployment crisis. Ironically, this made him perhaps less sympathetic to the strikers, because he thought that they were turning up their noses at the help being offered.

This could be seen in *R v Park*, where Park appealed his conviction for obtaining goods by false pretenses.[61] Park had received city relief vouchers worth $9 for groceries that he had redeemed with a local merchant. But authorities then discovered he had earned $53 that month instead of the $12 he claimed. The judges were outraged. As Harvey wrote:

> There is not the least warrant for a reduction in sentence. Indeed if the Crown had shown the least desire to have the sentence increased I would have been disposed to double it. It is well known that the burden on the authorities of providing relief for deserving unemployed persons has become almost an intolerable one and attempts by undeserving ones to increase that burden by fraud are deserving of the strongest condemnation.[62]

At the same time, the judges themselves were insulated from the harshest realities of the Depression. In *Park*, none of them considered that $9 in groceries might make an enormous difference for a family surviving on $53 dollars a month, which was not exactly living high on the hog. Harvey, with curious insensitivity, continued during the Depression to lobby aggressively for increases in judges' salaries. R.B. Bennett finally pointed out to him, with considerable sharpness, that given the economic situation, it was impossible to consider raising salaries and that judges, of all people, were among the least in need of more money.[63]

Sex Scandals in High Places: *Macmillan v Brownlee*

The Depression years also witnessed two sex scandals involving high political office in the province. Though only tangentially related to the social and economic conditions of the time, the scandals ended up in the courts and posed their own danger: an erosion of respect for the justice system. The two trials and aftermath are also two of the best stories from Alberta's legal history, but the role of the Appellate Division is not often much discussed.

O.L. MCPHERSON, MLA, MINISTER OF PUBLIC WORKS, CA. 1929. PAA A3597.

In 1921, the United Farmers of Alberta transformed itself from a lobbying group to a political party and formed the provincial government. The novice government benefited immensely from the guidance of John E. Brownlee, a Calgary solicitor who had been heavily involved professionally with the farmers' co-operative movements. Brownlee served first as attorney general and then became premier. Despite Brownlee's astute leadership, the Depression blindsided the UFA. Hamstrung by rapidly deteriorating public finances, the provincial government's response was ineffectual and its popularity slid. Then, in quick succession, the UFA was hit with scandals that created juicy headlines. It also created two troubling appeals for the Appellate Division, which was forced to deal with trial verdicts that many Albertans felt pandered to the politically powerful and editorialists decried as a perversion of justice.

The First Scandal: *McPherson v. McPherson*

The show opener was *McPherson v McPherson*,[64] a divorce case where the issue was whether the hearing had been held in an open court. Judicial propriety was also in play. Oran "Tony" McPherson was Minister of Public Works in the UFA cabinet. A friendship between McPherson and his wife Cora and another couple, Roy and Helen Mattern, resulted in a partner swap with two divorces. Although his divorce was uncontested, McPherson was a public figure and wanted it kept as quiet as possible. Justice Tom Tweedie held the unscheduled proceedings in the judges' library at the courthouse instead of one of the courtrooms. The library door, marked "private," was left open, and Tweedie declared the room an open court.

This might have been the end of it, except that the relationship between Cora McPherson and Roy Mattern, who had obligingly provided the evidence of adultery for the divorces, didn't last. McPherson, who had married Helen Mattern and had custody of the children from the earlier marriage, refused to give Cora any financial support. She then tried to have the divorce revoked. Cora's lawyer was leading Edmonton counsel Neil Maclean, who was heavily involved in the Liberal Party and well known for his intense dislike of the UFA. Maclean tried to get the divorce set aside on the ground of collusion, but Justice Frank Ford ruled that since Cora had participated voluntarily, she could not now sue to remedy the situation. Maclean then applied to overturn the divorce on the grounds it had not been performed in an "open" court. Justice Ewing dismissed this action, ruling the library had been a properly constituted court, and Maclean appealed.

A Secret Court? McGillivray's Opinion

It must have been an uncomfortable situation. Aside from the public notoriety of the scandal, the Appellate Division was essentially called on to weigh the actions of a brother justice that appeared, at least to the public, to constitute a special favour for the powerful and connected. While courts were still held in makeshift courtrooms throughout the province at the time, such sittings were well advertised and open to the public. A secret court offended a principle deeply embedded in the common law. As McGillivray stated on appeal:

> In my view the words "open Court" when used in their proper legal sense mean a Court that is open to the public as distinguished from one that is held in secret. I have no manner of doubt that if a Judge were to hold Court in the glade of a forest or in the furnace room of the court-house, without public notice, he would be as surely sitting in secret as a Judge who, while sitting in Court in the court-house, ordered that a cause be heard in camera.[65]

McGillivray, however, then relented: "This case is near the line...I have come to the conclusion, not without

JUSTICE THOMAS M. TWEEDIE, "THE TON OF JUSTICE." LASA ACC. 97-005.

hesitancy, that I cannot say that Ewing J. was wrong in holding that the divorce trial was not held in secret but was conducted in open Court."[66] This was not exactly a ringing endorsement of Tweedie's judgment. In effect, McGillivray decided on the balance of the evidence that there had been sufficient access to the judge's library so that whatever Tweedie's intent, there had not been a secret court. Harvey concurred, arguing that in the absence of any order barring the public from the court, it could be considered open. Harvey felt, given that the time and place for the proceedings were not publicized, that if one of the ordinary courtrooms had been used, the effect would have been the same. Clarke, interestingly, also concurred but on the pithy ground that the plaintiff had in no way been disadvantaged by the irregular proceedings in the first place, so the question of the open court was irrelevant.

The Judicial Committee Sees It Differently

The Appellate Division decision was not the end of the matter. An appeal was taken to the Privy Council. The Law Lords could not agree with the reasoning of the Appellate Division on the matter of the open court. Although admitting the actions of the judge were understandable and his conduct of the action correct, Tweedie had still intentionally restricted access to the public to hearing. Cora McPherson, however, was not successful. The Privy Council also decided that the passage of time and the second marriage meant the divorce would stand.

It is hard to avoid the impression that the Alberta judges, at least to some extent, strove to put the best interpretation on Tweedie's actions, unwilling to censure their brother judge and probably hopeful the affair would blow over quickly. Certainly, they realized it did not present well publicly. McGillivray for instance, felt a need to defend his brother on the trial court: "I cannot refrain from adding that no question can or does arise as to the *bona fides* of the trial Judge or as to his absolute impartiality in this divorce case.... His desire not to have more people than need be attend this undefended divorce action is something of which one may not approve and yet quite understand as a generous impulse rather than an attempt to hold a secret court."[67]

NEIL MACLEAN AND VIVIAN MACMILLAN, EDMONTON COURTHOUSE, 1934. GLENBOW ARCHIVES, ND-3-6747E.

The McPherson case was an embarrassment for the Brownlee government, and the appeal decision was perhaps not a great day for the Court.

The Second Scandal: The Premier Accused of Seduction

It was soon to get much worse. In 1934, with the McPherson affair just fading from the public's memory, another scandal exploded in the courts. This time, Vivian Macmillan, a young woman from Edson, and her father sued Premier John E. Brownlee, claiming Brownlee had seduced Vivian. A family friend, Brownlee had helped Vivian find a job as a government stenographer, and she lived at the Brownlee residence. Macmillan claimed the premier had instigated an affair that continued until she met a young medical student, John Caldwell. After he proposed marriage, she confessed about Brownlee. Caldwell withdrew his proposal but counselled Vivian to punish the premier by taking him to court. Towards this end, he introduced her to Neil Maclean, implacable enemy of the UFA. There has been much speculation that Maclean and Caldwell actually concocted Vivian's story in order to destroy Brownlee,

PREMIER JOHN E. BROWNLEE, FAR RIGHT, WITH LORD AND LADY WILMINGTON, 1930. GLENBOW ARCHIVES, ND-3-5136B.

> APPELLATE DIVISION, CA. 1936. L–R: LUNNEY, CLARKE, HARVEY, FORD, MCGILLIVRAY. LASA ACC.2002.028.

with Macmillan a willing accomplice in return for the proceeds from a successful lawsuit.

Maclean brought an action against Brownlee under the *Seduction Act*[68] on behalf of Vivian and her father. This *Act* codified a common law right for fathers and employers to sue for damages when a young woman was made incapable of work due to pregnancy and childbirth. The *Act* allowed parents to claim damages from an individual who essentially, in the archaic language of the *Act*, deprived the father of the "service" of the daughter. Clearly, one purpose of the *Act* was to force a payment to offset the care and maintenance of the issue of unwanted pregnancy. But could damages be awarded on any other basis to the woman seduced? That became a critical issue for the courts to resolve.

Justice Ives presided over the trial with a jury. A.L. Smith, Brownlee's counsel and a master of cross-examination, brought out many inconsistencies and improbabilities in Vivian's testimony. The jury, however, believed her and awarded her $10,000 and her father $5,000. But Ives then dismissed the action on a motion by the defence that there was no evidence that her father had lost any of her "service" or that Vivian had been unable to serve. In other words, because there was no pregnancy, there were no damages and no grounds for the suit. The decision caused an immediate public uproar. Some editorialists opined that Ives's action was a perversion of British justice because he had overturned a jury verdict.[69]

A Difficult Appeal and a Split Court

Maclean appealed and A.L. Smith counter-appealed against the judgment. Soon Harvey, Clarke, Mitchell, Lunney, and Ford had to address the matter. Ives's decision presented the Appellate Division with a knotty problem. Before the trial, there had been apprehension among the judges about the likely publicity. Ives had in fact asked Harvey to preside over the trial: "I cannot ask any other Judge to take it and already Maclean is making critical observations about me as the trial judge. I still think my suggestion to you not only is good one but a right one and as you did not tell me you would not act I am writing to ask if you will." The Chief Justice replied that, with the agreement of the other appeal judges, he felt he could not do so. Harvey no doubt thought it likely that there would be an appeal, which would require the full court and his steady hand.

On the appeal, the Court split three to two. The central issue was whether the *Seduction Act* allowed for damages in the circumstances of this case. Unlike the common law, s. 5 of the *Act* permitted the victim of the seduction to bring an action in her own name, and stated that "in any such action she shall be entitled to any such damages as may be awarded." Therefore, the question was this: Even if there had been no "loss of service" to the father, did s. 5 allow for damages to be awarded to the woman seduced?

The Chief Justice: Skeptical and Outraged

Harvey, writing for the majority, thought not. In his view, although s. 5 permitted the woman victimized to bring suit, there still had to be evidence of a loss of ability to serve, since this was the only grounds specified in the *Act*. Therefore, on his interpretation, the phrase "any such damages as may be awarded" had to be interpreted as referring to loss of service. Harvey acknowledged that illness or infirmity attributable to sexual activity could qualify as well as pregnancy. But he determined that on the record before him, there was no evidence of any damages that were actionable under the *Act*.

While Mitchell and Ford concurred, Clarke and Lunney dissented. Clarke preferred a more straightforward and generous interpretation of s. 5. In his view, the fact the legislation expressly provided that the woman could bring an action "in the same manner...as any other tort" created broader grounds for damages. "Loss of chastity," along with the subsequent stigma, was enough on which to base damages. Essentially, Clarke concluded that s. 5 created a new cause of action for a woman seduced with the right to recover damages. By taking this approach, the legislature had eliminated a convoluted and illogical need to relate a woman's seduction to her loss of ability to be of use to her parents. As he wrote:

> In my opinion, the mere fact of seduction gives her a right of action, per se, and there is no occasion of importing the fiction as in the case of the father's action.[70]

Lunney followed similar lines of reasoning, and pointed out that in a similar Alberta case, *Collard*, two appeal judges had thought $20,000 dollars in damages was reasonable.

Beyond this disputed interpretive point, however, Harvey was also clearly incensed with public criticism of Ives, writing:

Edmonton Bulletin

AN INDEPENDENT NEWSPAPER IN PUBLIC SERVICE

FIFTY-FOURTH YEAR—VOL. XXXII No. 149 EDMONTON ALBERTA —MONDAY, JUNE 25, 1934 FIVE CENTS

VIVIAN MACMILLAN TESTIFIES IN BROWNLEE'S SEDUCTION TRIAL

Complainant Tells How She Gave Up Career At Alberta Premier's Behest

Most Sensational Case Ever to be Tried in Edmonton Courts Gets Away to Start With Mr. Justice Ives Presiding

By J. S. COWPER

"Mr. Brownlee told my mother and I 'She will be welcome to come to my home. I will act as guardian for her and see that she doesn't get into any trouble."

In these words, quietly expressed, Vivian MacMillan this morning told the jury how it was she came to leave

The Jury

J. PATTERSON, Merchant, Wainwright.
JOHN MacLEOD, Merchant, Athabasca.
W. H. HEFFERNAN, Poolroom, Wainwright.
L. B. HIGGINS, Art Shop, Edmonton.
J. LONEY,

Presiding

MR. JUSTICE IVES

MISS M'MILLAN

$10,000 REWARD IS NOW OFFERED FOR DILLINGER'S HEAD

Sixty State and Federal Officers Armed With Machine Guns—Quarry Flees Before Trap Sprung

WASHINGTON, June 25.—Attorney-General Homer Cummings is offering a reward of $10,000 for the capture of John Dillinger, the desperado, and $5,000 for his fellow-gangster, Lester M. Gillis, alias George "Baby Face" Nelson.

He also announced $5,000 would be paid for information leading to Dillinger's arrest and $2,500 for similar information about Gillis.

BRANSON, Mo., June 25—Sixty state and federal officers, machine guns ready for action, raided the Ozark Hills branch of Clyde Higgs yesterday in a fruitless search for

QUEBEC HAS

The view that by giving judgment as he did the trial Judge made a finding on the facts contrary to that of the jury is entirely erroneous and a misconception of law and practice.

Under our system of jury trials while the jury is sole judge of the facts all questions of law must be decided by the Judge and it has always been a question of law whether there is any legal evidence, that is, whether if the facts of which evidence is given are all true they constitute such a case as in law will support a verdict for the plaintiff.[71]

Harvey laid out at length the powers of a judge to take the same course as Ives. He then addressed the power of the appeal court to set aside a jury verdict on a point of law but also if the facts, the evidence, do not support the verdict. This set up a most extraordinary review of Vivian's testimony:

Her whole story is quite unsupported by other evidence in all material respects and in many of its details is of such an improbable, not to say incredible character, that it seems impossible that any reasonable person could believe it in its entirety.[72]

Harvey went so far as to imply that the jury's verdict was motivated by misplaced sympathy and not the facts, stating: "There are other circumstances which appear from the record which suggest the jury's verdict was not founded on the evidence in the case."[73] The damages in particular struck Harvey as ridiculous given that there had been no pregnancy. He implied that the jury was punishing Brownlee for his alleged acts. Indeed, Harvey's obvious skepticism about the basis of the whole claim came through clearly. His disgust was palpable; it was obvious that he thought Brownlee was being victimized by political opportunists and fortune hunters. With his judgment, Harvey vented considerable indignation, and as was his wont, essentially retried the case. Harvey's attitude was nothing new. He clearly did not hold juries to be sacrosanct, and despite platitudes about deference to the contrary, he was quick to take issue with what he saw as unreasonable trial verdicts.

Clarke: The Jury Has Spoken

However, the rest of the Court declined to join Harvey in his outrage. Clarke disagreed with Harvey's view on the jury verdict. On the believability of Vivian's testimony, he pithily commented: "The story of the female plaintiff is a strange one but 'Truth is always strange, stranger than fiction.'"[74] Clarke determined that while there might be difficulties and inconsistencies with Vivian's testimony, the jury had the right to disregard parts of the testimony and believe other parts. He felt the jury had not come to an unreasonable conclusion:

Seldom, I think, has a jury been called upon to perform a more difficult or painful duty. I see nothing in the record to indicate perverseness or failure to do their duty in arriving at an honest verdict after a full consideration of all the evidence.[75]

The SCC reversed the Court, ruling four to one in favour of Vivian Macmillan. While admiring Harvey's judgment, Chief Justice Duff concluded that s. 5 should be read in its "natural and ordinary" meaning and agreed with Clarke. Brownlee appealed to the Privy Council. It too thought


Fair Co-Plaintiff
Seeking Damages
VIVIAN MacMILLAN
Convicts Escape

BROWNLEE HEADLINE. LASA FOND 62.

that s. 5 was intended to give a woman a cause of action and eliminate the clumsy need to have some sort of fiction of service or ability to serve as the basis for determining damages. Thus, in the end, Brownlee was found liable.

The degree of Harvey's skepticism about Vivian Macmillan's testimony made it easy to suspect that he, at least, believed the premier was innocent of wrongdoing and deserved to have the action dismissed. The Court, in considering the MacPherson and Brownlee affairs, can fairly be said not to have strayed outside any propriety. However, neither affair put the Court in the best light, and the ultimate reversal of their judgments on these controversial appeals may have made the Alberta judges appear, in the public's eye, complicit in helping the prominent avoid their just deserts.

The Appellate Division and Funny Money

The Brownlee affair was the final straw for Alberta voters. But it was not Maclean's Liberals who benefited. The failure of existing political and economic structures to deal adequately with the Great Depression opened the door for radical political movements, such as fascism and communism. Social Credit, the new Alberta provincial party brought into power in 1935, was sometimes called both.

ARTHUR L. SMITH, LASA ACC. 2003-002.

Led by William Aberhart, a high school principal and popular Baptist preacher in Calgary, the new party subscribed to the economic theories of an Englishman, Major C.H. Douglas. The Major advocated a radical reform to the monetary system called social credit, predicated on the idea that the existing banks and other financial institutions, through their control of credit, kept money and purchasing power out of the hands of consumers. In his view, poverty could be ended if consumers' purchasing powers were increased. The existing financial system was cast as the enemy. Capitalizing on the extreme voter discontent and a promise of a monthly $25 dividend from the government for every citizen of the province, Aberhart swept into power in a landslide victory in 1935.

Once in power, Aberhart had to govern a nearly bankrupt province and make good on his promises. Measures aimed at making social credit a reality, however, were almost guaranteed to raise constitutional issues because the federal government had control over banking and the money supply under the *BNA Act*. The three most notorious Social Credit statutes – the *Bank Taxation Act*, the *Credit of Alberta Act*, and the *Press Act* – proceeded directly to the SCC on reference by the federal government and were pronounced *ultra vires* the legislative power of the province.[76] Other statutes, however, came before the Appellate Division. The *Reduction and Settlement of Debts Act, 1936*, and the *Provincial Guaranteed Securities Proceedings Act, 1937*, were two good examples of legislation that gave rise to constitutional issues.[77] The Appellate Division also had to consider the appeal in *R v Unwin*, the "Bankers' Toadies" trial, dealing with a nasty manifestation of Social Credit propaganda.[78] To these challenges, the Appellate Division responded in a measured fashion congruent with its orthodox character.

The *Reduction and Settlement of Debts Act*: The Social Credit Government Loses

The first measure to find its way to the Appellate Division was *An Act to Provide for the Reduction and Settlement of*

Certain Indebtedness, or in short form, the *Reduction and Settlement of Debts Act*. The legislation allowed for the reduction or elimination of interest on debts, reduction of the principal, and even retroactive application of payments of interest on established debts to the principal. The statute was intended to assist Albertans struggling to pay for mortgages on their home and farms. And in good social credit fashion, it also took aim at the banks and mortgage companies that were considered the enemy of ordinary Albertans. It was not unprecedented legislation. The UFA government had passed the *Debt Adjustment Act* in 1933, and the federal government itself had passed the *Farmers' Creditors Arrangement Act* in 1934. Both measures restricted the ability of debt holders to sue to recover debts owing to them.

However, the *Reduction and Settlement of Debts Act* was much more draconian. It left no recourse to the courts for a debt holder, and struck at the very underpinnings of a capitalist-commercial economy: the sanctity of contracts. The *Act* potentially meant a huge pecuniary loss to lenders of all sorts and a massive intrusion of government into the affairs of citizens. It was quickly challenged in the courts, and came before the Appellate Division in *Credit Foncier Franco-Canadien v Ross et al and Attorney General for Alberta* in 1937.[79] This was a consolidated appeal which included *Netherlands Investment Co v Fife et al*. In both cases, mortgage companies attempting to foreclose on defaulting mortgages ran up against the *Act*. In the first action, a trial was held before Justice Ewing and the *Act* was declared *ultra vires*. The provincial attorney general intervened and appealed to the Appellate Division.

Harvey, writing for the Court, upheld the trial decision. In his view, the *Act* failed on several grounds. It clearly trespassed on federal powers over bankruptcy. The *Farmers' Creditors Arrangements Act* and the *Bankruptcy Act* already covered much the same ground as the provincial *Act* and took precedence. Harvey found that the provincial legislation could not function concurrently since it conflicted with the federal legislation. Harvey also ruled that the *Act* was essentially an attempt to control the amount of interest on debts contracted by Albertans. Regulation of interest was another federal responsibility under the *BNA Act*. The attorney general had attempted to argue that the federal power was limited to discouraging usury. Harvey disagreed. In his view, the purpose of the *Act* was to eliminate or reduce interest on debts. To claim otherwise would mean "the field for the application of this *Act* is a very limited one...and that its chief application would be to the relief of solvent debtors who are not in distress. Again it is difficult to think that that could have been the intention of the Legislature."[80]

Harvey saw another problem with the legislation. The mortgage companies were not based in Alberta but headquartered elsewhere. This raised the possibility that the companies could simply sue to recover their debts in other jurisdictions. As Harvey pointed out, the Privy Council had ruled many years before in an Alberta decision, *R v Royal Bank of Canada*, that provincial legislation could not abrogate rights to civil actions in other places. For all these reasons, the *Act* was *ultra vires*. Harvey noted that unless the parts of a statute were completely separate in function, if one part failed, the whole statute was compromised. Therefore the *Reduction and Settlement of Debts Act* could not stand.

NEIL D. MACLEAN, LASA ACC. 2005-019.

The Guaranteed Securities Legislation: The Government Tries and Loses Again

In *Credit Foncier*, the Court was unanimous. Another appeal involving Social Credit legislation and constitutional law was not as harmonious. In 1938, in *Independent Order of Foresters v Lethbridge Northern Irrigation District*, the Court divided four to one, with Harvey and the rest of the appellate justices ranged against Frank Ford in dissent.[81] At issue was the validity of *Provincial Guaranteed Securities Interest Act, 1937*, and the *Provincial Guaranteed Securities Proceedings Act, 1937*.[82]

A tangled web of litigation led up to the decision. The Aberhart government had brought in the *Provincial Securities Interest Act* in 1936, empowering the province to cut the interest rate in half on all securities it had issued and guaranteed.[83] The *Act* also banned court actions. The Independent Order of Foresters had invested in the debentures of the Lethbridge Northern Irrigation District in 1921. When some of the debentures came due and the Order tried to collect, the bank, on government instructions, would only offer 3 percent interest rather than 6 percent. In the resulting litigation, Justice Ives ruled the 1936 *Provincial Securities Interest Act* was *ultra vires* because it affected interest and also the right of bondholders to sue.[84]

This did not stop the Aberhart government. In response, in 1937 it passed three *Acts*, the *Provincial Guaranteed Securities Interest Act*, the *Provincial Securities Interest Act, 1937*, and the *Provincial Guaranteed Securities Proceedings Act, 1937*. The first two statutes essentially split the 1936 *Act* in two, one covering all securities guaranteed by the provincial government, the other all securities actually issued by the provincial government. In both cases, once again, the interest was halved. The *Provincial Guaranteed Securities Proceedings Act* was short and simply stated that no one could sue over any matters affected by the other two *Acts*. The Attorney General's department thought it had learned from Harvey's comments in the *Credit Foncier* appeal. By separating functions into several Acts

JASPER AVENUE, EDMONTON, 1930. PAA BL246/3.

instead of one, it tried to open the door to having at least some of the legislative program survive.

The Order of Foresters went back to court and Ewing in turn declared that the new *Acts* were also *ultra vires*. The Attorney General appealed to the Appellate Division, on behalf of the nominal defendant, the Irrigation District, and in defence of the legislation. The stakes were high. Aberhart's motivation was not purely ideological. The province was effectively broke, its credit exhausted and facing a huge deficit. The legislation was an attempt to balance the books and avoid the province defaulting, although the damage done to the credit of the province through such arbitrary action was surely as great.

The disagreement among the appellate judges over the constitutionality of the legislation centred on the *Provincial Guaranteed Securities Proceedings Act*. The other two *Acts* clearly dealt with the matter of interest, and the ruling in *Credit Foncier* applied. All the justices agreed that the Acts were not valid. The *Provincial Guaranteed Securities Proceedings Act*, however, was trickier and a clever stratagem. The *BNA Act* gave the provinces full authority over "civil rights," which meant what could be pursued in the courts via civil litigation.[85] The *Provincial Guaranteed Securities Proceedings Act* simply barred any actions involving provincial indebtedness, including any debt the government had guaranteed, without the permission of the Lieutenant-Governor. It was a blanket proscription that would effectively prevent any court challenges of any legislation that affected these subjects, backed in theory by the constitutional authority of the *BNA Act*.

As Ford pointed out, considered alone, there was nothing about the *Act* that was outside the power of the provincial legislature, even if it was a draconian limitation of legal rights:

> The "true nature and character" of Ch. 11, "its pith and substance," is not the invasion of any Dominion legislative field, colourably or openly, but a frank expression of

an intention to limit the enforcement in the province of certain contractual rights.[86]

Ford argued that the *Act* did not remove any substantive right of the courts, such as reviewing the constitutionality of the legislation. He argued that the existing federal *Interest Act* did not contain a specific requirement that the courts enforce contracts for specific rates of interest, although he recognized that Parliament could by legislation impose that duty upon the provincial courts. Ford's reading was an impeccable but narrow construction of the statute, one that defended the provincial legislative competence over contracts since they fell within property and civil rights.

Harvey, for his part, agreed that "if the statute stood alone it might be difficult to answer this argument."[87] However, he contended that it was clear from recent Privy Council and SCC decisions (including the 1937 reference on Social Credit legislation) that the *Provincial Guaranteed Securities Proceedings Act* should not be interpreted alone if there existed an obvious context in which it was intended to operate. In this case, that *Act* was clearly intended to back up the other two invalid Acts and therefore, it too "must fall with it." McGillivray, in concurrence, put it much more strongly:

> If this Legislature having passed an interest act that has been held to be *ultra vires* may now re-enact it and make it effective by the simple expedient of denying access to the Courts at the pleasure of the executive branch for those who seek the collection of the interest moneys which the *ultra vires* Act denied them, then the whole scheme of Confederation may be set at naught at the will of any provincial legislature.[88]

On further appeal, which skipped over the SCC (the provincial government knew they would get no solace there), the Privy Council agreed in substance with the majority of the Appellate Division.

In considering both appeals, *Credit Foncier* and *Independent Order*, the Appellate Division appeared neutral as to the larger political implication of the legislation. The appellate judges examined the legislation purely on the division of powers under the Canadian Constitution. Who had the jurisdiction to legislate – the federal or provincial government?

McGillivray perhaps betrayed impatience with the fact that the legislation was so clearly invalid, thus wasting the Court's time. But the attempt of the Aberhart statutes to eliminate recourse to the courts drew little adverse comment. This was surprising given Harvey's forcefully expressed sentiments about the centrality of the courts in protecting rights and liberties. Nor did the justices consider or even mention the obvious aim of the Acts in question, especially in the *International Order* appeal, which was to address the manifest difficulties of the Depression. They stuck to what they no doubt saw as their proper role, questioning the impugned

LAW OFFICE IN LETHBRIDGE, CA. 1930. LASA 66-G-1.

J.H. UNWIN, MLA, CA. 1935. PAA A2794.

> MEETING OF LAW SOCIETY BENCHERS, 1937. PRESIDENT J.E.A. MACLEOD FRONT ROW CENTRE; FRANK FORD; WILLIAM WALSH ON LEFT, HORACE HARVEY ON RIGHT. LASA 5-G-8.

legislation only on well-established constitutional division of power principles. However, since the judges of the Court almost certainly did not sympathize with the aims of Social Credit, their black letter approach may have been a convenient way of undermining Aberhart's agenda without drawing the premier's ire more than necessary.

Bankers' Toadies: "Just Exterminate Them"

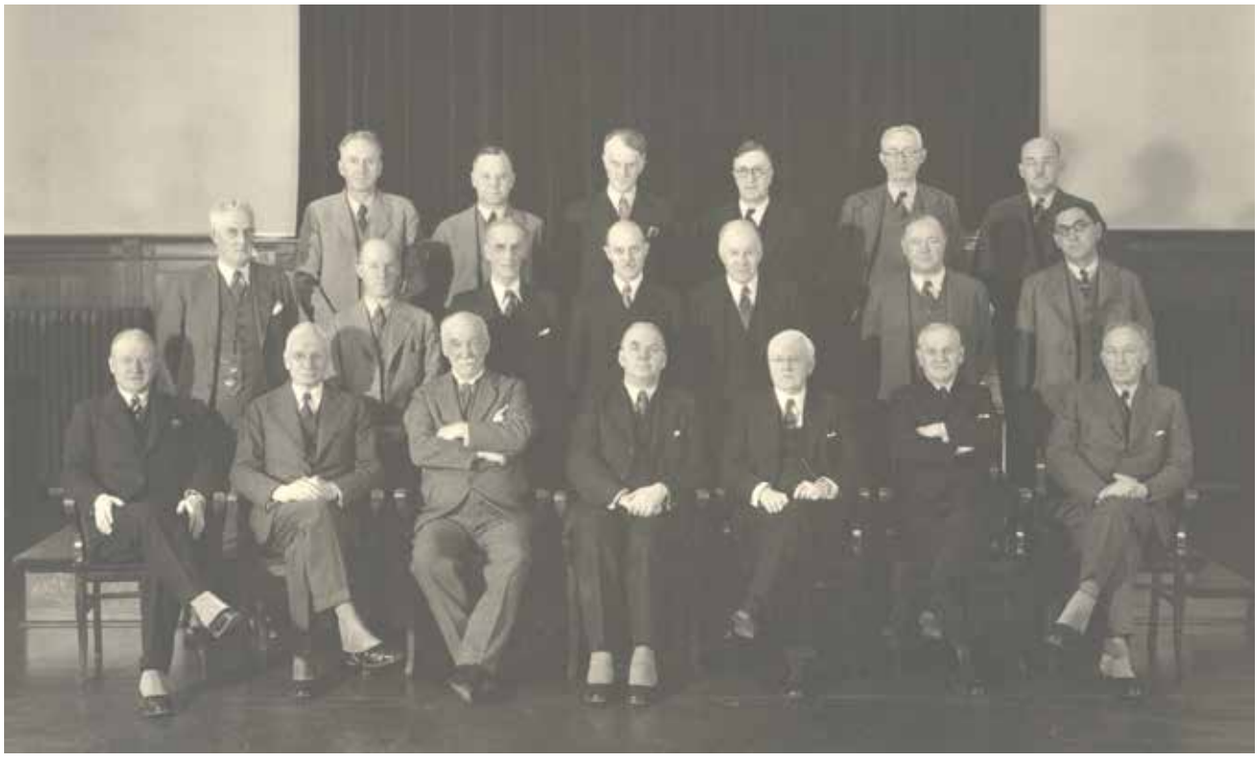
The judges, however, betrayed their outrage when dealing with Social Credit propaganda. In 1937, two members of the Social Credit entourage, Joseph Unwin and George Powell, published a pamphlet titled "Bankers' Toadies." Powell was originally an emissary of Major Douglas, sent to advise Aberhart on social credit, and Joe Unwin was the MLA from Edson and the party whip. The pamphlet took aim at what social creditors saw as the agents of the banks and insurance companies, namely the lawyers and brokers.

> My child, you should never say hard or unkind things about Bankers' Toadies. God made Bankers' Toadies, just as he made snakes, slugs, snails and other creepy-crawly, treacherous and poisonous things. Never therefore, abuse them – just exterminate them!

The pamphlet then went on to list a number of prominent Edmonton lawyers and brokers, ending with the phrase, in bold type, "Exterminate Them," and a call for the $25 dividend promised by Social Credit.

The men listed in the pamphlet were not amused and complained to the police. Unwin and Powell were arrested and charged with defamatory libel and counselling to commit murder. Under orders from the premier, who also held the portfolio of attorney general, the Crown was instructed not to prosecute the charges.[89] However, the Edmonton agent for the attorney general said the Crown would not hinder a private prosecution. Senator W.A. Griesbach, one of the lawyers listed in the pamphlet, pursued the charge, with G.H. Steer acting as his prosecutor. Ives was the trial judge sitting with a jury. Unwin and Powell were found guilty of "publishing a defamatory libel knowing it to be false" and were sentenced to short jail terms with hard labour. On sentencing Powell, Ives declared: "It would seem to me you are a propagandist and nothing more." He was ultimately deported; Unwin went to the Fort Saskatchewan jail for three months.

Unwin appealed, challenging the conviction and the sentence. The two main points of appeal were relatively technical. Private prosecutors were required to obtain the leave of a judge and show there was a sufficient case for the trial. The defence argued that when Ives reviewed the application in the presence of the prospective jurymen, he created a potential bias. The second point was that Ives should have directed the jury that if they considered that Griesbach's prosecution vindicated



his own private character, rather than the larger public interest, it could not stand.

Harvey wrote the unanimous verdict of the Court, firmly dismissing the appeal. In his view, that the pamphlet was defamatory libel was clear. It was also equally clear in law that since a number of individuals were named in the pamphlet, Griesbach's prosecution had more than a personal dimension, and Ives's direction to jury was sound. In considering leave to appeal sentence, however, he wrote:

> It cannot be said that the offence is a trivial one; it is a scurrilous attack on men of prominence and all of high repute, but over and above that it is shown by the evidence that the state of feeling throughout the province was such that the broadcasting of such a libel might have very disastrous consequences. The trial Judge was bound to treat the libel and its publication as a serious matter and was justified in imposing a substantial penalty.[90]

Harvey and the Court again showed their concern for maintaining the established order in the face of unrest and possible violence due to the unsettled times. As with his approach many years earlier in the sedition appeals, and more recently with the protests, Harvey was willing to invoke prevailing social conditions but primarily in the interests of maintaining law and order rather than for more liberal ends, like freedom of speech. In a time of often violent rhetoric, the Court defined the limits of legitimate political expression in Alberta.

Aberhart's Revenge

The Court continued to grapple with other Social Credit legislation. The government, however, had learned a lesson, referring new measures to the Court to ascertain their constitutionality before enactment.[91] In 1946, the government put its last attempt at introducing social credit ideas, the *Alberta Bill of Rights*,[92] before the Court, which approved the innocuous first half and disallowed the more radical proposals in the second half.[93] One writer has said that the Court's judgment was actually a great service to Aberhart's successor, Ernest Manning, who was more interested in running the province as a small "c" conservative than bearing the Social Credit banner.[94]

William Aberhart was a vengeful man. The government had deprived Lieutenant-Governor Bowen of his official residence for his obstreperousness when he refused to give assent to controversial statutes in 1937. Harvey was punished in turn. He was unceremoniously dropped in 1940 from the Board of Governors at his beloved University of Alberta. "I quite entirely agree with you that he wanted to get back at the judges and particularly at me, I think," Harvey wrote to Senator Buchanan of Lethbridge, who was outraged at the move.[95]

The government viewed Harvey and his brethren as part of the resistance against the social credit experiment simply by maintaining the rule of law. Consequently, in the eyes of Aberhart and his supporters, they were the enemy. The justices of the Appellate Division, though, did not necessarily see themselves as opposing the force known as social credit. Their stance, in the appeals examined as well as others, was always that of a typical "formalist" court. The judges looked first and foremost at whether the measures that the government proposed were constitutionally permissible given the division of powers in Canada. In disallowing the challenged legislation, they also happened to shore up the established order.

Maintaining the Rule of Law: In Defence of Formalism

Harvey and his colleagues, however, would have likely insisted that it was not their role to bring about change. And there was little show of *animus* against the Social Credit Party itself in the Court's decisions. Ford even demonstrated some judicial sympathy for provincial rights. The judges surely could see that the government's intention was to address a profound social and economic crisis. But equally, it was not their role to promote this aim, worthy or not. Nor was it for them to pronounce on the rightness or wrongness of social credit as an economic theory.

In all the decisions discussed above, the Court operated within what can be called the confines of an orthodox approach. The judges showed more concern for upholding order than broader social justice, but this was not uncommon in Canadian courts in this era. They were not entirely unaffected by the prevailing societal circumstances. But this played out more as a concern with preventing unrest than addressing the manifest problems of the day. The appellate justices in the Depression years felt that their role was to deal with the law as it was, not to try to change it. That was the job of the legislature, and certainly the strong deference to the elected lawmakers that permeated the judges of the Harvey court likely prevented more overt criticism of, or resistance to, Aberhart's Social Credit Party, when many measures of the government must have struck the judges as repugnant.

At the same time, the Court's stance was also a source of strength. In the deeply embarrassing circumstances of the UFA scandals, the Court had a ready refuge. Its duty was only to interpret the law. In dealing with the radical Social Credit legislation, there was no felt need to inquire into the desirability, or feasibility, or ultimate effect of the proposed Acts, but only whether they were lawful under Canada's Constitution. In deciding this issue, the question was not which government might do a better job but rather which government had been given the power and right to legislate in the disputed areas under the *BNA Act*. That was the only issue for

PG. 148 LAW SOCIETY ANNUAL MEETING, 1946. LASA 5-G-44.

PG. 149 MEETING OF ALBERTA SUPREME COURT JUDGES, APPELLATE AND TRIAL, 1946. LASA 5-G-57.

the Court. What is more, to the degree that the Social Credit proposals were unprecedented impositions of government control over the economic life of Albertans, the Court could stand firm in defence of the freedoms found in the law and the Constitution.

CONCLUSION

Horace Harvey always had conflicting feelings about retirement. He almost left during the chief justice crisis, at that time still a relatively young man. As he turned seventy and then again at seventy-five, Harvey pondered the notion of retiring. During 1933, he had a revealing exchange of letters with R.B. Bennett, whose government was proposing legislation to ease judges out of office by reducing their salary at seventy-five. On one hand, Harvey staunchly defended judicial independence – appointments were for life – and didn't like the implied aspersion on the judiciary. But he was sympathetic as well, saying that unfortunately it is not always obvious to a man when his powers are slipping. In his view, the solution was a better pension and using retired judges for commissions and arbitrations. "I have no doubt that one reason for some of the Judges holding on to the office is that they feel they would be quite lost if they gave up the occupation in which they had been engaged for so many years."[96]

This probably reflected Harvey's own frame of mind. Writing to his friend O.M. Biggar in 1938, he commented that he found it hard to contemplate retirement as long as he continued to enjoy his work and felt that he was performing well. At the same time, as with his discussion with Bennett, Harvey was sensitive to the problem of ailing judges, commenting that the public deserved to have confidence in their judiciary and standing aside for younger men was worthy of consideration. Clearly, he felt that he was indispensable. He worried about the shenanigans of the Social Credit government and thought it was not yet time for him to leave.

COURTHOUSE AND LAND TITLES BUILDINGS, CALGARY, ALBERTA. LOCATED ON 7TH AVENUE BETWEEN 4TH AND 5TH STREET SW; AT RIGHT IS PART OF 1888 COURT HOUSE DEMOLISHED IN 1958. GLENBOW ARCHIVES, NC-26-5.

And so Harvey stayed. World War II came, and he felt he had to stay longer as a form of duty. The war ended, and by this point, he must have felt that he might as well continue on. His wife died in 1948, no doubt a further disincentive to retirement. There was little sign of any deterioration of his mental powers. His hearing was another matter. By his last year he was close to being deaf. And, entering his eighty-sixth year, Harvey's energy waned. His formerly voluminous correspondence dropped off precipitously. He was still, however, contributing judgments for the Court and writing dissents that were as concise and well-reasoned as ever. It must have seemed like the Chief would be there forever. But on September 9, 1949, Horace Harvey, one of Alberta's judicial giants, died after a short illness. An era had ended.

Endnotes

1 Daniel Defoe, "The True-Born Englishman" (1701), Pt. II, 1.313.

2 Henry David Thoreau, *Journal*, vol. 5 (1853): 461.

3 LAC, MG 30 E87, file A 1924, letter, Harvey to Atkinson, March 8, 1924.

4 LASA, fond 9, series 5, file 53, Ronald Martland interview, 14.

5 Ibid., Spencer Cumming interview, 31.

6 Peter L. Miller, ed., *Alberta Law Review, 25th Anniversary Issue* (1980); 8 and 11.

7 LASA, fond 9, series 5, file 41, CBA Historical Dinner transcript, 21.

8 Ibid., Saucier interview, 60.

9 Ibid., Martland interview, 14.

10 Frank W. Anderson, *The Carbon Murders Mystery* (Calgary: Frontier, 1973), 37.

11 *R v Gallagher*, [1924] 3 WWR 357, at para. 41.

12 This is an interesting anomaly, but might be explained by the fact that the Meighen government was a continuation of Borden's unionist wartime administration, which contained Liberal MPs.

13 Louis A. Knafla and Rick Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997), 28.

14 At the time, negligence in the common law was an either/or proposition. In *Jeremy v Fontaine*, [1931] 3 WWR 203, Clarke advocated legislative change to allow for contributory negligence.

15 LAC, MG 30 E87, vol. 30, file RST 1926, letter, Stuart to Harvey, n.d.

16 LAC, MG 30 E87, vol. 30, file RST 1926, letter, Stuart to Harvey, n.d.

17 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 87.

18 LASA, fond 9, series 5, D.P. Macdonald interview, 4.

19 LASA, fond 9, series 5, file 30, Milvain interview, 26.

20 Ibid., 26–27; James Gray, *Talk to My Lawyer* (Edmonton: Hurtig, 1987), 62.

21 Like Simmons, Mitchell was not a legal giant. He wrote the occasional judgment but was not a strong contributor to the appeal court. Interestingly, upon his death the newspapers commented that as Chief Justice, Mitchell had not conducted any trials. He was made chairman of the Board of Review of the federal *Farmers' Creditor's Arrangement Act* the same year he moved to the Trial Division, and this consumed nearly all his energy. Ives

became the *de facto* chief, taking over all of Mitchell's administrative duties for a number of years before the latter's death in 1942.

22 LASA, fond 9, series 5, file 18, Allen interview, 54.

23 Wilbur F. Bowker, "Three Alberta Judges," *Alberta Law Review* 4, no. 1 (1965): 6.

24 *Albertan*, March 25, 1965.

25 LAC, MG 30 E87, vol. 22, file A,B 1929, letter, Harvey to Attorney General, Feb. 2, 1929.

26 PAA, acc. 69.287, box 5, file J5, letter, Scott to Attorney General, Jan. 22, 1923.

27 LAC, MG 30 E7, vol. 40, file G,H, 1941–1949.

28 Ibid., vol. 22, file A,B 1929, letter, Harvey to Attorney General, Feb. 2, 1929.

29 Alberta was not unique in resorting to a three-judge panel. According to Moore, the BC court frequently used three- and four-judge panels in the early years and again in the 1940s after the quorum requirement of the court was changed. See Christopher Moore, *The British Columbia Court of Appeal: The First One Hundred Years* (Vancouver: UBC Press, 2010), 24. There is unfortunately no data for other Canadian appellate courts other than formal quorum requirements, but it is tempting to speculate that small panels were always somewhat common.

30 J.E. Crankshaw, ed. *Crankshaw's Criminal Code of Canada,* 5th ed. (Toronto: Carswell, 1924), preface.

31 Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 293.

32 Theoretically, the English Court of Criminal Appeals could vary a sentence up and down, but given that appeals of sentence came only from the accused, it is unlikely it was increased except in rare instances.

33 LAC, MG 30 E87, vol. 22, file A,B 1929, letter, Harvey to Attorney General, Feb. 2, 1929.

34 Reported cases are not the most reliable indicator of the actual work of the court at any time, and some reports went out of business in the 1930s, but the drop in reported cases is still indicative.

35 LAC, MG 30 E87, vol. 27, file I,J,K 1935.

36 See chapter 2.

37 LAC, MG 30 E87, vol. 25, file file L,M,Mc,N 1932, letter, McGillivray to Harvey, Feb. 19, 1932.

38 PAA, acc. 73.322, box 1, file 3f, letter, Simmons to Baillie, April 27, 1936.

39 Ibid., vol. 40, file A 1941–49, letter, Harvey to Attorney General, May 10, 1947.

40 This assertion is based on the large number of letters from the latter to Harvey, asking his advice.

41 *R v Jones*, [1931] 3 WWR 716.

42 *R v Stewart*, [1934] 1 WWR 423.

43 *MacMillan v Brownlee*, [1935] 1 WWR 199.

44 *R v Park*, [1937] 1 WWR 49, at para. 50.

45 *Dowsett v Edmunds*, [1926] 3 WWR 447, at para. 19.

46 LAC, MG 30 E87, vol. 28, file M,Mc,N 1936, letter, McGillivray to Edwards, Dec. 9, 1936.

47 *R. v. Melynuik*, [1930] 2 WWR 179, at para . 41.

48 *Jeremy v Fontaine,* [1931] 3 WWR 203, at para. 24.

49 Ibid., at para. 25.

50 *An Act to make Uniform the Law respecting Liability in Actions for Damages for Negligence where More than One Party is at Fault*, SA 1937, c. 18.

51 *Foster v Kerr*, [1940] 1 WWR 385, at para. 26.

52 *Knight Sugar Co. v. Alberta Railway & Irrigation Co,* [1936] 1 WWR 416.

53 *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board,* [1932] 3 WWR 477.

54 *R v Jones,* [1931] 3 WWR 716.

55 *R v Stewart,* [1934] 1 WWR 423.

56 *R v Jones,* [1931] 3 WWR 716, included appeals of *R v Jones and Sheinin*, *R v Thernes*, *R v Farby and Dworkin* and *R v Campbell*, all unreported.

57 *R v Jones*, [1931] WWR 716, at para. 30.

58 Ted Byfield, ed., *Alberta in the 20th Century, vol. 6: Fury and Futility: The Onset of the Great Depression, 1930–35* (Edmonton: United Western Communications, 1998), 86–89.

59 *R v Stewart*, [1934] WWR 423, at para. 27.

60 Ibid., at para. 12.

61 *R v Park*, [1937] 1 WWR 49.

62 Ibid., at para. 37.

63 LAC, MG 30 E87, file A,B, letter, Bennett to Harvey, n.d.

64 *McPherson v McPherson,* [1933] 1WWR 321.

65 Ibid., at para. 31.

66 Ibid. at para. 41.

67 Ibid. at para. 41.

68 *An Act respecting Actions for Seduction,* RSA 1922, c. 102.

69 Thomas Thorner and G.N. Reddekopp, "A Question of Seduction: The Case of MacMillan v Brownlee," *Alberta Law Review* 20, no. 3 (1982): 460–61.

70 *MacMillan v Brownlee*, [1935] 1 WWR 199, at para. 99.

71 Ibid., at para. 2.

72 Ibid., at para. 23.

73 Ibid., at para. 26.

74 Ibid., at para. 86.

75 Ibid., at para. 89.

76 Dale Gibson, "Bible Bill and the Money Barons: The Social Credit Court References and their Constitutional Consequences," in *Forging Alberta's Constitutional Framework,* ed. Richard Connors and John. M. Law (Edmonton: University of Alberta Press, 2006), 203–16, discusses the references.

77 *An Act to Provide for the Reduction and Settlement of Certain Indebtedness,* SA 1936, c. 2; *An Act respecting Proceeding in respect of Debentures Guaranteed by the Province*, SA 1937 (2nd Sess.), c. 11.

78 *R v Unwin,* [1938] 1 WWR 339.

79 *Credit foncier franco-canadien v Ross,* [1937] 2 WWR 353.

80 Ibid., at para. 29.

81 *Independent Order of Foresters v Lethbridge Northern Irrigation District*, [1938] 2 WWR 194.

82 *An Act respecting Proceedings in respect of Debentures Guaranteed by the Province*, SA 1937 (2nd Sess.), c. 11; *An Act respecting the Interest Payable on Debentures or Other Securities Guaranteed by the Province*, SA 1937 (2nd Sess.), c. 12.

83 *An Act respecting the Interest Payable on Debentures and Other Securities of the Province*, SA 1936 (2nd Sess.), c. 11.

84 *Independent Order of Foresters v Lethbridge Northern Irrigation District,* [1937] 1 WWR 414.

85 *BNA Act*, s. 93.13.

86 *Independent Order of Foresters v Lethbridge Northern Irrigation District,* [1938] 2 WWR 194, at para. 50.

87 Ibid. at para. 16.

88 Ibid. at para. 68.

89 Byfield, *Alberta in the 20th Century, vol. 7: Aberhart and the Alberta Insurrection, 1935–40*, 66.

90 *R v Unwin*, [1938] 1 WWR 339, at para. 25.

91 The *Agricultural Land Relief Act* in 1938, and the *Legal Proceedings Suspension Act* in 1942.

92 *An Act Respecting the Rights of Alberta Citizens,* SA 1946, c. 11.

93 *Reference Re Alberta Bill of Rights Act,* [1946] 3 WWR 772.

94 Byfield, *Alberta in the 20th Century, vol. 9: Leduc, Manning & the Age of Prosperity,* 66. Harvey, sitting in for the Lieutenant-Governor, would later read the government's throne speech, which included criticism of the Court's decisions. Manning thought the Chief found the irony amusing.

95 LAC, MG 30 E87, vol. 30, file A,B, 1940, letter, Harvey to Buchanan, Oct. 31, 1940.

96 LAC, MG 30 E87, vol. 26, file A,B, 1933, letter, Harvey to Bennett, Mar. 14, 1933.

CHAPTER 5

GUSHERS, LEASES, AND LIENS, 1949–1961

Then, with a roar, the well came in...you could hear it like a train approaching when you put your ear to the pipe.[1]

Wealth is not without its advantages, and the case to the contrary, although it has often been made, has never proved widely persuasive.[2]

Horace Harvey's death coincided with the start of a new era for Alberta. Two years before, Imperial Oil drilled Leduc #1 in central Alberta and made a spectacular oil find. Alberta's small oil and gas industry grew by leaps and bounds after Leduc. Over the following two decades, the industry became a prime driver of the provincial economy, transforming Alberta from a "have-not" to a "have" province. Just ten years after Harvey's passing, Alberta was not the same sleepy agricultural society that he had known, as the province modernized and urbanized.

The Appellate Division also saw change, although not as transformative. After twenty-five years with the same leadership, the Court now welcomed two chiefs in relatively quick succession, George Bligh O'Connor and Clinton James Ford. A new generation of judges was called to the bench. Despite the new faces, however, the story of the Court in the 1950s was one of continuity. The decade underscored the pragmatic, problem-solving character of the Court, reinforcing its orthodox approach to its role. The common-sense outlook of the judges, ironically, was the element that tempered the Court's otherwise conservative nature, as the judges also showed their concern for fairness and justice and the limitations of simply following "black letter" law.

The practicality of the Alberta appellate judges was not a drawback in creating a body of oil and gas law during the post-Leduc boom. In the immediate aftermath of Leduc, the Appellate Division considered a string of appeals, the outcome of which profoundly affected the industry's development in Alberta. The names of some – *Borys*, *Turta*, and *Wakefield* – still resonate among oil and gas lawyers in the province. These early, but crucial, decisions of the Court are the subject of this chapter. The Court had to mould an emerging area of law through decisions with immediate, and sometimes profound, economic consequences. With a brace of judges who were able legal technicians and familiar with the nascent oil and gas industry of the 1920s and 1930s, the

TRANSCANADA PIPELINE UNDER CONSTRUCTION, CA. 1955. PAA P1355.

Appellate Division in the 1950s was suited for the challenge. Their decisions formed a truly Albertan contribution to Canadian law.

THE O'CONNOR-FORD COURT

However much you study, you cannot know without action.

– Saadi of Shiraz[3]

Along with a new chief justice, the Appellate Division saw a changing of the guard in the late 1940s. In the last years of Harvey's tenure, George O'Connor, Harold Hayward Parlee, and William A. Macdonald joined the Court, appointed between 1944 and 1946. They belonged to the new era, and were joined in the next decade by Clinton Ford, Marshall Menzies Porter, Horace Gilchrist Johnson, Hugh John Macdonald, and Boyd McBride, while Frank Ford, the last of the pre-war justices, retired in 1954.

GEORGE BLIGH O'CONNOR, 1941. COURT OF APPEAL COLLECTION.

The Judges: George O'Connor, Urbane and Astute

Chief Justice O'Connor was born in Walkerton, Ontario, in 1883. His father was sheriff of the surrounding judicial district and his mother a descendant of George Hamilton, the founder and namesake of the city of Hamilton.[4] After finishing school in Walkerton, O'Connor took his law degree at Osgoode Hall and was the silver medallist upon graduation in 1905. Intent on coming west to practise, he wrote the Northwest Territories bar exam while on a train to Portland, Oregon, to see the World's Fair. From there, O'Connor went to Edmonton. He didn't have a good start in Alberta. Shortly after arriving, his silver medal was stolen.[5]

O'Connor landed on his feet, entering into a partnership with one of Edmonton's leading citizens, W.A. Griesbach, who served as a major general during World War I and was then a Member of Parliament and Senator. Although political opposites – O'Connor was a Liberal, Griesbach a Conservative – they never bothered with a partnership agreement and practised together contentedly until Greisbach retired.[6] They were joined by O'Connor's brother Gerald, and, after Griesbach left, the two continued until George was named to the Alberta Supreme Court, Trial Division, in 1941. Gerald later received an appointment to the federal Exchequer Court.

By the time O'Connor was elevated to the bench, he was one of the leading barristers in Edmonton. Primarily a civil litigator, O'Connor also acted on a number of important criminal cases and did some solicitor work. He was special counsel for the City of Edmonton. A familiar face at the Appellate Division, O'Connor also appeared before the SCC several times, the first occasion in 1915.[7] He was made King's Counsel in 1913, and served as a law society bencher and head of the Edmonton Bar Association. O'Connor was not a flashy counsel, as near as can be judged, but he was very sharp and hard-working. His fellow judge, Clinton Ford, said that O'Connor's chief interest was the law to the exclusion of everything else. As counsel, his great strength was focusing on the crucial evidence and facts in a file.[8] Ford described him as genial and humorous, and a Dean of the University of Alberta Faculty of Law, who knew O'Connor well, summed him up as "urbane in manner, courteous, placid and astute."[9]

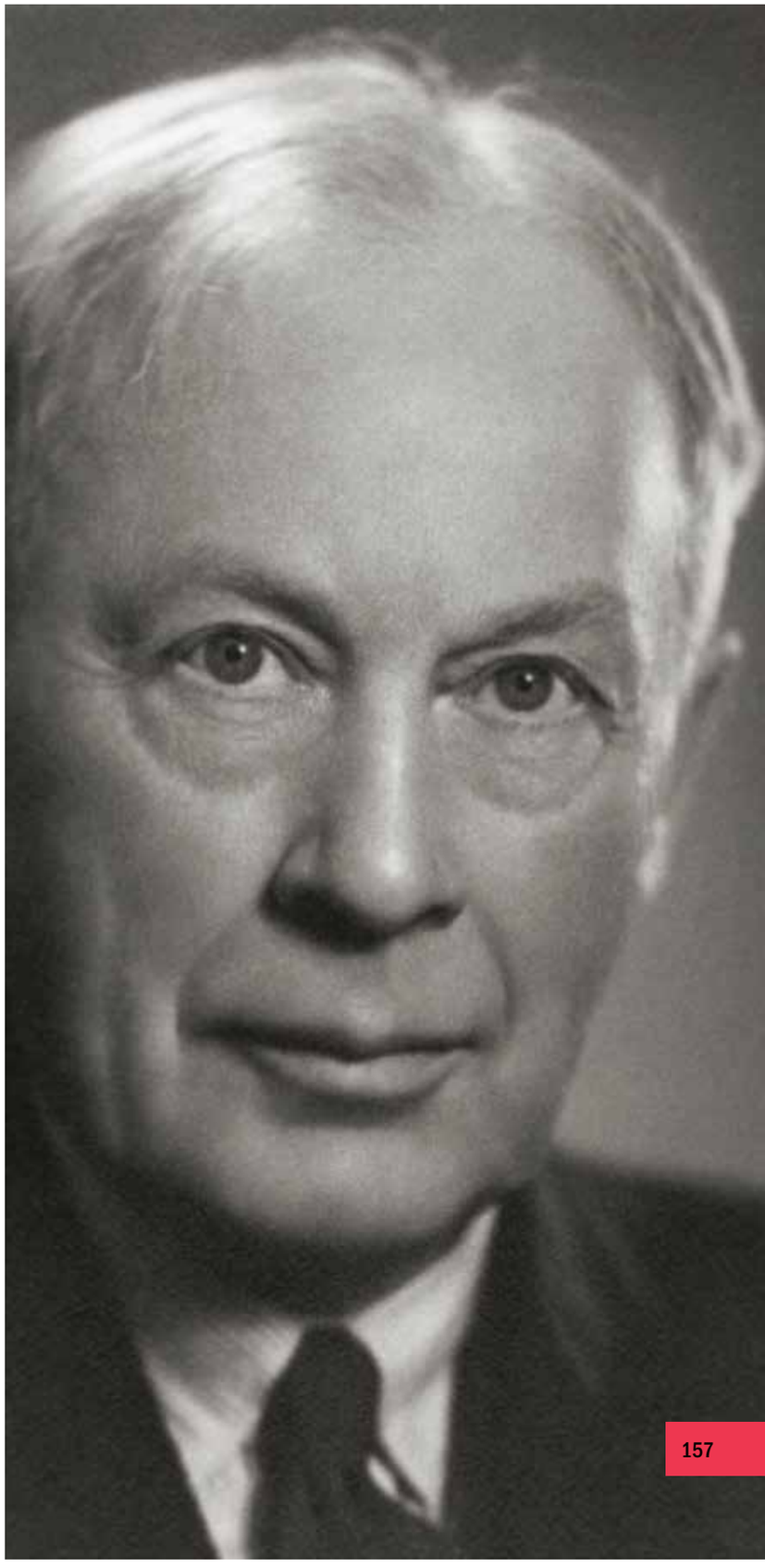
As a trial judge, O'Connor penned some significant decisions, such as *Majestic Mines v Alberta*,[10] an important judgment affecting the government's ability to collect royalties from mineral rights, which had significant implications for the oil and gas industry. In 1942, he acted as a mediator in a major strike in the coal

industry. This led in turn to his appointment as chairman of the Wartime Labour Relations Board and its peacetime successor, the Canadian Labour Relations Board.[11] O'Connor was promoted to the Appellate Division in October of 1946 as the replacement for Albert Ewing. He spent two years under Horace Harvey's tutelage, and then, despite being a relative newcomer to the Court, became his successor.

It is not clear why O'Connor was chosen to succeed Harvey. The deliberations of the federal cabinet on judicial appointments from this period are not a matter of record, and any gossip that might throw light on the decision has gone to the grave. O'Connor was already sixty-five and had not been on the appellate court very long. Nor had he been especially political. H.H. Parlee, appointed around the same time as O'Connor, had as good or better reputation as a counsel and judge. It may be that O'Connor's mediation of the coal strike and stint on the Labour Relations Board brought him to the attention of the Prime Minister and cabinet, or that his mild personality appeared a good choice for the leader of a collegial court. In the somewhat shadowy world of patronage and judicial appointments in that era, O'Connor may have just had some influential friends. Aside from the onset of poor health, O'Connor was quite capable of filling the post.

Harry Parlee, a Leading Light

Harold Hayward Parlee (known as Harry) was another late addition to the Harvey bench and another of Edmonton's leading lights at the bar. Parlee was born in Sussex, New Brunswick, in 1877.[12] He attended Mount Allison University in his native province but finished his Bachelor of Arts degree at Dalhousie in neighboring Nova Scotia. For law, Parlee went to Saint John's Law School and was admitted to the New Brunswick bar in 1901. A year later, he made the move to Alberta but was only admitted to the bar in 1906. He joined the firm of pioneer lawyer H.C. Taylor in Edmonton, which continues today as Parlee McLaws. Harry Parlee quickly built an impressive practice as both a barrister and solicitor

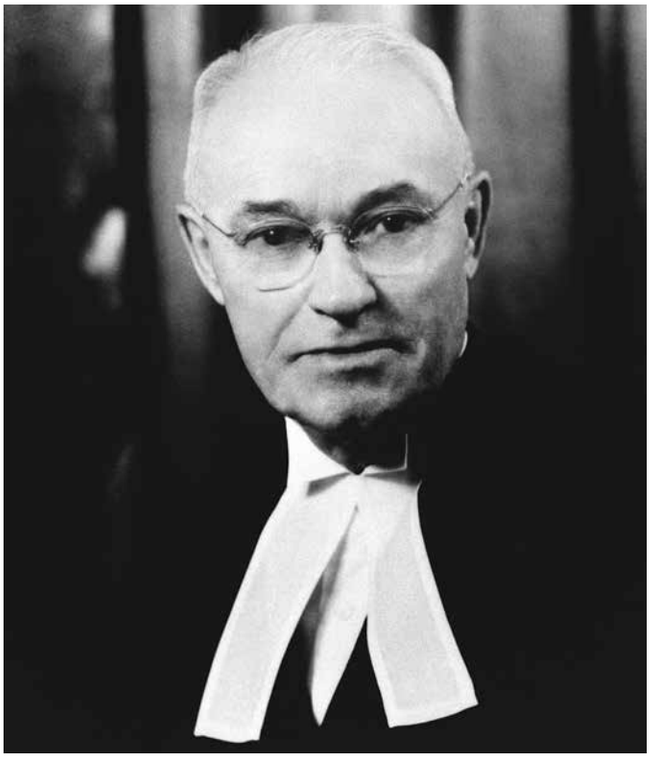


HAROLD HAYWARD PARLEE, 1945. COURT OF APPEAL COLLECTION.

and was one of the eminent talents of his era, receiving his KC in 1913. A bencher of the Law Society of Alberta for many years, Parlee was its president from 1933 to 1935. Outside of law, he was very involved with the University of Alberta and was chairman of its Board of Governors from 1940 to 1950.

At home in the courtroom in civil and criminal law, the versatile Parlee was effective at both trials and appeals.[13] Along with a dozen appearances at the SCC, he appeared twice before the Privy Council, on both occasions arguing constitutional cases. Parlee was recognized as one of Alberta's early authorities in oil and gas law. As the Edmonton solicitor for the Canadian Bank of Commerce, Parlee also had the dubious honour of being named one of the "Bankers' Toadies."

Parlee's judicial career started in 1944 on the Trial Division, an appointment many colleagues thought was long overdue.[14] He moved to the Appellate Division a year later to replace Howson, who had become Chief Justice of the trial court. On both courts, Parlee was considered a strong, conscientious judge, not afraid to speak his mind.[15] He frequently disagreed with Harvey and Frank Ford. His judgments were a model of conciseness. Always thorough, Parlee showed great talent for getting to the point. Parlee features prominently in the oil and gas cases discussed later in this chapter.



Billy Macdonald, a District Court Promotion

Calgarian William Alexander Macdonald was the next appeal judge, appointed in 1944 to replace Henry Lunney as the "Catholic justice." Macdonald had been on the bench since 1926. He was the first judge in Alberta to start at the District Court and move up the judicial ranks to the Appellate Division. Macdonald was another Maritimer, born in 1879 at Port Hood, Nova Scotia, into a large farm family, who were ardent Roman Catholics and equally ardent Liberals. Macdonald's younger brother Angus became the Premier of Nova Scotia during the Depression and Minister of the Navy in World War II. Billy Macdonald attended St. Francis Xavier University for his undergraduate degree and then did law at Dalhousie, graduating in 1910.[16]

After two years of practice in Halifax, Macdonald came to Calgary and partnered with Henry S. Patterson. He did not have a particularly distinguished practice.[17] Along with his partner Patterson, Macdonald represented Caledonian Collieries in a 1924 challenge to the province's right to collect mine taxes. This case went to the Privy Council, where Caledonian won, but Macdonald's involvement ended at the initial trial.[18] Soon afterwards, he was offered a position on the District Court bench in Calgary where he was a well-liked judge. After sixteen years, he was promoted to the Supreme Court, Trial Division, and then soon after, to the Appellate Division. He was a quiet man, whose decisions have been described as "sound and well written."[19]

Clinton Ford, from Farmboy to Chief Justice

George O'Connor's promotion to Chief Justice meant another appointment to the bench. Like Macdonald, Clinton Ford was a Calgary lawyer who started his judicial career on the District Court. Ford would go one better than Macdonald, however, replacing O'Connor as Chief Justice of Alberta in 1957. Ford was the first chief justice since Sifton to be headquartered in Calgary rather than Edmonton.

< WILLIAM ALEXANDER MACDONALD, LASA ACC. 2002-028.
> CLINTON JAMES FORD, COURT OF APPEAL COLLECTION.
> MARSHALL MENZIES PORTER ON YACHT, LASA ACC. 2002-003.

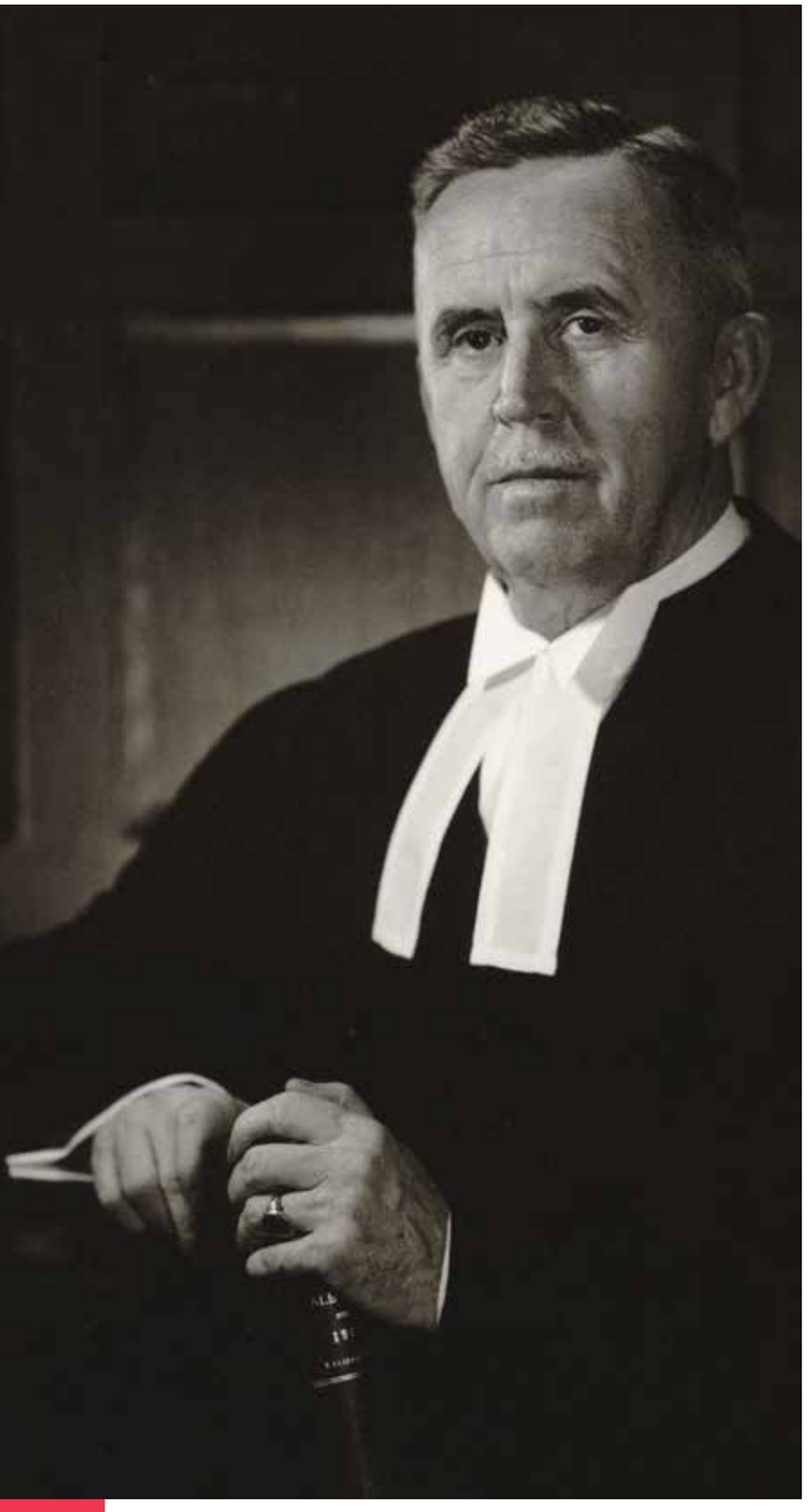
Clinton James Ford was not related to Frank Ford, his senior on the appellate bench, although they were both from Ontario. The younger Ford was born on a farm near Corinth, Ontario.[20] After finishing school, he taught for a couple of years before enrolling in the University of Toronto. The winner of the Prince of Wales medal upon graduating in 1907, Ford was obviously destined for greater things. After two years at Osgoode Hall, Ford came west. He finished his law degree in the University of Alberta's fledgling law program, graduating in 1910 and winning the gold medal for the highest marks on his bar exam. After a short time at the firm of Reilly and MacLean, Ford took the job of city solicitor for Calgary in 1913, where he soon established a good reputation and remained until 1922.

Returning to private practice, Ford teamed up with Leo H. Miller and Eric Harvie as Ford, Miller, and Harvie. Ford's partner Harvie became fabulously wealthy on oil speculation after Leduc, but by that time Ford had become a judge. Before his appointment to the District Court in 1942, Ford had a successful general practice, acting as both barrister and solicitor. Ford was politically active, serving as president of the Alberta Liberal Party and making an unsuccessful stab at provincial office. Notably, he made one of the first political speeches broadcast on radio in the province.[21] Community service was very important to Ford. He was the local president of the YMCA and served as its national vice-president, sat on the executive of the Board of Trade for a decade, and spent over thirty years on the Board of Governors for Mount Royal College.[22] A staunch Methodist, he was also a pillar of Calgary's Central United Church.

Hearkening back to his rural roots, Ford's great hobby was raising chickens. President of the Alberta Poultry Federation, Ford also bred and raised chickens in the backyard of his home in Calgary's Mount Royal.[23] There is no record of what the neighbors thought about this. They probably didn't mind. Ford was very likeable in his quiet way. One Calgary lawyer and later judge said: "Clinton Ford was a pretty colourless character, and I say that with the greatest respect."[24] Ford's humble upbringing may have been the source of one of his best attributes, his great fund of common sense, remarked upon by many. One of Ford's three children, Helen, followed him into law at a time when women lawyers were still a rarity, graduating from the University of Alberta law school in the 1930s and later practising in Vancouver.

Marsh Porter, Garrulous and Opinionated

Marshall Menzies Porter was acknowledged as one of the leaders of the bar in Calgary when he was appointed to the Appellate Division in July 1954, the first appointee since McGillivray to go directly to the Appellate Division from the street. He was praised widely for his common sense and ability to quickly reduce a legal argument to the essentials.[25] And among brethren not afraid to speak their minds, Porter had the best claim to be the decade's "great dissenter." Opinionated almost to the point of eccentricity, Porter was a somewhat larger than life character.



Born in Sarnia, Ontario, in 1894 to a railroading family, Porter came to Alberta in 1913.[26] After entering articles with Laidlaw, Blanchard and Rand in Medicine Hat, Porter went off to law school, choosing Dalhousie in Halifax. When he graduated in 1917, he joined the military, and after demobilization returned to Medicine Hat in 1919, where he was called to the bar. He soon moved to Calgary and practised in several different combinations before Premier John Brownlee asked him to join his firm. The partnership eventually became the firm of Porter, Allen and MacKimmie, later known as MacKimmie Matthews.

Like most prominent lawyers of his generation, Porter was a generalist and very capable as both a barrister and a solicitor. He was one of Brownlee's counsel in the Macmillan lawsuit. Much of his practice, however, was as a corporate lawyer, especially in the ten years before his appointment.[27] By that time, Porter was as much a businessman as a solicitor and was the first judge to come to the bench as a corporate executive. As well as serving as a director for corporations such as the Bank of Nova Scotia, Porter was the president of the Western Printing Company and publisher of the *Farm and Ranch Review*. He also headed up the Alberta Salt Company. His most important corporate post was vice-president of Home Oil, a connection that made Porter, Allen and MacKimmie a leader in oil and gas law. Porter had been a pioneer in this field, acting as counsel for the Alberta government and resolving outstanding issues resulting from the Natural Resources Transfer Agreement of 1930, which transferred control over Crown lands and natural resources within Alberta from the federal government to the province.[28] Porter has also been credited as the source of a very important change to federal government regulations for mineral exploration.[29] His oil and gas background made Porter a natural replacement for Parlee, who died in 1954.

Porter was an enthusiastic supporter of the Calgary Exhibition and Stampede and a long-time board member. His great love outside of the law was the Shriners.

HORACE GILCHRIST JOHNSON, COURT OF APPEAL COLLECTION.

In fact, while still on the bench, Porter was elected Imperial Potentate, head of the Order for all North America. Curiously, his Shriner activities led to Porter testifying years later at the Laycraft Inquiry into Royal American Shows, which probed allegations of bribery and corruption on the part of a carnival company.[30] Long since retired from the bench, Porter made light of the cheap gifts he had received as Shriner head, telling the inquiry that if the Royal American people were trying to buy his influence, they obviously didn't think it was worth much.

This was typical of Porter's irreverence. Along with being independent-minded, Porter was also something of a wit on the bench and a loquacious storyteller in his later years. One lawyer who knew Porter thought he was a rich man's Will Rogers, with a humorous but pointed story for every occasion.[31] While many lawyers liked Porter, some found him frustrating because of his habit of interrupting both counsel and fellow judges, monopolizing the discussion, and departing on tangents. In a criminal appeal before Porter, E.J. McCormick, a well-known wit, sought to portray a witness's reticence under questioning as a sign of unreliability. Porter interrupted to suggest that perhaps the witness was merely intimidated and tongue-tied, saying, "Why, that's even happened to me." McCormick shot back, "My Lord, that is a phenomenon which none of us have ever observed."[32] The entire courtroom, Porter included, dissolved into laughter.

Horace Johnson, a Quiet Intellect

Porter's appointment was followed quickly by that of Horace Gilchrist Johnson, who replaced Frank Ford. He was a strong judge who wrote extensively, not only judgments for the Court, but frequently in dissent and in concurrence. An Edmonton lawyer, Johnson was born in Medonte Township, Ontario, in 1899 and attended school in Orillia. He then had his legal education at the University of Alberta law school. He was arguably its first graduate to become an appellate justice.[33] Joining the bar in 1929, Johnson practised with the firm of Short and Cross his whole career. As a civil litigator, he appeared frequently in front of the bench he joined in 1954. A review of reported judgments shows a specialty in estates and trust litigation. He also lectured part-time at the University of Alberta law school.

Johnson, a quiet man who went about his work with no fanfare, has been described as "one of the most analytical and thoughtful judges of his era."[34] He was certainly a workhorse. One practitioner remembered that Johnson had a meticulous knowledge of case law and expected counsel to have the same. He was prone to impatience. Johnson sometimes turned around in his chair during argument if he felt the presenting lawyers were wasting his time, although he wasn't the only judge of that era to be rude to counsel.[35] In 1967, as a member of the Northwest Territories Appeal Court, in *R v Drybones*,[36] Johnson upheld the decision of Justice Bill Morrow, who had reversed the conviction of Joseph Drybones on the charge of being intoxicated off a reserve. Johnson agreed with Morrow that the relevant section of the *Indian Act* was discriminatory under the new *Canadian Bill of Rights*. This decision, subsequently upheld at the SCC, was a landmark for aboriginal rights and one of the few instances where the *Bill of Rights* proved efficacious. It also anticipated the challenges created by the *Charter* a generation later.

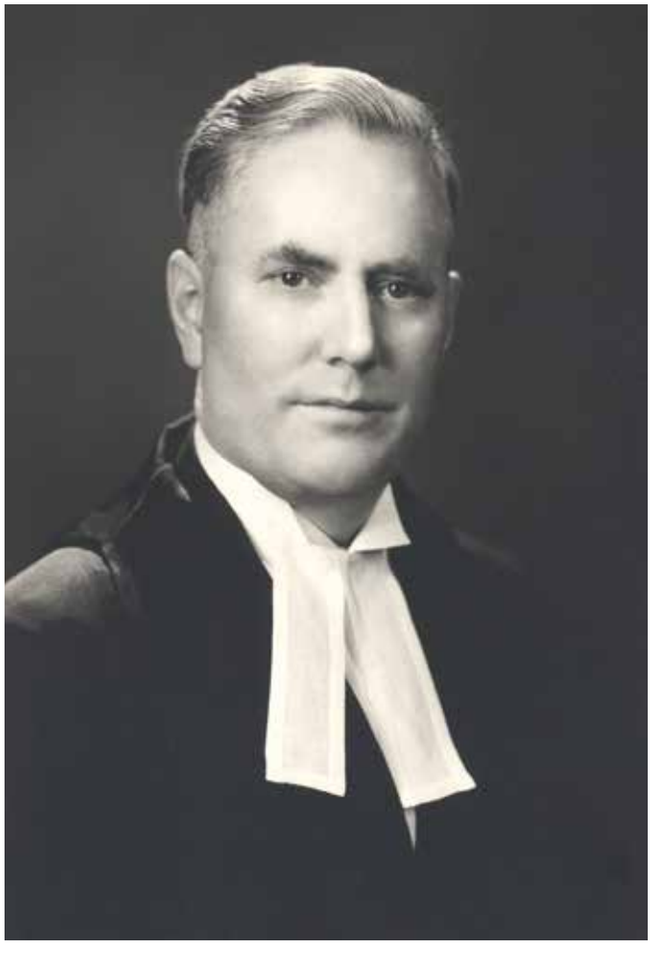
Johnson was the judicial representative on the three-man committee that revised the *Alberta Rules of Court* at the end of the 1960s, working with future appellate court members Herb Laycraft and Bill Stevenson. His interests outside the Court were several. Johnson was a Freemason, involved in his church, and a member of the Edmonton Library Board. He was on the Court for nearly twenty years, leaving at mandatory retirement in 1973. Johnson died in Honolulu, Hawaii, in 1982.

Hugh John Macdonald, the Athlete

Billy Macdonald, as he was affectionately known to his friends, became seriously ill in 1954. He managed to keep sitting for several years, but his output of decisions,

never voluminous, stopped almost entirely. In 1957, Macdonald elected to retire and was replaced by another, unrelated Macdonald, Hugh John. Hugh Macdonald was born in Massachusetts in 1898 and came to Edmonton as a boy.[37] His father was originally from Cape Breton, Nova Scotia.[38] Attending the University of Alberta, Macdonald received his teaching credentials as well as graduating with a law degree. Interestingly, Macdonald returned to the United States to join the army during World War I and went overseas to Europe, entering pilot training with the Army Air Corps. Afterwards, he came back to Edmonton to finish university.

Initially, Macdonald chose teaching over law and went to Banff, where he became principal of the public school. In 1927, Macdonald decided to start practising law and returned to Edmonton, becoming part of the firm of Wood, Buchanan and Macdonald. According to one biographer, Macdonald was primarily a solicitor specializing in insurance law, although he knew his way around a courtroom.[39] Outside of law, he was heavily involved in politics as a Liberal Member of the Legislative Assembly for four years and city alderman for six. Macdonald took a keen interest in his *alma mater* and was on the university's Senate and the Board of Governors, as well as serving as president of the Alumni Association. Macdonald's passion was sports. He played baseball for years, avidly followed hockey and football, and rarely missed any significant games.[40]



HUGH JOHN MACDONALD, 1960. LASA 61-G-38.

Macdonald was not particularly distinguished as a lawyer, but he had done his time in the political trenches, which likely explained his appointment to the Trial Division in 1944. He was very popular as a judge, producing workmanlike decisions and conducting his courtroom with great patience, courtesy, and fairness. He was favourably compared to Justices Ewing and Walsh, who had both been well-loved as trial judges.[41] Macdonald was fated to follow Ewing's path onto the appeal court, to which he was elevated in 1957. One of his qualifications for the appellate bench was that he was a Roman Catholic. Like his namesake predecessor on the Court, Macdonald also became ill and struggled during his last years, dying in 1965.

Boyd McBride, a Scots Lawyer in Alberta

A late appointment to the O'Connor-Ford court, James Boyd McBride was a thirteen-year veteran of the District Court and the Trial Division when he was elevated in 1957 as the replacement for Chief Justice O'Connor. A Scot born in Grenock in 1887, he attended the University of Glasgow but finished his legal education at the University of Alberta.[42] After a brief stint in Lacombe, McBride practised in Edmonton until he was named to the District Court bench in 1944. McBride did not have a chance to make much of an impact on the Appellate Division, falling ill and dying at the beginning of 1960. He came to the appeal court with a reputation as a meticulous legal scholar, and demonstrated in his short tenure that he had an independent mind. McBride was said to be proudest of a trial decision where he was able to apply admiralty law in Alberta, a first.[43] He was also the trial judge on the *Bakeries Combine* case, which had the distinction of being the longest trial in Canadian legal history at the time. McBride's replacement, S. Bruce Smith, served under Ford for less than a year before becoming chief justice.

Along with veteran Frank Ford, these eight men made up the bench through the 1950s. Over a short ten-year span, Alberta managed to have two judges on a five-judge bench with the same surname, Ford, and one justice named Macdonald was replaced by another Macdonald. This spoke volumes about the homogeneity of the bench and bar of the era, which remained very much "Anglo-Scottish," reflecting the business and professional elites of the province. It would be several decades before the Court became more representative of society.

At the same time, the appellate bench was gradually becoming more Albertan. The judges appointed before 1950, with a couple of exceptions, had been born and received their legal education in another province and had started to practise before coming to Alberta.[44] Clinton Ford finished his law degree through the University of Alberta, and Johnson, Hugh Macdonald, and McBride all had degrees from the provincial law school. After Porter in 1954, every appointment until 1979 had a law degree from Alberta.[45] The Court still awaited its first native son (or daughter), but a large step had been taken towards a home-grown bench.

O'Connor and Ford: Brief Tenures and Little Change in Court Practice

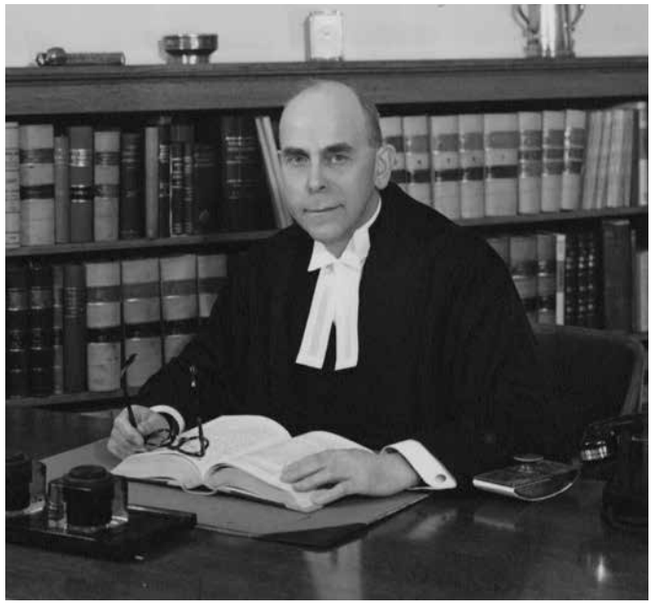
Neither O'Connor nor Ford had much opportunity to put their mark on the Court as chief justice. Both their terms were brief. O'Connor's health deteriorated markedly during his seven years, and Ford was only chief justice for four before the introduction of mandatory judicial retirement ended his tenure. The Court was also not that busy. Although legal business picked up considerably after the war, there was no sign that the Court was overwhelmed with appeals, even with the oil boom.

Administration remained simple and the Court continued to operate much as it had under Harvey. Sittings alternated between Edmonton and Calgary, in one city one month and the other the next, except through the summer break.[46] Usually the Court needed less than a week to get through the list. The only innovation was that the Court started keeping a separate list for appeals from the District Court, heard with a three-judge panel. Although the Court tried to sit as a whole court on appeals from the Trial Division, these also were often heard by smaller panels since, as often as not, a judge was ill or absent.

Lawyers who remembered appearing before the Ford court thought that the judges generally were familiar with the appeal and had probably read the factums, but this was the extent of their preparation. Most appeals ended with a quick oral judgment that was given off the bench at the end of the hearing. There do not seem to have been any delays or backlogs at all with the lists or with reserved judgments. The Court was possibly somewhat less collaborative than under Harvey, with more concurring opinions and more dissents, but the evidence on this is not conclusive. Both Ford and O'Connor were generally respected and liked. Ford was perhaps too much a gentleman. Herb Laycraft, later Chief Justice of the Court, remembered that senior counsel sometimes ran a bit roughshod over Ford when he presided, something unthinkable under Harvey. The strongest impression of the two chiefs, and most of the judges that served with them, was of practical, sensible men, solid lawyers but not brilliant, an impression that was borne out in their jurisprudence.

THE O'CONNOR-FORD COURT AT LAW

The O'Connor-Ford court dealt with several of the most famous oil and gas cases in Alberta which remain well-known and, in some instances, relevant, to this day. *Huggard Assets*, *Borys v Canadian Pacific Railway*, and *Turta v Canadian Pacific Railway* were all foundational



JAMES BOYD MCBRIDE, 1960. LASA 61-G-22.

decisions which determined vital issues regarding royalties, mineral reservations on titles, and the legal definition of oil and gas. Another case, *Wakefield*, had the distinction of the being the last Canadian appeal to the Privy Council. These decisions had a profound effect on the development of the oil and gas industry in Alberta.

In these appeals and others, the Appellate Division demonstrated a sound grasp of the issues, including the implications of the law for what was happening on the ground at the drilling rigs in the farmers' fields of central Alberta. The Court strove to develop solutions within the existing common law, but with occasional creativity. Its approach reflected its inherent conservatism. And yet, in their decisions, the judges showed a desire to come up with workable solutions which did not sacrifice rights unduly to expediency or the dictates of the law. In sum, the Court looked for good, practical outcomes that did not stray too far from accepted conventions of the time for judicial law-making, and that were fair to litigants.

Judging the Judges: A Black Letter Court

In eulogies and the like, O'Connor, Ford, and their confreres were consistently described as congenial, courteous, possessing great common sense, scrupulously fair, and so on. This wasn't quite the whole picture. Judges like Johnson, Porter and Hugh Macdonald could be impatient, even rude with counsel. In terms of their jurisprudence, however, common sense and fair-mindedness were prominently on display. If one word summed up the O'Connor and Ford court, it would be pragmatic. The judges were problem solvers primarily concerned with the litigation before them. The picture that emerges is of a group of competent judges, intellectually lively if not particularly adventurous. Although it was a basically orthodox court, the common sense of the judges meant that they also were quite concerned with equitable outcomes, which softened their otherwise black letter approach to the law.

Deference Remains the Rule, But Judicial Law-making Still Alive

In their approach to statutory interpretation, deference remained the rule of the day. The judges clearly thought it was the job of the legislature to make a desirable change to the law. The judges would take judicial notice of the changing circumstances of society, but usually stopped at opining that the legislature should take action. In *R v Shula*,[47] where the Court quashed a conviction for committing a common nuisance in the case of obscene phone calls, Johnson noted:

> I feel I must add that it is difficult to conceive conduct which is more despicable or reprehensible than that of the person who made these telephone calls, but if such conduct is to be punished the change in the law is to be made by parliament and not by the courts.[48]

The Court, however, was not invariably conservative in its law-making role. Johnson, who was diligent and scholarly, showed an explicit understanding of that role and felt the Court should interpret and apply the law to reflect new social realities when it could, especially if fairness was involved. In a divorce action, *Jackman v Jackman*,[49] Johnson noted there had been an important shift in family life. The litigants were both wage earners and their salaries had been used for the collective economic success of their family, something that had to be taken into account in dividing property on divorce. As Johnson stated:

> In recent years there has been a marked change in home life. Husbands are no longer the only wage earners and the wife has, in many cases, forsaken her traditional role in the home and has shared with her husband…the building up of family assets.[50]

Johnson understood that sometimes precedents became outdated and produced irrational or unjust results. Another example was his judgment in *R v Stewart-Smith*, where the issue

was whether the wife's evidence could corroborate her husband's.[51] Under old common law, husbands and wives were considered as one legal entity, and therefore a wife's testimony could not support or contradict her husband's. Johnson contended that this had already been changed in the *Canada Evidence Act*,[52] though some proscriptions still applied, especially in criminal offences. He then extended the argument further. Reviewing case law, he demonstrated that in actuality, previous decisions dealing with this issue were uncertain as to whether a wife's testimony was automatically disqualified. Given this ambiguity, Johnson concluded that the judge had freedom to make the law in contemporary terms:

> Thus being unhampered by authority, and the status of a wife being completely changed, she being emancipated in law and in fact from the authority of her husband, it would be illogical to apply the concept of unity of spouses at this time.[53]

To support his point that antiquated legal notions should be discarded, Johnson quoted the admonition of Lord Atkin in *United Australia v Barclays Bank Ltd*:

> When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them unhindered.[54]

Johnson's comments reflected not only his belief that the law had to reflect changing realities but that judges and the Court should play a role in doing so if not statute-bound. Porter, in several judgments, also showed his willingness to inquire into the larger social context behind litigation. This reflected his concern with just results over the strict letter of the law. And as Clinton Ford said on his retirement: "You can't follow a silly law."[55] While their approach contrasted to the Court's general orthodoxy, it also reflected the judges' common sense and a key feature of the Court's heritage, namely a concern with justice that can be traced back through the decades to its early days. Their views were also symptomatic of some restiveness with legal formalism among the Canadian judiciary.[56]

Compared and Contrasted: O'Connor and Ford as Jurists

As chiefs, O'Connor and Ford made for an interesting comparison. In civil law, they shared a common passion for justice in the general sense of fairness. Ford even implied that O'Connor was willing to work around the letter of the law to get a more equitable outcome. Writing about his predecessor, Ford stated, "In civil matters, justice was his motto, and he was able to achieve his purpose, at times ingeniously, within the ambit of the law."[57] Ford often referred to "natural justice" in his own writings for the Court. In the famous *Turta* oil and gas case, Ford and O'Connor were both disturbed that the civil rights of the defendant had apparently been removed due to a clerical error protected by statute. The concern of the two chiefs for fairness was reflected in the Court.

The most obvious difference between the two chief justices was in the criminal law. O'Connor was a hanging judge and strongly favoured capital punishment. Asked in one interview about the wisdom of hanging capital offenders, he stated: "I don't see how you can stop murder without it."[58] He also expressed reservations about the deterrent efficacy of replacements like the gas chamber or electric chairs. He did, however, express doubts about continued use of the lash, a small concession to modern views on punishment. His colleague Clinton Ford confirmed that O'Connor was "obdurate that law and order be upheld and that crime be punished sufficiently."[59]

Ford, on the other hand, believed wholeheartedly in the ideal of "beyond a reasonable doubt" and had a generously elastic view of that ideal. Many of his dissenting judgments were in favour of quashing a conviction or dismissing Crown appeals, often on the ground there

was sufficient doubt to preclude a conviction.[60] He was tough on prosecution arguments presented to juries. Generally, Ford's decisions showed a strong concern for the rights of the accused, especially with due process. In one case, where a storekeeper had called in the police after a customer's cheque bounced, Ford wrote:

> The heritage to liberty of the person won by the Magna Carta and confirmed later in the Petition of Right cannot be subordinated to the expediency of collecting a debt without statutory authority. What was done is contrary to our concept of civil liberty.[61]

There were exceptions. One unusual criminal appeal that came before the Court from the Northwest Territories in 1955 involved the conviction of a woman for indecent assault in a lesbian tryst. O'Connor, reviewing the evidence, threw out the conviction on the grounds that there had been no assault, just an attempt at seduction duly rejected. Ford, on the other hand, took a "serious view of the evidence" and would have sustained the conviction. It was an odd reversal of roles for the two chief justices, and not at all clear if this was due to one man's enlightened views about sexual assault or another man's strong aversion to homosexuality.[62]

Porter's Concern over Liberties and the Power of the State

Overall, Ford's approach to criminal law was more congruent with the general attitude of the appeal court of the day. The justices in the 1950s showed concern with the rights of the accused, and there was a discernible concern over police and prosecution methods. This reflected the Court's hardy tradition of defending the liberties of the individual, but also postwar concerns about state actions and human rights. The judges were clearly wary about the increased power of the state and police. Porter, for instance, penned *R v Jones*,[63] an appeal of a conviction for having care of an automobile while intoxicated. He felt there were circumstances when the accused should be given the benefit of the doubt such as being found drunk and in possession of the keys in a parked automobile but on an empty country road, where the danger to others was negligible. Although he agreed the conviction appeal should be dismissed, Porter thought this was not the final word:

> I think full effect can be given to parliament's intention to protect the public without so interpreting the section as to destroy the rights of the individual in circumstances where their enjoyment does not and cannot harm others. It will be time enough when such a case arises to decide whether parliament has made in the circumstances then appearing what has been called "an unwarranted foray"

TWO WOMEN IN RURAL CENTRAL ALBERTA, THE HEART OF THE OIL DISCOVERIES, 1953. GLENBOW ARCHIVES, PA-2218-678.

into the civil rights of the individual under the guise of passing a criminal enactment.[64]

Porter brought a libertarian perspective to his jurisprudence that became more marked over the years. He also came to be increasingly in dissent. Although Porter did not differ fundamentally in principles or outlook from the rest of the Court, he was a contrarian by nature and frequently had his own take on the issues. He was also more deferential to trial judges than his brethren, and was often content to agree with the original judgment.

Who Was Writing – or Not

Despite being very opinionated, Porter was not an energetic writer compared to most of his colleagues. The production of judges like W.A. Macdonald or even O'Connor noticeably dropped off during their tenures, but that could be put down to declining health. Parlee, Johnson, Clinton Ford, and Hugh Macdonald were all industrious. Through the O'Connor-Ford years, the Court fully reverted to the common practice of the day where judges often wrote whether in concurrence or dissent. Decisions, however, were generally short and to the point. Statements of larger legal principles were rare. The judges were technicians. All five might weigh in with dissenting and concurring judgments for an intricate appeal involving, for example, contract law. But there were few of the more philosophic exchanges and richness of argument seen on earlier courts, such as those produced by Stuart, Beck, or even Harvey and

LOADED TRUCK DOES A WHEELIE IN THE FIELD, CA. 1949. PAA P1824.

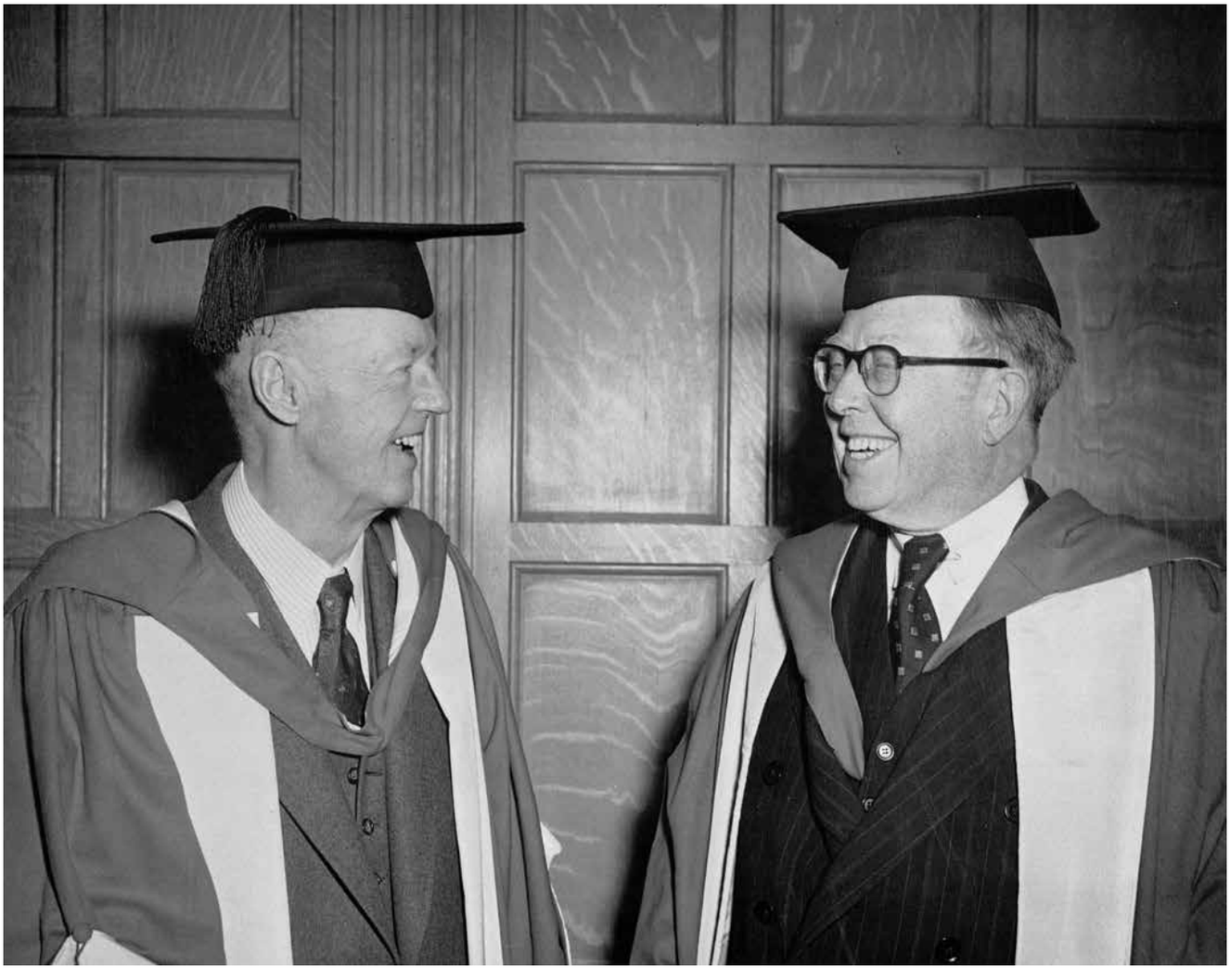
McGillivray. Instead, the judgments of the members of the O'Connor-Ford court tended to be more narrowly focused on solving the issues at hand on the appeal.

In fairness, however, the Court in the 1950s did not have the same problems placed in front of them. This was a court that heard few appeals dealing with constitutional issues or fundamental legal principles. Fifty years of adjudication in the Territories and the province had produced a large body of settled law. The Court was not called on often to ponder heady constitutional matters. *Reference re Orderly Payment of Debts Act* in 1959 was one of the few constitutional cases of the O'Connor-Ford years.[65] Another of Social Credit's debtor relief initiatives the statute, like its predecessors, was declared *ultra vires*. The ground had already been well worked in the 1930s. This does not mean that the Appellate Division had no decisions important for public law. *R v Pacific Inland Express Ltd*,[66] also in 1959, dealt with the prohibitions under the *Lord's Day Act*.[67] The Court decided that trucking freight occupied the same position as shipping by rail, and should also be exempt from the restrictions on commerce in the *Act*.

A Few General Trends in Appeals

As much as reported decisions reveal, the areas of developing law in Alberta during this era can be summed up as crime, automobile accidents, and oil. Criminal appeals became much more a part of the Court's work. The *Criminal Code* was revised in 1955, although the rules of appeal saw no real substantive changes. Crime rates, however, started to rise after the war even if crime remained, by historical standards, relatively low. The criminal appeals argued before the Court reflected a changing society. There were several involving drugs. Narcotic prosecutions had been rare in Alberta previously and generally involved opium and immigrants from China and other parts of Asia.

These appeals presaged a major future issue for the courts. With the rise of automobile use, provincial and federal governments brought in legislation to control drinking and driving. Justice McBride penned one of the



first precedent decisions on the admissibility of blood samples.[68] There were also, of course, some very notorious appeals of convictions for serious crimes such as murder, the most famous of which was that of Robert Raymond Cook, the last man to be hanged in Alberta. These were not especially significant at law, although the Cook appeal and others contributed to a growing debate on the wisdom of capital punishment.

On the civil side, without question, the automobile generated much work for litigation lawyers in Alberta and many appeals for the Court in the 1950s.[69] In fact, for the first few years of the decade, it seemed as if every reported judgment in the reports delved into some new issue involving automobile accidents or a dispute somehow related to the oil and gas industry. Vehicle ownership and use rose dramatically after the war, matched by an enormous amount of road building on the part of the province, paid for with oil revenue. The vast majority of litigation was related to accidents. The courts worked through the various permutations of liability, contributory negligence, damages, and so on. It was no accident that many of the judges of the Court appointed in the 1970s had extensive careers as insurance litigators, cutting their teeth on injury suits.

The millions of new cars on North American roads in the 1950s created an insatiable thirst for more oil, and Alberta reaped the benefits. The discovery of oil at Leduc in 1947 couldn't have been timelier. And the Court soon found itself busy with many appeals involving the oil and gas industry.

Oil, Gas, Land Titles, Liens: The Appellate Division and Energy Law

An oil well has been called "a hole in the ground surrounded by lawsuits." Although the Leduc boom has been popularly mythologized as an era of straight shooters and multi-million dollar handshake deals, in reality the oil and gas industry in Alberta from its beginning spawned disputes destined for the courts.

The Court was not uninitiated in oil and gas law, since Alberta's oil industry predated 1947. The Leduc strike was the culmination of over forty years of searching for oil and gas. The CPR had discovered natural gas as early as 1883, and by the turn of the century, the town of Medicine Hat was using natural gas for heating. In 1914, oil in the form of naphtha distillates was found in Turner Valley southwest of Calgary, creating a speculative frenzy. Development in Turner Valley proceeded in fits and starts, depending on the state of the economy. But in the 1930s, crude oil was found in the Turner Valley field's deeper geological features. With wartime demand, production in the valley grew to upwards of six million barrels a year. The nascent oil and gas industry in Turner Valley spurred the province to obtain control of its natural resources, and the Brownlee administration successfully negotiated the Natural Resources Transfer Agreement with the federal government in 1930.

Turner Valley was a minor but significant part of the provincial economy. More importantly, the development of the field motivated Imperial Oil to carry out an ambitious program of drilling throughout Alberta. After a string of 137 consecutive "dry holes," the company almost threw in the towel. But then came Leduc #1. More discoveries swiftly followed, such as the 1948 Redwater field. The new finds were significant enough to attract the interest of international oil companies, especially American, resulting in a massive influx of capital and expertise, and a decade-long boom in Alberta.

The period after Leduc was a bit of a Wild West, as large companies fanned out to grab reservations of big blocks of land for exploration and entrepreneurs formed small firms to drill on individual leases. Many disputes of a growing industry fit into existing commercial and contract law, but other issues both peculiar to the industry and vital to further development arose, and the courts had to deal with novel situations, and certainly novel applications of established law. Often, this involved dealing with difficult expert testimony in unfamiliar fields like geology and petroleum engineering. The judges in

CHIEF JUSTICE O'CONNOR AND H. RAY MILNER, 1952. COURT OF APPEAL COLLECTION.

Alberta were called on to translate technical problems into legal definitions and precedents, a difficult task.

The Lease: Foundation of the Industry

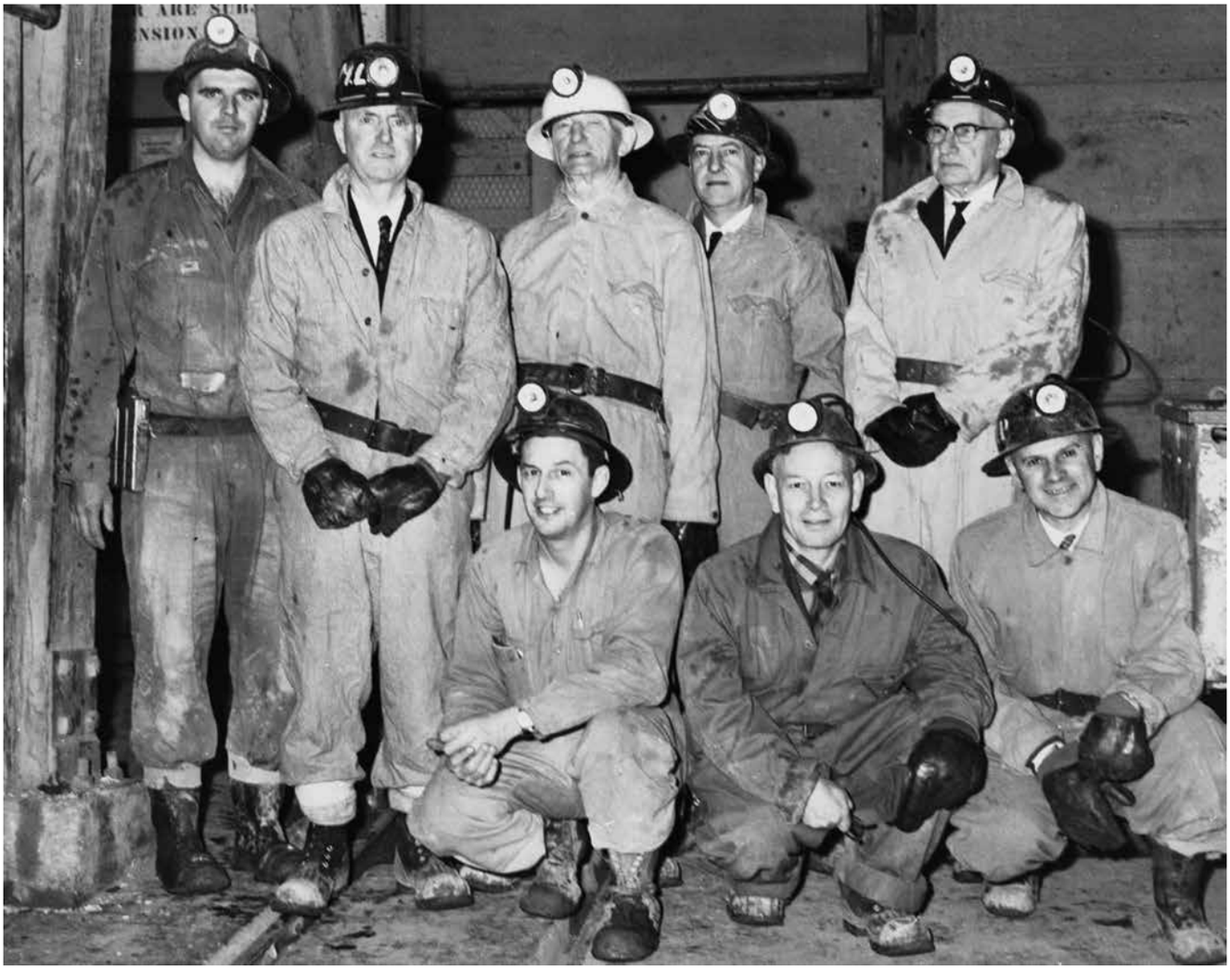
By the time of Leduc, there were a number of decisions on oil and gas from the Alberta courts, some of which had been examined by higher courts, forming a nascent body of oil and gas law. Some dealt with the same issues that loomed large in the post-Leduc litigation: how oil and gas discoveries fit into titles for land and mineral rights. Alberta's industry was based on leasing rights to oil and gas to the companies that drill and produce. The oil companies negotiated a surface lease with the landowner to allow access for drilling, and then a lease with the holder of the mineral rights – which the courts held included oil and gas – to drill and produce, with the holder of the rights getting a royalty.

In Alberta, most landowners didn't own the mineral rights. As a matter of policy, after 1887, the Dominion government kept the mineral rights for the Crown when it granted homestead lands in Western Canada. There were some exceptions. The Hudson's Bay Company had retained mineral rights amounting to about 2 percent of the province.[70] The Canadian Pacific Railway held about 8 percent, rights kept from its vast land grants sold to homesteaders after 1902. A lucky 4 percent of landowners, mostly farmers, had CPR land sold prior to 1902 that came with the mineral rights. A disproportionately large number of these "freehold" landowners were found in and around Leduc.

A complication that emerged in the 1950s was the inconsistency of reservations of mineral rights on freehold land. Sometimes petroleum and/or natural gas were specifically included in these reservations. Sometimes, the reservation was for "coal and other valuable minerals," and many other variations. Some of the first important cases, therefore, dealt with the question of what was included in reserved mineral rights.

Antecedents from Turner Valley: Legal Definitions of Petroleum

William Walsh had sat on two trials in 1927, *Creighton v United Oils* and *Starley v New McDougall-Segur Oil Company and Mid-West Oil Company*.[71] Both cases dealt



with fundamentally the same question: was petroleum, including natural gas, a mineral? In both cases, the plaintiff's homestead patent reserved minerals but did not specifically state that minerals included petroleum, and the plaintiffs challenged the definition of petroleum as a mineral. Walsh held that both expert testimony and established law made it clear that petroleum was considered a mineral and that this had already been true at the time the homestead patents were granted. Although the reservations did not specify petroleum or natural gas, these substances were covered under the term "minerals." The Appellate Division considered the plaintiff's appeal in *Starley*, felt no need to go further than adopting Walsh's reasoning, and dismissed the appeal.

The definition of petroleum came up again in *Knight Sugar Co v Alberta Railway & Irrigation Co* in 1936.[72] In this case, the plaintiff had bought land from the railroad company in 1903, subject to the reservations for coal only of the Crown's original grant. But the railroad transferred title with the reservation as coal *and other minerals*. Many years later, with the general interest in oil and gas exploration, the sugar company "appeared to awake to the fact" that the reservation was not correct and demanded the railway company convey the mineral rights. The sugar company asked for a declaration that it was the owner of the mineral rights except for coal, or alternatively, the owner of the petroleum rights.

On appeal, the sugar company argued that oil and natural gas was different from other minerals, and the phrase "coal and other minerals" should mean other minerals similar to coal, as this was the only mineral specified. Harvey, dismissing the appeal, couldn't see why the reservation should be given such a restricted meaning. Coal was specified because it had been specified in the original Crown grant; minerals had not. Furthermore, he pointed out that coal, petroleum, and natural gas all had the common property of combusting to produce heat, so they arguably were of a type even by the sugar company's own argument. The decision further clarified the inclusion of oil and gas among minerals.

Antecedents from Turner Valley: Regulation

The controversy in *Spooner Oils Ltd v Turner Valley Conservation Board* was of much more import, and the legal resolution more problematic.[73] McGillivray had dealt with an earlier application and thus wrote the Court's judgment.[74] In 1932, the province established the Turner Valley Conservation Board to regulate oil production and prevent the premature exhaustion of the field. The Board's first order restricted Spooner Oils to a production of less than five barrels a day from 100 barrels from the wells the company operated on freehold land it owned. Spooner also had a Crown lease on adjoining land, though no wells. The company, claiming financial ruin, challenged the order on constitutional grounds. At trial, Ewing declared the Board had the power to make the order.

On appeal, the crucial argument of *Spooner* was that s. 2 of the Natural Resources Transfer Agreement between Alberta and the federal government made the *Act* inapplicable to the appellants' land. Section 2 stated that the province had to honour any existing purchase or lease agreements and couldn't modify them without consent of all parties. Ironically, Spooner didn't have any wells yet on its leased lands – but many other companies did, on leases granted before 1930, so it was an extremely important point to resolve. Ewing thought the province could act within the accepted doctrine governing landlord and tenant relations, to prevent waste or damage. Furthermore, Dominion regulations preceding the transfer in 1930 allowed the Dominion to interfere to prevent the waste of natural gas, and the province inherited this same power. McGillivray concluded that the power granted provincial legislatures in the *BNA Act* over property rights governed and was not overridden by the Transfer Agreement.

Unfortunately for conservation and the Alberta government, the SCC

JUDGES OF APPELLATE DIVISION IN THE NORTHWEST TERRITORIES, CA. 1960. STANDING L-R: MACDONALD, FORD, S. BRUCE SMITH, JOHNSON. GLENBOW ARCHIVES, NA-3500-4.


NATURAL
GAS
CAPITOL
BLUE RIBBON
CLARK GABLE
IN A GREAT ADVENTURE
TECHNICOLOR
BILLIARDS
169

disagreed with McGillivray, holding that the provincial government could not interfere with the earlier leases, although ironically the *Act* was valid regarding Spooner's freehold land. With many old leases active in the valley, the Supreme Court judgment scuppered the *Turner Valley Conservation Act*. McGillivray later headed the commission looking into the oil and gas industry at Turner Valley in 1938, which eventually led to the creation of the Oil and Gas Conservation Board, with increased and more constitutionally sound powers than its predecessor had.[75]

Another Antecedent: The Natural Resource Transfer Agreement and Pre-existing Leases

Another judgment, *Majestic Mines v Attorney General of Alberta*, in 1942, would later play a central role in another key oil and gas case. An issue similar to *Spooner* was involved and O'Connor's trial judgment was another important precedent.[76] Majestic Mines had inherited grants of the mineral rights for coal mining on two parcels of land in southern Alberta under Dominion regulations for mineral prospecting, which included petroleum. No coal was produced but commercial oil wells were drilled. Alberta demanded royalties on the oil production. The company denied they owed any royalties on the grounds that there was no royalty set for oil in the original grant. It challenged the province's authority to charge a royalty for mineral rights originally granted by the Dominion. O'Connor agreed with Majestic Mines. The original grant stated that the grantee should pay "the royalty, if any prescribed by the regulations." The Alberta government argued the phrase "if any" allowed for a future royalty, but O'Connor did not think that construction valid. The Appellate Division agreed. Although Frank Ford held that the province had definitely inherited the power to apply royalties, he concluded that in the particular case, the language used in the patent precluded a royalty.

The Majestic Mines litigation was brought to the courts as a test case and an important one. O'Connor pointed out that the eventual judgment might affect a half-million acres of lands. His decision and that of the Appellate Division were upheld by the SCC.

Interestingly, although American oil and gas law was much further developed than Canadian, its influence in Alberta was mostly indirect, especially in the early days of the industry. The provincial government borrowed heavily from American examples in developing a regulatory regime, and the industry did so as well for freehold leases and the myriad exploration and development deals that characterized the oil and gas business. Yet in the decisions of the Appellate Division from the 1920s through the 1950s, American jurisprudence was not a major point of reference, though it was not ignored. The Alberta judges clearly felt that there were too many differences with American law for it to be very useful even by analogy.[77] They preferred to develop oil and gas law through English and Canadian common law jurisprudence, reflecting a continuing reliance on English law and also local conditions, creating new law for the province.

By the time Leduc blew in, the Appellate Division was no stranger to oil and gas litigation. The above decisions are only a small sample of the more important early precedents. There were plenty of others. Important work had been done in creating legal definitions to govern oil and gas, and to solve problems over control of the land and the rights for petroleum exploration. While the oil industry, centred on Turner Valley, was economically important before 1947, the stakes were now much higher. The first three major oil and gas decisions of the Appellate Division after Leduc, *Huggard Assets*, *Borys*, and *Turta*, had major implications for the industry. In all three decisions, Justice Harold Hayward Parlee played the major role on the Court's behalf. In his incisive style, he cut to the main problems in each. Concise, but also thorough in his research and analysis, Parlee developed the thinking that the higher courts followed, and he is responsible for much of the Court's early reputation in handling oil and gas matters.

JASPER AVENUE, EDMONTON CA. 1952. PAA KS315/1.

Huggard Assets v Attorney General for Alberta: Old Leases and Royalties

The first challenge thrown at the Appellate Division post-Leduc was *Huggard Assets Limited v Attorney General for Alberta*.[78] The trial was in 1949 before McBride, and the central issue was Alberta's power to impose a royalty on oil and gas production on certain lands. Once again, the province was attempting to do what it had not been permitted to do in *Spooner* and *Majestic Mines*. The litigation arose because the original grant of exploration rights involved in the case had, as in *Majestic Mines*, predated the province's control over its natural resources. The issue was similar in some ways to that found in *Spooner*: to what extent did the province have control over old Dominion grants and leases?

The Original Dominion Lease

The facts were simple. In 1906, the Dominion Government granted exploration rights for "petroleum prospecting" on a large expanse of lands on the Athabasca River, including an option to purchase the oil and gas rights, which a successor company did in 1913. The grant included a clause that stated the rights were subject to the regulations regarding petroleum exploration in force at the time. This included royalties payable to the government on oil and gas production, but expressed in ambiguous language:

> Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, as well any royalty rules in effect.[79]

There was no royalty in effect when the grant was made. Following *Majestic Mines*, McBride held that the provincial government could not subsequently impose a royalty.[80] The provincial government, faced with the possibility of not being able to collect royalties on Crown grants and leases made by the Dominion before 1930, was quick to appeal. And understandably so: after all, what would have been the point of securing control over provincial resources if, in the end, the province lacked any ability to impose royalties on its natural resources? The Dominion likewise would have been unable to do so since it had surrendered control over the natural resources on Crown land to the province. For the companies involved, avoiding any royalties by either level of government would be a major windfall.

Parlee's Minority Opinion Looks to the Future

It was a knotty problem, made more so by the earlier decision in *Majestic Mines*, and it equally divided the four-man panel. Hugh Macdonald and O'Connor dismissed the appeal. Following his decision in *Majestic Mines*, the Chief Justice argued simply that there was no evidence the federal government applied or intended to apply a royalty on the oil and gas production. On this thinking, there was, therefore, no royalty for the province to inherit. Following his earlier reasoning, O'Connor decided the phrase regarding possible royalties had the same meaning in *Huggard Assets* as in *Majestic Mines*.

Parlee disagreed. In his view, there were two important questions. The first was whether the Dominion government had possessed the right to impose a royalty if there had not been one set in the original grant. The second was whether the provincial government had inherited the rights of the Dominion government over grants such as the one Huggard Assets controlled. In answer to the first, Parlee felt that there was a crucial difference between the words of the grant in *Majestic Mines* and in *Huggard*. In the earlier case, the phrase had been "a royalty, if any prescribed" while in the new litigation the phrase was "if any, from

LEDUC # 1, FEBRUARY 1947. PAA P2733.

time to time prescribed." Parlee thought this phrasing clearly "looks to the future and has a prospective outlook."[81]

There was another important difference. The facts, Parlee felt, were quite different from *Majestic Mines* and distinguishable. The Huggard grant clearly stated that it was subject to Dominion regulations in force in 1909, which allowed for a royalty to be put in place on oil and gas production. As to his second question, Parlee thought it obvious that the province had acquired all the rights of the Dominion in the leases under the Resource Transfer Agreement, and did not feel it necessary to explore the point. Frank Ford, who had had some doubts in the Majestic Mines appeal, agreed with Parlee. But since the Court was split evenly, the appeal was dismissed. Alberta pursued the matter up the appellate ladder from the SCC to the Privy Council.

The Privy Council Agrees with Parlee and Not the SCC

The Privy Council's decision vindicated Parlee, and the Law Lords' analysis favourably contrasted with that of the SCC. The seven justices in Ottawa agreed with Parlee about the meaning of the clause. On their own initiative, however, the SCC was sidetracked into applying the *English Statute of Tenures*, 1660, to the issue because of the original Hudson's Bay Company grant. In a rambling, discursive judgment that looked in detail at feudal landholding, the panel invoked the archaic statute, decided four to three that the royalty was bad because it offended ancient rights of "free and common socage."[82]

The Judicial Committee found the SCC's judgment mystifying. The Committee thought it was obvious that the 1886 *Dominion Lands Act* replaced any archaic legislation in the Northwest Territories, commenting, "Their Lordships do not consider that in dealing with such special or hard cases... it was intended that the discretion of the crown should be fettered or controlled by incidents of English feudal tenure."[83] Getting to the heart of the matter, in a few short paragraphs, they agreed with Parlee.

Although *Huggard Assets* did not necessarily apply to all the old grants and leases of the Dominion in Alberta, it was a significant decision in support of the provincial government's power to apply royalties on oil and gas production.[84] And given that the grants at issue in *Huggard Assets* lay at the heart of what have become the Alberta oil sands, it is tempting to speculate how a different outcome might have influenced the development of the industry or, more to the point, undermined the development of the province of Alberta. It would have been ironic indeed had Alberta's quest for control over its mineral rights resulted in the province being unable to require the payment of any royalties by those exploiting those rights under old Dominion grants and leases.

Borys v. Canadian Pacific: Does Petroleum Include Natural Gas?

Hard on the heels of *Huggard Assets* came a case of greater import. This time, the definition of petroleum was revisited, again because of the wording of the mineral reservation in a land title. A farmer, Michael Borys, successfully obtained an injunction from Chief Justice Howson of the Trial Division, preventing Imperial Oil from drilling on his land under a lease of the mineral rights from the CPR. Borys claimed the natural gas under the surface was his, and he sought to prevent Imperial from producing or destroying it in the company's quest for crude oil. Borys' father Simon had bought the quarter section from the CPR in 1906. The title reserved "coal, petroleum and valuable stone" for the railway company. The Borys farm turned out to be on top of the Leduc-Woodbend field, and it was only a matter of time before an oil company showed up with a drilling rig.

Howson's Trial Decision: Natural Gas Is Not Petroleum

The main issue was whether natural gas was included in the term petroleum or whether petroleum consisted only of liquid hydrocarbons like oil. Another question that emerged was whether, if Borys

owned the gas, Imperial Oil could produce the oil if this disturbed the natural gas. The issue came before Howson in May of 1951, and involved vast amounts of expert testimony from geologists, engineers, and representatives of the oil and gas industry. Borys' contention was that petroleum, in its common usage, always meant liquids like oil, and not gases. Imperial countered that petroleum was a scientific term that encompassed all related hydrocarbons, whatever their physical state. While Borys sought an injunction preventing Imperial from drilling, Imperial counterclaimed for a declaration that petroleum included natural gas, and failing that, that the company had the right to remove the oil even if it disturbed the gas.

Expert testimony established that the Borys land likely had two different "producing horizons," the first a pool of oil that would have natural gas dissolved in solution with the liquid petroleum, and then a deeper pool where a cap of gas overlay the oil. Howson accepted that the natural gas, both alone and in solution, was a vital part of the dynamics of the field that helped bring the oil to the surface. In other words, gas escaped when oil was pumped out.

Howson ruled that petroleum did not include natural gas. Although some petroleum engineers and scientists used this definition, he found that overwhelmingly the popular definition, common usage,

NATURAL RESOURCES TRANSFER AGREEMENT CONFERENCE, 1930. COURT OF APPEAL COLLECTION.

and usage even in the oil industry favoured natural gas as a separate entity. Howson noted that split titles, one for oil, one for gas, were common in the United States. The more contentious part of Howson's ruling, however, was the decision that Imperial Oil could not drill for the oil. The CPR reservation did not specify the right to work and carry away the oil. Expert testimony declared that much of the gas under the Borys property would be sacrificed in oil production. Relying on established law for mining, Howson ruled that Imperial Oil could not destroy the natural gas, equating it to destroying the surface of land in working a mine.

Parlee's Judgment: Gas Is Not Petroleum, But...

Obviously, this was a result that Imperial Oil could not let stand. Early in 1952, the matter came before the Appellate Division, with all the justices present for the hearing. With Macdonald dissenting, Parlee wrote the judgment for the Court, reversing Howson only in part – but in the most important part. As with the *Huggard Assets* decision, Parlee's writing was notably concise and incisive. In his view, just two questions needed to be answered. How should petroleum be defined in the reservation of mineral rights? And did Imperial Oil have the right to produce the oil if it interfered with the natural gas?

"The trial judge found that petroleum and natural gas were by common usage, two different substances, and that conclusion ought not to be disturbed," Parlee wrote. He noted that government regulations, both Dominion and provincial, clearly discuss petroleum and natural gas as different substances. The justices also pointed out that before 1911, when natural gas in Alberta was not considered a commercially valuable substance, the CPR generally reserved only petroleum on titles. After 1911, when gas became worth something, the reservation was for petroleum and natural gas. Therefore, even the railway company clearly thought gas was a different substance.

Parlee, however, differed from Howson in respect to natural gas occurring "in solution" underground. It was the start of what can be described as a clever judicial compromise. Parlee found that the reservation applied to the substances while in their natural state underground. Natural gas in solution with the petroleum due to the heat and pressure underground was for all intents and purposes part of the petroleum. This neatly divided the disputed hydrocarbons into gases and liquids. Parlee concluded that Borys owned the gases. Imperial had the rights to the liquids since the CPR had reserved the rights to the petroleum.

Parlee's Judgment: An Analogy Allows Drilling

Parlee also disagreed with the trial judge about the right of the oil company to exploit the mineral rights, but more importantly, how the law governed the recovery of petroleum as opposed to other minerals. First, he noted that the fact that the CPR's reservation did not specify a right to produce the oil was not an issue. It was well established in case law that mineral reservations implied the right to recover the mineral in question. Thus, this did not need to be explicitly stated. More importantly, the holder of the reservation had the right to recover the petroleum by any reasonable or accepted methods, avoiding if possible damaging the landholder's property but recognizing that some damage might obviously be necessary. Next, he rejected invoking the law that protected the rights of surface owners from damage from mines on their property. This was generally aimed at preventing subsidence like sinkholes or open mine scars. By contrast, the property of Borys that would be damaged was underground. It was a different and eminently distinguishable situation.

Instead, Parlee looked at decisions regarding subterranean waters, which he thought much more analogous to the matter at hand. "The principles applicable to support of the surface of land should not apply to the rights to underground property such as water, oil and gas," he wrote. Parlee further quoted an American decision, to the effect that gas and oil are "substances of

JUDGES OF THE SUPREME COURT OF ALBERTA, MEMBERS OF THE LAW SOCIETY, AND COURTHOUSE STAFF, EDMONTON, 1950. LASA 5-G-65.

a peculiar character" and therefore must be considered differently than most minerals. Dealing with underground waters, the common law was different. Parlee found that an old Privy Council decision from the nineteenth century, *Ballacorkish Mining Co v Harrison*, provided guidance. The Law Lords had decided that holders of mining leases were not liable if subterranean waters dissipated because of their mining activities. Other cases concluded that a landowner had no redress if wells on adjacent lands, in tapping a common reservoir, caused water underneath his land to move and be pumped up. Parlee concluded:

> From these authorities these conclusions follow, that the reservation of the petroleum…enables the appellants to use all reasonable means to extract the petroleum from the earth; that gas in the earth may be likened to subterranean waters and they are subject to like principles of law.
>
> In my opinion, the defendants are entitled to extract all the petroleum from the earth, even if there is interference with a wastage of the plaintiff's gas, so long as in the operations modern methods are adopted and reasonably used and the provisions of the relevant statute and regulations are observed.[85]

Parlee's judgment was both elegant in its deduction of applicable legal principles and thoroughly commonsensical in dealing with the realities of oil production. Borys appealed to the Privy Council in England. It wholly supported Parlee.

A Modern Coda to *Borys: Anderson v Amoco*

Borys might be characterized as a decision accommodating the needs of oil companies. Michael Borys' victory in being named owner of the gas was pyrrhic at best. From a practical perspective, the decision doubtless made oil and gas exploration easier, eliminating a point of contention that, had the decision gone the other way, might have resulted in companies being unable to drill on lands without difficult negotiations and potentially expensive compensation agreements for lost gas. If Parlee had this

burden in mind while writing *Borys*, his decision neatly sidestepped it.

There was a last word on *Borys*. In 2002, a test case was brought before the Alberta courts, *Anderson v Amoco Petroleum*.[86] Landowners decided to test the definitions of petroleum used in *Borys*. Although the Court's practice now allowed it to discard outmoded precedent, the Court nevertheless chose to continue to follow the Privy Council decision. Parlee's reasoning was deemed valid over fifty years after he applied himself to the problem.

Turta v Canadian Pacific Railway: A Challenge to the Integrity of the Torrens System

Turta v Canadian Pacific Railway dealt with a specific set of circumstances that had serious and widespread implications. Once again, title to land and reservation of the rights governing petroleum was the underlying issue. The source of the litigation, however, was a mistake made in the land titles office. At stake was the entire land registry system in the province.

A Cascade of Errors

The saga began in 1901. The CPR received a land grant from the Dominion government that included the quarter section that became the heart of the lawsuit. The grant included the mineral rights. In 1908, the CPR sold the quarter to a homesteader, and transferred the title with a reservation of coal, petroleum, and other minerals in favour of the company. The land titles office, however, made a mistake and noted a reservation for coal alone in the new title issued to the homesteader. The CPR, in the midst of a blizzard of land sales, never noticed the mistake. The company was in the habit of leaving its duplicate title certificates at the land titles office so changes and cancellations could be made immediately, to save work for itself and the Registrar, and therefore never checked them.[87] As housecleaning, the land titles office cancelled the CPR certificate that showed the company had the petroleum rights.

The mistake on the title was perpetuated as the land changed hands. Anton Turta bought the two parcels making up the quarter in 1911 and 1917, and, in 1918, he had the land titles office issue him a consolidated title, still with the reservation for coal only. To complicate the eventual litigation, after performing an audit of titles in 1943, the registrar ordered corrections made to a large number of certificates, including Turta's. The correction restored the original reservation to the CPR. As emerged at trial, Turta never received a notice of the correction. His duplicate title was at the land titles office because of a mortgage he had registered, and the office never bothered to notify him, the CPR, or any other landowners whose titles were changed.

In 1944, Turta transferred the quarter section to his two sons, Nick and Metro, splitting it between them. However, Nick and Metro's title, because

of the 1943 correction, now gave the petroleum rights back to the CPR. The lawyers Anton Turta hired to transfer the lands to his sons did not discuss the mineral or petroleum rights and prepared the transfers from the corrected title at the land titles office. As one of the lawyers testified at trial, almost no one paid any attention to the mineral rights at the time, since they weren't worth anything. This included the Turtas, who once again did not ask about the state of the mineral rights. Turta later candidly testified that he just wanted farmland and paid no attention to the mineral rights.

Then oil was discovered nearby, on the farm of another of Anton's sons, Mike Turta – one of history's ironies.[88] Anton's other sons were now very interested in the petroleum rights on the property, and unsurprisingly so. Expert testimony at trial made it clear that they were almost certainly sitting on a large pool of oil. The catalyst seems to have been Nick. His father granted a lease to Mike Sereda of Edmonton, and a torrent of caveats were registered in 1950 by Anton Turta, Nick Turta, Sereda, and the Montreal Trust Company claiming the petroleum rights on the two halves of the quarter.

However, the CPR had entered into an agreement in 1942 with Imperial Oil granting the company the mineral rights the railway held over a large swath of central Alberta. In 1946, the Turta quarter section was added to the schedule of lands described in the 1942 agreement. Finally, in December of 1950, Imperial registered a caveat on the title to the Turta lands claiming an interest in the mineral rights and in 1951 entered into a ten-year oil and gas lease with the CPR. The matter quickly headed to the courts. The central issue, of course, was the effect on the mineral rights of the mistake and subsequent correction the land titles office made on the title.

The Torrens System of Land Titles

The litigation revolved around Alberta's system of registering property ownership. In 1886, the Dominion government established the Torrens system of land titles in the Northwest Territories. Named after its creator, Sir Robert Torrens, the premier of a short-lived government of South Australia, the system had been established in the Australian colony to drastically simplify the legal requirements involved in property transactions. In common law jurisdictions, individuals held deeds that proved their ownership of land. Conveying real estate often involved laborious research to ascertain whether the deed was correct and derived from an original true title. In addition to the challenges of tracing its lineage, a deed could also be stolen, lost, forged, and so on.

The central principle of the Torrens system was that "the registry is everything." Every time land changed hands, the registrar of the land titles office cancelled the old title, created a new certificate of title, and gave the new owner a duplicate copy. If the title was modified, for example, when a caveat or mortgage was registered against the land, the registrar recorded it on the title. The registry undertook to have an accurate and up to date title on record. A prospective purchaser of land needed only to look at the title to see if there were any legal encumbrances. Conveyancing was fast and efficient, and there was a high certainty about the validity of titles.

Most statutes based on the Torrens system stated that the certificate of title the registry issued was also considered to be the last word – mistakes and all. The theory was that if people had to start checking titles for accuracy, tracing the title back to the original grant, the rationale for the system was undermined. Statutes generally had some provisions for correcting mistakes, or specified circumstances where a title might be challenged, generally in cases of fraud. There was also usually an assurance fund to compensate individuals who received a faulty or invalid title due to a mistake of the land titles office and consequently suffered financial loss, such as the value of the land for which they thought they had title.

APPELLATE DIVISION IN NWT, CA. 1960. LASA 62-G-26.

Alberta's Version of Torrens and Its Deficiencies

The *Alberta Land Titles Act* largely followed this model. The legislation that applied to Turta, the *Act* of 1942, was a direct descendant from the original *Dominion Lands Act* of 1886. Under Alberta's statute, a "bona fide purchaser for value" had an indefeasible title – that is to say, it could not be legally challenged barring any fraud in the transaction - once the purchaser received its certificate of title from the land titles office. This title was conclusive even if there were mistakes or even if the person they purchased the land from shouldn't have had a valid title. Under this regime, transferees were not obligated to investigate the title on file at the registry. They were entitled to trust the title in the land titles office, whatever its possible underlying defects. This was termed "faith in the registry."

The statute, as was common, specifically stated that the title could not be challenged in a court in law or equity. A section of the *Act* did allow some correction of errors, such as "misdescription" of the land. For example, if property that was not originally part of the title was added through some mistake in the legal description, it was a mistake that could be corrected. The registrar could not change a title unilaterally, however, if it affected any rights the *bona fide* (legitimate) purchaser had in their land. As it emerged, there was one serious deficiency in Alberta's *Act*. It was very difficult to claim compensation for claims involving mineral rights.[89]

Egbert Rules for the Turtas at Trial

The position of the Turtas was that the 1943 corrections were void and a new title should be issued giving them the petroleum rights, because, having been purchased in good faith before the correction, the title Anton Turta had originally received must be considered correct. The CPR essentially contended that the 1943 corrections were valid; that the certificate issued to them at the time of the original sale showed they had the petroleum rights and should take precedence; and that petroleum, as a mineral, was, under the *Act*, part of the definition of land and therefore, not including the reservation of petroleum was an error of description. Imperial Oil contended they had the indefeasible right to the petroleum because they had a lease agreement from the proper titleholder. There were other issues that the trial judge decided, but these were the ones that became the important focus of the appeals.

At trial, Justice W.G. Egbert, in a long and thorough judgment, ruled in favour of the Turtas. He concluded that the 1943 corrections were void. The *Act* specifically prevented the registrar from modifying a title so as to deprive a purchaser in good faith of any substantive rights in the property. Instead, unless there was fraud or some sort of description error, the registrar could only make relatively minor corrections of a clerical nature. He found that there was clearly no fraud on anyone's part, just an honest mistake. Egbert thought the land titles office's cancellation of the CPR's original certificate also meant the company had no basis for a claim under a prior title. As for misdescription, Egbert did not agree that petroleum could be considered a separate parcel or part of land. The Turtas won. But with huge stakes on the table, an appeal was inevitable.

Parlee's Majority Opinion Expands on Egbert

It was Parlee who again wrote for the Appellate Division. He was no doubt very familiar with freehold titles and oil and gas leases, even though, strictly speaking, *Turta* was a dispute over interpretation of the *Land Titles Act*. Parlee agreed with the trial judge, who had done a very thorough job of examining the issues. But he added some further reasons.

Basing his analysis on the plain language of the statute, Parlee concluded Anton Turta's title had been valid. Reviewing decisions where a Torrens title had been successfully challenged, Parlee showed that in none of these instances was the situation like Turta's. Turta had bought the land in good faith even though the title had been erroneously issued by the land titles office. Turta was entitled to "faith in the registry."

LINEUP FOR LAND TITLES, LETHBRIDGE, 1912. THE VOLUME OF TITLES PROCESSED AT THIS TIME LED TO MANY MISTAKES. GLENBOW ARCHIVES, NC-2-586.

Had the CPR challenged the certificate of title before the first purchaser had sold the land, the result might have been different. Parlee also agreed that the fact the registry had cancelled the CPR's original title certificate and issued a new one meant the CPR could not make any claims on its original title. Under the *Act*, that title no longer existed.

On the "misdescription" claim, Parlee found that according to the statute, this applied only if a different parcel of land from the one properly part of the title was included in the title. That had not happened. The mineral rights could not be considered a separate estate and therefore a "parcel" of land erroneously included with another parcel. In any case, again, the CPR had no valid title at all to use in claiming ownership; it had been cancelled.

As for the registrar's corrections to the Turta title, Parlee again agreed fully with the trial judge. Although the statute gave the registrar the power to make all manner of corrections, the language of the *Land Titles Act* was clear. The registrar could not, except in a case of fraud, make corrections to a title if that meant the titleholder would then lose any rights they held. The 1943 correction had done just that. Turta, as a legitimate purchaser entitled to rely on his transferor's title, had ended up with the petroleum rights, and the registrar couldn't simply strip them away.

O'Connor Is Unhappy and Ford Dissents

Parlee's reasoning carried the day with his colleagues, but it did not sit well with the Chief Justice. The law was correct, but the conclusion offended O'Connor's sense of rightness:

> I concur in the judgment of Parlee, J.A. I do so reluctantly because the result is to take from the Canadian Pacific Railway Company, without their consent and without consideration, what may prove to be valuable oil rights and give them to the plaintiff who never expected to get them as shown by his transfers of the land in the words of the corrected title. This is due entirely to the negligence in 1908 of the registrar of land titles and his staff and to the parsimonious and ineffectual attempt of the registrar and his staff in 1943 to correct the title.[90]

Clinton Ford shared this sense of injustice, but also felt there were grounds to allow the appeal and overturn the trial judgment. "One must have painstaking regard to all parts of the particular statute before deciding that natural justice must be sacrificed to the Act," he wrote.[91] Ford agreed with Parlee on

most grounds. However, he felt that the original transfer did not necessarily give the purchaser the petroleum rights. In his view, simply because the title issued erroneously did not reserve the mineral in full, it did not follow that the purchaser got the mineral rights as part of his title. It had to be explicitly added. Ford was convinced to some extent by the CPR argument that the minerals, as part of the land, could be considered a "separate estate." However, he did not conclude that this meant that "misdescription" applied. Instead, he concluded that since the first purchaser had never explicitly received the petroleum rights, the CPR had never lost possession of those rights, and the registrar had wrongly cancelled its certificate to that effect. Being a "prior certificate of title" that should still be valid, under the *Act*, it took precedence over Turta's claim to the disputed mineral rights.

The SCC Agrees with Parlee, but Reluctantly

Undaunted, CPR appealed. At the SCC, six of the nine justices agreed with Parlee. Chief Justice Rinfret led the dissenters and followed much of Ford's argument. Even the justices of the SCC who supported the original judgment were a little queasy with the result, and the Alberta Land Titles Office and Registrar of Land Titles were thoroughly chastised.

Regardless of the sense of unease at the SCC, its decision in *Turta* had a profound impact. It preserved the integrity of the Torrens land registry system in Alberta. A future Chief Justice of Alberta, Herb Laycraft, was involved in *Turta* as junior counsel. He would later say that Egbert's decision, upheld by Parlee and the Supreme Court, conclusively settled the question of security of titles in the province. At all levels of the litigation, those jurists who found for the Turtas could see that the challenge by CPR and Imperial Oil, if upheld, would undermine the whole rationale of the Torrens system in Alberta and other prairie provinces where the system was used. For others, like Clinton Ford, O'Connor, and Chief Justice Rinfret of the Supreme Court, the result offended their sense of natural justice. They were not pleased that what they viewed as flawed legislation swept away time-honoured common law rights.

Turta added considerably to the cost of business for oil companies. Ironically, the decision made it abundantly clear that a search of the historical title to ensure accuracy of ownership of mineral rights was necessary, even though this was the sort of thing the Torrens system was supposed to help avoid. Imperial Oil claimed a loss of five million dollars with *Turta*, and was completely unsuccessful in obtaining compensation from the assurance fund.[92] In response to industry complaints, the provincial government passed a special act in 1956 to allow those deprived of their mineral rights to sue the registrar, which became known as the "Act to Benefit the CPR." The company particularly suffered from land title errors.

Turta also provided the motivation for the government of Alberta to perform a thoroughgoing review of land titles in 1955 and make changes to the *Act*.[93] Despite this, *Turta* made it obvious that, certainly where mineral rights were concerned, much of the utility of the Torrens system had been lost in Alberta. The testimony in the *Turta* trial had shown that the staff in the land titles office had been remarkably sloppy for many years when mineral rights were apparently worthless, and no one really paid much attention to their titles. There would be other lawsuits involving mistakes on titles. However, *Turta* was the case that largely settled the law.

Earl F. Wakefield Co v Oil City Petroleums: Canada's Last Case at the Privy Council

Another common issue to come before the courts in the 1950s was the application of mechanics' liens in the oil patch. These liens were vital "nuts and bolts" law but proved difficult for the Court. In fact, it was a mechanics' lien action that made history as the last Canadian appeal to the Privy Council in 1959.

Bill Morrow's Quest for the Last Appeal

In 1949, the Canadian government finally decided to abolish civil appeals to the Privy Council. Actions started in Canadian courts before the end of 1949 could still be the subject of appeal to the Council. Canadian lawyers continued to set sail for London, but in ever-dwindling numbers. Several appeals near the end of the 1950s were each greeted with great fanfare as "the last Canadian appeal" only to have another materialize.

As the story goes, Edmonton lawyer Bill Morrow was determined he would have the absolute last appeal to the Privy Council.[94] A client, Ponoka-Calmar Petroleum, was the defendant that had filed its defence in an action only two days before the abolishment of Privy Council appeals. Seeing a chance to make history, Morrow recruited his client to appeal and went to London with his junior, future SCC justice Bill Stevenson. Val Milvain, Herb Laycraft, and Ross MacKimmie, all top-ranked Calgary counsel, were on for the respondents.

The Problem of the Mechanics' Lien in the Oil Industry

The appeal was not just a lark. The mechanics' lien was a serious legal problem for the oil industry. Mechanics' lien legislation was intended to allow tradespeople, builders, and suppliers to collect what was owing to them for their work and materials without their having to use a lawyer. At least this was the theory.[95] A statute allowed them to file a lien against the title to property, including an interest or improvement in the lands for the amount owed, supposedly a relatively simple task. The remedies varied depending on the statute, but generally provided for judicial sale of the property with the proceeds applied to the payment of the liens.[96]

The primary problem for the oil industry was deciding to what the liens were supposed to attach. The land leased for exploration? The mineral rights? The production of an oil or gas well? Well housing and pump stations? The Harvey court had made two precedent-setting decisions. *Union Drilling & Development Co v Capital Oil Co* in 1931 ruled that a lien could be registered against an interest or improvement in lands, even if the surface land was still held by the Crown. The leased mineral rights were such an "interest" and an oil well, the "improvement."[97] Later, in 1939, the Court held in *McFarland v Greenback and Trusts and Guarantee Co* that a lien could also attach to the equipment used in producing oil and gas from a well, even if that equipment was not necessarily permanent.[98]

In 1943, to minimize perceived problems with the application of the law to the oil and gas industry, the province amended the *Mechanic's Lien Act* to expressly allow for liens against the mineral rights, oil and gas in place, and also against oil and gas "severed," that is to say, produced and out of the ground.[99] Unfortunately, this did not end the difficulties in applying the *Act* to the oilfield business. Indeed, in a perfect example of the law of unintended consequences, the amendments made it worse, creating apparent contradictions with older sections of the *Act*.

That became obvious in *Crown Lumber Co v Stanolind Oil and Gas* when the Court produced four opinions that differed considerably from each other. This prompted Justice Martland on the SCC to remark: "The formal judgment order of the Appellate Division...does not contain any judgment of the whole Court, but consists merely of a recital of the conclusions reached by the individual members of it."[100] Martland then gave yet another interpretation. In his judgment, Horace Johnson had written:

> Amendments which have been introduced, particularly those dealing with oil and gas, have brought into the Act a state of confusion and uncertainty in which the most astute legal practitioner must find great difficulty in finding his way. As the learned trial judge has said, any judicial interpretation of these provisions must be at best "a guess."[101]

The resulting complexity in the law obviously undermined the *Act*'s rationale, which was to allow

J.H. LAYCRAFT, VAL MILVAIN, ROSS MACKIMMIE, BILL MORROW, W.A. STEVENSON AT PRIVY COUNCIL, 1959. LASA 47-G-8

tradespeople an avenue for debt collection without requiring a lawyer.

The Facts in the *Wakefield* Litigation and the Trial Decision

Wakefield was yet another problematic appeal of a lien. The litigation was very characteristic of the go-hard ethos of the oil patch in the era right after Leduc. A group of five investors obtained a lease on part of a quarter-section. Two other men, Harding and McMullen, acting as agents, commissioned the Wakefield company to start drilling a well on the basis of a permit given to Oil City Petroleums (Leduc) Limited, a corporation that did not yet exist. Drilling started September 10. Oil City was incorporated September 19, with Harding and McMullen as the only directors and shareholders, and an agreement between Wakefield and Oil City for drilling the well was signed the same day. The agreement stipulated that drilling had to start no later than September 15. It had in fact started five days earlier.

Meanwhile, the five investors assigned their interest to another small company, Ponoka-Calmar Oils. On September 24, Oil City, Ponoka-Calmar Oils, and American Leduc Petroleum, which held leases on adjacent lands, signed another agreement to pool their rights and assign everything to the Prudential Trust Company to essentially administer the agreement and divvy up the profits. In this agreement, Oil City, which had already set up the contract for drilling with Wakefield, was considered the operator for all the partners. However, Wakefield & Co. had not yet been paid for any work. On September 23, the company stopped drilling, informing Oil City it would not resume until payment was made for work to date as provided for in the September 19 agreement. Oil City wrote a cheque. It bounced, and in October, Wakefield applied to the Conservation Board to plug and abandon the well and then slapped two liens on it before the end of 1949.

Three months later, another company was hired to finish drilling, and the well was brought in as a commercial, but anemic, producer. The Trial Division appointed a receiver to sell the oil and deposit the net proceeds into a trust account pending the outcome of the lien action. Initially, the well did not produce much, but it later improved. By 1955, there was enough money in the trust account to be worth fighting over, and the matter moved forward to trial before Chief Justice McLaurin. Counsel agreed that $30,000 from the trust account would settle the lien. McLaurin ruled Wakefield had a valid lien and awarded the company the money. Oil City appealed. One of the grounds of appeal was that the liens had expired due to lack of renewal. Another was that the liens were a nullity because they had not been properly registered against an owner or anyone with an interest in the land.

The Appeal Court's Opinion: An Expired Lien

The Court agreed with Oil City. The term of a mechanics' lien was six years, after which time, if not renewed, the lien "absolutely ceased to exist."[102] The trial took place just after six years had elapsed. Unknown to the trial judge, the liens had not been renewed as required by the *Act*. Justice McBride, with Johnson concurring, concluded that, given the plain language of the *Act*, the lien had expired. McBride rejected Wakefield's argument that the receivership order had superseded the lien and that Wakefield's interest had transferred to the money in the trust account, making renewal of the lien unnecessary. McBride ruled the step taken to enforce payment of the lien – the receivership order – was not the same as a final judgment on the lien. Thus, the lien still had to be registered at the time of the resulting trial.

Porter, writing for the rest of the Court, considered Wakefield's position to be even worse. He determined that a lien could only be registered against someone who owned or had an interest in the land. Wakefield started working on September 10 at the request of Harding and McMullen, but at that point, the two had no actual interest in the lease. Wakefield stopped drilling on September 23, and it was only the next day that Oil City made the agreement with Ponoka-Calmar for drilling on the leases. Porter reasoned that under the September 24 agreement, the two men and their company,

JASPER AVENUE, EDMONTON, CA. 1945. PAA BL1015/1.

Oil City, never acquired an interest in the oil and gas, but only a share of the proceeds realized from its sale. This meant, in his view, that Oil City did not have any ownership or an interest in the lands. The lien, therefore, was not valid. Ironically, both McBride and Porter then gave judgment for Wakefield against Oil City for over $50,000 on grounds of breach of the September 19 contract.

The SCC and Judicial Committee Disagree: Valid Lien for Wakefield

Wakefield appealed to the SCC, more interested in the $30,000 in trust with the court than trying to recover $50,000 from Oil City, which was now out of business. The SCC reversed the Court. It concluded that even though the drilling had started before the relevant agreements had been signed, it was an "irresistible" inference that all parties understood that the arrangements were forthcoming. This being so, this created an "interest" for Oil City in the oil and gas lease and therefore the lien was valid. The SCC also held that while the effect of the receivership order was unclear from the statute, the point of the lien was to produce funds to settle the debt. Those funds had been produced, were now in court, and therefore, there was no reason for Wakefield to renew the lien. Failing to renew the lien did not affect its right to the monies in trust.

And thus, the final appeal to the Privy Council was launched. Unfortunately, the Court's part in this historic moment was that of the last appeal court reversed. The Privy Council too determined that McBride and Porter had been too literal in their interpretation of the *Act*. Although the Committee acknowledged that the appeal "raises questions of some difficulty upon the true construction of *The Mechanics' Lien Act*," it agreed with the SCC's conclusions.[103]

No one was too shocked. According to Herb Laycraft, all the counsel involved, including Bill Morrow, knew that the appeal was a foregone conclusion. The point of going to England was to have the last appeal.[104] But there was to be one final surprise. The Privy Council insisted on a line-by-line examination of the *Mechanics' Lien Act*, and the hearing took longer than all the previous appeals in the case together. Afterwards, Lord Denning told the Canadians: "Well, that certainly is a most enlightened statute."[105] A comparable law did not exist in Britain.

Laycraft remembered that he had never thought of the *Act*, commonplace to Alberta lawyers, in quite that way before.

In the extensive litigation leading to *Wakefield*, as Morrow later put it, "once again, the flexibility of the Alberta judges was in evidence."[106] Two of the other companies involved in drilling on the land in Wakefield, Ponoka-Calmar and American Leduc, were also ensnared in litigation with Oil City. While busy suing Oil City for not finishing other wells, the two companies discovered that they were in danger of losing their leases because of the failure to drill the wells. Chief Justice O'Connor directed the Clerk of Court to take charge of the drilling of the disputed wells and complete them while the appeal was pending. Thus even the Appellate Division participated in Alberta's oil boom. More importantly, this true story captured the practical, take-charge, problem-solving bench of the era.

CONCLUSION

The dozen years of the O'Connor-Ford leadership were stable ones for the Court. O'Connor and Ford were fine chief justices, intelligent, practical men who, if they didn't put a strong personal stamp on the Court, certainly continued its congenial and collegial atmosphere. O'Connor was a likeable, witty consensus builder with a streak of iron where criminality was involved, but also with a passion for justice. Ford was an upright, decent man not quick to judge. Common sense was an attribute ascribed to both chiefs and to most of their judges, and it was meant as an altogether positive quality. The record reveals a solid bench, orthodox in the main, and pragmatic to the core. The conventions and common practices of the times, in terms of jurisprudence and the operation of an appeal court, were their tools and the justices made them suffice.

At the same time, the post-Leduc oil boom was exciting, brought a welcome new prosperity, and was the beginning of major economic and social changes for Alberta. It also produced the major legal challenges of the era for the Court. O'Connor, Ford, and their confreres wrestled with difficult, and sometimes unique, problems that the industry created. *Wakefield* demonstrated that the Court did not always get it "right" in the sense of producing decisions that withstood the test of higher courts. But in several landmark cases, the Court crafted decisions that not only passed this scrutiny but have stood the test of time. In the *Borys* case in particular, the Court reached a result that was right in the law and, more importantly, right in the real world. The Court's pragmatic mindset was an

asset in reaching conclusions which, by their nature, also involved creative jurisprudence, even if the judges didn't necessarily view it that way. The Court generally rose to the demands of the occasion.

The next decade and half would be more difficult. Social, political, and economic change in Alberta would accelerate in the 1960s. The Court had moved on from the Harvey era, but, like most Canadian appeal courts, it tended to stick to very conservative decision making and time-honoured practices. This would all look increasingly inadequate and parochial in a time of rapidly shifting social morés and the demands of a busy legal profession. Grappling with this was something left to Ford's successor as chief justice, S. Bruce Smith.

Endnotes

1 "Striking Oil in Leduc: There she blows... finally," feature article, www.thecanadianencyclopedia.com.

2 John Kenneth Galbraith, *The Affluent Society* (Boston: Houghton Mifflin, 1958), chap. 1.

3 Quoted in Idries Sayed Shah, *The Way of the Sufi* (London: The Octagon Press, 2004), 88.

4 *Edmonton Journal*, Jan. 4, 1957.

5 *Calgary Herald*, "Personality of the Week," Oct. 24, 1953.

6 Clifford P. Ford, "The Honourable George Bligh O'Connor," *Alberta Law Review* 1, no. 3 (1957): 142.

7 See the *Western Weekly Reports*, such as (1915), 8 WWR 20.

8 Ford, "The Honourable George Bligh O'Connor," 142.

9 LASA clipping file "O'Connor, George B.," letter, Dean W.F. Bowker to Justice R.P. Kerans, Aug. 27, 1990.

10 *Majestic Mines Ltd. v Alberta (Attorney General)*, [1941] 2 WWR 353.

11 *Calgary Herald*, "Personality of the Week," Oct. 24, 1953.

12 Louis A. Knafla and Rick Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997), 140.

13 LASA clipping file "Parlee, Harold," letter, Dean W.F. Bowker to Justice R.P. Kerans, Aug. 27, 1990.

14 Ibid.

15 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 140.

16 Ibid., 90.

17 LASA clipping file "MacDonald, William Alexander," letter, Dean W.F. Bowker to Justice R.P. Kerans, Aug. 27, 1990.

18 *R v Caledonian Collieries Ltd*, [1926] 2 WWR 280.

19 LASA clipping file "MacDonald, William Alexander," Bowker letter.

20 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 40.

21 *Calgary Herald*, October 1, 1923.

22 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 41; see also *Albertan*, Feb. 24, 1961, "Looking Back at 50 Years in Law."

23 *Calgary Herald*, March 9, 1996, "Chief Justice was proud of his rural roots."

24 LASA, fond 9, series 5, W.G.N. Egbert interview, 44.

25 *Albertan*, Oct. 10, 1969. Milt Harradence, noted defence lawyer, said, "The complicated presentations of counsel, including mine, were on occasion reduced to stark simplicity by My Lord Porter with a speed that was sometimes unnerving."

26 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 143.

27 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 143. Referring to the law reports, it also appears that Porter hardly stepped into a courtroom after 1942, although he had been quite active as a litigator before then.

28 *An Act respecting the Transfer of Natural Resources to Alberta*, SA 1930, c. 21; *Alberta Natural Resources Act*, SC 1930, c. 3. When Alberta became a province in 1905, the federal government retained control over natural

< CLINTON FORD AND MARSH PORTER, COURT OF APPEAL COLLECTION.

^ LAW SOCIETY OF ALBERTA DINNER JANUARY 20, 1958, COURT OF APPEAL COLLECTION

resources, paying instead an annual grant to the province. Older provinces, as provided in the *BNA Act*, had control over natural resources. The 1930 transfer was the culmination of many years of negotiation and was considered the signature accomplishment of the Brownlee administration.

29 James Gray, *Talk to My Lawyer* (Edmonton: Hurtig, 1987), 140. To prevent speculators from interfering with legitimate exploration, Porter apparently suggested that the government issue "prospecting" licences to large acreages. The companies would then trade in the licences for leases on areas where they wanted to drill.

30 *St. John's Calgary Report*, April 10, 1978, "Clock and Cookbook."

31 William A. Stevenson Interview, Aug. 21, 2008.

32 LASA, fond 9, series 5, Gordon Allen interview, 67.

33 The university offered a LLB starting in 1913, but students only took courses part-time while articling. This was how Clinton Ford received his law degree. In 1921, the law school was properly established and the LLB became a full-time three-year degree program.

34 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 78–79.

35 LASA, fond 56, series 5, Tom Mayson interview, 22.

36 *R v Drybones*, [1967] 61 WWR 370.

37 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 89.

38 Wilbur F. Bowker, "Three Alberta Judges," *Alberta Law Review* 4, no. 1 (1965): 8.

39 Ibid., 8.

40 Ibid., 9.

41 Ibid., 9.

42 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 113.

43 LASA, fond 9, series 5, Justice J.H. Laycraft interview, 15. The case is *Horne v Krezan* (1955), 14 WWR 625.

44 Two exceptions were Simmons and Ewing, who had done articles with R.B. Bennett and A.L. Sifton respectively.

45 Of the 28 appointments between 1954 and 1990, 26 were U of A graduates.

46 *Alberta Gazette*, vol. 51, no. 22, Nov. 30, 1955, 2232.

47 *R v Schula*, (1956), 18 WWR 453.

48 Ibid., at para. 19.

49 *Jackman v Jackman*, [1958] 2 WWR 131.

50 Ibid., at para. 17.

51 *R v Stewart-Smith* (1960), 31 WWR 618, The case was interesting – a private detective appealing his perjury conviction arising from his testimony in a divorce action.

52 *Canada Evidence Act*, RSC 1952, c. 307.

53 *R v Stewart-Smith* (1960), 31 WWR 618, at para. 18.

54 Ibid.

55 *Albertan*, Feb. 24, 1961, "Looking Back at 50 Years in Law."

56 Russell, *Judiciary in Canada*, 341.

57 Ford, "The Honourable George Bligh O'Connor," 143.

58 *Calgary Herald*, "Personality of the Week," Oct. 24, 1953.

59 Ford, "The Honourable George Bligh O'Connor," 143.

60 Bowker, "Three Alberta Judges," 8, supports this contention.

61 *Valkenburg v Libin* (1954), 13 WWR 383, at para. 19.

62 *R v B.(A)* (1955), 16 WWR 425.

63 *R v Jones* (1961), 34 WWR 487.

64 Ibid.

65 This is based on reported cases, but constitutional matters usually made it into the law reports. See *Reference re Orderly Payment of Debts Act* (1959), 29 WWR 435.

66 *Lord's Day Act,* SC 1906, c. 27.

67 *R v Pacific Inland Express Ltd* (1959), 27 WWR 588.

68 William G. Morrow, "An Historical Examination of Alberta's Legal System – The First Seventy-Five Years," *Alberta Law Review* 19, no. 2 (1981): 161. The case was *R v Ford*, [1948] 1 WWR 404.

69 Morrow, "Alberta's Legal System," 162. Justice Morrow's observations in this article are based on his recollections as well as looking at the reports.

70 Ted Byfield, ed., *Alberta in the 20th Century, vol. 9: Leduc, Manning & the Age of Prosperity* (Edmonton: United Western Communications, 2001), 16.

71 *Creighton v United Oils*, [1927] 2 WWR 458; *Starley v New McDougall–Segur Oil Co and Mid-West Oil Co*, [1927] 3 WWR 464.

72 *Knight Sugar Co v Alberta Railway & Irrigation Co*, [1936] 1 WWR 416.

73 *Spooner Oils Ltd v Turner Valley Gas Conservation Board*, [1932] 3 WWR 477.

74 *Spooner Oils Ltd v Turner Valley Gas Conservation Board*, [1932] 2 WWR 641.

75 Alastair Lucas, "Energy Law: The Court and the Prosperity Bonus," in *The Alberta Supreme Court at 100: History and Authority* (Edmonton: Osgoode Society and University of Alberta Press, 2007), 231, points out, however, that an important part of the Appellate Division's judgment was not challenged in the SCC, which was that the Alberta government had the constitutional power to regulate oil and gas production.

76 *Majestic Mines Ltd. v Alberta (Attorney General)*, [1941] 2 WWR 353.

77 Lucas, "Energy Law," 253, makes passing reference to this point, quoting Justice Constance Hunt of the Alberta Court of Appeal in *Scurry Rainbow Oil v Galloway Estate*. Hunt pointed out that while some early decisions relied on American jurisprudence, Canadian courts have tended to develop their own approach based largely on English common law principles. She views this as due to the considerable variance among American jurisdictions of very basic oil and gas precepts.

78 *Huggard Assets Limited v Attorney General for Alberta*, [1950]1 WWR 69.

79 Ibid., at para. 3.

80 *Huggard Assets Ltd v Attorney General for Alberta,* [1949] 2 WWR 370.

81 *Huggard Assets Ltd v Attorney General for Alberta*, [1950] 1 WWR 69 1950, at para. 41.

82 Lucas, "Energy Law," 234, provides a good summary of what the SCC justices were trying to get at. Essentially, they argued that any service derived from land, in this case the royalty, had to be "certain," not changing, and the royalty regulation offended this.

83 *Huggard Assets Ltd v Attorney General for Alberta* (1953), 8 WWR (NS) 561, at para. 69.

84 Lucas, "Energy Law," 236.

85 *Borys v Canadian Pacific Railway* (1952), 4 WWR (NS) 481, at para. 91.

86 Lucas, "Energy Law," 239. See also *Anderson v Amoco Canada Oil & Gas*, [2003] 1WWR 174. There was one difference in the Alberta Court of Appeal ruling, that natural gas in solution in "connate" water was not included in a reservation for petroleum. The SCC upheld this ruling.

87 *Anton Turta v Canadian Pacific Railway & Imperial Oil,* [1952] 5 WWR 529 at para. 24.

88 Byfield, *Alberta in the 20th Century*, vol. 9, 17. Mike did not have the mineral rights for his farm, so he only received a small amount of money for surface rent for Leduc #1.

89 Ronald V. Clarke and William N. Richards, "Defeasibility of Mineral Interests," *Alberta Law Review* 12, no. 1 (1974): 76.

90 *Turta v Canadian Pacific Railway,* [1953] 8 WWR (NS) 609, at para. 1.

91 Ibid., at para. 127.

92 Clarke and Richards,""Defeasibility of Mineral Interests," 77–78. The CPR in the end collected $160,000 dollars for their loss in *Turta*.

93 Gray, *Talk to My Lawyer,* 152.

94 There are several versions about the origins of the appeal. Gray, *Talk to My Lawyer*, 162, who interviewed most of the counsel involved, implies Morrow had intentionally pursued the case to Privy Council as a lark. His account of the *Wakefield* litigation, however, is woefully inaccurate. Justice Herb Laycraft claimed that the counsel knew it was a foregone conclusion that Wakefield would win. Morrow, in *Northern Justice: The Memoir of Mr. Justice William G. Morrow* (Toronto: Osgoode Society and Legal Archives Society of Alberta, 1995), 39, presents the appeal more as a logical step in the very extensive litigation he conducted for Ponoka–Calmar, of which the Privy Council appeal was only one part.

95 *Canadian Law Dictionary* (Toronto: Law and Business Publications, 1980), 242.

96 Today in Alberta, the relevant legislation is the *Builders' Lien Act*, RSA 2000, c. B-7.

97 *Union Drilling & Development Co v Capital Oil Co*, [1931] 2 WWR 507.

98 *McFarland v Greenback and Trusts and Guarantee Co*, [1939] 1 WWR 572.

99 *Crown Lumber Co v Stanolind Oil & Gas Co*, [1958] SCR 361.

100 Ibid., at para. 29.

101 *Crown Lumber Co v Stanolind Oil & Gas Co*, [1958] 24 WWR 337, at para. 73.

102 *Oil City Petroleums Ltd v Earl F. Wakefield Co*, [1957] 22 WWR 267.

103 *Earl F. Wakefield Co v Oil City Petroleum (Leduc) Ltd*, [1959] 29 WWR 638.

104 Morrow, *Northern Justice,* 179.

105 Laycraft interview, August 11, 2008.

106 Morrow, "Alberta's Legal System," 163.

SQUARE DANCING ON 9TH AVENUE IN CALGARY DURING STAMPEDE, CA. 1952. GLENBOW ARCHIVES, NA-2640-16.


TAILORS
AMERICAN
VOICE
STOP
THE
BOMBING
RIGHT
NOW
SCHOOL

CHAPTER 6

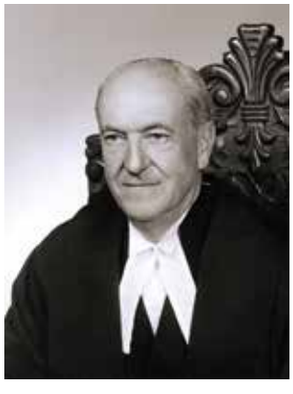
CRIME AND PUNISHMENT: THE SMITH COURT, 1961–1974

Because punishment does not annihilate crime, it is folly to say it does not lessen it. It did not stop the murder of Mrs. Donatty; but how many Mrs. Donattys has it kept alive![1]

Is not uncertainty and inconstancy in the highest degree disreputable to a court?[2]

The Court began the 1960s with a new Chief Justice, S. Bruce Smith, who was appointed in 1961. The previous decade had seen the beginning of an economic transformation of Alberta. Smith's tenure coincided with some equally ground-breaking social changes in North America. An optimistic, affluent society became increasingly progressive minded, just as the baby boomers came of age.[3] Their youthful rebelliousness and questioning of authority, combined with rebellion against traditional views of morality and social behaviour, led to unrest and opposition on a scale not seen for decades. The fight for civil rights morphed into militancy, a quest for alternative lifestyles led to experimentation with drugs and sex, and youth culture became the counter-culture. Older generations reviled some of the changes they saw but willingly embraced others. Even conservative Alberta, far from the radicals of Berkeley and the civil rights marchers in Selma, was not untouched.

Alberta's appellate court seemed to float serenely above a rambunctious decade, little changed. It remained a traditional, orthodox court with only hints of the more active approach to judging that would surface in Canada in the 1970s. It is telling that Smith, on his retirement in 1974, would say that his Court dealt with few significant appeals.[4] Yet there were changes in the staid world of Canadian law that reflected the progressive spirit of the day. Parliament brought in mandatory retirement for judges at age seventy-five, the first reform of the judiciary in generations. A new and liberal divorce law underscored shifting social values. The Royal Commission on the Status of Women exposed the second class status of women in Canada. And, under Prime Minister John Diefenbaker, Parliament brought in the *Bill of Rights* to better safeguard the rights and freedoms of Canadians. Positive change, however, came from legislation rather than the courts, which now looked more conservative and resistant to valid public expectations than ever before. The Alberta Court was certainly in this category.



< DEMONSTRATION AGAINST VIETNAM WAR ON JASPER AVENUE, EDMONTON, 1967. PAA J127/1.

> CHIEF JUSTICE SIDNEY BRUCE SMITH, COURT OF APPEAL COLLECTION.

In his appraisal of the Court's jurisprudence, Chief Justice Smith was undoubtedly thinking of landmark judgments. But he overlooked a criminal justice issue that was a significant challenge for the Court: the explosion of marijuana offences at the end of the 1960s, growing directly out of the challenge of youth to conventional society. These offences involved criminalizing the behaviour of many people who might not have normally been considered criminal. In dealing with the issue, the Court demonstrated the strengths and weaknesses of a formalist court. The Court's time-honoured approach to criminal law was also reaffirmed, in which its natural inclination to control crime and maintain order sometimes threatened, but never overwhelmed, its equally valid concern to safeguard individual liberty.

THE SMITH COURT

An Amendment for the Age

The first sign that real change was in the wind was the retirement of Chief Justice Clinton Ford. On March 1, 1961, an amendment to the *BNA Act* set seventy-five as the mandatory retirement age for all superior court judges. Ford had to step down after only four years in the top judicial post. He left with grace but not enthusiasm. In an interview after his retirement was announced, Ford stated: "I regret very much leaving the bench, as I felt I might have had a little longer to serve the public in this capacity ... I do not desire to comment generally on the justice of the new law. However, in my own case, I do not feel my usefulness is at an end because I am 79."[5] He died three years later.

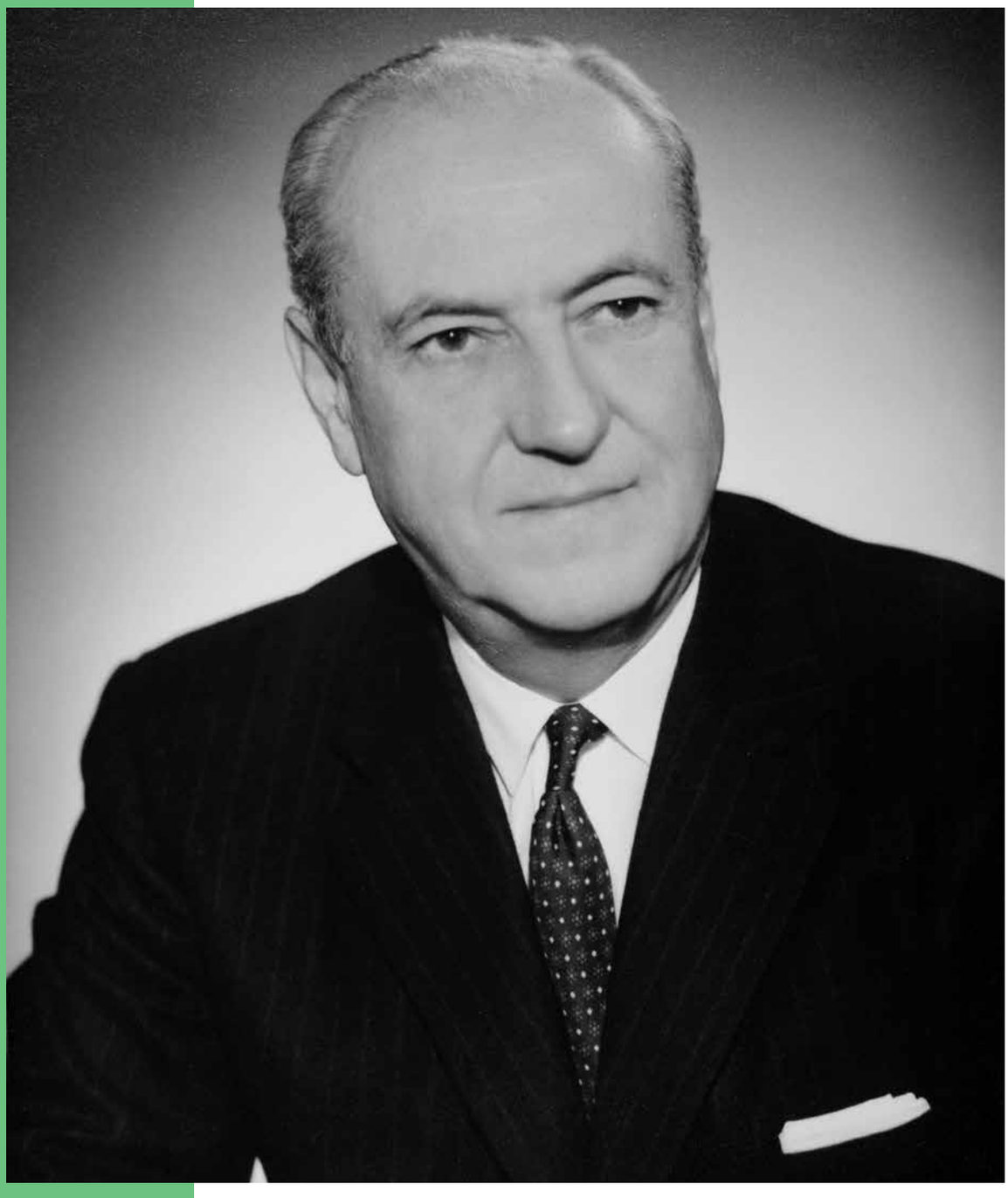
Mandatory retirement was an idea that had been around since at least the 1930s.[6] The Diefenbaker government finally brought in this reform, as well as passing legislation granting pensions to the widows and widowers of judges, which Harvey had fought for decades earlier. Mandatory retirement was the first major change in legislation affecting judges since Confederation and the most significant alteration of the Canadian judicial system since the abolition of appeals to England. How appropriate that the 1960s – a decade dominated by youth – would start with an acknowledgment of the limitations of age.

Sidney Bruce Smith, Formal and Formidable

Ford's replacement was immediately at hand. Sidney Bruce Smith had served a brief apprenticeship on the Trial Division, appointed in 1959, and as an appellate judge, appointed in 1960. Diefenbaker then promoted Smith to Chief Justice of Alberta. Although a judicial neophyte, Smith had the qualifications. An active Conservative, Smith was acknowledged as a leading member of the Edmonton Bar. He almost missed a judicial career. In 1958, the Diefenbaker government appointed him chairman of the Board of Transport Commissioners, a position well suited to Smith, who had appeared as counsel for the city of Edmonton at a number of freight rate hearings. He had gone so far as to buy a house in Ottawa, but ultimately turned down the post due to his wife's poor health. Smith returned to his firm, Smith, Clement, Parlee, Whitaker, Irving, Mustard and Rodney. As compensation, he received a judicial post at the age of fifty-nine and the distinction of being the first Alberta Supreme Court appointment by a Conservative government since A.A. McGillivray.[7]

As well as being a leading Edmonton litigator, Smith had been a bencher and President of the Law Society, and vice-president of the Canadian Bar Association. Born in Toronto in 1899, Smith moved with his family to Edmonton in 1914. He went to the University of Alberta at the precocious age of fifteen, earned his bachelor's degree in three years and then pursued law. At the time, the university offered a law degree but did not have a formal law school. Like his fellow students, Smith did his law the old-fashioned way, entering into three years of articles with Frank Ford and attending lectures at the courthouse downtown.[8] He had his call to the bar before receiving his degrees, in 1921 and 1922 respectively, and was the gold medal winner for his year.

CHIEF JUSTICE SIDNEY BRUCE SMITH, COURT OF APPEAL COLLECTION.



Smith stayed on for a year with Ford, and then struck out on his own, establishing a partnership with Hugh Stanton, which included pioneer lawyer C.C. McCaul as counsel.[9] In 1929, A.A. McGillivray invited Smith to join his firm in Calgary. This enhanced Smith's reputation as a barrister. When McGillivray went to the bench, his protégé returned to Edmonton and joined the Parlee firm. Smith practised civil litigation, including numerous appearances before Alberta's appellate court and the SCC. One of the mainstays of his practice was the city of Edmonton. Smith became senior partner and litigator for his firm after Harry Parlee was appointed to the bench. Along with his extensive practice, Smith was very much involved in the community, serving on the Edmonton Public School Board, heading the Rhodes Scholarship Committee, and acting as a director of the Edmonton Chamber of Commerce and the Alcoholism Foundation of Alberta. Deeply religious, Smith was Chancellor of the Anglican Diocese of Edmonton.

Although he had the necessary prerequisites, Smith undoubtedly owed his elevation to the post of Chief Justice to his political leanings and good timing. He was one of the few remaining prominent members of the pre-war generation at the bar. The profession was generally pleased with his promotion.[10] Smith was a no-nonsense and down-to-business sort, quite sufficient to the demands of running the Court. He was, however, much more formal than his predecessors. Where counsel may have sometimes taken advantage of Ford's good nature, no one would have dared do the same with Smith. He was a "formidable presence," in the words of one barrister. Although often described as gentlemanly, Smith had little time for idle conversation, and some thought him a bit cold and distant. As Chief Justice, Smith was personally involved in the design and building of Edmonton's new law courts building, an imposing modernist design of poured concrete which was promptly dubbed "Fort Smith."

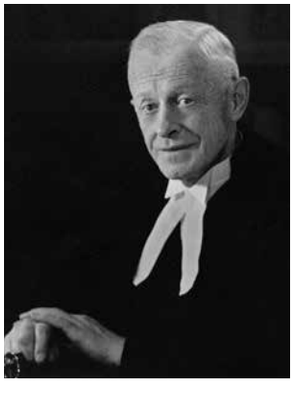
Ted Kane, a Kindly Judge

The appellate bench saw significant turnover in personnel in Smith's first five years as chief. Another puisne judge was needed, and it was Edward William Scott Kane of Edmonton. Everyone knew Ted Kane. As one lawyer said, "Every year, he took your money."[11] As the Secretary-Treasurer from 1938 to 1952, Kane had been essentially the one-man staff of the Law Society, collecting dues, among other duties. Kane was born in Belfast, Ireland, in 1899, but grew up in Edmonton.[12] He got his degrees from the University of Alberta and joined the bar in 1922. Over the next forty years, he built up a good practice in Edmonton, establishing the firm Kane, Hurlburt and Kane. In the early part of his career, Kane was a partner with famed Edmonton criminal lawyer and litigator Neil D. Maclean. During his years as secretary of the Law Society, he maintained his own office. Although he was known primarily as a commercial lawyer when he was appointed in 1961, Kane had done some court work, mostly during his partnership with Maclean. He had even appeared before the SCC once in the capacity of counsel for the Law Society.[13]

A friendly and kindly man, Kane was well liked. It is fair to say that he was not considered one of the top-rank Edmonton lawyers, and he was not an especially active judge. Kane had no pretenses of being a legal scholar. His judgments tended to be short and practical without extensive reference to case law.[14] Kane, however, surprised counsel and colleagues from time to time with vigorous dissents.[15]

Kane was appointed directly to the Appellate Division. This was a common practice during Smith's tenure: six of the nine appointments under Smith were straight to the court from practice. While not unprecedented, it was unusual for so many candidates not to serve at least a little time on a trial court.[16] It was a pattern that was soon reversed under the next chief justice.

Smith's tenure also saw the first expansion of the Court since 1921. Over the next dozen years, by the eve of Smith's retirement in 1974,



EDWARD WILLIAM SCOTT KANE, COURT OF APPEAL COLLECTION.

the Court almost doubled to nine sitting judges. There was no great mystery for the expansion; it was a consequence of the growth of the province and greater volume of appeals. The Court's procedure books, where a record was kept of each appeal, showed a tripling of appeals by the beginning of the 1970s.[17] Appointing more judges was the simplest solution to the expanding lists, although there were also a few changes to the Court's practice, described below. Surprisingly, there was none of the determined lobbying necessary to expand the bench as in the past.[18] Instead, a new judge was added every few years with quiet provincial and federal co-operation.

Doug McDermid, Corporate Lawyer to Appellate Judge

The first "expansion" appointment came in 1963. Neil Douglas McDermid immediately made history as the first native-born Albertan to sit on the Court. McDermid was a Calgarian, born in 1911, the son of a successful pharmacist. He finished law school in 1935, a graduate of the University of Alberta, where he had been top of the class in second year. McDermid articled with Senator George Ross, and then his career nearly came to an early end. No firm in Depression-era Calgary needed a freshly minted lawyer. Fortunately, Marshall Porter put McDermid to work filing in his office, keeping him employed until he could find something more permanent.[19] It did not take long. At university, McDermid had been a classmate of Bobby Brown, soon to become famous as head of Home Oil. Brown asked him to join the family oil investment firm, Brown Moyer Brown, as in-house counsel.

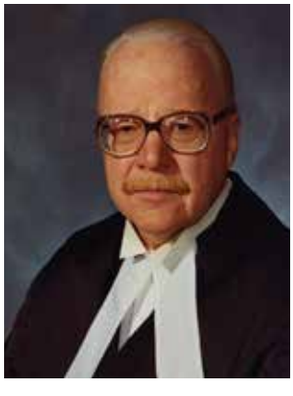
Later, McDermid brought Brown as a client to the firm of Macleod, Riley, McDermid and Dixon, which he helped found in 1944. He added Eric Harvie to his list of corporate clients from the oil industry. McDermid was generally acknowledged as an expert in oil and gas law as well as tax, securities, and corporate financing. Along with his corporate and commercial work, however, McDermid also served as the federal Crown prosecutor in Calgary for drug offences from 1949 into the mid-1950s. As the story goes, this was patronage for his political work for the Liberals. McDermid was supposed to be the tax prosecutor and his partner Harold Riley the drug prosecutor, but the appointments got mixed up.[20] The experience, however, served him well, since drug offences were a major part of the Court's work in the early 1970s.

Outside of practice, McDermid was very active in the community. He did a term as an alderman on Calgary City Council in 1950 and was a director of the Chamber of Commerce. He was a director for the Calgary Children's Hospital and the YMCA, and a prominent member of the Kinsmen. Thanks to his connection to Harvie, McDermid was the founding chairman of the Glenbow-Alberta Institute, better known as the Glenbow Museum. Joining the Court at fifty-two, McDermid was the youngest appointment seen for a few years and he was on the bench for twenty-three years. Quiet and modest, he was popular and well respected with his brother judges and a very able jurist.

Jimmy Cairns, Always a One-Liner

The next expansion appointment was Justice James Mitchell Cairns of the Trial Division. Jimmy Cairns was a character. Renowned for his quick wit, Cairns had been an inveterate practical joker in his younger days. Even on the bench, he frequently couldn't restrain his sense of humour: Cairns' *bon mots* were favourites with the Calgary bar for many years. When he was appointed as a trial judge in 1952, the profession was surprised, as he had been practising almost exclusively as a corporate and commercial lawyer and his courtroom experience was years in the past. Milt Harradence, dean of the Calgary criminal bar for many years, remembered Cairns as an excellent judge who made a special study of criminal law to make up his deficiencies in the field.[21]

Cairns was born in Edinburgh in 1902 but grew up on a fruit orchard near Nelson, British Columbia. The family was not well off. As a teenager, Cairns had to run the orchard when



NEIL DOUGLAS MCDERMID, LASA ACC. 2002-028.

JAMES MITCHELL CAIRNS, LASA ACC. 2002-28.

his father was overseas in the army. He attended school in Nelson and nearby Trail, but went to Edmonton – and the nearest law school – for university. Cairns maintained a strong connection to the Kootenay region around Nelson, spending summers there for most of his life. After finishing his law degree in 1927, Cairns went to Calgary to article with Alexander Macleod Sinclair. He stayed at the McLaws, Redman, Lougheed, Sinclair firm until 1935, before partnering with A.H. Goodall. After Goodall died in 1939, Cairns continued solo until 1942, when he rejoined McLaws.

In 1946, Cairns teamed up with Bill Howard to establish the firm that became Howard Mackie, remaining there until his judicial appointment. His specialization in corporate and commercial law led to a number of company directorships, and he served as a director of the Calgary Chamber of Commerce. Cairns also took an interest in politics, was active in the Liberal Party, and was elected for a term to Calgary City Council.

Cairns had just hit his stride as a corporate lawyer when he was offered the bench. His son, Justice R.M. Cairns, remembered that his father discussed the appointment with his family, especially the fact he would be making only a quarter as much money.[22] The elder Cairns, however, belonged to a generation that believed strongly that being a judge was both a duty and also the "pinnacle of the profession." He was very popular as a trial judge, a quick study who was prompt with decisions, usually delivered from the bench without reserving. He was less happy in the Appellate Division. According to his son, Cairns missed the excitement and independence of being a trial judge and did not enjoy the consensus decision making necessary for appeals. He was interested in moving back to the Trial Division as Chief Justice when Campbell McLaurin retired in 1969.[23]

Gordon Allen, a Savvy Operator

The Court lost Hugh John Macdonald in 1965, the first appellate judge in nearly twenty years to die while in office. The appointment a year later of Gordon Hollis Allen marked the end of the tradition of maintaining a "Catholic seat" on the Court. Such concerns were becoming increasingly archaic. The number of Catholics on the bench would increase significantly without any so-called quota.

Allen was from the United States, born in Chestertown, New York, in 1901. He moved to Calgary in 1912 with his family.[24] His father was a businessman who owned several stores in town. Allen's mother died when he was just fifteen. After attending Crescent Heights High School, where William Aberhart was principal, Allen went directly into law via articles in Calgary, first with H.C.B. Forsyth, and then with

the firm of Taylor, Allison, Moffat and Whetham. The articles lasted five years with Allen attending lectures at the courthouse, much as Bruce Smith had done in Edmonton. At the end of articles, Allen received a law degree from the University of Alberta, but he never received an undergraduate degree.

After receiving his call to the bar in 1923, Allen was promptly fired, as there was no space for him.[25] He was able to find a berth at Lent and Mackay. In 1930, Marsh Porter invited Allen to join Brownlee, Porter and Goodall. Porter and Allen's firm eventually became MacKimmie Matthews, long one of Calgary's major partnerships. As a young lawyer, Allen was a generalist and even appeared in court once in opposition to the great R.B. Bennett. But after joining Porter, he became almost entirely a solicitor. Not surprisingly, oil and gas made up a large part of his practice. During World War II, Allen was made counsel to the Emergency Coal Production and Oil Boards. Developing an excellent reputation as a well-respected corporate lawyer, Allen served as president of the Calgary Bar Association before being elected a bencher of the Law Society in 1951. He served as its president for part of 1961 and 1962 as well because the previous incumbent, Val Milvain, was appointed to the bench.[26] A football player in his youth, Allen was also a director of the Calgary Stampeder Football Club. Although he never ran for office, Allen was a major backroom player for the Liberal Party in Alberta.[27]

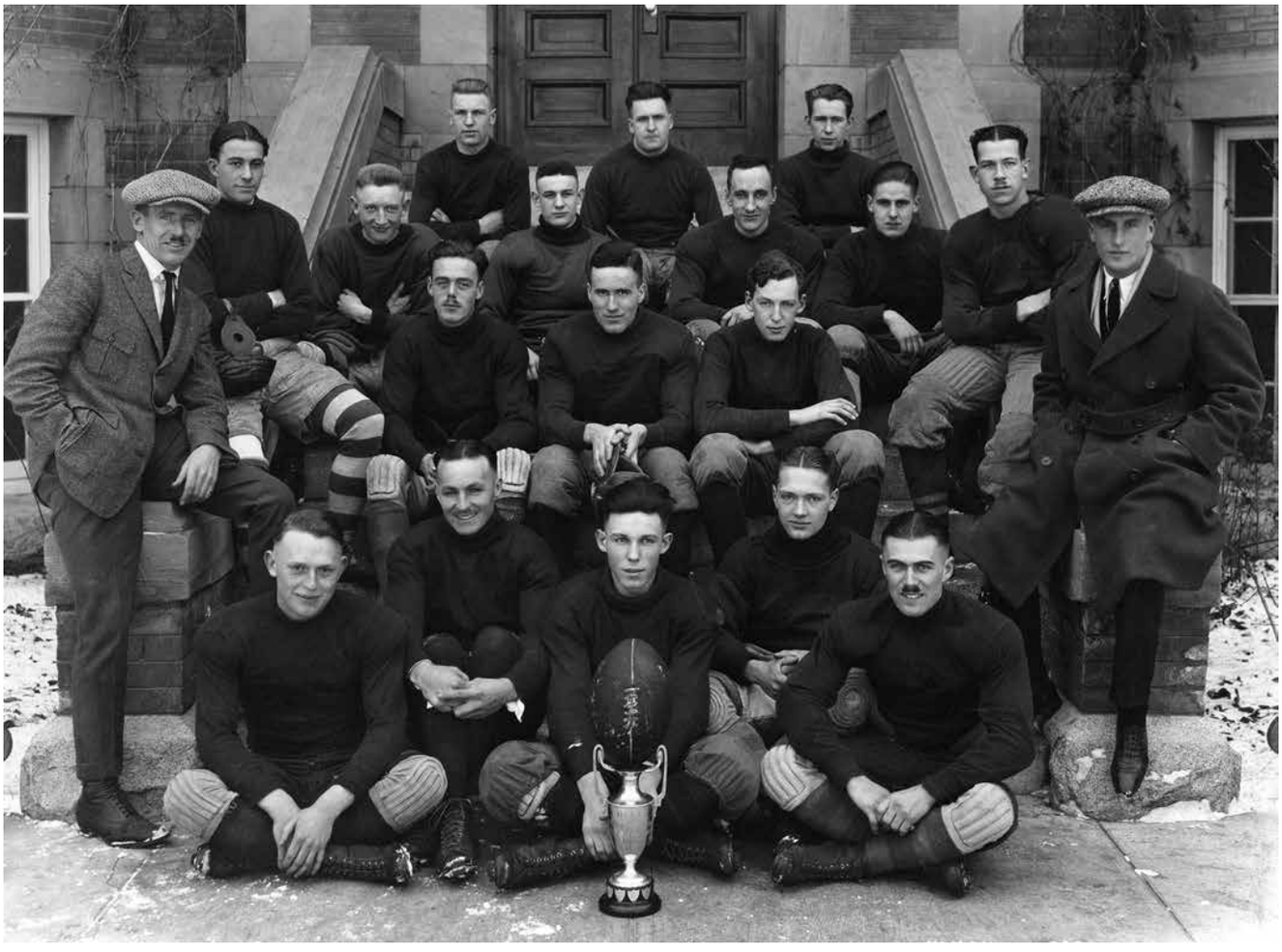
The number of pure solicitors appointed straight from practice was one of the distinguishing features of the Smith court, with four of eight appointments in this category. Previously, appointments had gone to proficient barristers, although the reality is that most lawyers in early Alberta were generalists who did a bit of everything. Kane, McDermid, Cairns, and Allen had done little barrister work, although Cairns had ten years as a trial judge. What effect this had on the Court was not obvious. McDermid, for instance, came to be considered a very good appellate judge; opinions on Kane and Allen were perhaps more mixed. Conventional wisdom, among barristers at least, was that courtroom experience was important for a judge, but a solicitor's background brought advantages as well.

Carl Clement, from Country Lawyer to Court of Appeal

The next new justice, Carlton Ward Clement, was a barrister and a strong addition to the Court. Appointed in 1970 to replace Marsh Porter, he had an immediate impact on the Court, writing often and well. He was not just a workhorse, however, but was respected for his pointed analysis and intellectual grasp of the law.

Clement was born in Waterloo, Ontario, in 1907.[28] His family moved

GORDON HOLLIS ALLEN, LASA ACC. 2002-028.



to Winnipeg, where he attended St. John's College, and then to Edmonton, where he attended the University of Alberta, earning a bachelor's degree and staying there for law. Graduating in 1932, prospects for Clement were dim in Edmonton thanks to the Depression. He later recounted seeing lawyers in the breadlines.[29] Clement started practice in Peace River instead. Not that business was brisk in the country; Clement recalled receiving fees in the form of firewood, garden produce, and the occasional side of meat.[30] Like many lawyers in small towns, however, Clement dealt with a wide range of law on behalf of his clientele, including quite a bit of criminal work.

Clement returned to Edmonton after a couple of years and became partners with George Van Allen. On his partner's death, Clement joined the Parlee firm. Demonstrating his talents, he quickly transformed from country lawyer to leading barrister, with a strong appellate practice that included numerous appearances at the Supreme Court. Clement also had broad experience as a corporate and commercial solicitor. He was known as an immensely hard worker, and some of his energy spilled out of the office. Clement was president of the Law Society in 1968 and on the Council for the Alberta section of the Canadian Bar Association. He headed the Edmonton Chamber of Commerce in 1959, was on

UNIVERSITY OF ALBERTA LAW AND COMMERCE RUGBY TEAM, EDMONTON, 1923.
BRUCE SMITH GRADUATED THE YEAR BEFORE. GLENBOW ARCHIVES, ND-3-2222A.

the executive for the national organization, and was involved in charitable work with the Heart Fund. He served as head of a Commission that set up the first provincial ombudsman. He was also a keen sailor. Quiet and modest, Clement had a dry and ironic sense of humor, and was an important member of the Court for over a decade.

An Older Generation

Along with veterans Johnson and Porter, these judges formed the bench under Smith, which had become ever more Albertan. McDermid was the only native son, but almost all the judges had grown up in the province and all had taken their legal education through the University of Alberta in one form or another. If this common experience and background affected their jurisprudence, it was not obvious.

There were several appointments right at the end of Smith's tenure – Cliff Prowse, Bill Sinclair, and Spud Moir – to replace retiring justices and also to further expand the Court. These men were the vanguard of a new generation of judges, and they had an immediate effect on the Court, serving as a contrast to their older brethren. Their careers, however, belonged to the next era of the Court.

Indeed, the bench of the Smith years was the last of what might be called the old guard – lawyers who were practising before World War II, who were thoroughly grounded in traditional precepts of common law, and who were very conservative as judicial lawmakers. It was a generation of judges of an old order, who in some cases found the social changes taking place to be confusing and even alarming. One of the trial court judges, Harold Riley, threatened to seek the return of a Calgary city park donated by his family after a rock concert was held there. There was some irony in this, given his own personal problems with alcohol. There was also a story, possibly apocryphal, about Porter, Allen, and a young hippie. The two judges encountered the young man lounging on the courthouse steps and commented on his shoddy attire, to which he gave a tart reply. The outraged judges recruited a uniformed orderly, who manhandled the youngster into the courthouse, where the judges gave him a thorough dressing down with threats of jail for contempt of court.

Delivery of Justice: Lack of Change in Practice and Procedure

During Smith's tenure, the Court started to experience pressure to make some changes in practice and procedure. The pressure came from a slow but steady increase in the workload. The primary response was to increase the Court's size. The judges were somewhat resistant to making major changes in procedure, and the management of the list of appeals for hearings soon became a point of real contention with the profession.

The Court of Appeal Waiting Room

In the age-old and simple practice of the Court, when an appeal was ready to be heard the Registrar set it down for the next sitting of the Court. Beyond that, nothing was scheduled. The Court tackled the appeals in the order they were set down on the list. Except for those at the top of the list, no counsel knew exactly when they might be called upon for their appearance, and the further down the list, the greater the uncertainty. Hearings might be short or long, an appeal might be dropped, or there might be an adjournment or application to move an appeal on the list to a later sitting. Because they did not know exactly when they might have to present argument, lawyers had to choose between hanging around the courthouse waiting their turn, sometimes for several days, or taking a guess and then risking the wrath of the panel if they guessed wrong. As one said, "God help you if you weren't there when called."[31]

This was annoying for everyone but a real hardship for some of the busier litigators, especially those who focused on appellate work. The pace of work picked up a great deal in Alberta in the 1960s. Herb Laycraft, a leading member of the bar, remembered sometimes

CARL CLEMENT, COURT OF APPEAL COLLECTION.

having two or three appeals in a single sitting, plus trials scheduled for the same time period. The Court was very good at accommodating him, but this occasionally meant some other unfortunate counsel had his hearing bumped. As the 1960s turned into the 1970s, the lack of scheduling became an increasing irritant.

The Law Society tried to bring the matter to the attention of the Court when its new judicial liaison committee met with Chief Justice Smith in 1973. But it was not an easy subject to broach. As W.H. Hurlburt observed in a letter to Laycraft, who was a member of the committee:

> To my mind the major concern of the profession with the Appellate Division is the time wasted in sitting around. This is a question on which the Court seems to be extraordinarily sensitive and I'm not sure that it is appropriate to raise it at a first meeting when we should presumably be trying see that lines of communication are open.[32]

In his own memo a few days later, Laycraft was even blunter: "My own impression is that the liaison with Chief Justice Smith will be a very delicate problem." He added an amusing observation:

> As long as I can remember dealing with the Alberta Court of Appeal, the Bar has had criticism as to the necessity of waiting for the Court. I have in fact heard such criticisms well and vehemently expressed by persons who are now on the Court, including the Chief Justice himself. Nevertheless the metamorphosis, which takes place when the judicial mantle is assumed, must have some basis.[33]

Noting that the workload of the Court had increased four-fold, Laycraft concluded by opining that the appeal judges would be very unwilling to make changes if it meant more demands on their time. In fact, this prickly problem was not addressed until there was a new chief justice. There was one advantage to the waiting: many remember that young lawyers were given a chance to see the best litigators in action.

Another issue that the profession wanted to bring up was the "long vacation" – the summer break. This venerable tradition was seen as another anachronism not in step with the times. The agitation for change began in 1965 and was still an active topic two years later, although the profession ultimately dropped the matter.[34] It might well have been because it is the summer months that lawyers also typically take their vacations. But clearly, there was some restiveness among the province's lawyers about how the Court was being run. The bench, however, seemed strongly resistant to suggestions – and still less to actual change.

A Positive Change: Small Panels to Cover More Sittings

Yet the Court was not completely hidebound. One fairly significant change was to use two panels of three for the sittings of the Court. This was made possible with the expansion of the Court to six and then seven. It became general practice to use a larger bench of five only for certain important appeals, rather than trying to sit the full bench for most hearings.[35] As an example, Smith as Chief Justice assigned a large panel in *Cahoon v Franks*, explaining:

> This appeal was first argued before a division of this court consisting of Porter, Johnson and Kane, JJ.A. Because of the importance of the question of law involved, I directed that the case be re-argued before a division of five members before judgment was delivered.[36]

As the lists grew in the 1960s, two panels were necessary to keep up, and for most sittings in the latter half of Smith's tenure, there was one panel for criminal appeals and one for civil.[37] The chief justice generally gave priority to criminal appeals, honouring the tradition of English law in which cases involving the liberty of the subject were considered paramount. The Court continued to alternate between Calgary and Edmonton as before, so the judges travelled to each city and worked together regularly.

Smith was also responsible for introducing the Court's use of articling students. In 1969, at Smith's request, the Law Society permitted Neil Nichols to article to the Chief Justice for ten months out of fifteen, with the remaining five months to be completed with a practitioner. This had already been done in Ontario. Articling students would later become very useful to the judges as research assistants.

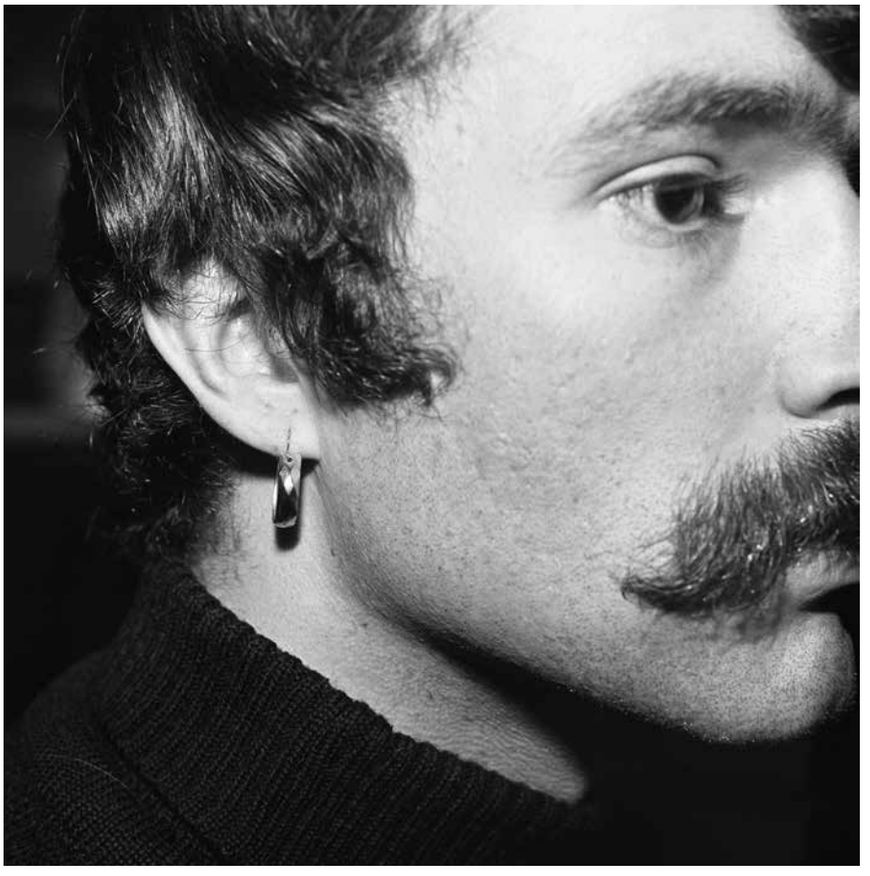
During Smith's tenure, Alberta's appellate court continued on much as it had for decades. Pressure was beginning to build as the legal business of the province greatly expanded, but two more judges and minor adjustments to sittings sufficed to carry the Court over. Dissatisfaction was starting to coalesce, but for the judges, there seemed little urgency for change. The Court's jurisprudence was in a similar state. Even with new faces on the bench, the Appellate Division approached the law as a judicially conservative and orthodox bench. However, this approach began to look inadequate in the face of a rapidly changing society.

THE SMITH COURT AT LAW

In its jurisprudence, the Smith bench may have been the most conservative in the history of the Court. It was "black letter," to use the lawyer's term, almost to the core. It was a court that minimized its law-making role even as it inevitably made law. And it concentrated on literal, formalist interpretations and applications of the law. In this regard, it was not unique. The same has been said of other Canadian courts in the 1960s.

However, this legal formalism, disconnected as it was from the realities of daily life for citizens, was soon to be found wanting as turbulent social and political change

SUPERINTENDENT JACK JAMES DISCUSSES BAN ON JEANS WITH STUDENTS AT ERNEST MANNING HIGH, CALGARY, 1968. GLENBOW ARCHIVES, NA-2864-1675I-11.



became the order of the day, even in conservative Alberta. The province was not untouched by the upheaval in society at large, as the 1960s witnessed a shift in some fundamental social mores around authority, religion, sex, and relationships, especially among the "baby boom" generation that was coming of age. There was also a blooming of activism to end poverty, inequality, discrimination, and capital punishment, and reformist zeal in government that produced universal health care and the welfare state. Against this backdrop, the judges of the Court sometimes looked parochial and behind the times.

This can be seen in the Court's response to changes in the legal environment with statutes like the *Canadian Bill of Rights* in 1961 and the *Divorce Act* in 1968 reflecting some of the progressive changes in society. The Court was more even-handed with jurisprudence flowing from such statutes than might be expected, thanks primarily to the thoughtful Horace Johnson, but it was not hard to find evidence that the Court was reluctant to engage with change more than absolutely necessary. The conservatism, both judicial and social, was most apparent when dealing with criminal justice issues such as drug use. Especially with the latter, the Court was clearly most concerned with upholding law and order.

Judicial Characteristics: Less Collegiality?

Under Smith, it is fair to say that the Court was not a convivial bench. The Chief Justice was a somewhat chilly personality who kept a very formal court and didn't tolerate anything that might be perceived as a lack of respect. The judges had a reputation for being hard on counsel, which was not unusual for appellate courts of the day.[38] Some could be quite rude. Johnson was well known for impatiently turning his back to counsel, but McDermid could also be abrupt and critical, while Porter was argumentative and very prone to interrupt. The other judges were less vocal, but this left counsel in the dark as to what those judges were thinking – until receiving a losing judgment. It must have been just as unnerving for less experienced counsel to be faced with a row of stern sphinx-like faces revealing nothing as to be bombarded with pointed questions.

Although Smith on retirement talked about having a happy court, the judges were apparently much less collegial in their work habits.[39] Clement, for instance, was known to leave a hearing, write a judgment, and give it to the Registrar without consulting his colleagues from the panel. Others sometimes did the same.[40] Still, retaining

A YOUNG OILFIELD TECHNICIAN DISPLAYS HIS NEW EARRING FOR THE CALGARY HERALD, 1972. THE PAPER OPINED THAT IT "PROBABLY COMES FROM ADOLESCENT FANTASIES ABOUT PIRATES." GLENBOW ARCHIVES, NA-2864-22030.

long-established habits of the Court, the judges did share their draft judgments at least some of the time and likely gave comments or suggestions.[41] They were certainly engaged in the law. One later judge of the Court recalled, as a young lawyer, entering the judges' locker room on an errand at the tail end of the Smith years. There he found the panel that had finished the day's hearing in various states of dishabille, rather heatedly arguing the merits of the appeal they had just heard.[42]

Orthodox but Capable of Flexibility

"A traditional court but not necessarily hidebound," was the appraisal of SCC Justice William Stevenson, who frequently appeared in front of the Smith court. The Court maintained its character as an orthodox court, closely following *stare decisis*, deferential to legislatures, and strict constructionists in interpreting statutes. Stevenson and others remembered a bench that was generally competent but not intellectually adventurous, and also not easy to persuade. The appellate judges were tough and often put counsel on the spot, and they could be quite harsh with the unprepared or specious argument, even preemptory if they did not think an appeal had merit. Some barristers remember that at times even senior counsel had to fight to be heard.

Smith as Chief Justice did not take a particularly strong lead with the Court's jurisprudence. Stevenson called the Chief Justice a "black letter lawyer," and Smith's judgments certainly support this.[43] Smith had a streak of independence, however. He did not feel compelled to agree with the decisions of other provincial appeal courts, even in the interests of creating uniformity of law. In *R v Mckenzie*, Smith wrote bluntly: "To the extent to which my views are inconsistent with the decision of the majority of the court of appeal of British Columbia...I disagree with that decision."[44] This is not the only time he expressed such sentiments, and it showed a certain narrow approach in Smith's outlook. In most respects, Smith was very conventional.

Porter and Johnson were the two judges of the Smith court who, according to Stevenson, had a deeper interest in the law. Johnson continued to demonstrate in his judgments that he was one of the more perceptive judges in understanding the wider context of a legal problem, though he was very much a formalist and always cautious towards law making. Still, he produced several judgments that were striking and perhaps revealed a potentially more radical jurist, who felt obliged to emulate the restraint of the times. Johnson remained the Court's workhorse up until the last year or two before he retired. He said little, but he wrote extensively, the opposite of Porter, and was probably the most scholarly of the justices on Smith's court.

Porter was a dominant figure on the Smith court, at least in hearings. In the reported judgments, he was as likely to be in dissent as writing for the Court. However, he wrote relatively infrequently. Stevenson, who knew Porter very well, thought that he did not take much interest in routine appeals; something had to catch his fancy. Porter relished debate and was always very active in the courtroom. Stevenson remembered that Porter often got sidetracked on extraneous issues. Porter could also be a bully, constantly interrupting counsel and quite often disagreeing with them before they had finished argument. However, many lawyers liked and admired Porter because he was very quick. Porter loved history and often liked to discuss the historical developments behind a point of law. He had a strong admiration for the common law tradition and especially the protection of individual rights within that tradition. This, of course, accorded well with his libertarian leanings.

"I had many battles with Justice Porter," remembered Herb Laycraft.[45] Appearing at the Court on the matter of costs in the *Wakefield* appeal, where the Court had been reversed by the SCC, and that reversal affirmed by the Privy Council, Porter was on the panel. He criticized the decisions of the higher courts, berating Laycraft, and finally demanding to know what he thought. Laycraft replied: "My Lord, I think that it would be inappropriate

for a counsel as junior as I am to comment. Sixteen judges heard the case in Canada and England, thirteen decided on the way it has gone, and three in this court, dissented, and it would be inappropriate for me to question the thirteen." This quieted Porter down, at least for that hearing. It also demonstrated that the best way for counsel to handle Porter was to stand up to him.

Johnson wrote and Porter talked, but other judges were also present. Kane and Cairns were not remembered as very engaged judges, and they did not leave many reported judgments. Allen and McDermid were active, and many counsel remembered Allen's low growling voice in hearings. Although not verbose in hearings, McDermid was the strongest jurist, writing solid judgments with a heavy emphasis on common sense. Clement, after joining the Court in 1970, took on Johnson's role as the worker bee. Collectively, the judges seemed a pretty orthodox lot, reinforcing the reality of a court of conservative jurisprudence, applying the law as given.

Less Black Letter than Appearances?

At least, that was the appearance. Jack Major, later of the SCC, frequently appeared before the Court in the 1960s, and opined that the judges of that era had their own ways around inconvenient law. The most effective device: a brief oral judgment dismissing or allowing an appeal, without reasons.[46] Major suspected that this was one way the Court of that era dealt with cases where the law did not give what the judges thought was a fair and just result for the litigant. A judgment without reasons was a harder judgment to appeal, and, in many cases, litigants were not able to go to the SCC. Given the immense deference given an appellate court in that era, only a very senior or strong-willed counsel was likely to challenge the decision in any other way. According to Major, Porter in particular was skilled at avoiding precedents to get the outcome he felt was right. Very attuned to equity, Porter was quick to spot points that allowed him to distinguish the issue from inconvenient precedents. This may also explain why Porter wrote very little. He had his own way of achieving the result he wanted.

That some of the judges might have chosen this more subtle, but equally effective, way of accomplishing a fair result speaks to the restiveness with "dry formalism" that had appeared in Canada. Shortly before Smith became Chief Justice, the passing of the *Canadian Bill of Rights*[47] indicated things were beginning to change in Canadian jurisprudence – but not too fast.

Canadian Bill of Rights: Noble but Doomed

It was fitting that the decade opened with Parliament passing *An Act for the Recognition and Preservation of Human Rights and Fundamental Freedoms*, better known as the *Canadian Bill of Rights*, in 1960. Intended to define in statute the civil liberties of Canadians, as the Americans had in their constitution, the Bill was a priority of Prime Minister John Diefenbaker. Although it was an example of the reforming impulse seen in the 1960s, it was destined to become a historical curiosity. But it served a worthy purpose, driving home the need for a constitutionally entrenched *Act* to guarantee fundamental rights and freedoms. That was to come with the *Canadian Charter of Rights and Freedoms* in 1982.

Concern over civil liberties increased greatly in Canada after World War II.[48] Diefenbaker had long been a vocal proponent of entrenching civil liberties in legislation. Canada had inherited the British tradition where many basic rights and freedoms, developed under the common law, were part of the unwritten constitution. These rights were vulnerable to another fundamental constitutional doctrine – the supremacy of the legislature. Parliament, or provincial legislatures, could freely make laws that interfered with traditional liberties. And they did. Respect for tradition and concerns about public opinion were the only restraints on lawmakers. The *Bill of Rights* was intended to enshrine and protect rights and freedoms such as freedom of speech, freedom of religion, and traditional legal rights.

Diefenbaker's government, however, chose to make the Bill a simple statute, to avoid constitutional wrangling with the provinces that making it part of the *BNA Act* would have required. This meant it had narrow scope and little bite. The Bill only affected federal legislation; it allowed Parliament to override its provisions; and, as a simple statute, it could be subsequently cancelled or modified at will by Parliament.

The courts then reduced an already diluted Bill to impotence. The Bill did not accord well with the training and outlook of Canadian judges. They did not like applying the generalities of the Bill's provisions: "Common law judges, who commonly turn to literalism in interpreting written laws, are not accustomed to giving content to vague formulae."[49] That seemed to be especially so if the rights were asserted by new rights holders, whether those were women or groups not part of society's mainstream. Even with its limited scope, the Bill also expanded the power of review on the part of judges, who were now required to determine if legislation violated the provisions of the Bill, much as American judges did with their constitution. Canadian judges were not interested in that role: their training stressed the supremacy of Parliament, and their approach to law-making generally was ill-suited to the requirements of such review. Appellate decisions avoided applying the Bill's provisions, and even seemed calculated to eviscerate it.[50] By 1969, one law professor wrote: "The existence of the *Bill of Rights* has not sunk deep into the consciousness of lawyers" and "the practical, direct impact of the *Bill of Rights* has been almost nil."[51]

Did Religious Freedom Even Exist in Canada?

Walter v Alberta illustrated both why the Bill was needed and its weakness.[52] The province's Communal Property Act,[53] first passed as the Land Sales Prohibition Act in 1942,[54] was aimed at restricting members of the Hutterite sect, which owned land and lived communally, from purchasing more land.[55] The *Act* was outrageously discriminatory against Hutterites, essentially on grounds of their religious practices, as Johnson matter-of-factly stated in his judgment:

> This Act then in its pith and substance is legislation restricting the acquisition by Hutterites of more land in the province…I find it difficult to say that legislation which is aimed at the restriction of new and existing colonies and the holding of land in common…when living in such colonies and holding lands in that manner are the principal tenets of Hutterian faith, does not also deal with religion. It falls therefore to be decided if this is legislation that the province is competent to pass.[56]

The appeal was not decided, however, on the *Bill of Rights*, for the simple reason that the *Communal Property Act* was provincial legislation so the Bill did not apply. On appeal, the question became whether religious rights, if they existed at all in Canadian law, restricted the provincial jurisdiction over property rights. Johnson and McDermid, in concurring judgments, held that the *Act* was valid. They concluded that the province's legislative competence over property and property rights allowed it to pass laws restricting communal ownership. And although the *Communal Property Act* was discriminatory and indirectly affected the practice of a religion, this did not make the statute *ultra vires*. Neither judge thought there was a clear general right to religious freedom in Canada. Indeed, McDermid concluded that it was not clear who had competence to make laws regarding religious rights, Parliament or the provinces. The existence of the *Bill of Rights*, which guaranteed freedom of religion, did not even enter into either judge's reasoning.

R v Drybones: An Exception that Proved the Rule

Yet there was one notable exception to the risibly narrow interpretations that the courts gave to the *Bill of Rights*. And members of the Alberta Court were destined to play a leading role in it. That was the decision in *R v Drybones* in 1971, one of the few decisions that gave some effect to the *Bill of Rights*.[57] Joseph Drybones had been charged with being intoxicated while off a reserve in contravention of the *Indian Act*. He was arrested in a

hotel in Yellowknife, Northwest Territories, and fined $10 by the local magistrate. After pleading guilty, Drybones appealed his conviction. Justice Bill Morrow of the Territorial Supreme Court heard the initial appeal. Morrow, an Edmontonian who later joined the Appellate Division, held that the *Indian Act* violated the Bill's provision of equality before the law because it targeted one group, Indians, and made illegal an activity which was legal for non-Indians.

A panel of the Alberta Court consisting of Smith, Johnson, and Allen agreed with Morrow. Writing for the Court, Johnson did not add much to Morrow's judgment. But he did adroitly step past an earlier judgment of the British Columbia Appeal Court, *R v Gonzales*, which also dealt with the *Indian Act* and the *Bill of Rights*. The BC Court had held that "equality before the law" meant only that everyone affected by a law had to be treated the same, not that law had to be applied the same to everyone, regardless of race, religion, and so on. In other words, as long as all Indians were disadvantaged on the same basis, that would do. Johnson wrote that this interpretation clearly missed the whole thrust of the *Bill of Rights*:

> This interpretation would restrict equality before the law to equality before the courts. If this subsection means no more than this, it would hardly have seemed necessary to include it for this right has always been jealously guarded by the courts. He also seems to say that sec. 1(b) permits legislation that discriminates against race so long as all persons within the race that is discriminated against are treated in the same way. This interpretation would permit parliament, without the express declaration required by sec. 2, to enact respecting Indians the kind of legislation which was in force for so many years in the United States and which

SUNFLOWER CROP ON HUTTERITE COLONY IN SOUTHERN ALBERTA, 1963. GLENBOW ARCHIVES, NA-1752-56.

denied the coloured race equal rights with those enjoyed by white people and which has been struck down by the Supreme Court of that country during the last 15 or so years. If such legislation is permitted to be so passed by the parliament of Canada, the Act falls far short of the high purpose expressed both in the Act and its preamble.[58]

The SCC agreed with Johnson, although the dissents reveal the reluctance of judges of the time to entertain the idea of the courts taking the activist role the Bill required.[59] The interplay of Johnson and Morrow was most interesting. A judge from a younger generation, Morrow, pointed the way, but Johnson followed. And he expanded on Morrow's reasoning, cutting right to the heart of what should be meant by equality before the law and exposing the ludicrous results that would flow from an emasculated interpretation of the concept equality before the law. *Drybones* was very significant in terms of the civil rights struggles of Canadian aboriginals. As an important and virtually solitary successful application of the *Bill of Rights*, *Drybones* also illustrated what could have been – and, in the eyes of many disadvantaged groups, what should be. *Drybones* revealed that a younger generation of judges might be more amenable to the challenges inherent in the judicial role flowing from a constitutionally protected bill of rights.

Serving as the Appeal Court for the Northwest Territories

Drybones, properly, was not an Alberta appeal but one from the Northwest Territories. Why, then, was Horace Johnson writing the judgment? The answer was simple – the *Northwest Territories Act*[60] was amended in 1960 to establish the Northwest Territories Court of Appeal. The judges of the court were drawn from the appellate court of Alberta along with the sitting trial judges of the Territories, which remains the case to this day.[61] Appointment to the provincial appeal court automatically brings a patent for the NWT Court of Appeal. More recently, the Alberta Court has also staffed the appellate court for the new territory of Nunavut.

For much of the past, residents of the Territories did not have any avenue of appeal, an astonishing state of affairs. When the old Supreme Court of the Northwest Territories morphed into the Supreme Courts of Alberta and Saskatchewan in 1905, the administration of justice in the north was put in the hands of stipendiary magistrates and justices of the peace under a 1908 amendment to the *Northwest Territories Act*. However, the federal government did not make provision for either civil or criminal appeals.[62]

This omission received little notice until *R v Rivet* in 1942, when the accused tried to overturn a conviction for incest and discovered there was no appeal.[63] The resulting outcry led to a 1943 *Criminal Code* amendment that declared that all provincial appellate courts could deal with NWT appeals, with cases arising west of the 89th meridian going to one of the appeal courts of the four western provinces, and those east of it to any of the other provincial courts.[64] In 1947, in *Ross v Lieberman*, Harvey's court ruled that it had no jurisdiction over civil matters although there was appeal by right to the SCC.[65] This ruling prompted an amendment to the *NWT Act* in 1948 that allowed civil appeals to a provincial court.[66]

The sittings of the Court in the North may not have been as colourful for the judges as those experienced by Albertans John Sissons and Bill Morrow. Serving as northern trial judges, they travelled regularly on court circuits through the NWT. But for appellate judges from Alberta, hearing appeals from the NWT and later travelling to Yellowknife and Iqaluit for sittings has added an adventurous touch to their duties.

The Divorce Act, 1968: A Significant Shift in Social Morés and Family Law

The shift in social mores in Canada also resulted in the 1968 *Divorce Act*, which the Liberal Justice Minister, Pierre Trudeau, shepherded through Parliament as part of his oft-quoted goal to get government "out of the

bedrooms of the nation." The *Divorce Act* liberalized divorce proceedings and finally created a uniform divorce law for the entire country.[67] Under the *BNA Act*, divorce laws were a federal responsibility that had never been exercised. Access to divorce had varied widely through Canada, depending on whether the English 1857 *Matrimonial Causes Act* was part of the received law of a province. It permitted divorces on grounds of cruelty, abandonment, or adultery.[68] Thanks to *Board v Board,* the 1857 *Act* applied in Alberta, although divorces were uncommon.

After World War II, the social stigma of divorce eased and, by the early 1960s, divorces became routine matters in court. Most couples resorted to swearing to cruelty or adultery, sometimes going as far as to hire a private detective to set up a compromising situation. Everyone, including the judge, gave a nod and a wink to a thinly veiled legal fiction. The notoriously impatient Campbell McLaurin, Chief Justice of the Trial Division, was often heard muttering, "C'mon, let's get 'em into bed," as lawyers presented the case.[69] This threatened to bring "the administration of justice into disrepute," as the phrase goes, and had to be addressed.

More importantly, however, Canadians wanted less restrictive laws due to a shift in beliefs about marriage. The 1968 *Divorce Act* allowed "no-fault" divorce where petitioners could simply plead permanent marriage breakdown. It also removed a double standard that had existed under the old English law between men and women, including denial of support for a wife who had committed adultery. The new *Divorce Act* led to an immediate doubling of the number of divorce cases in the courts.[70]

MRS. RALPH WILKINS BEHEADING CHICKEN, PINE LAKE, ALBERTA, CA. 1970. GLENBOW ARCHIVES, NA-4172-12.

Trueman v Trueman: Boldness from Johnson

With more divorces came litigation on issues like division of marital assets. It is fair to say that Canadian courts were not forward-thinking in dealing with this and other issues, particularly in regards to women's rights. Yet conservative Alberta almost led the way: *Trueman v Trueman*,[71] in 1971, showed Horace Johnson at his best. His decision anticipated the celebrated dissent of Justice Bora Laskin of the SCC in *Murdoch v Murdoch*, another Alberta appeal.

The issue in *Trueman* was whether a wife had an interest in the family farm on divorce when the title was in the name of the husband and there had been little or no direct financial contribution from the wife. Johnson's decision was not surprising given his earlier observations on the change in the economic relationships of spouses in modern marriages. Following the reasoning in recent English decisions, Johnson ruled that the wife had a constructive trust in the farm due to the labour she had contributed to its operations.[72] Johnson stopped short of addressing whether her domestic chores as wife and mother should also be recognized, finding this to be unnecessary to the appeal. But his ruling was a giant step forward in recognizing the contributions that women made, outside of earning a salary, to the economic success of a family.

Murdoch v Murdoch: Unsurprising Conservatism at the SCC

The SCC then took a giant step back when the issue came it before two years later in *Murdoch v Murdoch*. A rancher and his wife had divorced and Irene Murdoch had been awarded alimony. She had also sued for a half-interest in the family ranching operation, testifying that she had made large direct contributions to its operation and success. However, the trial judge disagreed, ruling that her role had been "no different than any farm wife."

The Appellate Division played only a minor role in *Murdoch*. The Division never addressed the merits of Irene Murdoch's appeal. Instead, Jimmy Cairns dismissed it on the ground that the alimony award at trial was dependent on her receiving no division of property. And since she had been "taking advantage of the judgment" by accepting the alimony awarded, Irene Murdoch could not appeal the denial of the property claim. The SCC did address Murdoch's argument, but Irene Murdoch lost despite testimony that showed, among other contributions, that she had run the ranch entirely for months at a time when her husband was pursuing other employment. Martland, writing for the court, did not overrule *Trueman*, distinguishing it instead.[73] Justice Bora Laskin in his dissent argued powerfully in Irene Murdoch's favour.

Cairns and the majority at the SCC refrained from anything but a purely formalistic treatment of Murdoch's appeal. By contrast, Laskin had taken a broader, contextual approach and one which had a measure of active judicial law-making. As he said: "Legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way."[74] It was a sign of things to come. And while Irene Murdoch was not successful, her case created widespread outrage, particularly among women. The anger created considerable pressure in Alberta and elsewhere for reform, which resulted in a wave of matrimonial property legislation across the country in the late 1970s.[75]

Mathieson v Mathieson: Changing Generation, Changing Perspective

As much as Johnson's *Trueman* decision showed the Court capable of forward thinking, Gordon Allen's judgment in *Mathieson v Mathieson*[76] demonstrated the generation gap in judicial outlooks that had formed among Canadian judges. A husband appealed a one-year jail sentence for breaching a restraining order. Although they were not the main issue on appeal, Allen led off his

judgment with highly skeptical comments on restraining orders. Questioning the Court's authority to make such an order, Allen seemed shocked by its terms, feeling them too harsh:

> It will be noted that the order is rather drastic in its terms in that it granted the wife sole possession and occupation of the matrimonial home, directs the husband to forthwith vacate the premises, grants interim custody of the infant children of the marriage to the wife, and restrains the husband from visiting, molesting or interfering with the wife or the children and from entering upon the residential premises.[77]

These terms would not strike a contemporary family law lawyer as unusual in appropriate circumstances. Although Bill Sinclair, a recent addition to the Court, a generation younger and former trial judge, agreed with Allen's disposition of the main issue, he felt compelled to add:

> It is my experience that the use of restraining orders in suitable cases is of great value to distressed women and to the police whose help in domestic disputes is so often needed.[78]

Like Morrow's judgment in *Drybones,* Sinclair's opinion in *Mathieson* demonstrated the different outlook of the judges that were coming to the appellate bench.

"Administrative Tyranny": Dealing with Administrative Law

The *Bill of Rights* and the *Divorce Act* were examples of changes in the law to enhance individual rights and freedoms. A broader development, however, revealed another side of the 1960s revolution – more state regulation and oversight. The proliferation of administrative boards and tribunals that started before World War II picked up steam in the 1950s and 1960s, especially in planning and development. A new body of law was created as well as quasi-judicial procedures, and some of the leading barristers of the province made their bread and butter from regulatory hearings of bodies such as the Public Utilities Board and the Oil and Gas Conservation Board.

However, the seemingly never-ending increase of boards and tribunals was also criticized as "administrative tyranny." One question was whether the courts could review their decisions. In Alberta, the statutes establishing these institutions usually – but not always – had some provision for appeal, sometimes first to trial judges whose judgments were then open to further appeal, and sometimes directly to the Court.

As the overseers of these bodies, members of the Court clearly felt some discomfort at their intrusion into territory previously belonging to courts and legislatures. In the main, though, the Court took a deferential stance, adhering to the role given to it by statute and refraining from actively policing the operation of the boards. There was, however, one notable exception. That was with respect to disciplinary proceedings, especially against members of professional associations.

Porter's Libertarian Distaste For Boards

Porter, for one, clearly had qualms about what he saw as the erosion of civil rights in the statutes establishing planning and development authorities, sufficiently strong to temper his deference to lawmakers. Dissenting in 1964's *Medicine Hat v Rosemount Rental Developments*, Porter criticized Alberta's *Planning Act*. He compared it to England's 1947 *Town and Country Planning Act*, which he claimed "reduced landowner's rights to the extent that it left him owner in little more than name."[79] In Porter's view, Alberta's *Act* was worse because of its power "to coerce without compensation," whereas the English *Act* at least "provided for compensation for loss or damage to the owner." Noting a later amendment that he argued was clearly intended to put some limits on the operation of the *Act*, he stated:

It seems to me, therefore, that the use by planning authorities of the very wide powers contained in the Act must now be tested to see that they are exercised without infringing on the rights of land owners except to the extent that is necessary, for the greater public interest, to obtain orderly development and use of land in the Province.[80]

Porter's dissent was a strong defence of traditional common law rights of property over the infringement of bureaucratic action. Kane's decision for the majority stayed narrowly focused on the proper action of the statute and its appeal provisions.

Deference characterized the Court's decisions in administrative law in this era. The justices left it up to the legislature to decide in the relevant statutes what redress there should be from decisions of boards and tribunals and did not assert the historic power of the courts to intervene. In two decisions, *Eastern Irrigation District Brooks v Board of Industrial Relations for Alberta* and *Chad Investments v Longso, Tammets and Denton Real Estate Ltd,* written in 1970 and 1971 respectively, the Court struck down the use of *certiorari* proceedings to overturn orders from boards. These involve a judge being asked to quash proceedings if a court or tribunal did not have jurisdiction to hear a matter. In both cases, the Court held that a litigant unhappy with a board decision had to look to the statute for the procedure for redress, and could not bypass this by appealing to the Court's inherent powers of judicial review.

Safeguarding Natural Justice

One area, however, where the Court was quick to enforce limits on administrative bodies was with respect to disciplinary proceedings. Johnson's 1970 decision in *Reich v College of Physicians and Surgeons*[81] made it clear that the Court would not allow any abuse of rights. Facing his professional organization's disciplinary committee, a doctor was present at an initial hearing with his lawyer but did not see the subsequent report of the committee and was not present when the college's council determined his penalty. Johnson found that the council had to be considered a quasi-judicial body in its disciplinary role. Therefore, it was bound by the rules of "natural justice," including, first and foremost, that the accused must be present and heard through all parts of the disciplinary proceedings.

Reich was an early decision in what would become a body of law the Court developed on this issue. It underlined the importance of the liberties of individuals, something the Court had repeatedly upheld where the criminal law was concerned. Equally significant, though, was this decision's recognition that the courts did have an important oversight role to play in reviewing the actions of administrative bodies that exercised a quasi-judicial function. That included disciplinary tribunals. Prior to

SGT. GERRY EPP OF THE RCMP WITH LSD SEIZED IN CALGARY RAID, 1971. GLENBOW ARCHIVES, -2864-20296.

this era, the courts generally considered exercises of discretion by such bodies to be beyond their reach. And it was not even clear that the processes followed by such bodies could be effectively scrutinized by the courts. *Reich* set the Court on the right path as far as review of due process issues was concerned.

It might be pointed out the Court did not always stay on that path. The 1970s and 1980s found the Court often going beyond procedural defects to examine the merits of the decisions of disciplinary tribunals. The judges were acting from the highest motivation, concerned as to qualifications of tribunal members to carry out their function. In doing so, they were beguiled by the siren song of judicial power, and "whatever you can do, I can do better" often seemed to be the Court's mantra. In deciding that the substance of the decisions of disciplinary tribunals was fair game, the Court followed a common practice in other Canadian appellate courts. But it created an excessively high standard of proof in civil cases involving disciplinary matters that hamstrung tribunals. It took decades and decisions from the House of Lords and later the SCC to correct this, and also make clear that the public interest weighs heavily in cases of this kind: they were not simply about the fate of a professional, but also about the public that self-regulating professions are entrusted to serve.

The Court's respect for due process and traditional legal rights was tested in the flood of drug-related offences in the late 1960s and early 1970s. This criminal law issue challenged the Smith court, even if the judges themselves

CALGARY CITY CONSTABLE ON EARLY MORNING PATROL QUESTIONS YOUNG MAN, 1968. GLENBOW ARCHIVES, NA-2864-1460-7A.

did not necessarily see it that way. Drug offences were inextricably linked to larger social transformations taking place, some of which alarmed the judges of the era. And there were substantive problems, too, some traditional to criminal law, but others created when the law had not quite caught up to social realities.

Drugs and Doing Time: The Appellate Division Confronts the Counter-Culture

In 1962, there were twenty arrests in Canada for marijuana-related offences; in 1967, it was 1,678.[82] The numbers would double and then triple over the following two years. Alberta was no different. In the space of five short years, the courts were confronted with thousands of mostly young people who suddenly decided to disregard the law. It was unprecedented for these jurists; the only comparable Canadian experience was Prohibition, but with one important difference. Alcohol had been legal before Prohibition; marijuana and related drugs had been illegal since 1923.

The appearance of so-called soft drugs came at a time when Canadians were facing societal upheaval and a lot more crime. During World War II, overall crime rates in Canada actually dropped precipitously and did not reach pre-war levels until late in the 1950s.[83] In the 1960s, however, crime rates started rising. Factors such as increased urbanization played a role. So too did the fact that the demographic bulge known as the baby boomers started to enter into young adulthood.[84] With this generation also driving other changes in social norms, the increased permissiveness of society was regarded in many quarters as the source of more criminality.[85]

This issue put into sharp relief the inherent tension between two different roles of the courts and criminality, the "crime control" model and the "due process" model – punishment and deterrence or fairness and rights. Both forced the courts to confront social issues behind the law and, in doing so, placed judges in a difficult position, one that by their training and judicial practice of the day they sought to avoid. While the Court had a long-standing tradition of great respect for due process, its traditions also included controlling crime through stern sentencing and deterrence. On balance, the Smith court gravitated towards crime control, which suited a conservative bench.

Severe but Striving to be Fair: The Court's Traditional Stance with Criminality

Until the nineteenth century, the courts in common law countries generally were much more concerned with punishing criminality than upholding an accused's rights. By the time Alberta's courts were established in 1907, the concept of due process was well developed. Historically, Alberta's appellate judges were often strong defenders of civil liberties, quashing convictions and upholding acquittals. On the other hand, they showed little tolerance for criminality. Once the Court began reviewing sentences in the early 1920s, the judges were severe, frequently increasing sentences on Crown appeals. In the collective mind of the Court, stern sentencing and assumed deterrence were entirely compatible with due process and fairness to an accused. This combination became a signature of the Court. It also tended to consist of a mix of "hawks" and "doves" at any one time, as some judges took a more humane perspective – Ford versus O'Connor immediately comes to mind.

Despite the Court's respect for due process and the rights of an accused, there was also a tradition of little patience for attacks on conviction based on minor points and so-called "technicalities." The appellate power to uphold a guilty verdict if the trial errors did not amount to a miscarriage of justice was well exercised in Alberta. And it certainly informed judges in Smith's time. In an appeal from a rape conviction on the grounds that the accused had been discharged at his first preliminary hearing because the Crown had not proven that the complainant was not the accused's wife, McDermid wrote with some weariness: "It is this kind of technicality which makes the criminal law incomprehensible

to the layman."[86] He also upheld the conviction. The Smith court, especially when dealing with impaired driving appeals, a point discussed below, often showed impatience with such gambits.

The Smith court, therefore, inherited a particular viewpoint of criminal law that was already disposed towards law and order. But it became more hawkish yet. Smith took a strong interest in criminal appeals since he considered himself an expert in criminal law.[87] He was very keen to make sure that the criminal courts functioned properly and was exceptionally quick to exercise his authority if he thought there was an abuse of process. After over a year of delays in a trial due to *certiorari* applications by the accused, Smith ordered that the trial proceed immediately. In his judgment, in a declaration of the type of which he seemed fond, Smith left no doubt as to where he stood as Chief Justice:

> If judicial proceedings are not continuously carried on and promptly determined in criminal matters unfairness results to the accused, the crown is open to criticism and the whole of the function of the courts comes into disrepute. This has led to a breakdown of law and order at other times and in other places. This court is determined that no such deterioration shall occur in the processes of law in this province, if it is within the power of this court to prevent it…Mindful of the tradition of Canadian courts for prompt disposition of criminal matters this court will deal with the extraordinary remedies and technical objections fully but as promptly as is necessary in its view to maintain this tradition.[88]

Smith could be described as a tough nut when it came to criminal matters. But so too were his confreres on the bench. There was really no equivalent of Beck or A.A. McGillivray, and thus it was a law and order court. At a time when the justice system was shifting towards the due process model and rehabilitation over punishment, the Court looked out of step.

A Few Too Many: Impaired Driving Charges

An old-fashioned drug – alcohol – and impaired driving, a consequence of its consumption, was an issue that exemplified the court's approach to criminal law and is worth considering briefly before turning to marijuana offences. By the late 1960s, drunk driving had become a serious public menace. In 1968, Justice Minister John Turner introduced amendments to the *Criminal Code* dealing with impaired driving to allow the effective use of a relatively new weapon in the police arsenal: the breathalyzer.[89]

The breathalyzer chemically determined blood alcohol content from a breath sample, and quickly superseded old-fashioned and subjective sobriety tests and very intrusive blood tests. Turner's 1968 amendments created a new charge, s. 224, driving with a blood alcohol level of 0.08 percent or greater – known as the "legal limit." This was the level where most people were impaired, and it created a relatively objective measurement. Refusing to provide a sample without "reasonable excuse" was also made an offence, s. 223. The aim of the amendments was obvious – to end the challenges as to the degree of impairment and intoxication. As Justice Gordon Allen put it in 1973:

> Section [224] relieves against the difficulties which were so often encountered in establishing "impairment" of drivers in charges of driving while impaired in which the court often had to weigh the evidence of police officers as to visible signs of impairment, e.g., uncertain balance, glassy eyes, odour of alcoholic beverages on the breath and the like, against the stout contention of the accused that he "only had consumed two beers" or that other circumstances, not involving alcohol or drugs, had created a false impression as to his condition. Under s. [224] the offence is not one of impaired driving but of driving with a percentage of alcohol in the blood in excess of the maximum therein specified, which maximum has been fixed upon scientific and medical opinion that a percentage in excess thereof indicates some degree of impairment.[90]

The amendments resulted in a flood of legal challenges before the appellate courts. Defence counsel hammered at legislation that represented a significant state intrusion into the lives of individuals, even if in pursuit of a laudable goal. Not surprisingly, the accuracy of breathalyzers and the training of the operators, who were by and large police officers, as well as procedures for taking, handling and analyzing samples, were all questioned. Many accused fought hard against a charge, given the loss of driving privileges and the stigma of a criminal record on conviction, but also because people, who were otherwise law-abiding citizens, did not see themselves as criminals. Quite often, they might not have even thought that they were impaired when they got behind the steering wheel. Even now, after fifty years of enforcement, with defence counsel having worked and reworked every conceivable angle, people still fight impaired charges tooth and nail because of the consequences of conviction in a car-centric society.[91]

R. v Manysiak and *R v Rilling*: Those Pesky Technicalities

By 1971, what Allen called "a plethora of cases involving the breathalyzer test" had made it onto the Court lists. Many of the early cases involved challenges based on the wording of s. 224. This section, which laid out the procedures for taking samples and certifying them as evidence for court, was complex, even convoluted.[92] The Court found the endless probing of counsel annoying and a waste of time, as was demonstrated in *R v Manysiak*.[93] As Chief Justice Smith put it with some exasperation:

> May I add my view with respect to this case is that 'There is no merit. There is no substance', and the points taken are technical points and constitute an attempt to suggest that Parliament failed to pass an effective Act when they enacted the portions of the *Criminal Code* Amendment Act, which we have under consideration in this case.[94]

There is no shortage of such comments in the Court's impaired driving decisions. Even when a more substantive point was raised, the judges clearly thought that the ends justified the means unless there was a serious violation of rights. *R v Rilling* had dealt with whether the requirement of an officer to have reasonable and probable cause in demanding a breath sample, part of s. 223 of the amendments, had any effect on the validity of the breathalyzer test subsequently carried out, as per s. 224.[95] Allen ruled that, as written, once an accused gave a sample the circumstances in which it was taken were irrelevant to its validity. Allen clearly thought the defence argument to the contrary was nitpicking, stating:

> In view of the difficulties previously experienced in endeavouring to suppress the dangerous practice of driving while impaired, I feel that a liberal interpretation of the laws designed to facilitate the attainment of this objective should be preferred to giving effect to technical objections which do not go to the root of the matter.[96]

While Allen's comment may not have represented the views of all the judges on the Court, it was likely indicative. It was illuminating that while the Court generally used strict statutory interpretation to reject defences based on technicalities, Allen was willing to take a more purposive approach to defend the statute and its goals.

Yet the judiciary did have some serious concerns about the infringement of civil liberties with impaired driving legislation. In *Rilling*, the SCC was divided five to four in upholding Allen's judgment. Justice Spence wrote a scathing dissent that attacked the removal of protections for the accused in the amended statutes and the subsequent decisions of the courts.[97] This was not the only time the Supreme Court justices showed uneasiness about the implications of the amendments, such as the very significant shifting of the onus onto the accused, something that did not seem to unduly trouble the Alberta judges.

R v. Peterson: The *Bill of Rights* Thwarted Again

Not surprisingly, impaired driving charges were fertile ground for invoking the *Bill of Rights,* designed as it was to protect due process rights. While many of these challenges were not well grounded and were doomed to failure, others raised important points. Yet the Bill did not have the efficacy that it might have had. The Court's jurisprudence again demonstrated why such legislation was needed, and also what might have been.

In *R v Peterson,* the accused had asked to see his lawyer, but the police insisted he give a sample first, and he had obliged.[98] The trial judge had acquitted Peterson on the grounds that his rights had been contravened. A new judge, Cliff Prowse, allowed the Crown appeal, arguing that under the *Code* once the sample was given, it did not matter if there had been a violation of rights in obtaining it; the sample was still valid. The appeal highlighted why the *Bill of Rights* was necessary. As Prowse pointed out: "I know of no case which holds that the police have an obligation to advise an accused of his rights under the law."[99] Although stating the "evidence was tainted with illegality" as rights of the accused under the Bill had been contravened, Prowse ruled that it was still admissible.[100] *Peterson* made clear the limitations of the *Bill of Rights.*

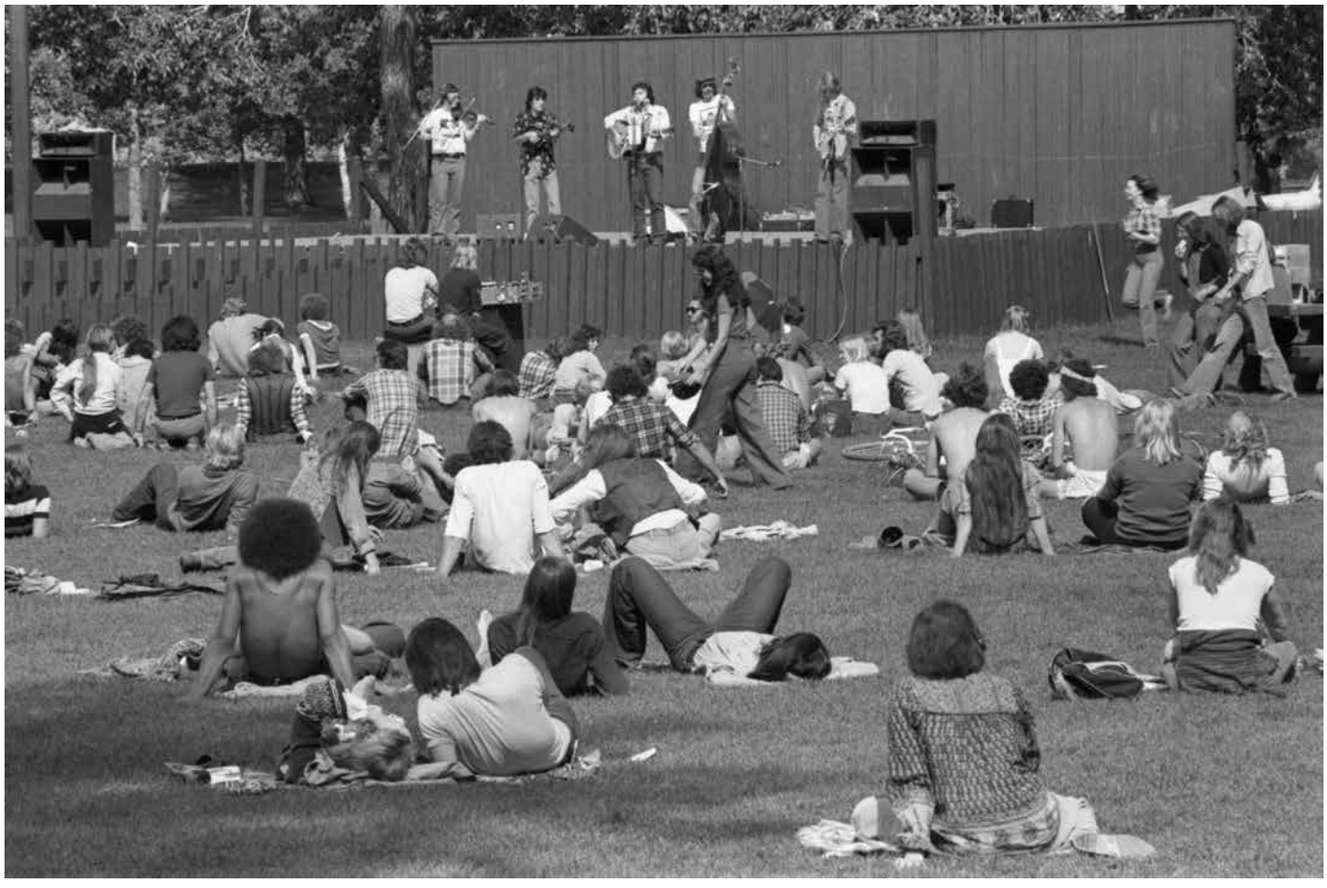
Prowse, however, also wrote the decision in *R v Balkan*, where the *Bill of Rights* was successfully invoked, a rare thing.[101] A late addition to the Smith Court, Prowse, it might be noted, later authored the *Southam* decision. One of the leading early *Charter of Rights and Freedoms* decisions, *Southam* was instrumental in preventing the same fate for the *Charter* that had befallen the *Bill of Rights.*

The Court's decisions in impaired driving appeals created a picture of a bench more concerned with crime control than safeguarding due process rights. The distinction between a claimed technicality and a vital procedural failure was not always evident. The Court, however, often showed little patience in sorting this out. The judges were often impatient with what they saw as arguments that did not raise substantive matters but rather sought to wiggle out, on specious technicalities, of a well-merited conviction. It also spoke of a belief that what the judges viewed as minor quibbles should not stand in the way of enforcing a duly constituted law of the nation, rather than as an indication that there might be something wrong with that law or its application by the police. These were attitudes that informed the Court's handling of another criminal justice issue, illegal drugs, which played out against a clash of generations.

Reefer Madness: The Onset of the Drug Scourge

Drug offences were rare in Alberta before the late 1960s. In the early years of the twentieth century, drug offences predominantly centred on opium, mostly from within the Asian immigrant community. After World War II, occasionally cases involving drugs like cocaine, morphine, and heroin appeared. One drug that seldom entered the picture was cannabis or marijuana. Although not strictly speaking a narcotic, it became illegal in Canada in 1923 when it was added to the *Opium and Narcotic Drug Act*.[102] Simple possession was an indictable offence.

In Alberta, drug offences remained rare through the 1950s. Then came the 1960s. The explosion of marijuana use, and its consequent trafficking, was a phenomenon for which the courts, like society, were not prepared. In 1967, there were forty-nine arrests for drugs in Calgary. This doubled in 1968, and in the following year, sixty-five people were arrested in a single raid.[103] In a few short years, marijuana use became commonplace. More ominous was the appearance of Lysergic Acid Diethylamide, or LSD. The sudden popularity of pot, LSD, and other drugs was mystifying and threatening to mainstream society. Given marijuana's obvious connection to the counter-culture of the time, its sudden popularity was interpreted as a challenge to authority, which was largely true.[104]



The initial response of government, law enforcement, and the courts was to crack down hard. In early 1968, Justice Minister Pierre Trudeau stated that federal policy was to seek jail time for simple possession.[105] It was widely accepted that marijuana use led to abuse of more dangerous substances like heroin. However, the initial tough reaction of the police and the courts swiftly became unpopular with the public. The typical marijuana offender was young, often middle class, a student and not a typical member of the "criminal class." And smoking pot was not a violent crime.

The public became increasingly disturbed by the spectacle of the courts locking up large numbers of young people for a relatively harmless crime. With astonishing speed, this led to calls for a drastic reduction in punishment as well as legalizing or decriminalizing marijuana use. Much of the pressure came from parents who had children jailed for trifling amounts.[106] Although Canadians might have been alarmed by the behaviour of young people, they were also repelled by the spectacle of a sixteen-year-old sentenced to several years in the penitentiary for selling marijuana.[107] Parliamentarians, no doubt hearing from their constituents, demanded lighter penalties. One of the most eloquent was Eldon Woolliams, a criminal lawyer and Conservative MP in Alberta.

The Le Dain Commission

When members of the medical establishment, public health professionals, and even some law enforcement officials questioned the wisdom of harsh enforcement,

SIT-IN FOR LEGALIZATION OF MARIJUANA, 1978. GLENBOW ARCHIVES, NA-2864-32360.

the federal government appointed the Le Dain Commission in 1969. Its mandate was to examine all facets of non-medical drug use. Even as the Commission commenced its work, the government moved to soften penalties for drug offences. The *Narcotics Act* was amended to reduce the penalties for simple possession of drugs. This allowed prosecutors to charge first-time offenders with a summary offence and gave judges the option of levying a fine instead of jail time.[108] In 1972, the justice department recommended that Crown prosecutors ask for a fine and a complete discharge for possession of marijuana, and concentrate on dealers and traffickers.[109] While the changes went some way to satisfying critics, they also led to a great deal of disparity in punishments across Canada.

The Le Dain Commission's report, released in 1973, did not recommend legalization but did call for a partial decriminalization of marijuana.[110] The government was not prepared to entertain this idea. It did consider softening the penalties further by transferring marijuana from *The Narcotics Act*[111] to the *Food and Drugs Act*.[112] However, the issue had lost urgency by then. A new status quo had taken hold. Marijuana continued to be illegal, but the penalties imposed on casual users were not harsh enough to excite public outcry. For half a dozen years, though, marijuana was a burning social and criminal justice issue across Canada.

The Court was very disturbed by the spectacle of marijuana and LSD use. The instinct of the judges was to come down heavily on anyone involved in the drug trade. This was much the same as in other appellate courts in Canada.[113] This approach was particularly evident in the Court's handling of sentencing appeals. For the Court, deterrence was the primary objective. It sought to achieve more uniformity and certainty in sentencing, partially in response to opposition among trial judges to the Court's tough approach.

However, it was not long before the judges started to have second thoughts, particularly when prosecutors asked for lesser penalties and concerns surfaced over the effect of jail on youthful offenders. Also, the Court was changing as new judges arrived. *R v Lehrman*, *R v Doyle*, *R v MacGregor,* and *R v Sprague* all demonstrated the hard line the Court had taken, but also the nuances increasingly involved in dealing with young drug offenders.[114] To some extent the Court ameliorated its tough stance on drug offences with conviction appeals. With significant jail time on the line, the Court demonstrated some of its "traditional" approach to criminal law. Even a hard nut such as McDermid, the former drug prosecutor, took great care with conviction appeals and sometimes gave surprising rulings. Two conviction appeals, *R v Snyder* and *R v Peterson*, indicated the Court's approach to issues such as criminal intent.[115] Despite the hostility of the judges towards drugs, they disposed of these appeals with more nuanced arguments.

Deterrence, Deterrence, and More Deterrence

There can be no doubt how the appellate judges felt when confronted with the new social ill of drug use:

> We are all aware of and alarmed by the spread of the use of drugs amongst young people, especially amongst young people of good mental capacity such as we find in our high schools and universities. Almost without exception these young people have come from good homes and been well raised and they associate with people of their own kind, congregating in areas adjacent in Edmonton to the university.
>
> The sale and distribution of the hard narcotic drugs has always been nearly exclusively in the hands of the underworld…Those who sell hard drugs would not be acceptable in the places where these decent young folk congregate….They have therefore attempted to induce young people who have all the earmarks of decency to engage in the business of selling the drug to young people with whom they associate…The conduct of those young people who undertake to become salesmen of these vicious mind-destroying substances is the

key to the success of this illicit trade. Without their aid the drug importer and distributor would not be able to sell to these young folk. Punishment for those who thus undertake to insinuate themselves into the company of decent young people for the purpose of selling them these drugs must be sufficiently severe to serve as a deterrent to those young people who may be tempted to engage in selling drugs as a means of making an easy dollar.[116]

So wrote S. Bruce Smith in *R v Nolet* in 1969. Whether or not the Chief Justice's criminology was accurate, his point was clear. The sale of narcotics would not be tolerated, and deterrence was the most important principle in sentencing for drug offences. The Le Dain Commission found that appeal courts were often harsher with sentences than trial courts. Smith's bench lived up to this conclusion.

R v Lehrman: Allen Sets the Policy

R v Lehrman in 1967 was the decision that set the tone for the Court's sentencing. Smith, Johnson, and Allen were the panel reviewing a Crown appeal of a sentence of one day in jail for possession of cannabis. The accused was a graduate student in psychology at the University of Alberta. Allen, writing for the Court, treated the case very seriously. As he wrote:

The use of this particular narcotic has in the past few years become altogether too prevalent and because of this and because of the wide variation in the sentences imposed in cases of this type which have come before the courts, ranging from fines to lengthy terms of imprisonment, it has been suggested that in this case we might indicate some guidelines which may be of assistance to lower courts.[117]

In the case of drug offences, Allen argued strongly that deterrence was the most important consideration. He acknowledged the long tradition of judicial discretion in sentencing, which was important because only the judge knew all the circumstances in each case. Therefore it was not desirable to try to make sentences formulaic. But it was desirable to confirm what the prime consideration should be. As Allen remarked:

It appears obvious that the sentence imposed in the case…under consideration can have little or no deterrent effect on other persons who may wish to engage in or experiment with the use of the narcotic…and it seems to me that the deterrent effect of sentences meted out in such cases is a matter of paramount importance.[118]

In Allen's view, Lehrman's good character as a scholar made his offence worse rather than better. He should have "appreciated the necessity of maintaining a high standard of personal conduct and setting a good example to the young people with whom he was in contact." His sentence was increased to three months in jail. Allen left no doubt where he and the Court stood:

When the offence involves trafficking in or distribution of narcotics, enabling or encouraging people to become addicts of a narcotic drug at personal profit to the accused, most severe sentences are justified. While the gravity of the offence is reduced when the charge is of possession… it is nevertheless a serious offence and should be dealt with accordingly.

R v Doyle: Smith Lays Down the Law

The Court's approach to sentences for simple possession of marijuana would soon be sharply out of step. Within two years, prosecutors were being encouraged not to seek jail time for simple possession. However, the principle of deterrence laid down by Allen lived on and remained paramount. In *R v Doyle*, in 1970, Smith explicitly referred to *Lehrman* as the guide for the Court, adding that, "we wish to emphasize…the greatest importance must be attached to the governing principle of deterrence and that undue importance cannot be given to the interests of the accused and reformation of him."[119]

The *Doyle* appeal was actually eleven different appeals, some Crown, some accused, all concerning trafficking, and all considered together. In his decision, Smith made two things clear. First, deterrence remained the principle for sentencing in drug

cases. Second, the ongoing debate about drug laws and marijuana was not going to be played out in his court. Responding to arguments for lighter sentences because major changes in legislation might be coming, Smith pointed out that courts administer what the law is, not what it might become. To do otherwise would encroach on Parliamentary prerogative.

As for actual sentences in *Doyle*, the Crown was generally successful and the accused not. Almost all the Crown appeals involved sentences from Justice Harold Riley. Ironically, Riley had made headlines for calling on Calgary not to allow rock concerts in a park originally donated by his family. The judge might have railed against hippies to the press, but on the bench, he was lenient. If these cases were any indication, fines and probation were his preferred punishments. Reversing Riley, Smith made it jail time, usually eighteen months to two years. The appeals from accused mostly originated in Chief Justice Val Milvain's court, where the sentences were anything but short. For these, Smith saw no reason to interfere. However, while the Court continued to stress deterrence, concern with the effects of prison on younger offenders started creeping into its decisions.

R v MacGregor : A Harsh Stance Begins to Soften

The year before *Doyle*, Johnson, Kane, and Allen penned a short judgment in *R v MacGregor*. Another batch appeal, with five convicted traffickers protesting relatively harsh sentences dished out by Chief Justice Milvain, the case had some public notoriety. MP Eldon Woolliams had used it as an example during an impassioned plea in Parliament for leniency in marijuana offences.[120] In his judgment, Johnson reiterated the danger of drugs to users and society, especially LSD. However, he then argued that "a difference of opinion can arise" as to what constituted sufficient deterrence.[121] Noting that the Court had settled on sentences of two years or less for trafficking offences in a number of recent appeals, he advocated this as an effective maximum. This would allow the accused to serve time in provincial jail, a preferred outcome "because it will not expose these appellants to the damaging effect that several years in the penitentiary would cause." The five appellants, he noted, were aged sixteen to twenty-one. All had their sentences reduced.

Johnson's judgment recognized that excessively harsh sentences might do more harm than good with youthful or first-time offenders. Even the hawkish Smith had actually reduced the sentence slightly in *Nolet* to keep the offender out of the federal penitentiary. The Court did acknowledge that they were not necessarily dealing with hardened criminals. However, it was a grudging concession. Allen, the author of *Lehrman*, reluctantly went along with Johnson's reasoning in *MacGregor*, but he also wanted to ensure that no one thought the Court was getting soft. So he added:

> It is therefore to be hoped that our reduction in the length of sentences…will not be taken as an indication that traffickers in any type of restrictive drug may look forward to more lenient treatment in the future.[122]

Although *MacGregor* showed some softening in the attitude of the appeal judges, that softening was limited. The appellants in *MacGregor* still served significant time in custody. The bottom line at the Court was that deterrence required a good chunk of jail time. This stance increasingly put the Court at odds with some trial judges. They were the ones who dealt with offenders first-hand. And, to paraphrase the words of one Parliamentarian, they did not want to ruin a young man's life because he was dumb enough to try pot once or twice and happened to get caught.[123] Although some trial judges were tough like Milvain, others, like Harold Riley or Neil Primrose, were often very lenient with first-time offenders or accused of good background or good character.[124]

Roger Kerans, appointed to the District Court in 1970, presided over many drug trials. He recalled that some of the Edmonton judges, and that included him, would often speak to the prosecutor about sentence to make sure there would be no appeal because he knew that the Court would almost certainly increase whatever he had

APPELLATE DIVISION, 1961. L–R: JOHNSON, MACDONALD, SMITH, PORTER AND KANE. LASA 62-G-10.

given.[125] This conformed very much to a pattern the Le Dain Commission found across Canada. Trial judges themselves varied wildly in how they sentenced – witness Milvain versus Riley – but often took it easy on first-time offenders, particularly in cases of simple possession, but also minor trafficking offences. This seemed to be largely due to the fact that trial judges had direct contact with the accused and were more familiar with them. Appellate courts, however, which operated at a distance, tended to be more concerned about seeking some degree of consistency in sentencing among trial judges. Le Dain claimed that in some provinces there was a "real struggle" between appellate and trial courts. He implied Alberta was such a jurisdiction, a conclusion the jurisprudence supported.[126]

R v Sprague: Moir Puts Rehabilitation on the Table

At the end of Smith's tenure, some of the new appointees began to resile from the iron rule of deterrence. Five judges – Smith, Cairns, McDermid, Clement, and Moir – sat on another multiple appeal, *R v Sprague*, in 1974. Smith, in the majority, restated the Court's position that deterring drug use, and especially trafficking, was the most important principle for sentencing. On Richard Gottselig's appeal of his sentence on a conviction of trafficking in LSD, Smith actually increased it, even though the Crown was not asking for more time, and the judge had already given him eighteen months on a first conviction.[127]

This was too much for Arnold "Spud" Moir, who had joined the Court just the year before. He dissented in strong terms, especially about the Court's stance on deterrence, which he saw as simplistic. Moir argued that "deterrence is not to be found solely, or even largely, in the length of a prison sentence...the greatest deterrent to a person...is the probability that he will be discovered committing the offence and as a result will be charged."[128] The stigma of being convicted and having a criminal record, argued Moir, was sufficient deterrence for many. Moir believed that other factors had to be considered: punishment, protection of the public, and most importantly, rehabilitation. Concentrating on one aspect – deterrence – could result in substantial injustice. As he wrote:

> Where the sentencing court is dealing with a first offender with a good work record, substantial academic achievement, favourable probation report, the principle of rehabilitation is, in my respectful opinion, of major importance. Every effort should be made to turn a first offender into a useful citizen; rehabilitation must not lose its importance in drug offences.[129]

Although Moir agreed that, with drug trafficking, jail time is often required, his statement encapsulated the main criticism against treating drug offences severely – the punishment often did more harm than good. Ironically, in disposing of other sentences on this appeal, Moir was not particularly lenient. Some of the appellants were clearly not misguided youth but involved heavily in trafficking or had extensive criminal records. Nevertheless, Moir obviously wanted to state a principle in his dissent.[130] Moir's judgment, like Sinclair's comments in *Mathieson v Mathieson* and Prowse's judgment in *Balkan*, signalled the start of a shift in judicial outlook.

R v Snyder: McDermid Protests against Absurdity

While the Court remained stern in drug sentencing cases, the judges were careful with conviction appeals. Despite the law and order mentality obvious with drug crimes, the Court showed its traditional concern with

ensuring fairness when dealing with conviction appeals. Judges quite heavy-handed on sentence were surprisingly skeptical of police and prosecution on these appeals. *R v Snyder* demonstrated this concern and the limitations of black letter interpretation of the law as the Court divided over whether the seeds of the cannabis sativa plant, or marijuana, were a narcotic under the *Narcotic Control Act*.

Snyder had been arrested with a vial of seeds. The Crown's own chemical analysis showed the seeds contained no narcotic properties. Snyder naturally contended that he could not be charged with possession of a narcotic if the substance he had was not a narcotic. The *Act* specified "Cannabis Sativa, its preparations, derivatives and similar synthetic preparations." Kane, writing for himself and Johnson, the majority, thought it plain what this meant: "I do not think in interpreting the *Act* for the purpose of this appeal that it is necessary to attempt to break Cannabis Sativa into different parts such as the fruit, the seed, the leaf, the bark, the root and so on."[131] Possession of the plant or any part was illegal.

The former drug prosecutor, McDermid, thought the statute was ambiguous. He pointed out that while possession of cannabis sativa was illegal, the *Narcotic Control Act* was silent about possession of a part of the plant. He noted that hemp, a part of the plant, was also used to make rope, and that cannabis seeds were widely used in birdseed mixtures and also reduced to an oil used in painting. To interpret the *Act* as Kane did meant that rope makers, birdseed vendors, and painters were all guilty of possession of a narcotic. McDermid argued that an interpretation that avoids "monstrous consequences" and absurdities was to be preferred over an interpretation that did not.

McDermid also contended that if the statute included by implication "a part of" the plant, then that part should be material to the purpose of the *Act*, namely the control of narcotics. Therefore, considered in context, the word "derivative" should be interpreted to mean those parts of the plant capable of being distilled into hash or hash oil. It was a subtle and compelling argument. But it was not sufficient to convince McDermid's two colleagues.

R v Peterson: Suspending Common Sense to Defend a Right

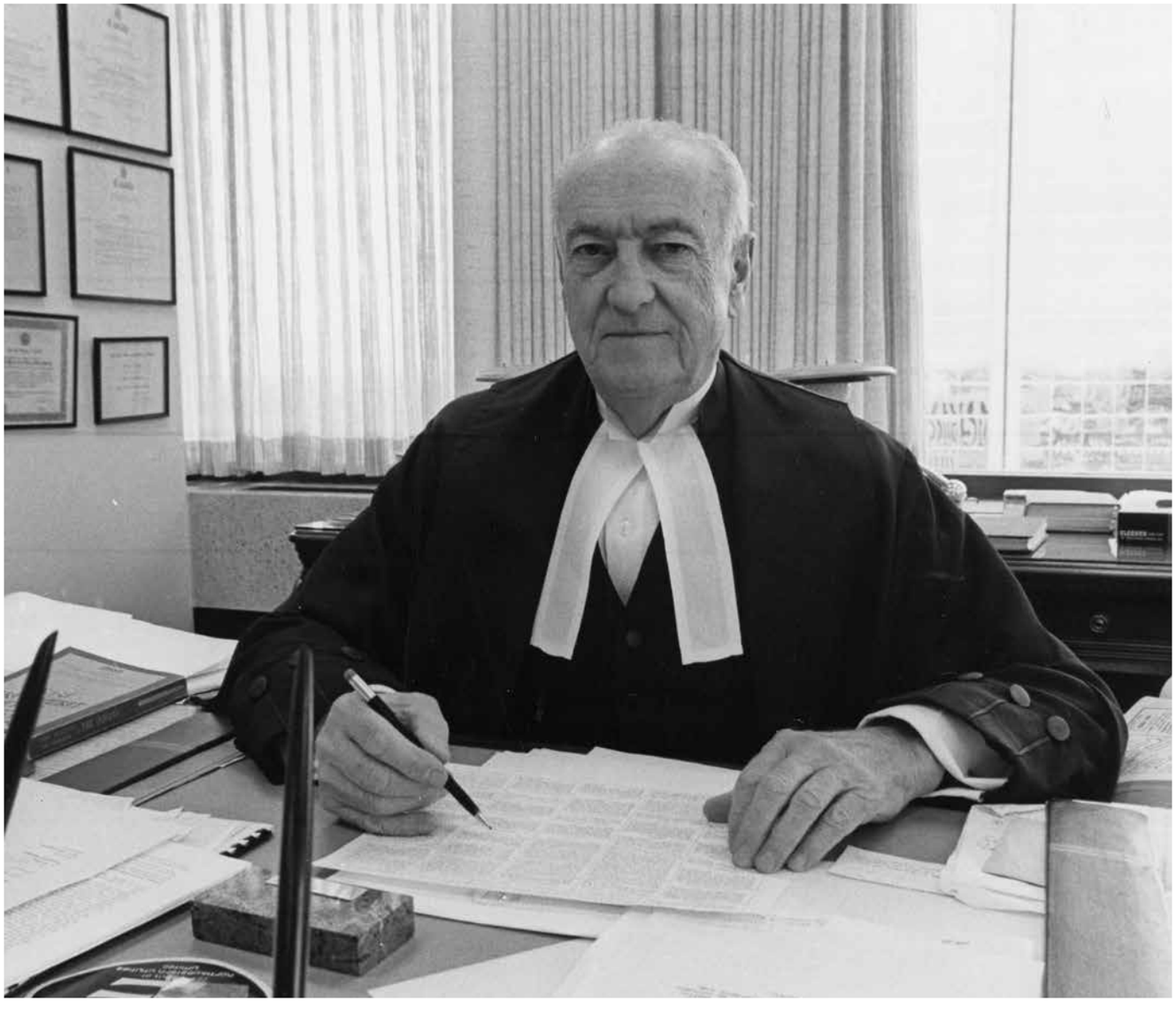
McDermid wrote *R v Peterson* in 1970 for the majority of the Court. It was a complex appeal heard by a five-judge panel including Smith, Johnson, Kane, and Clement. Peterson had been arrested with twenty tablets of LSD which he told the arresting officer he had found on the street. At trial, the officer recounted the conversation. Normally, the judge would have held a *voir dire*, a hearing within the trial, to determine if the statements of the accused to the police were voluntary and therefore admissible as evidence. However, because the conversation was exculpatory, the Crown prosecutor and defence counsel had decided a *voir dire* was not necessary. The judge agreed. He then acquitted Peterson. While the trial judge was suspicious about Peterson's evidence, nevertheless, he found that the Crown had not proven that Peterson knew he was in possession of an illegal drug.

Although McDermid expressed serious doubt about Peterson's innocence, he upheld the dismissal. The absence of a *voir dire* at trial was not a key issue on appeal. McDermid concluded that the trial judge almost certainly would have admitted the same evidence had a *voir dire* been held. So nothing turned on this.

In any event, as McDermid wrote: "There is a further ground for not directing a new trial. It was the Crown who introduced the evidence."[132] In his view, the Crown could not complain about the admission of evidence it had introduced. He was concerned that, in a new trial, the Crown could try to exclude the evidence that had proven damaging to its case the first time around. McDermid saw no justification for allowing the Crown a do-over to "correct what have turned out to be errors in judgment." To reinforce his point, McDermid quoted

THE CHIEF JUSTICE IN HIS OFFICE IN "FORT SMITH," EDMONTON, 1974. LASA 65-G-4.

APPELLATE DIVISION, 1966. L–R: MCDERMID, JOHNSON, CAIRNS, SMITH, PORTER, KANE, AND ALLEN. LASA 62-G-7.



Horace Harvey in *R v Curlette* to say that it was "quite apparent that the rules applied on appeals...based as they are on the traditional policy of the English law for safeguarding of life and liberty...are not appropriate to an appeal by the Crown which is made for the purpose of putting an acquitted person a second time in jeopardy."

McDermid also rejected the Crown argument that the Court should minimize the Crown's obligation to prove that Peterson had the necessary *mens rea*, that is, guilty mind. In this context, that meant the Crown had to prove that Peterson knew that what he possessed was illegal. Proving he had it physically in hand was not enough. The *Food and Drugs Act* (which governed LSD) explicitly

stated that possession was to be construed as in the *Code*. The Crown invited the Court to read the legislation in "the light of its social context" of runaway drug use and therefore ease the Crown's burden of proof. McDermid declined to do this for the same formalistic reason the Court had refused to consider possible decriminalization in sentencing. Consistent with that approach, it was for Parliament, not the Court, to set policy. In his view, had Parliament wanted to change the burden of proof, Parliament would have said so.

Although McDermid agreed that the trial judge could have inferred guilt from the facts before him, since the trial judge had not done so, and McDermid considered that finding to be one of fact, the Court could not properly interfere. He dismissed the Crown appeal, with Chief Justice Smith dissenting. As some subsequent decisions revealed, McDermid was quite prepared to uphold inferences of intent by an accused even when the evidence was very circumstantial.[133] In Peterson, his reluctance to interfere with the trial judge's finding respected an important principle of appellate judging. Fact findings of trial judges are not to be interfered with absent some clear error.

A young Albertan drawn to the drug culture of the flower power generation, and unfortunate enough to run afoul of the law, might have consoled himself that "the Man" would give him a fair trial and maybe a light sentence. However, he probably did not want to come before the justices of appeal, especially if he were hoping for less jail time. Despite mounting pressure from the public and politicians, the Court did not back down from its position that deterrence was the primary goal in drug offences. The question could be fairly asked if the Court, in emphasizing deterrence almost, it seemed, to the exclusion of any other sentencing principles, was not creating sentencing policy itself. As a new judge, Moir pointed out there were other aspects to sentencing such as rehabilitation.

The Smith court demonstrated how conservatism is also about law-making. In doing so, it reveals why labels about "liberal" and "conservative" courts and jurists are misplaced, and debates about the proper role of judges misguided. The reality is that all judges engage in law-making because that is, always has been, and will continue to be an essential role of judges in the common law world. This role becomes all the more apparent – and transparent – where the democracy has constitutionally entrenched a charter of rights, as has Canada.

CONCLUSION

Drug offences did not end with Bruce Smith's retirement in 1974. Cases in these categories took their place as part of the workload of the courts at the trial and appellate levels. In the first instance, a new status quo was achieved. Pot and LSD remained illegal, but police and prosecutors increasingly focused their attention on major traffickers, not casual users. This removed most of the controversy over how drug laws were enforced. To say that Smith's court showed an innate conservatism in dealing with these issues and even favouritism towards maintaining law and order would be accurate in part. But the full reality was more complex. The Court approached criminal law in much the same way as the first judges of the Court had done fifty years earlier.

And yet, confronted with something like the exploding use of marijuana, the Court could, and did, consciously or unconsciously, favour a narrow concept of the delivery of justice – strict compliance with the letter of the law in Canada. As an orthodox, formalistic court, which was very much in common with other Canadian appellate courts, Smith and his brother judges did not feel it was their place to question the law or even scrutinize too closely the way it was being applied. Although cracks were starting to show, the Court frequently continued to demonstrate its strong bias towards maintaining law and order, sometimes, perhaps, at the expense of full consideration of the due process rights of individuals.

SUPREME COURT OF ALBERTA JUDGES AT ANNUAL COURT MEETING, 1973. LASA 62-G-32.
THE CHANGING APPELLATE BENCH. L–R: MOIR, CLEMENT, ALLEN, CAIRNS, SMITH, MCDERMID, SINCLAIR, AND PROWSE, EDMONTON, 1974. LASA 72-G-1.

Towards the end of Smith's tenure, there were signs this was changing as a new generation of judges ascended to the Court. Cliff Prowse, Spud Moir, and Bill Sinclair were joined by Bill Haddad, Bill Morrow, Herb Laycraft, Sam Lieberman, and others, under a new chief justice, Bill McGillivray. This group included many of Alberta's top barristers. Aside from adding some impressive legal wattage to the court, the next wave of judges also brought a different outlook. Although some of them might have claimed they were very much part of the legal traditions that had informed the Smith court, these judges belonged to the new generation who had come of age in the crucible of war. The justices of appeal in the 1970s, the subject of the next chapter, prepared the ground for a broader role for the judiciary.

Endnotes

1 Sydney Smith, *Edinburgh Review*, 1824.

2 Dr. Samuel Johnson, June 4, 1781 (in a memorandum to Boswell).

3 Douglas Owram, *Born at the Right Time: A History of the Baby-Boom Generation* (Toronto: University of Toronto Press, 1996), 174, analyzes the complex interaction of the Baby Boom generation and the counter-culture movement.

4 "Happiness – and sadness – for retiring Chief Justice," *Edmonton Journal*, Nov. 2, 1974.

5 *Albertan*, Feb. 4, 1961.

6 Chief Justice Harvey and Prime Minister R.B. Bennett debated the merits in the 1930s.

7 Louis A. Knafla and Rick Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997), 197–98. Appointment dates are easily compared to the 1930–35 tenure of R.B. Bennett, the last Conservative Prime Minister before Diefenbaker.

8 PAA, acc. 80.146, S. Bruce Smith interview, 1980.

9 Ibid.

10 Laycraft interview, Aug. 8, 2008.

11 Ibid.

12 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 79.

13 *M v Law Society of Alberta*, 3 DLR 714.

14 Knafla and Klumpenhouwer, *Lords of the Western Bench,* 80.

15 Kerans interview, Oct. 23, 2008. Kerans recounted that Kane once rendered Porter nearly speechless by contradicting him in a hearing.

16 Alfred Clarke (1921), Henry Lunney (1928), A.A. McGillivray (1931), and then Horace Johnson and Marshall Porter in 1954, were all precedents.

17 PAA, 87.95 Procedure Book, Calgary Appellate Division, books 5 and 6.

18 A perusal of the Law Society Bencher's Minutes through the 1960s does not show appointment of new judges was an issue.

19 *Calgary Herald,* Aug. 14, 1963.

20 David Mittelstadt, *The Macleod Dixon Century 1912–2012* (Calgary: Norton Rose Canada, 2012), 130.

21 LASA, fond 56, series 3, Harradence interview, 22.

22 LASA, fond 56, series 3, Cairns interview, 7.

23 Ibid., 9, 11–12.

24 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 15.

25 LASA, fond 9, series 5, Gordon Allen interview, 3.

26 Ibid., 5.

27 Kerans interview, Oct. 28, 2008. Kerans recalled that Allen was the Liberal bagman in southern Alberta, and was a "savvy operator."

28 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 28.

29 *Edmonton Journal,* Jan. 18, 1982.

30 LASA, fond 88, Clement Reminiscences, unpublished manuscript, 4.

31 O'Leary interview, Jan. 14, 2010.

32 LASA, fond 5, series 2, subseries 3, vol. 376, file 3144.

33 Ibid.

34 LASA, fond 5 series 1, subseries 1, Bencher's Convocation Minutes, Oct. 21. 1965, 10; Jan. 1967, 12.

35 Both Justice Herb Laycraft and Justice Bill Stevenson remember, as counsel in the 1950s and 1960s, that the whole court was present at hearings. Many reported judgments from this same period only list a panel of three, and the court procedure books also show three-judge hearings.

36 *Cahoon v Franks*, [1966] 58 WWR 513.

37 Laycraft interview, Aug. 23, 2008.

38 Philip Girard, *Bora Laskin: Bringing the Law to Life* (Toronto: Osgoode Society and University of Toronto Press, 2005), 339, describes the Ontario Court of Appeal in 1969, which sounds harsher in comparison: "The court was run like a corporate law office, with a corresponding emphasis on hierarchy and productivity. It was virtually an all-male world, with a rough and tumble edge to it. Relations with counsel were often tense and combative, as the judges sometimes lashed out at lawyers who were relatively powerless to reply. Bud Estey...described the Court of Appeal of the 1960s as a 'firing line.'"

39 Kerans interview, Oct. 28, 2008. Kerans was told by two judges of the Smith court whom he later sat with that there wasn't much collegiality.

40 Kerans interview, Oct. 28, 2008; Stevenson interview, Oct. 8, 2008. This happened to Kerans and Stevenson when they were junior judges and had been on a panel with Clements.

41 This is clear from the reports, where the judges often refer to having read their colleagues' work.

42 Watson interview, Nov. 25, 2012.

43 Stevenson interview, Aug. 21, 2008.

44 *R v Mckenzie*, [1965] 51 WWR 641, at para. 13.

45 Laycraft interview, Aug. 11, 2008.

46 Major interview, Feb. 18, 2010.

47 *An Act for the Recognition and Preservation of Human Rights and Fundamental Freedoms* S.C. 1960, c. 44.

48 Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (McGill-Queen's University Press, 2003), 3–4.

49 Peter Brett, "Reflections on the Canadian Bill of Rights" *Alberta Law Review* 7, no. 2 (1969): 307.

50 Brett, "Reflections on the Canadian Bill of Rights," 297–98. Brett characterizes Tysoe JA's analysis in *R .v Gonzales* of the equality provisions as applied to treaty Indians as "Orwellian." James G. Snell and Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985), 218–223, analyze the Supreme Court's handling of the *Bill of Rights*.

51 Ibid., 294–95.

52 *Walter v Alberta (Attorney General)*, [1966] 58 WWR 385.

53 *Communal Property Act*, RSA 1955, c. 52.

54 *Land Sales Prohibition Act*, RSA 1942, c. 209. *Walter v Alberta (Attorney General)*, [1966] 58 WWR 385, at para. 24, provides some legislative history.

55 The hostility towards the Hutterites in Alberta is admirably examined in Jonette Watson Hamilton, "Space for Religion:

Regulation of Hutterite Expansion and Superior Courts of Alberta," in *The Alberta Supreme Court at 100: History and Authority*, ed. Jonathan Swainger (Edmonton: Osgoode Society and University of Alberta Press, 2007), 159–69. Hamilton also looks more in-depth at the judgments of the Trial and Appellate Divisions in *Walter v Alberta (Attorney General).*

56 *Walter v Alberta (Attorney General)*, [1966] 58 WWR 385, at para. 33.

57 *R v Drybones,* [1967] 61 WWR 370.

58 Ibid., at para. 12.

59 Snell and Vaughn, *The Supreme Court of Canada*, 221. Cartwright, for instance, reversed himself from an earlier dissent wherein he strongly favoured the Bill, apparently frightened by the implications in *Drybones.*

60 *An Act to Amend the Northwest Territories Act,* SC 1960, c. 20.

61 Judges of the Supreme Court of the Northwest Territories are also members of the Territorial Court of Appeal.

62 Graham Price, *Remote Justice: The Stipendiary Magistrate's Court of the Northwest Territories, 1905–1955* (LLM thesis, University of Manitoba, 1986), 190–91. This discussion is condensed from Mr. Price's work.

63 *R v Rivet,* [1944] 2 WWR 132.

64 This had been the state of affairs from 1905 to 1908, when the *NWT Act* was amended.

65 *Ross v Lieberman,* [1947] 1 WWR 1070.

66 *An Act to Amend the Northwest Territories Act,* SC 1948, c. 20, s. 2.

67 Parliament had passed legislation regarding divorce before 1968, but it had not necessarily applied to every jurisdiction, only those that had an operative divorce law. See Bernard Green, "Divorce Act of 1968," *University of Toronto Law Journal* 19, no. 4 (Autumn 1969): 628.

68 By 1968, only Quebec and Newfoundland had to use Acts of Parliament. Ontario, for instance, had passed legislation in 1930 allowing it to use the 1857 *Act* by adopting English law as of 1870. See Green, "Divorce Act of 1968."

69 LASA, fond 9, series 5, Spencer Cumming interview, 31.

70 Celeste McGovern, in Ted Byfield, ed., *Alberta in the Twentieth Century, vol. 10: The Sixties Revolution and the Fall of Social Credit* (Edmonton: United Western Communications, 2002), 84.

71 *Trueman v Trueman*, [1971] 2 WWR 688.

72 Ibid.

73 *Murdoch v Murdoch*, [1975] 1 SCR 423. Martland argued that the trial judge had found that Mrs. Trueman had been involved in the operation of the farm beyond the normal duties of a farm wife, unlike the trial judge in *Murdoch.*

74 Ibid., at 450.

75 Mysty S. Clapton, "*Murdoch v. Murdoch:* The Organizing Narrative of Matrimonial Property Law Reform," *Canadian Journal of Women and the Law* 20, no. 2 (2008).

76 *Mathieson v Mathieson,* [1974] 5 WWR 453.

77 Ibid., at para. 6.

78 Ibid., at para. 50.

79 *Medicine Hat (City) v Rosemount Rental Developments*, [1964] 49 WWR 449 at para. 4.

80 Ibid., at para. 8.

81 *Reich v College of Physicians and Surgeons of Alberta*, [1970] 75 WWR 561.

82 Marcell Martel, *Not This Time: Canadians, Public Policy and the Marijuana Question, 1961–1975* (Toronto: University of Toronto, 2006), 168.

83 D. Owen Carrigan, *Crime and Punishment in Canada: A History* (Toronto: McClelland Stewart, 1991), 87.

84 David K. Foot, *Boom, Bust, Echo 2000: Profiting from the Demographic Shift in the New Millenium* (Toronto: McFarlane Walter Ross, 1998), 190–95. Demographer Foot asserts that jumps in crime rates usually coincide with large demographic bulges of young people. In Canada and North America, there was also a rise in public perception of crime loosely associated with the demographic change. In the 1950s, for example, society became preoccupied with juvenile delinquency, although the actual number of teenage offenders was small. See Owram, *Born at the Right Time,* 143–44. Owram also analyses the rise in incidence in drug offences in the late sixties, 198, 201–3.

85 Carrigan, *Crime and Punishment in Canada*, 191. He argues that, in effect, the permissiveness and widespread contempt for authority and the establishment of the "Me Generation" caused a spike in crime. This causality seems dubious.

86 *R v Ewanchuk*, [1974] 4 WWR 230, at para. 7. McDermid ruled that there was nothing in law preventing the Crown from preparing a new charge, as dismissal at a preliminary hearing was not the same as acquittal.

87 Stevenson interview, Aug. 11, 2008, and Kerans interview, Oct. 21, 2008.

88 *R v Frankel*, [1969] 68 WWR 201, at para. 1.

89 *Criminal Law Amendment Act,* SC 1968–69, c. 38.

90 *R v Rilling,* [1973] 3 WWR 319, at para. 29.

91 LASA, fond 56, series 3, Hetherington interview, 101. Justice Hetherington of the Alberta Court of Appeal felt that these convictions were strongly challenged, with the seriousness of loss of a licence in a car-centric society the main reason.

92 *Reference by Governor in Council Concerning the Proclamation of S. 16 of the Criminal Law Amendment Act, 1968–1969*, [1970] 74 WWR 167.

93 *R v Manysiak*, [1971] 3 WWR 530.

94 Ibid., at para. 17.

95 *R v Rilling*, [1973] 3 WWR 319.

96 Ibid., at para. 30.

97 *R v Rilling*, [1975] 6 WWR 626.

98 *R v Peterson*, [1974] 4 WWR 144. The accused had been arrested near Lacombe and taken to Red Deer, where police asked him to give a sample. When he asked for his lawyer, the police told Peterson he could consult with him when they took him back to Lacombe, at which point Peterson gave a sample.

99 Ibid., at para. 43.

100 Ibid., at para. 44.

101 *R v Balkan*, [1973] 6 WWR 617. Prowse held that Balkan's right to consult counsel had been violated when the police insisted on being present because they were worried he would try to undermine the breath test somehow.

102 *Opium and Narcotic Drug Act*, SC 1923, c. 22.

103 Mike Maunder, in Byfield, *The Sixties Revolution and the Fall of Social Credit*, 55.

104 Martel, *Not This Time*, 44; Carrigan, *Crime and Punishment in Canada*, 91–92.

105 *Debates of the House of Commons*, Feb. 16, 1968, 6818.

106 Martel, *Not This Time*, 11.

107 *Debates of the House of Commons*, Nov. 4, 1969, 515–17.

108 Martel, *Not This Time*, 188.

109 Ibid., 188.

110 Ibid., 150. The majority of commissioners, including Le Dain, recommended eliminating possession as an offence and reducing penalties for trafficking and cultivation, but felt full legalization was premature due to lack of understanding of the effects on the long-term health of marijuana users.

111 *Narcotic Control Act*, RSC 1970, c. 34.

112 *Food and Drugs Act*, RSC 1970, c. F-27.

113 Gerald Le Dain, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Ottawa: Royal Commission of Inquiry, 1969, 247–48.

114 *R v Lehrman*, [1968] 61 WWR 625; *R v Doyle*, [1971] 1 WWR 70; *R v MacGregor*, [1969] 71 WWR 475; *R v Sprague*, [1975] 1 WWR 22.

115 *R v Snyder*, [1968] 65 WWR 292; *R v Peterson*, [1971] 1 WWR 321.

116 *R v Nolet*, [1969] 70 WWR 636, at para. 1.

117 *R v Lehrman*, [1968] 61 WWR 625, at para. 13.

118 Ibid., at para. 20.

119 *R v Doyle*, [1971] 1 WWR 70, at para. 8.

120 *Debates of the House of Commons*, Nov. 4, 1969, 515.

121 *R v MacGregor*, [1969] 71 WWR 475, at para. 3.

122 Ibid., at para. 11.

123 *Debates of the House of Commons*, April 7, 1970, 5602.

124 Primrose was the trial judge in *Lehrman* and had handed out a very light sentence.

125 Kerans interview, Oct. 26, 2008.

126 Le Dain, *Cannabis,* 247.

127 Eventually, with a new Chief Justice, the Court would adopt a practice that prevented sentence from being increased unless the Crown had filed an appeal within the prescribed time limits.

128 *R v Sprague*, [1975] 1 WWR 22, at para. 54.

129 Ibid., at para. 58.

130 Moir disagreed with Smith's increase in sentence for Gottselig, and pointed out that it went against generally accepted principles even if the Court had the power to do it. He also lightened most of the other sentences, but in the namesake appeal, which involved heroin and a repeat offender, he thought a tough sentence was suitable.

131 *R v Snyder*, [1968] 65 WWR 292, at para. 13.

132 *R v Peterson*, [1971] 1 WWR 321, at para. 28.

133 In *R v Caldwell*, questions of possession and *mens rea* was considered in circumstances not unlike those in *Peterson*. In this case, Chief Justice Milvain had inferred *mens rea*, much as McDermid thought the judge could have done in *Peterson*, based on the actions of the two accused during a raid even though they were not in actual physical possession of the drugs.

CHAPTER 7

BOOM TIMES AGAIN: THE MCGILLIVRAY YEARS, 1974–1984

*Talent is always conscious of its own abundance, and does not object to sharing.**

William Alexander McGillivray became the Chief Justice of Alberta on December 4, 1974. His appointment marked the arrival of judges from the "Greatest Generation" who had grown up in the Depression. Largely veterans of World War II, this generation had practised in a busier, more complicated legal environment. They benefited immensely from the postwar prosperity and were very much a part of the social changes and progressive politics of the times. These men – for the judiciary remained overwhelmingly male until the 1980s – brought a new perspective to the appellate bench. McGillivray's tenure coincided with the advent of legal modernism in Canada, and, while some of his judges remained rooted in the conservatism still characteristic of the legal profession of the time, others provided a needed breath of fresh air.

At the federal level, steps were being taken to modernize the law and the judiciary and the Alberta appellate court took part in that shift. High-quality appointments allowed McGillivray to build a very collegial court. Faced with the demands of the "litigation explosion" of the 1970s, the Court undertook a collaborative effort to meet the challenge. This involved reappraising the Court's practices and its jurisprudence. The new generation showed a greater willingness to exercise the Court's role in developing the law. In common with judges across Canada, they demonstrated a desire to move beyond the orthodoxies of so-called "black letter" law and make the law more responsive to changing social circumstances. One contemporary even called the period "magical."[1]

The more receptive outlook of the McGillivray bench was timely, given the demands on the Court. The Court now found itself considering constitutional law, which had experienced a rebirth in the 1970s. The growth of government at all levels brought jurisdictional conflicts between federal and provincial governments to the fore in a way not seen for decades. Disputes over Alberta's energy wealth exacerbated tensions between Ottawa and the province. Against this backdrop, the Court dealt with

BUCKET WHEEL IN OPERATION AT SYNCRUDE OIL SANDS MINE, 1976. PAA J4248/12.

a number of "division of powers" cases, strongly defending provincial rights from federal encroachment.

THE MCGILLIVRAY COURT

Courts are, unquestionably, the seats of politeness and good-breeding; were they not so, they would be seats of slaughter and desolation.

– Lord Chesterfield.[2]

Necessary Reforms Begin Modernizing the Judiciary

Bill McGillivray's 1974 appointment came amid federal government efforts to improve the country's judiciary. Minister of Justice Pierre Trudeau took a first step in 1968 when he undertook to consult the legal community on judicial appointments. As the benchers of Alberta's Law Society remarked at a 1973 meeting:

> The fact that the Minister has sent people out to make enquiries seems to indicate that he might want help in making his selections…Until five or six years ago there was no suggestion that anybody should be consulted on this Government prerogative. Certain unhappy appointments persuaded the Minister of Justice to consult the Canadian Bar at least to the extent that a list of possible appointees would be submitted to a Select Committee scattered across the country.[3]

Previously, the appointment process had been opaque and informal. The Minister of Justice was nominally responsible for finding and nominating individuals, with Cabinet approval. Patronage was a prime consideration. Other cabinet ministers had considerable influence over appointments in their jurisdiction. If a lawyer wanted to become a judge, words had to be put into the ears of the right people. Under the Trudeau initiative, the Canadian Bar Association's Select Committee only assessed names put forward by the minister and gave an opinion as to their qualifications. But it was a first step.

Trudeau's successor, John Turner, took reform further. Proclaiming that merit was the primary qualification for candidates to the judiciary, he worked the phones privately to find appealing prospects and check their backgrounds.[4] Upon becoming justice minister in 1972, Otto Lang, former Dean of the University of Saskatchewan Law School, appointed Ed Ratushny as his Special Advisor on Judicial Affairs.[5] Ratushny criss-crossed the country, consulting widely with chief justices, chief judges, and law societies, as well as the party faithful.

From his research, a list of candidates was drawn up for Lang and his successors to recommend for the judiciary. Some appointments across party lines signalled the emphasis on merit. An early Alberta example was Val Milvain, known as an arch-Conservative, who was appointed Chief Justice of the Trial Division in 1968.[6] McGillivray was known to be nearly apolitical. Widely acknowledged as a leading light of the bar, McGillivray was elevated "from the street" straight to chief justice to show that the government wanted the best for the bench.

The government also started to address the lack of any women on the federally appointed bench.[7] Neither the Trial Division nor the District Court in Alberta had yet seen a woman appointed, much less the Appellate Division. Turner appointed the first female superior judge in Canada, and Lang followed up with several more. The first two women made federal judges in Alberta, Elizabeth McFadyen in 1976 and Mary Hetherington in 1978, later had distinguished appellate careers, but it was well into the next decade before a woman ascended to the provincial appeal court.

Youth was another focus. There had been a tendency in Canada to regard the bench – especially the appellate bench – as a retirement home for lawyers worn out by the rigours of practice or wanting to coast into retirement. The average age for appeal court judges in Alberta during the 1950s and 1960s

was about sixty-two. In the 1970s, it dropped to fifty-three.[8] Many individuals coming onto the bench in that decade were in the prime of their careers.

The Liberal policy also emphasized candidates with experience as barristers, and, for appeal courts, prior experience as a trial judge. With the generalist lawyer fast disappearing, new appointments were usually lawyers highly experienced in court work. For appellate appointments, most had trial judge experience. Certainly this was true of Alberta's appeal court. Starting with Clement in 1970, and for the next twenty years, new members of the Court were mostly barristers, generally of high calibre, and many had also been trial judges.[9] Of the thirteen appointments between 1972 and 1981, nine were from trial courts.

The Talent Pool on the District Court

Many new appointments came from the District Court of Alberta, and they were some of the best appellate judges of their generation. Chief Judge John Decore had created a pool of legal talent on his court. An Edmonton lawyer, Decore was appointed head of the District Court of Northern Alberta in 1965 and subsequently chief judge of the amalgamated court in 1975. As part of the drive to modernize and improve the District Court, Decore very actively recruited young barristers who showed promise.[10] A former Liberal MP, Decore had excellent political connections and influence on appointments.[11] Starting in the late 1960s, the District Court was stacked with good lawyers, and six of the thirteen appellate appointments between 1971 and 1981 got their start on the District Court in Edmonton.

By 1980, the Alberta appellate court could boast some real heavyweights. McGillivray, Spud Moir, Cliff Prowse, Bill Morrow, and Herb Laycraft were all considered among the best of the best in civil litigation, while Milt Harradence and Buzz McClung fell in the same category in criminal

WILLIAM ALEXANDER MCGILLIVRAY, LASA ACC. 2003-03.

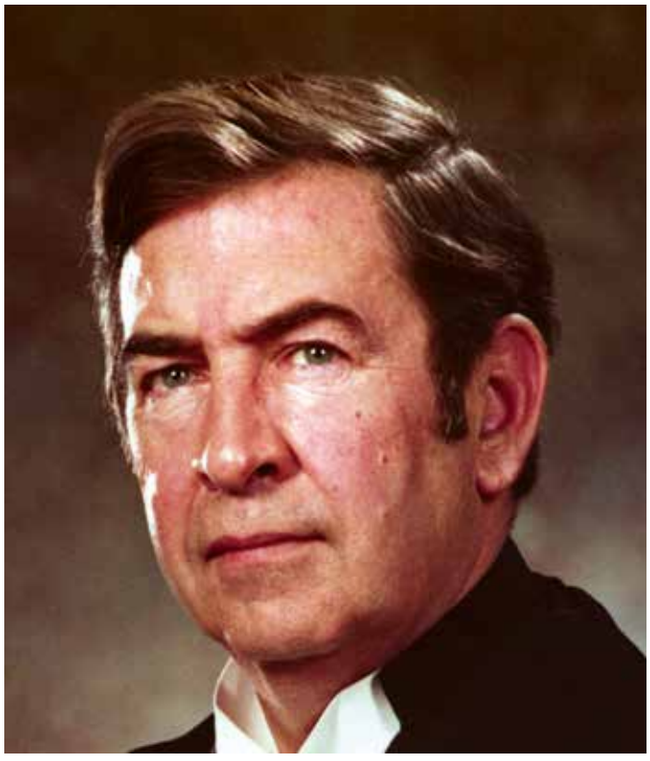
litigation. Others, such as Sam Lieberman, Roger Kerans, and William Stevenson, emerged as excellent judges. It was almost too powerful a bench. Roger Kerans, no retiring person himself, remembered his older colleagues as tough when he first came to the appeal court as a junior judge. "They could be a real bunch of bullies. Bill Stevenson and I realized that we had to stand up for ourselves or get buried."[12]

The New Judges

McGillivray was not the first appointment to the Court under the revamped policy. Shortly before Smith retired, there were three appointments, two replacing Ted Kane and Horace Johnson, and one new one, bringing the Court up to nine justices. The three new judges not only reflected an enhanced selection process but were also indicative of the wartime generation coming to the fore.

Cliff Prowse, Distinguished Veteran and Progressive Thinker

David Clifton Prowse, known as Cliff, was the first, appointed in 1972. He was a member of the Prowse legal clan. His father, J. Harper Prowse, had started his practice in Taber, Alberta, and became a leading member of the Lethbridge bar. Born in 1920, Prowse was one of three brothers who were successful as lawyers and politicians. Eldest brother Harper was leader of the provincial Liberal Party and eventually a Senator, and Hubert became a Queen's Bench justice.



Prowse grew up in Taber and entered the University of Alberta just as World War II began. He joined the RCAF and was a bomber navigator. Shot down over Germany, Prowse lost a leg and was a prisoner of war for two years, which severely compromised his health later in life. After the war, Prowse finished a B.Comm. degree and then did law, finishing in 1950 at the top of the class. He articled in Calgary at the Fenerty firm, stayed on as a

litigator and subsequently as a partner. Bill McGillivray was a colleague and close friend. Prowse was not a courtroom performer.[13] He preferred the art of negotiation, and was very effective, given his meticulous preparation, compelling arguments, and reputation for fair dealing.[14] Often in charge of the firm's articling students, Prowse was a tough taskmaster who didn't suffer fools. Although sometimes irascible due to his ill health, Prowse never complained about his infirmities.

He made an immediate impact on the Smith court, and was a frequent writer. Prowse's judgments were clear, well argued, and well researched but not overburdened with case law and authorities. He was not afraid to dissent and frequently offered his own views when concurring. In his judgments, he was a breath of fresh air on the Court, progressive and very willing to make law. When the *Charter of Rights and Freedoms* was enacted, Prowse was determined to write the first *Charter* judgment for the Court. And he did, with *Hunter v Southam*. Prowse, however, did have at least one fault. Never a trial judge himself, he had a tendency to "retry" cases on appeal.

Bill Sinclair, Courageous Warrior and Artist

At the beginning of 1973, William R. Sinclair joined the Court, coming up from the Trial Division. Six years later, he would leave to become the first Chief Justice of the newly constituted Court of Queen's Bench, the amalgamated court that replaced the Trial Division and the District Court. After stepping down as chief in 1984, he stayed on as a supernumerary judge and chaired a number of federal commissions. Although Sinclair had been born in Winnipeg in 1920, his family had deep roots in Alberta, as his grandfather had arrived with a CPR bridge crew in the 1880s. His father was Dean of Agriculture at the University of Alberta. Sinclair grew up in Edmonton and attended university there, earning a B.Comm. in 1941 before joining the navy.

As a landing craft officer, Sinclair participated in four different Allied invasions, starting with the Dieppe raid in 1942. Under heavy fire, he returned four times

to the beachhead to pick up troops, even disembarking to assist them onboard.[15] After the war, Sinclair entered the law program at Alberta, although he first considered a career as an artist. Throughout his life, he continued to paint as a hobby.[16] After getting his law degree in 1948, Sinclair articled with S. Bruce Smith and stayed on with his firm as a litigator. In 1954, Sinclair joined Canadian Gulf in Calgary as in-house counsel, staying five years before returning to Edmonton and a litigation practice with Emery Jamieson. He also did his time in Liberal politics, running John Decore's campaign in 1963 and running as a candidate himself in 1965. After just ten years of practice, Sinclair was appointed to the Trial Division in 1968. He was well liked as an impeccably impartial judge who ran a good court.

Sinclair was probably happier as a trial judge. Although he did not write often for the Court, his decisions were clear and well organized, avoiding the long, sometimes discursive quotations that still plagued most appellate judgments of the time. A gentle, modest, and

< DAVID CLIFTON PROWSE, LASA ACC. 2002-028.

< DISTRICT COURT OF ALBERTA JUDGES, SOURCE OF SEVERAL JUDGES FOR THE COURT OF APPEAL, AT SWEARING-IN OF ELIZABETH MCFADYEN, FRONT, 2ND FROM RIGHT, 1976. ROGER KERANS (FRONT 2ND LEFT), BUZZ MCCLUNG, JOHN BRACCO (BACK, 2ND AND 3RD LEFT) BILL STEVENSON, AND ROGER BELZIL (BACK, 2ND & 1ST RIGHT) ALL JOINED THE APPEAL COURT. LASA 79-G-11.

^ WILLIAM ROBERT SINCLAIR, COURT OF APPEAL COLLECTION.

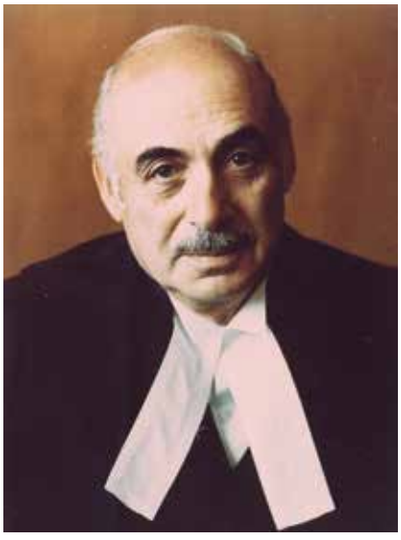
good-natured man, Sinclair was sympathetic and humane, and a judge who was considered sensitive to social conditions. Indeed, it is fair to say that he was one of the most progressive judges of this era on the Court. Among his accomplishments was mastering French at the age of fifty.

Arnold Moir, Flashy Litigator With a Social Conscience

Spud Moir followed Sinclair onto the Court near the end of 1973. Born Arnold Fraser Moir in 1918 in Fort Macleod, he took his law degree at the University of Alberta, graduating in 1946. He then went on to Harvard for a master's degree in law. Returning to Edmonton to practice, he was one of the partners of the Wood, Moir, Hyde and Ross firm. Moir quickly emerged as a top litigator in Alberta, one of a club of "eight or nine counsel" who, according to Herb Laycraft, dominated trial work in Alberta in the 1960s.[17]

Moir was a reformer. He had an important role in establishing legal aid in the province. As a bencher (and later president) of the law society, Moir pushed for negligence insurance and for spot audits of lawyers' trust accounts.[18] For years, he taught legal ethics, among other subjects, at the University of Alberta. A frequent champion of the underdog, Moir did work for aboriginal communities and was made an honorary chief of the Samson Cree Band. Indeed, his main weakness as an appeal judge was a tendency towards advocacy, along with a willingness to retry criminal cases. In criminal matters, he acquired a reputation as the Court's "dove." McDermid joked that Spud single-handedly brought the sentence for robbery down to three years from five. If so, it was a tribute to his compelling nature and ability to convince others. Although Moir disputed the value of stern sentencing, he penned several influential judgments that stressed deterrence for certain crimes.

Extroverted and opinionated, Moir was also very patient and reasonable during argument and in conference with his brethren. Almost immediately, he revealed himself as a judge with an activist bent. One defence counsel claimed a panel of Moir, Sinclair, and Bill Morrow to be one of the "most sympathetic" and



talented appeal courts ever seen in Alberta.[19]

Bill Haddad, Pragmatist and Mediator

William J. Haddad followed Moir, appointed just a few days before the new chief at the end of 1974. He came directly to the Court from the District Court, where he had been appointed in 1965 as one of John Decore's "recruits."[20] Haddad had an exotic background. Although he was born in Saskatchewan, his parents were Lebanese. His father, who was from the Bekka Valley, came to Canada in 1897 to escape Turkish oppression.[21] He became a successful merchant. Improbably, he met a countrywoman from the same hometown who was travelling in Canada and married her. Bill Haddad was born in 1915, one of eight children.

L-R, ARNOLD FRASER MOIR, COURT OF APPEAL COLLECTION.
WILLIAM JOSEPH HADDAD, 1979. LASA 71-G-3.

The family moved to Edmonton in 1936, specifically so their children could go to university. Haddad enrolled in the combined arts and law program. He finished his degree in 1941 and enlisted in the navy while doing his articles. He was called to the bar before starting active service. Haddad spent most of his service as a legal officer attached to Pacific Command, with the rank of lieutenant. After discharge in 1946, he started practising in Edmonton, first with A.L. Marks and then as part of Wood, Haddad, Moir, Hyde and Ross, before starting Simpson, Haddad, Cavanagh, Henning, Buchanan and Kerr in 1961. Haddad had a mixed practice of litigation, commercial work, and real estate. An active Liberal, Haddad was also a director and vice-president of the Eskimos football club and chair of the Edmonton Police Commission from 1966 to 1971.

Haddad could be characterized as an open-minded pragmatist. His nine years as a trial judge complemented his diverse practice. Interestingly, Haddad felt his appointment to the Court was in large part due to S. Bruce Smith, who strongly recommended the promotion. He was a conscientious judge, very courteous with counsel. Although not an energetic writer, he was sufficiently sure of himself to dissent when necessary.[22]

Bill Morrow, Justice of the North

William G. Morrow was one of two new appointments in 1976. Morrow was legendary as the "Justice of the North," appointed to the Territorial Court of the Northwest Territories in 1966 to replace another Albertan, John Sissons. Morrow's Arctic connection was forged earlier when he accompanied Sissons on a far-flung circuit through the Territories as a (mostly) unpaid defence counsel.[23] It was typical of Morrow, who had a passion for justice and a taste for adventure. Born in Edmonton in 1917, the son of a solicitor, Morrow attended the University of Alberta. He then articled with his father and was admitted to the bar in 1940. Morrow joined the navy shortly afterward, serving as second officer of a minesweeper. He was at the head of the invasion flotilla at D-Day.

After the war, Morrow returned to Edmonton and decided to practise as a litigator. He would say later

that it appealed to his Irish combativeness.[24] Morrow was a maverick. Quickly establishing himself as an ace courtroom lawyer, both at trial and appeal, he took all clients, regardless of their ability to pay. He was prepared to go to the highest court in the land, even at his own expense, if he felt there was an injustice to his client. "I would always ask him at the Supreme Court [of Canada], are you getting paid for this one, Bill?" remembered Herb Laycraft, who faced off against Morrow many times.[25] Morrow was also a romantic. As related in an earlier chapter, he was determined to appear in the last case in front of the Privy Council before appeals there ended, and he succeeded with the *Wakefield* appeal.

In the north, Morrow found an environment to which he was well suited. He was a great believer in the common law tradition of actively shaping

L-R, JUSTICE BILL MORROW IN THE NWT, COURT OF APPEAL COLLECTION.
WILLIAM GEORGE MORROW, COURT OF APPEAL COLLECTION.

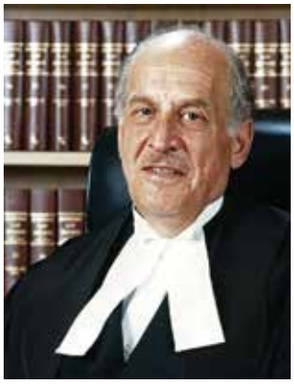
the law. Dealing with the aboriginal communities of the Arctic, Morrow moulded his judgments to take local conditions and social realities into account. One commonly cited example was the shorter criminal sentences he imposed for the Inuit, which took into account their much shorter lifespan, and he often allowed offenders to stay in the north for their incarceration. He also ruled that Inuit adoption practices were legal and binding.[26] Morrow wrote the trial judgment in *R v Drybones,* one of the most significant *Bill of Rights* cases. His experience in the north, coupled with his own understanding of the problems people have in life, made Morrow one of the most open-minded judges on the Court in his four years there. He died in 1980, only sixty-three.

Sam Lieberman, Builder of Legal Institutions

Sam Lieberman was the other 1976 addition to the Court. Lieberman was the first Jewish superior court judge in Alberta, appointed to the District Court in 1966. He was promoted to the Trial Division in 1970, coming to the appeal bench with a reputation as an excellent trial judge. Another veteran, Lieberman had been a pilot with the RAF Coastal Command and did two overseas tours, ending the war as a squadron leader. Sam was born in 1922, the son of Edmonton lawyer Moses Lieberman. His father Moe was well known in the city. He had played for the Edmonton Eskimos football team, managed them for a period in the 1920s, and was president of the club when the team won the Grey Cup in 1956.[27]

Lieberman had just started university when the war broke out. He enlisted in 1940. After the war, Lieberman considered staying in the military but returned to university. He chose law initially as a comfortable career, but it became a true calling by the time he finished school.[28] He articled with his father's firm, Friedman, Lieberman and Newson, and stayed on after his admission to the bar in 1949. The firm had an extensive insurance practice, and Lieberman specialized in insurance negligence litigation. He was also involved with the Eskimos football club as well as many other community groups: the B'nai Brith, the Kiwanis Club, the Canadian Council of Christians and Jews, and the Canadian National Institute for the Blind, among others. As a member of the air force auxiliary, Lieberman was assigned as aide-de-camp to Lieutenant-Governor J.J. Bowlen for four years.

Like Moir, he pushed for the establishment of legal aid and was the first chair of the Legal Aid Society of Alberta. Lieberman also lobbied for a provincial board of review for the long-term disposition of individuals who had been incarcerated in mental institutions after being found unfit to stand trial or not guilty due to insanity. Although recently appointed to the bench, Lieberman was made chair of the board when it was set up in 1967.



SAMUEL SERETH LIEBERMAN AND WITH WIFE NANCY, 1997. COURT OF APPEAL COLLECTION.
SAMUEL SERETH LIEBERMAN, LASA 62-G-11.

As an appellate judge, Lieberman has been described as pragmatic. He termed himself "a constructionist, but not strictly so."[29] In some ways a judicial conservative, he was also open-minded and thoughtful. As a trial judge, Lieberman authored some important judgments in civil law, and he was considered a strong and hard-working judge on the appeal court.

Bill McGillivray, a Collegial and Congenial Leader

Not surprisingly, another strong judge was the new Chief Justice of Alberta, William Alexander McGillivray. His appointment from "the street" to the highest judicial office in the province was a first for Alberta. Otto Lang announced McGillivray's appointment himself in Calgary, clearly to showcase the federal government's new approach. Apolitical (his sympathies claimed by Conservatives and Liberals both), McGillivray was very popular with the bar and acknowledged widely as a leading barrister in the province. The announcement of the appointment was greeted with enthusiasm.

McGillivray was also the first native-born Albertan to become Chief Justice. Born in Calgary in 1918, he was initially educated at a private school in Victoria, completed high school in Calgary, and then went to the University of Alberta. The young McGillivray was an avid tennis and badminton player and was provincial champion in tennis and table tennis. He was also a dedicated hunter and fisherman, and remained so all his life. After earning his BA in 1938, McGillivray entered law

CHIEF JUSTICE MCGILLIVRAY SWEARING IN ROGER KERANS, 1980. LASA ACC. 96.034.

and graduated first in his class in 1941. His father, A.A. McGillivray, died only a few months before his graduation.

Back problems and the need to support his mother – pensions for judges' widows did not exist – kept McGillivray out of the military.[30] He articled in Calgary at the Fenerty and McLaurin firm and stayed there for the rest of his career as a practitioner, joining the bar in 1942. By the 1960s, McGillivray was probably the most respected counsel in Calgary, a classic courtroom lawyer. His strengths as a barrister included his ability to quickly analyze a problem to get to the essential issue, and most importantly, his exceptional talent at cross-examination. In discovery or the courtroom, McGillivray used a friendly, naïve, country bumpkin persona that would invariably lure witnesses into complacency and letting their guard down. Needless to say, this could be quite effective, especially with experts.[31]

McGillivray's courtroom persona was a reflection of an immensely gregarious and likeable man. He was genuinely unpretentious, refusing to take himself too seriously. On appointment, he answered a reporter's question about his judicial principles with a quip: "I'm for motherhood and against crime."[32] However, while McGillivray might enjoy a good lawyer joke, he was quick to defend the law as an honourable and valuable profession. He took the obligations of his calling seriously, and reportedly drove his partners to distraction. He took all comers and, like Morrow, would throw great time and energy into the cause of a penurious client. He had an innate sympathy for the underdog and the underprivileged.

McGillivray and his wife Kay were the souls of hospitality. Once he was chief, any visiting judge in Calgary, from the District Court on up, was usually invited for dinner at the McGillivray household. The invitation often included an evening of cards, since the McGillivrays were avid bridge players. McGillivray's correspondence shows the reach of his congeniality: Grey Cup pools with other chief justices, met and befriended at judicial conferences; fishing trips with fellow jurists; notes sent to new acquaintances. He joked that going to the bench meant spending his days with a group of old friends.

McGillivray's warm personality had a salutary effect on the Court. As colleague Bill Stevenson noted, McGillivray "breathed collegiality into a court which could have had significant problems."[33] It was a quality that was considered lacking under the previous chief justice.[34] McGillivray's management skills went beyond simply being everyone's friend. Bill Haddad and Spud Moir had a well-known falling out as law partners, and the new chief made it clear that he expected them to put any bad feelings behind them.[35] The ability to keep a group of high achievers on good terms should not be underrated. As Sam Lieberman remarked, "every member of the

judiciary has a well-developed ego. Some develop it more than others."[36] An appeal court, where consensus is vital, cannot afford conflict. And as provincial appellate courts started to more explicitly embrace their law-making roles – which largely corresponded with McGillivray's tenure – collegiality took on even greater importance.[37] A happy court was a better-functioning court.

McGillivray had his flaws. Despite the warm reception for his appointment, there was speculation about his lack of bench experience. A contemporary, Herb Laycraft, thought this would have benefited McGillivray. The chief justice, like some of his brother judges, suffered from a tendency to play advocate and retry cases. The worst offenders, it might be observed, were generally the judges who went straight from the street. Howard Irving, who joined the Court in 1985, remembered appearing once before a panel with McGillivray and Prowse. Even though he was the appellant, he never actually argued the case. The Chief Justice and Prowse interrupted him immediately, proceeded to argue the appeal between them, and then reserved judgment.[38] Neither Irving nor the respondent counsel presented anything. Irving didn't complain – he won.

By the late 1970s, the Court needed more judges. This was a direct result of what Alberta lawyers and judges of the era remember as a "litigation explosion." McGillivray's term coincided almost exactly with the beginning and the end of the now almost mythical Alberta energy boom of the 1970s. This was created by the rapid rise of oil and gas prices after the OPEC oil embargo of 1973. The provincial economy went into overdrive and thousands of people flooded into Alberta. The economic activity produced large amounts of litigation. Crime rates in Canada also shot up upward in the 1970s and Alberta saw some of the biggest increases.[39] A raft of other factors, such as more government regulatory activity, constitutional issues, and new kinds of public and private law, greatly grew court lists in Canada.[40] The primary response in the 1970s was to appoint more judges, but this rarely kept pace with the emerging needs of courts across the country.

Creating supernumerary status for judges helped to some degree. This was another policy designed to ensure the vigour of the bench by allowing older judges to partially retire. Supernumeraries were first created with an amendment to the *Judges Act* of 1971. Upon reaching seventy, judges with at least ten years' service could elect to become supernumerary, which meant a greatly reduced workload. In 1975, further changes brought the age down to sixty-five for judges with fifteen years' service. It was good policy to ensure the vigour of the bench while retaining experienced judges, but it had mixed effects on judicial manpower, depending on whether there was a full-time appointment to make up for a judge going supernumerary. In the case of the Alberta Court, McDermid and Haddad elected to go supernumerary in 1978 and 1980 respectively. Through the crunch that developed in the early 1980s, however, the supernumeraries worked nearly full-time to help out, which in essence gave the Alberta bench twelve judges for a time.

Milt Harradence, Flamboyant Maverick for the Defence

Two appointments were made in 1979 to keep the Court up to strength. Milt Harradence was a surprise. Flamboyant hardly began to describe Harradence. He dressed to the nines; flew vintage warplanes in air shows; was armed to the teeth (for self-defence); and was known for late-night cloak-and-dagger phone calls to his cronies. Harradence was also acknowledged as the pre-eminent criminal lawyer in Alberta, with a reputation that reached across the nation. Like McGillivray, Harradence was a masterful cross-examiner, and much of his formidable reputation was due to his courtroom ability.[41]

Asa Milton Harradence was born in Blaine Lake, Saskatchewan, in 1922, the son of a general merchant. Through his mother, he was related to the Horner family, prominent in Liberal politics. Growing up in Prince Albert, Milt Harradence

COLLEGIALITY: MCGILLIVRAY 10TH ANNIVERSARY DINNER, 1984. L–R: HADDAD, MCGILLIVRAY, MCCLUNG, KERANS, LAYCRAFT, CHIEF JUSTICE KEN MOORE (SEATED), ROD MCLENNAN, QC, ASSOCIATE CHIEF JUSTICE TEVIE MILLER. LASA 65-G-015.

would cut classes to see John Diefenbaker in court. His parents socialized with the Diefenbakers, and this turned his mind towards law at a young age. Enlisting in the RCAF at the beginning of the war, Harradence was trained as a pilot but was disciplined for unauthorized stunting and finished up the war in the infantry.[42]

After the war, Harradence took law at the University of Saskatchewan and then articled in Calgary with the Nolan Chambers firm, improbably doing mortgages under Jack Saucier. After joining the Alberta bar in 1951, Harradence struck out on his own, almost exclusively practising criminal law, although founding a general service law firm. Harradence was a president of the Calgary Bar Association and served as a Law Society bencher. He was politically active, serving as an alderman in 1957–58 and as leader of the provincial Progressive Conservative Party in the 1963 election. In 1974, he was appointed to head an inquiry into a riot at the Calgary Correctional Centre.

When Harradence was offered an appointment and accepted, the bar was shocked. He seemed far too colourful a character to be considered and didn't seem the kind of lawyer with ambitions for the bench. Like some of his brother judges, Harradence remained a counsel at heart. He was notoriously lenient with sentencing. McGillivray reportedly said that Moir and Harradence could never be allowed to sit together on sentence appeals.[43] But, as he knew all the tricks, Harradence could sometimes be tough. Laycraft remembered a lawyer telling him, "When Harradence says your client is guilty – by golly he's guilty."[44] Harradence was labelled the "Great Dissenter," an outspoken defender of the rights of an accused who was often proved correct at the SCC.

Herb Laycraft, Brilliant Man of Duty

James Herbert Laycraft was in many ways the opposite of Milt Harradence. What he lacked in flamboyance, however, Laycraft made up for in ability. Many observers considered Herb Laycraft to be one of the foremost legal minds of his generation in Alberta. His reputation as a barrister, as formidable as McGillivray's, was based on an array of strengths: a skilled courtroom tactician, a strong analytical thinker, thorough with research and preparation, and a very hard worker. On the appellate bench, Laycraft stood out immediately as a thoughtful judge who really understood the function of the Court in developing the law.

Born in the hamlet of Veteran in 1924, Laycraft grew up in High River. As a teenager, he worked for the local paper published by Prime Minister Joe Clark's father. Along with his twin brother, Harold, Laycraft lied about his age and joined the army at seventeen.[45] After being trained as a radar technician in the Royal Canadian Artillery and spending a couple of years in the Maritimes, he was sent to Australia for the last two years of the war. In 1946, he returned home and attended the University of Alberta with his veteran's allowance, taking the combined arts and law program and graduating in law in 1951. Among other accomplishments, he met and married Helen Bradley, a member of the university faculty.[46]

ASA MILTON HARRADENCE, LASA 115-G-21(3).

MILT HARRADENCE ON UNIVERSITY OF SASKATCHEWAN BOXING TEAM, CA. 1940. LASA 115-G-2.

> JAMES HERBERT LAYCRAFT, LASA ACC. 2002-028.

>> ROGER PHILIP KERANS, LASA ACC. 2002-028.

Laycraft articled under E.J. Chambers at the Nolan Chambers Might firm, now known as Bennett Jones, and joined the bar in 1952. Henry Nolan, considered the leading civil barrister in the province, became his mentor. As a student, Laycraft helped prepare the factum for the *Borys* appeal and was Nolan's junior on the *Turta* appeal. Laycraft also worked with Val Milvain, another leading counsel brought into the firm to replace Nolan when the latter went to the SCC. When Milvain joined the Trial Division in 1959, Laycraft became the senior litigator for the firm. His specialties were resource law, medical malpractice, and increasingly, regulatory hearings. Although Laycraft was known to be a Conservative – if not particularly active in politics – the Trudeau government appointed him to the Trial Division in 1975, and Laycraft soon proved himself to be an outstanding trial judge.

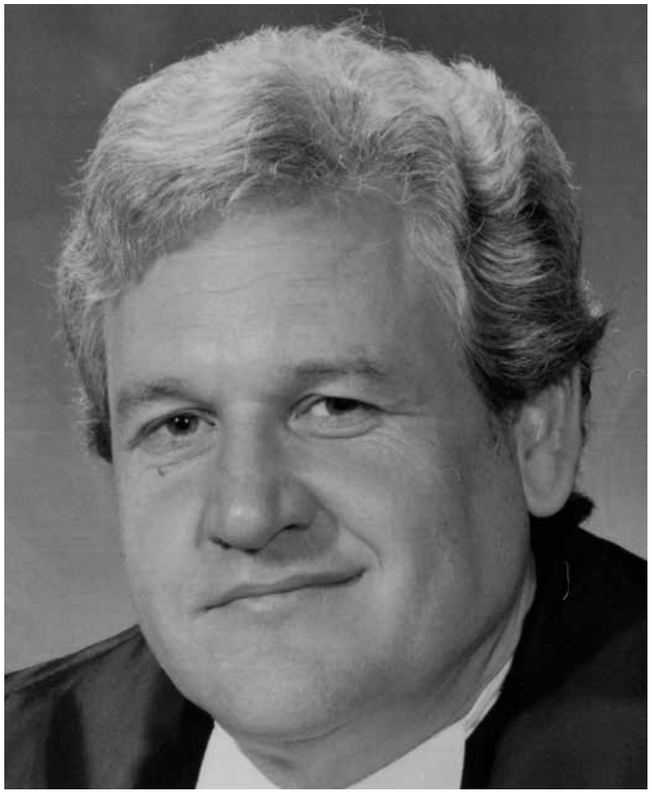
McGillivray almost certainly requested that his eventual successor be moved to the Court. Laycraft was widely considered to be SCC material.[47] And he was probably the first Alberta Chief Justice since Harvey to really consider the proper role of a provincial appellate court. More will be said about Herb Laycraft in the next chapter.

Four more appointments followed Laycraft, one to replace Morrow, who died in 1980; one to make up for Haddad going supernumerary; one to replace Clement; and one for the new position to bring the full-time bench up to ten. Roger Kerans and Bill Stevenson were appointed on the same day in October 1980, followed soon after by John W. "Buzz" McClung. Then, finally, the "other Roger," R.H. Belzil, joined the bench in 1981, anticipating Carl Clement's retirement. They were all products of Decore's District Court. Belzil was a contemporary of McGillivray, but the other three were young tigers in their mid-forties.

Roger Kerans, Forceful Man of Ideas

Roger Kerans brought intellectual restlessness and a delight in administrative and procedural ideas to the Court. He was an experienced judicial administrator as Decore's associate chief judge. Kerans was also the most activist of the judges on the McGillivray and Laycraft courts. And quite consciously so: Kerans saw developing jurisprudence as a fundamental and important role of an appeal court. Taking his cues from the "golden age" of common law in the nineteenth century, before legal formalism took hold, he believed simply that the law should change as society changed – this was the great strength of the common law tradition, and one of the responsibilities of its judges.

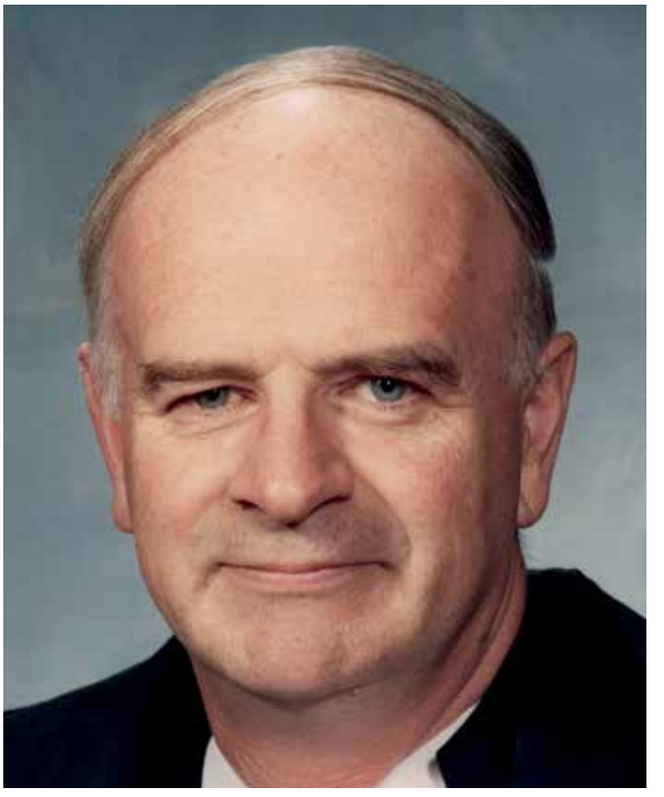
Kerans was born in Lashburn, Saskatchewan, in 1934, the son of schoolteachers. The family moved to Edmonton where Kerans took most of his primary school education. A graduate of the University of Alberta, he



obtained his BA in 1954 and law degree in 1957. His time at law school was a little tempestuous. Kerans started working in a local law office while still a student, which did not sit well with Dean Bowker, but he was allowed to finish his degree.[48] After articles, Kerans immediately opened his own office, which evolved into the partnership of Dantzer, Trofimuk, Kerans and Cristall. He was the firm's civil litigator and also did some criminal law, defending the last man charged with capital murder in Alberta. Kerans could be combative: Chief Justice Smith once threatened him with contempt after a rocky appeal hearing. Shortly afterward, the Chief Justice swore Kerans in as a judge, telling him he had gone "from the jailhouse door to the courthouse door in a week."[49]

Involved in Liberal party politics since university, Kerans knew John Decore well and was one of the young energetic lawyers the Chief Judge wanted for the District Court. At thirty-six, Kerans was the youngest judge appointed to a federal court in Alberta. Kerans quickly became Decore's right hand and was made associate chief judge in Calgary. After amalgamation, Kerans was briefly part of the new trial court before going to the Court of Appeal. He joked that McGillivray asked for him because, while sitting *ad hoc* on the Court, he pleased the chief justice with a judgment that let an aboriginal man off the hook for trafficking in wildlife parts.

Laycraft called Kerans a "stalwart of the Court," willing to take on any task. His colleagues credit him with several innovations, such as the introduction of the specialized sentence appeal panels in 1985, and the Court's early computerization. Kerans was also one of the Court's leading writers on *Charter* cases. He was creative, open-minded, and not afraid to be an agent of change with the law. Kerans was another name touted as SCC material.



Bill Stevenson, Cerebral and Scholarly

Bill Stevenson was also considered one of the intellectuals of the Court, if more conservative with jurisprudence than Kerans. He had spent two years as a full-time law professor at the University of Alberta, and taught part-time much longer. Widely considered a candidate for the SCC, Stevenson was appointed to it in 1990. His appointment was widely praised, as Stevenson was lauded for his promotion of judicial education and training, his learned and well-written judgments, and his application of common sense to the law.

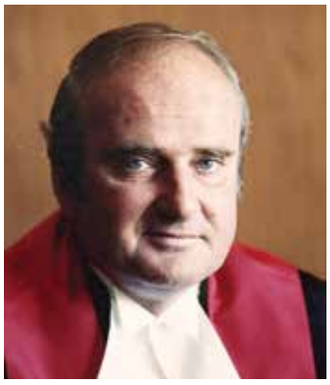
William Alexander Stevenson was a native Edmontonian, born in 1934. His father was a police officer who became the city's deputy chief.[50] He attended the University of Alberta and entered the combined arts and law program. Stevenson got his law degree in 1957, the gold medal winner for his class. He articled with Bill Morrow and became his partner immediately upon joining the bar.

< ROGER KERANS AS BABY WITH MOTHER JULIA AND BROTHER PAT, COURTESY ROGER KERANS.
^ WILLIAM ALEXANDER STEVENSON, COURT OF APPEAL COLLECTION.

Morrow was a very important mentor to Stevenson, who attended the Privy Council hearing for *Wakefield* as junior to his principal. They were very close friends. Stevenson inherited Morrow's robes and even wore them on the SCC.[51] Known as a fine litigation counsel, Stevenson worked on the revision of the Rules of Court with Herb Laycraft and Horace Johnson in the late 1960s. One of Stevenson's strengths was his encyclopedic knowledge of practice and procedure.[52]

He had also started teaching in 1962 as a sessional instructor at his *alma mater*. In 1968, he became a full-time faculty member, but after two years went back to practice and part-time teaching. In 1975, he was offered a post on the District Court. An excellent trial judge, Stevenson's appointment to the appeal court was not a surprise. His judgments were models of logic and clarity, and he was an active writer on the Court. Stevenson combined an appreciation for the incrementalism inherent in the common law tradition with a fine sense of the role of the appeal court in developing jurisprudence. In other words, while never deciding more than needed, he was not afraid to change the law as necessary.

As the founding chairman of the Legal Education Society of Alberta, Stevenson had an abiding interest in legal education and that included judicial education for judges. Prior to the late 1970s, there was literally no training for judges. They received their appointment and went to work, though often with help from established colleagues. As part of its efforts to improve the judiciary, the federal government implemented in 1975 an orientation course known as "dumb judge school" to help new appointees. Judicial education, however, remained limited. In 1986, Stevenson co-authored a report for the federal government that led to the creation of the Canadian Judicial Centre, now the National Judicial Institute, whose mandate was to provide courses, seminars, and workshops for judges.[53] The Institute is now considered a world leader in judicial education, an important part of Stevenson's fine legacy.



JOHN WESLEY MCCLUNG, LASA ACC. 2002-028.

Buzz McClung, the Historian and Wordsmith

The next appointment to the Court, John Wesley McClung, was in many ways a quintessential individualist. McClung had a famous pedigree. His grandmother was renowned Alberta feminist Nellie McClung, one of the "Famous Five" who brought the *Persons* case in 1929. McClung did not have an easy childhood.[54] He was born in Edmonton in 1935. His father, a prominent criminal lawyer who acted as the chief Crown prosecutor in Edmonton, died when McClung was eight, and he lost his mother when he was thirteen, followed by his beloved grandmother a year later. McClung was raised by his sister, and "Buzz," as he was universally known, finished school, attended university, and graduated in law in 1957. He was a champion golfer as a teenager.

After graduating, McClung articled with Neil D. Maclean, a renowned defence counsel and former partner of his father. Following his mentor's lead, McClung carved out a formidable reputation as a criminal lawyer. At one time, he was named as one of the top ten counsel in Canada, and deservedly so. McClung's approach was very analytical and probing, based on thorough preparation, not courtroom pyrotechnics. For a number of years, he taught criminal procedure and evidence for the bar admission course and at the University of Alberta. Criminal law was not the extent of his practice; he also did civil litigation. An avid student of history, McClung was wonderfully steeped in the common law tradition and the legal history of Alberta, a topic he wrote on later in his career.

McClung accepted a position on the District Court in 1976. Four years later, he was named to the Court. Although he had a predictable interest in criminal law, McClung emerged as a strong judge in all areas. Unlike Harradence, he was often a hawk on criminal

sentencing, strongly emphasizing deterrence as a principle.[55] McClung was most certainly a traditionalist. Thoughtful and dedicated, he later became known as a judicial conservative, both because of his reticence about any changes in the status quo and his reaction to what he felt were excessive trespasses of judges on legislative prerogatives. His judgments have been characterized as "elegant and compelling."[56] His writing had a literary flair, sometimes with flowery turns of phrase. McClung's draft judgments often had colleagues consulting a dictionary. Unfortunately, his evocative style sometimes went too far, as was seen with his controversial and heavily criticized judgments for the *Vriend* and *Ewanchuk* appeals in the 1990s. McClung affected a gruff exterior, but a colleague claimed he was actually a "real softy." Another summed up the complex McClung simply as "a hell of a good lawyer."

Roger Belzil, His Own Man

Roger Belzil came onto the Court in 1981 in anticipation of Clement's retirement a few months later. It put the bench at ten full-time judges and two supernumeraries. There was a slight weighting of Edmontonians at seven. Belzil, however, had started his career in his hometown

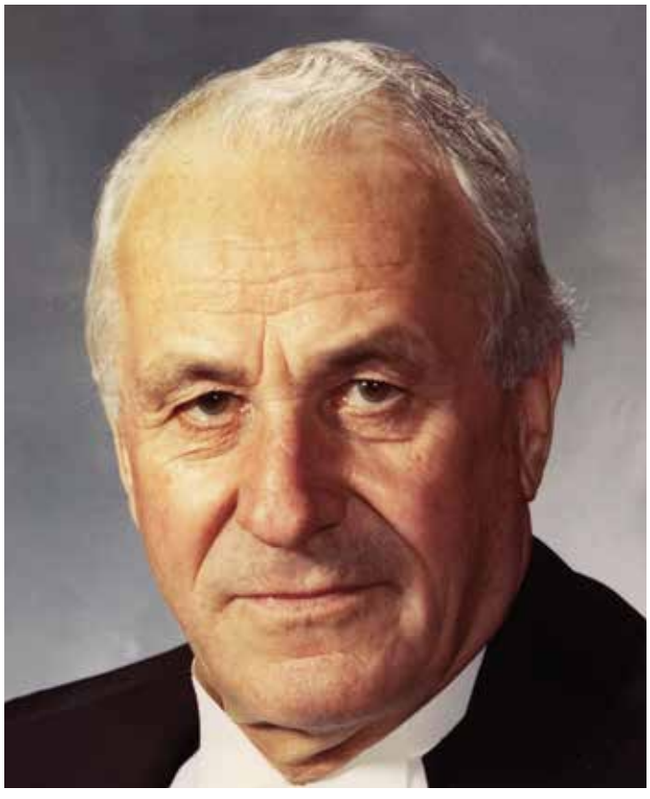
PG. 246 BUZZ MCCLUNG, RIGHT, AS BOY MARCHES BESIDE HIS FATHER, CA. 1940. COURT OF APPEAL COLLECTION.
BUZZ MCCLUNG AND RAY HORN SELLING LEMONADE, 1947. ECA EA-600-207.

of St. Paul before moving to Edmonton in 1954, so he had not been exclusively a big city lawyer. He was the first native-born bilingual judge in Alberta and the first on the appeal court.

Born in St. Paul in 1921, Belzil went to Quebec and Laval University for his undergraduate degree. After law school at the University of Alberta, where he was the gold medallist, Belzil articled in Edmonton under Ronald Martland, later of the SCC. Joining the bar in 1946, Belzil decided to set up practice back in St. Paul. Returning to Edmonton after several years, he became a solicitor who specialized in oil industry agreements.[57] In 1969, Belzil was asked to join the District Court of Northern Alberta, likely because of his command of French and connection to rural Alberta. Belzil maintained his rural roots, buying a small farm after moving to Edmonton.

As an appellate judge, Belzil was an active writer. One colleague remembered him as self-contained, not vocal in hearings but always well-prepared, a hard worker and well-rounded. If reported judgments are an indication, Belzil was independent and not afraid to speak his mind, especially in dissent. In one interesting example, he argued powerfully against allowing simulations as evidence contradicting a breathalyzer test. Calgarians could thank him for the city's Nose Hill Park, as one of his judgments paved the way for expropriating the land for the park.

Belzil was the last appointment for several years. Ironically, although the Court felt undermanned, the judges also started to worry that it was getting too big. McGillivray thought another one or two judges would be helpful, but wrote in a memo to the Court: "I think we must all agree that the Court of Appeal cannot continue to simply get bigger and bigger, or we will not have one Court, but several."[58] The chief and many of his colleagues thought a closely knit bench was essential for maintaining collegiality, and simply adding judges to deal with growing case lists was not the answer. Thus,

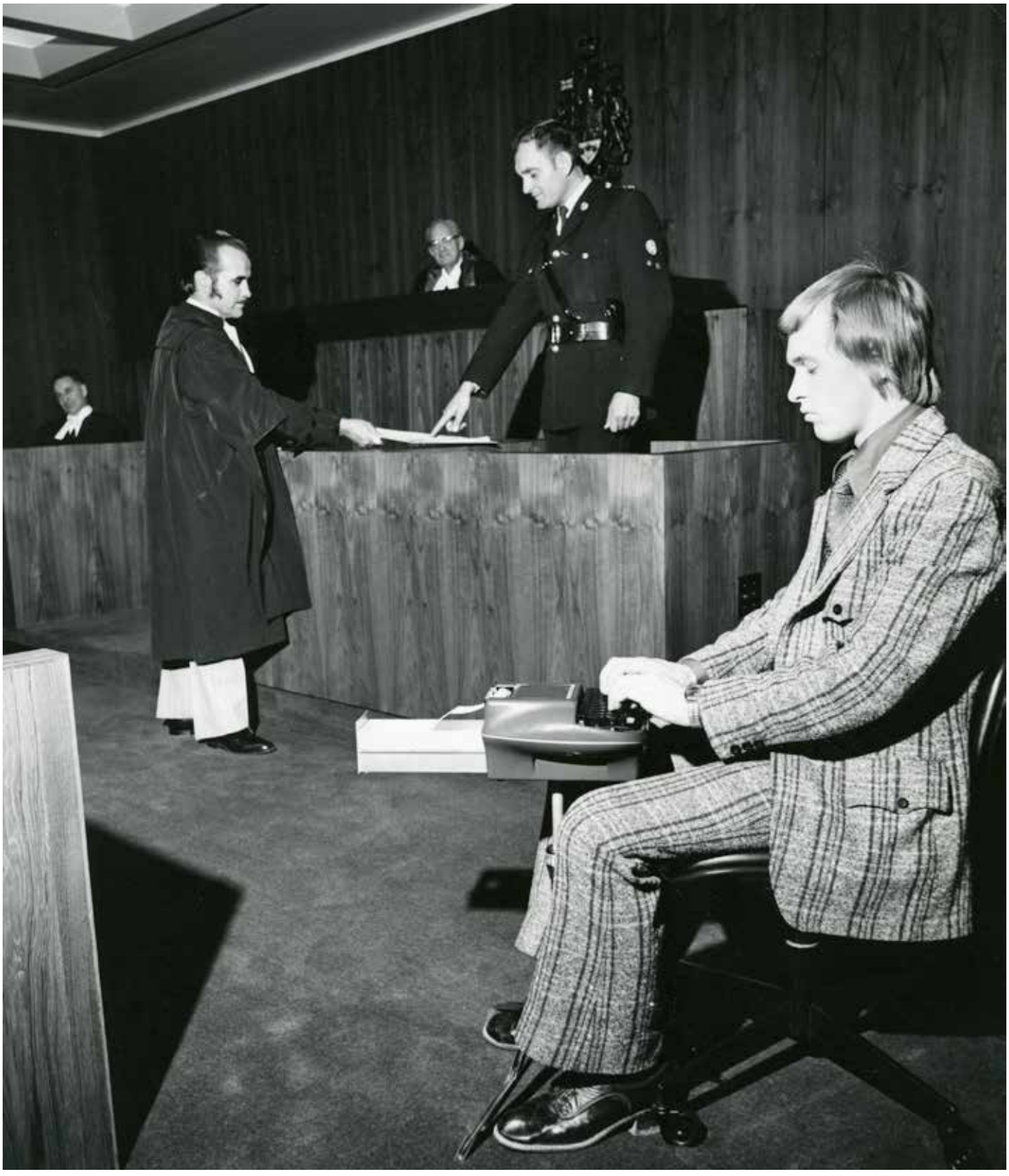


ROGER HECTOR BELZIL, COURT OF APPEAL COLLECTION.

the Court looked for other ways to make its work manageable.

Delivery of Justice: The Court's Practice, Procedure and Administration

Confronted with a seemingly ever-growing case list, McGillivray needed to make the Court more efficient. There was no doubt the Court was feeling burdened. In 1979, citing "a work load that is becoming impossible," McGillivray struck a committee with himself, Lieberman, and Laycraft to look for "improvements in the procedures" to "make the operation of the Court more efficient."[59] In the early 1980s, sittings sometimes extended into a third week and an extra panel was necessary, which severely cut into the time the judges had to write decisions and prepare for upcoming appeals. Alberta was not the only court seeing a major increase in its caseload, and courts across the country were looking



A TYPICAL CRIMINAL TRIAL IN THE ALBERTA SUPREME COURT TRIAL DIVISION, CA. 1970. LASA ACC. 2010-010.
> THE MCGILLIVRAY COURT, 1981. L–R: SEATED, LIEBERMAN, MCDERMID, MCGILLIVRAY, CLEMENT, PROWSE; STANDING, MOIR, KERANS, HARRADENCE, MCCLUNG, LAYCRAFT, BELZIL, STEVENSON, HADDAD. LASA 79-G-13.

at administration and procedures.[60] McGillivray initiated a very productive period for the Court, one in which the judges considered not only administration, practice, and procedure, but also the proper role for an appeal court.

Managing the Work Flow: Implementing List Management

McGillivray grabbed the bull by the horns almost immediately with list management. The lack of any management had become a real sore point towards the end of Smith's term. Spud Moir took charge of revising procedure.[61] The first step was having a judge in each city act as the manager of the list – initially Moir in Edmonton, Prowse in Calgary. The manager set the list for the next sittings at a chambers hearing in consultation with counsel – this was known as "speaking to the list." Essentially, the list manager ascertained which filed appeals were ready to be heard, determined how much time counsel expected them to require, and what order worked best. Short appeals came first, longer appeals last, and out-of-town counsel got priority. By 1979, counsel were asked, when filing factums, to give an estimate of the time required to present their argument. Once a sitting commenced, the court clerk kept track of progress on the list and gave counsel notice of when they would likely be heard, so they didn't have to wait around quite so much.[62]

These changes helped considerably, but there were still complaints from the profession, especially with regard to criminal sittings. Agitation continued for fixed hearing dates.[63] The Court, however, resisted moving to fixed dates and times for appeals until well into the 1980s.[64] This was largely due to the long-standing tradition of fulsome oral arguments. To work efficiently, fixed times required limits on the length of oral argument. Otherwise, the length of hearing was unpredictable, with some hearings ending early, leaving a panel with nothing to do, or running overtime and requiring adjournment. The 1979 requirement for a time estimate marked the start of discussion on the Court about limiting oral argument, which carried on through the 1980s.

Becoming a Hot Court

To help move hearings along, McGillivray's judges decided to commit to being a "hot" court, meaning the judges would prepare for appeals ahead of time by reading factums and appeal books.[65] To some extent, this was not new in Alberta – the Court had always required factums and appeal books. However, strictly speaking, it had not been a court policy for judges to read them in advance. Some did so diligently; others less so. In theory, a hot court would make hearings faster and more efficient since the judges would already know the issues and the arguments. Counsel could then concentrate on clarifying or amplifying their points.

Not all the judges supported the idea of a hot court. The main criticism was that judges would make up their minds before hearing counsel, essentially prejudging the appeal. By McGillivray's time, hot courts were common in the US, although the British tradition was still a cold court. Canadian appellate courts were starting to move towards American practice, and Alberta may have been one of the first.

A decision to become a hot court was something on which the judges had to agree. Chief justices generally wielded much influence on their courts, but it was largely informal, and every judge was to a large degree independent. This was another reason why collegiality was vital. McGillivray's court was very collaborative. The Court's establishing statute required that the judges meet once a year, but McGillivray instituted bi-monthly court meetings.[66] "Housekeeping," such as tracking the status of reserve judgments and other day-to-day concerns, figured prominently on agendas, but the meetings were also an opportunity to consider policy and procedure, especially new ideas.

Finding Inspiration in American Appellate Courts

Judges like Lieberman, Laycraft, Kerans, and Stevenson had a great deal of input into the search for

better practices. One of the places the Court looked was the United States. Canadian judges were increasingly aware that judicial theory, education, and resources were much more advanced south of the border. Several members of the Court strongly advocated exploring the American appellate know-how. Initially, the judges discussed sending an emissary, or even a committee, down to Stanford University in California, to New York, or possibly to visit American appeal courts to look for solutions on handling case overload.[67] The province started providing money for travel to conferences, and the judges took advantage of the opportunity not only to search out new procedures, but to allow them to broaden their judicial education.

Lieberman made the first trip to Philadelphia in 1981. Subsequently, a judge attended the annual seminar on appellate courts at New York University, as well as other conferences. The exposure injected some new ideas – for instance, Lieberman's trip inspired the Court to experiment with pre-appeal conferences to settle on contents of appeal books.[68]

Circulating and Ranking Judgments: Improving Consistency and Clarity

One substantial change in practice was with judgments. In response to requests from counsel, McGillivray had recording equipment installed in courtrooms so that oral judgments from the bench could be transcribed, if necessary. The Court decided, as a matter of policy, to start transcribing and circulating some bench judgments, generally if the trial judge had been reversed.[69] These tended to be mostly sentence appeals. The Court instituted a "no-cite" rule for these sentencing "bench memoranda," considering them primarily of interest to the parties and the trial judge, with little value as precedent. In practice, it was difficult to enforce. Well into Laycraft's time as chief, the Court continually reminded the profession and the law report editors of their purpose, and asked that the memoranda not be cited.

One reason the Court decided oral bench judgments didn't have much precedential value was that McGillivray also instituted a practice of circulating judgments in draft to the Court if a new statement or clarification of law was involved.[70] Since reserves likely, though not necessarily, included a statement of law with value as precedent, the judges felt it was important that the whole court know what the panel was deciding. All members of the Court were expected to read the draft and offer critical comments. If a judge off-panel disagreed strongly with the opinion, he could suggest a rehearing, and, as the practice evolved, the Court decided that substantial opposition to a draft would require a rehearing.[71]

Circulation was also intended to improve judgments: the more eyes, the greater the chance mistakes might be caught. Laycraft, for example, was very experienced with public utility hearings, and on one occasion he saw a major error in a colleague's circulated judgment on the subject.[72] Canvassing the Court might also give the writer useful insight or ideas. Another goal was to create consistency in the Court's rulings, avoiding a situation where panels ruled different ways in different appeals on essentially the same substantive issue – which Laycraft pointed out had happened in Nova Scotia.[73]

The circulation of reserve judgments on new points of law reflected the Court's recognition of the increased importance of its function in making law. Since three-judge panels decided the vast majority of appeals, consistency demanded that the rest of the Court know what a panel had decided in a case settling a point of law. The predominance of small panels also raised the philosophical issue for a ten-judge court of whether a panel decision represented the whole court. Circulation seemed to be the solution. Alberta may have been the first appellate court in Canada to adopt such a policy, although it later became common in other appeal courts. Under Laycraft, circulation was refined with a system of labelling judgments making new law as "Reserved Judgments." The goal of promoting clarity and consistency in the law was also aimed at avoiding appeals by counsel simply in the

hope that another panel would take a different view of the law.

Making Judgments More Collaborative

Not surprisingly, the increased collaboration started to show in the Court's decisions.[74] Over McGillivray's tenure, concurring opinions became much less common, and even dissents dropped off, although one year Cliff Prowse recorded almost as many dissents as he did majority judgments. Harradence was another frequent dissenter. Generally, there was a move towards having a single author for decisions. The Court also began to occasionally write major judgments *per curiam*, that is, for the whole court and not ascribed to one judge as author.

On one occasion, in *Re Export Gas Tax*, the panel split up the writing duties for a collaborative decision. The move towards consensus was not surprising, the result of the high level of collegiality and desire to keep on top of the caseload. Colleagues remembered that McGillivray liked agreement, but, as a matter of policy in developing jurisprudence, consensus was associated more with his successor, Laycraft. Given the continuity between the tenures of the two chief justices, however, it may very well be something that started under one and became more prominent under the other.[75]

Although the Court showed great willingness to innovate, not every new proposal was willingly adopted. Some were destined to be debated for years. Along with limits on argument, the Court considered instituting leave for some appeals, and even adopting the approach in other appeal courts, such as Ontario's, to split into error-correcting and law-making divisions. These ideas were not pursued, either as unnecessary or too radical. Some traditions died hard. At McGillivray's behest, in 1984 Kerans examined the tradition of alternating sittings in each major city month-to-month, with all the Court members moving back and forth together. Kerans proposed a move to sittings in each city each month and cutting down on travel to make the Court more available. Although Kerans argued the existing system was very inefficient, he could not get much support to change it. One colleague, referring to the visiting judges, said to Kerans – probably tongue-in-cheek – "But Roger, who would we have dinner with then?" The fear was that collegiality might diminish with a new sitting regime. It was to be another ten years before any changes were made.

A New Take on Judicial Independence

An emerging issue during McGillivray's tenure was judicial independence. The mounting caseloads and prospects of delays brought court administration onto the table in an unprecedented fashion. The judges were not the only ones with a stake in the efficiency of the Court: any backlogs greatly concerned the provincial government. McGillivray, however, was wary of the possible encroachment of government bureaucracy and the implications for judicial independence. Responding to comments of the Attorney General that the judges were not doing enough to expedite trials and maximize resources, he sent a memo to the Court that showed his irritation:

> What if anything should be done about the Attorney-General's advice, as I understood it, that, in effect, the Government was going to administer the Courts, which is simply a joke, and would add another 25 bureaucrats to the Provincial payroll; and David Boyd's advice that the Courts should be regarded as a "work processing organization," whose efficiency is measured by the volume of end-product.[76]

The chief justice and the Court were also frustrated with the provincial government's slow response to requests for more resources and administrative support. At the end of a letter complaining about the lack of discretionary funding on hand for office purchases, McGillivray added a pointed postscript:

> Mr. Justice Laycraft last September put in an order for an alphabetical telephone index for his desk. There is no sign

of it yet. Had he put in such an order to the office manager in his old Firm, he would have had it the same day.[77]

McGillivray could see that the financial dependence of the Court on the government for its administration had negative implications. In the same letter, he pointed out that in "a number of jurisdictions the Judiciary, as a matter of independence from the Government, make all the expenditures and are responsible to the Legislature." This was a topic of some discussion in Canada, he stated, and there was considerable merit in keeping the courts at arm's length from the government. McGillivray responded to a government suggestion that each court should have a dedicated administrator by stating this official should report to the Chief Justice or Chief Judge of their respective court, not the Attorney General.[78] He went further yet and advocated putting the administration and operations of the courthouses under the jurisdiction of the Chief Justice – to keep them out of the hands of "efficiency experts and chartered accountants...proceeding on the footing the Law Courts are mere places of business."[79]

McGillivray clearly thought there was danger in judges being treated as civil servants doing the bidding of judicial administrators. He was voicing the concern felt by other chief justices in Canada over the erosion of judicial independence in administration of the courts. Alberta was not the only jurisdiction where rising workloads were creating tension between the judiciary and government. In 1981, the Canadian Judicial Council commissioned the Deschênes Report, *Masters in Their Own House,* which concluded that institutional autonomy was the best way to protect judicial independence.[80] The judiciary in two provinces, British Columbia and Quebec, acted on the report and won some administrative control in the early 1980s. The SCC did likewise under Chief Justice Brian Dickson.

In Alberta, the status quo remained. The relationship between the Court and the ministry was generally good, and McGillivray was reluctant to disturb it.[81] McGillivray also had one distinct advantage as chief. He knew Premier Peter Lougheed and other members of cabinet personally. According to Kerans, if McGillivray was sufficiently annoyed with the civil service, he wasn't shy about picking up the phone and calling Lougheed, who had articled at McGillivray's firm, Fenerty's. When the provincial government, without consulting McGillivray or the Court, inserted a clause into labour legislation that made the appeal judges arbitrators in disputes, the Chief immediately contacted the premier directly and asked that the government excise the provision.[82] He objected both to the government's unilateral action in putting in the clause, and to its very existence, as it had the potential to compromise the Court and involve the judges in politically charged controversy.

Whether because of McGillivray's influence or other factors, any nascent conflict between the Court and the government over administration sputtered out. The embers remained, however, and would be fanned into flames later.

A New Name for the Same Old Court

Not the least of changes for the Court under McGillivray was its name. In 1979, the Appellate Division of the Supreme Court of Alberta became the Court of Appeal of Alberta. The amalgamation of the District Court and the Trial Division to form a superior trial court called Queen's Bench prompted the change. The 1978 establishing statute altered little for the appellate court outside of its name. It was not even a freshly constituted court. Section 2 of the *Court of Appeal Act, 1978* reads: "The Appellate Division of the Supreme Court of Alberta is continued as a superior court of civil and criminal jurisdiction styled the Court of Appeal of Alberta."[83]

The Court of Queen's Bench was also a continuation of the Trial Division, though with some obvious substantive changes. The appellate and trial judges continued to be *ex officio* members of both courts, an arrangement that offered great flexibility and was much utilized in the 1980s. The two courts instituted a policy of having a

Queen's Bench judge regularly sit *ad hoc* when the reorganization took place, and special sentence appeal panels set up in 1986 used even more trial judges.

There was clearly no sense of occasion in establishing the separate Court of Appeal, unlike the Queen's Bench, which not only opened with a flourish but marked the closure of its predecessor courts with ceremonies. Herb Laycraft wryly remembered joining the "new" Court of Appeal. "One day Bill came into my office with a Bible in his hand. He gave me my oath of office right there, without any witnesses."[84] It captured the businesslike, no-nonsense, and unpretentious attitude of the judges of the era.

THE MCGILLIVRAY COURT AT LAW

The McGillivray Court's jurisprudence was representative of the liberalization of a conservative Canadian judiciary. It marked a shift away from legal formalism to what came to be called legal modernism or legal realism. At least in Alberta, the change that occurred

JOE STRATTON AND SAM LIEBERMAN (L & R OF WRESTLER TEX WILKINS, CENTRE) AT STAG PARTY, 1950. STRATTON JOINED THE COURT IN 1987. ECA EA-600-4157A.

in the 1970s, while not radical, was profound nonetheless. Judges became more accepting of the role of judges, especially appellate judges, in shaping the law. Simply put, they became more activist. Roger Kerans called this a return to the common law's "Golden Age" of the nineteenth century. The shift in judicial philosophy occurred as a direct result of the advent of the *Charter* in 1982. It gave the court a much enhanced role in reviewing government action for compliance with the Constitution. While the *Bill of Rights* had not gained much traction after its introduction in 1960, the *Charter* was, by contrast, transformational – for society, the government, and, perhaps most of all, the judiciary. Once it was enacted, all judges were ready – and some also eager – for their new task.

Essentially, judges adopted a more flexible approach to the law, its interpretation, and its application. This manifested itself in a number of ways. One was less reverence for *stare decisis,* and open recognition by judges that precedents could become outmoded and should be changed accordingly. The House of Lords had decided in 1966 that it should, in the right circumstances, overturn its previous decisions, although it was a decade or more before Canadian courts formally considered doing so. And did.[85]

The Modern Rule of Statutory Interpretation

Another was the adoption of the "purposive" approach to statutory interpretation, known as the "modern rule." The purposive approach emphasized analyzing the overall context and intent of legislation – that is, its purpose – and not simply the literal meaning. A purposive and contextual interpretation meant considering the context in which the legislature had passed the *Act* under scrutiny. That context included the real world in which the legislation was passed and in which it functions. This meant looking at the "policy" behind the legislation. In considering various statutory interpretations, a court would also assess the real world impact of competing interpretations. It was not until the 1970s, for example, that it became acceptable for judges to refer to academic legal treatises in a decision, and it took another ten years or so for judges to use parliamentary debates or works of sociology, history, economics, and so on in assessing parliamentary intent. This evolution in purposive and contextual interpretation was linked to the courts' increasing recognition of the judicial role in law-making.

Another factor was demographic: the arrival on the bench of the so-called Greatest Generation, for whom the Depression and World War II were formative experiences. This demographic was responsible for many of the progressive changes in the judiciary in the 1960s. As lawyers, they dealt with a faster-paced environment, especially in dealings in the business world, a world that was more interested in results. In broad terms, they were more open to change and less patient with tradition for tradition's sake. This was even more pronounced among the lawyers a little younger than the veterans.

Bora Laskin, the Prophet of Legal Modernism in Canada

The arrival of Bora Laskin at the SCC in 1970 marked the shift in Canada to a more liberal and activist approach to law by the judiciary. A law professor before becoming a judge, Laskin promoted a concept of law that one biographer has called "legal modernism." Laskin did not worship at the altar of *stare decisis*. His main philosophical tenet was clear. The law should be a progressive tool used to better society, and judges should properly consider what "ought to be" as well as "what is" when interpreting the law.[86] He rejected the legal formalism or positivism that had dominated Canadian courts for several generations. Instead, given the ambiguity inherent in both statutes and precedents, Laskin believed that, as arbiters of the law, judges should consider the law's impact on society and fairness, as well as correctness. In his view, judges should not ignore the policy implications of their rulings.

Laskin was not alone. The expansion of law schools after World War II created a large number of full-time legal academics, who analyzed and critiqued the law as well

THE EARLY MCGILLIVRAY COURT, 1975. L-R: ALLEN, CAIRNS, MCGILLIVRAY, MCDERMID; STANDING, L-R, MOIR, CLEMENT, SINCLAIR, PROWSE, HADDAD. LASA 72-G-2.

as teaching it, and who promoted a greater understanding of the interaction between law and society. The creation of legal reform groups during 1960s and 1970s reflected the desire to identify and abandon clearly outmoded laws and legal practices. The Alberta Law Reform Institute was formed in 1967, originally as the Institute of Law Research and Reform. Lawyers involved in law reform became candidates for the bench. The public also played a role in the liberalizing of Canadian judges.[87] Concern for civil and human rights, admiration for a bolder US Supreme Court, and impatience with a judiciary not sufficiently in step with the times created a public climate in favour of judges being less cautious, especially as guardians of individual rights.[88]

The Supreme Court of Canada Sets an Example

Another example of the changing judicial climate was the SCC. In 1975, the SCC took control of its calendar, eliminating most appeals by right and requiring leave instead.[89] Previously, the SCC had wasted much time on appeals involving no new law. There was a growing sense, inside and outside the SCC, that it should play a loftier role in developing jurisprudence, settling major points of law, and focusing on public law such as constitutional issues.[90] This model appealed to the younger generation of judges, including Laskin, who became Chief Justice in 1974.

Laycraft was on the Canadian Bar Association's Rules Committee for the SCC. This crash course on appellate theory was very useful for Alberta's appeal court after his appointment in 1979. The changes to the SCC Rules meant a boost to the stature and importance of provincial appellate courts. In the

words of Laycraft, they became the "court of last resort for 99 percent of all appeals."[91] This enhanced the role of appeal courts in developing jurisprudence in their respective provinces. In Alberta, the responsibility was taken quite seriously, and several judges put a greater emphasis on this role of the Court.

New Appointments Change the Tenor of the Bench

On the McGillivray court, the liberalization of judicial attitudes was gradual and ongoing, and not readily obvious. The reality of an intermediate appellate court is that the vast majority of appeals are prosaic, error-correcting ones that do not require new law. However, Kerans and Stevenson, keen observers of their older colleagues, speak of their greater flexibility. In their view, as a whole, the judges were much less black letter in their approach than in times past, although a range of judicial outlooks remained.

The appointment of Moir, Prowse, and Sinclair marked the beginning of the shift to legal modernism on the Court. These three judges demonstrated some of the qualities discussed above, along with sheer competence. Cliff Prowse in particular was "very bright": Kerans noted that he was quoted in the House of Lords, a singular accomplishment.[92] The next puisne appointment, Bill Morrow, brought to the Court a concern for social justice, an understanding of the law as an evolving entity with historical roots, and a keen appreciation of the judge's role in shaping law, all honed by his time in the north.[93]

The Chief Justice Straddles Two Eras

McGillivray was a judge both contemporary and traditional. Much of what legal modernism entailed appealed to him, given his deep concerns about justice. As one commentator noted: "Great as were his energy and industry, his conscience and his sense of fairness and right were greater yet."[94] When Kerans was appointed to the Court, McGillivray gave him a book, *The Common Law Tradition: Deciding Appeals*, in which American author Karl Llewellyn contrasted the "formal style" to the "grand style" in common law judging, the latter being very much akin to the judicial modernism that was taking root on Canadian courts.[95]

McGillivray was obviously interested in this perspective, and the acknowledgment of judicial law-making. However, at the same time, he was comfortable with the inherent conservatism of the common law, of incremental rather than sweeping change. Indeed, it is fair to say that he was more comfortable with the traditional role than the more overt judicial review required with the *Charter,* which was implemented towards the end of his term as chief justice. This can be seen in his dissent in the *Big M Drug Mart* judgment, when Laycraft, writing for the Court, struck down the *Lord's Day Act*.[96] Other judges of the Court, such as Prowse, Laycraft, and Kerans took the lead with *Charter* jurisprudence. Like everyone else on the Court, McGillivray had been trained in the black letter tradition, and it sometimes showed.

Other judges, such as Haddad and Lieberman, were pragmatists first and foremost. Still others, such as Belzil and Harradence, had more orthodox leanings. Harradence was a strong advocate of the rights and protections of the accused, that is, in protecting civil liberties. However, in other ways, he was a traditionalist, deferential to legislative authority and opposed to invoking policy as a judicial consideration. This was especially so when that policy underpinned equality rights of others that, in his view, conflicted with an accused's rights. Belzil was a bit of an enigma. Mostly a pragmatist, he also tended towards an orthodox approach, but he could be surprising. McClung was admired for his knowledgeable jurisprudence, infused, like Morrow's, with a rich understanding of the common law and its history. With the advent of the *Charter,* McClung became more conservative, showing discomfort as early as 1983 with the implications of the *Charter* regarding legislative authority.[97]

ARNOLD "SPUD" MOIR, COURT OF APPEAL COLLECTION.

A Trinity: Laycraft, Stevenson, and Kerans as Progressives

Three of the most powerful judges were Laycraft, Stevenson, and Kerans. Herb Laycraft was seen by many observers as one of the more liberal or progressive judges.[98] In Laycraft's case, this was due to his formidable analytical skills and appreciation of the historical development of law. Rather than an activist, Laycraft was a reformer – he disliked bad and outmoded law and valued clear and orderly development. He could also be bold, as was seen in *Charter* judgments like *Big M Drug.* Laycraft essentially thought it was part of the duty of a common law judge to consider the development of the law.

The same could be said of Bill Stevenson. As a District Court judge, Stevenson had argued that the *Bill of Rights* made age discrimination contained in the *Criminal Code* untenable, an example of his willingness to apply new approaches to the law. Observers of the court, however, saw Stevenson as conservative compared to Laycraft or Kerans.[99] Intellectually rigorous, Stevenson was a very careful judge who rarely said more than absolutely necessary for the disposition of an appeal.

Kerans, in contrast, was the most activist judge of the McGillivray bench. He was bolder in considering policy implications and examined closely the social and historical context around a legal principle or statute. Kerans embraced the judge's law-making role. He was also the most likely to consider novel ideas and innovation, whether in administration, procedure, or law. Most importantly, by the sheer force of his intellect, Kerans had the ability to break through conceptual barriers and rationalize unconnected ideas, both of which are key in settling new law.

The two veterans of the court, McDermid and Clement, adjusted to the new atmosphere quite readily. They were both intelligent judges and were quite open to persuasion. Kerans remembered that when he said in a meeting that the Court shouldn't necessarily be bound by earlier decisions, Clement spoke up to say that he had written exactly the opposite in a judgment. Kerans informed Clement that regretfully he was going to have to overrule him at the next opportunity. Instead of being annoyed, Clement responded: "I love you guys. You're a lot of fun."[100]

Some Examples of Progressive Jurisprudence

The decisions of the Court from this period clearly displayed a liberalized jurisprudence. There was much more flexibility in interpreting statutes by incorporating the purposive approach, often in service of finding an equitable outcome. Prowse, for instance, overturned a decision of the Alberta Crimes Compensation Board in 1977, ordering additional compensation for a man who had been shot when he pulled a woman out of the line of fire.[101] Prowse ruled that the board need not interpret its governing statute strictly, but rather could interpret it broadly to ensure a just outcome.

In *Round v McGongile,* Lieberman had doubts whether, procedurally, the Edmonton city clerk could appeal, but he decided to hear it in order to deal with the underlying issue.[102] Lieberman upheld the trial court's decision that the city clerk could not refuse a citizen's petition simply because some signatures were not in the form the city required. As Lieberman noted: "We think it is of importance that the historical right of electors to petition any level of government over grievance not be denigrated by rigid standards of grammar where the intention is clear."[103] Lieberman's comment might seem surprising for a self-described constructionist, but it demonstrated how the purposive approach was influencing not only constitutional interpretation but other statutory interpretation too. It avoided many harsh or unreasonable decisions often arrived at through literal interpretation.

The judges also became more openly critical of outmoded law. In *Strang v Cheney*, which involved the question of the inability, derived from common law, of spouses to sue each other, Laycraft wrote:

> This case brings once again before the court problems arising from the provision of the Married Women's Act, R.S.A. 1970, c. 227, that no husband or wife is entitled to sue the other for a tort. Though harried by the criticisms of academics and practicing lawyers alike, though abolished in three Canadian provinces and in Great Britain, though recommended to be abolished here by the Institute of Law Research and Reform, this vestige of medieval law remains durable.[104]

This passage demonstrated Laycraft's quiet wit and willingness to characterize laws as outdated when necessary. In *Strang*, there was not much to be done other than note the obvious and look for a way around the inconvenient statute, which was available in the case law.

New Thoughts on Precedent

There was also debate on the extent of *stare decisis*. Kerans was probably the most vocal in advocating a much more flexible approach to precedent. He argued that strict doctrine had become stultifying and responsible for the survival of much obsolete case law. Reminiscent of Nicolas Beck, early in his tenure Kerans stated the Court should not necessarily be bound by earlier decisions. Instead, he proposed that the Court adopt a policy for reconsidering past precedents.[105] This would allow for changes in outmoded precedent but still permit this to be done in an orderly fashion. It became a topic of regular discussion, but it was not until 1985, Laycraft's first year as chief justice, that the Court formally adopted a reconsideration procedure[106]

The Court was careful not to exceed its proper law-making role. When judges on McGillivray's bench are described as progressive or more liberal, this has to be considered in relative terms. Even Kerans, who was the most openly activist judge on the Court, was very mindful of the limitations of judicial law-making. As he wrote in *Hlushak v Fort McMurray*:

> I am not persuaded that we ought to interfere on these grounds. Whether to prefer one scheme of taxation over another is surely a legislative function, not a judicial function. The simple answer is that the appellant has failed to persuade me that the tax in question is so unfair that it ought to engage the gears of judicial intervention.[107]

In another appeal, Kerans reversed a trial judge who had decided that a non-practice agreement at a Medicine Hat medical clinic was contrary to public policy because it restricted patients' choices of doctor. Kerans held that this was opinion, not fact, that such a contention had to be proven, and that it was not the judge's job to do this.[108] Kerans concluded that this overstepped the judicial role.

Who Was Producing the Judgments?

The judges were universally hard-working. If reported judgments are an accurate measure, the burden of writing was shared widely.[109] But this is not to say that there was no difference in output. Some judges were more enthusiastic about writing than others. Clement remained a workhorse up to his retirement, especially on appeals involving administrative law and regulatory bodies. Lieberman, Morrow, Laycraft, Kerans, Stevenson, McClung, and Belzil were consistently active.

The record of the other judges was more mixed, sometimes for health reasons. Prowse, for instance, was a stalwart for his first few years, but his production dropped off precipitously because of ill health. However, he did a great deal of the chambers work for the Court. Moir too was a very active writer for a few years, but much less so as time went on. Harradence wrote mostly on criminal law, though sometimes a private law appeal engaged his interest. Surprisingly, McGillivray was not prolific. Much like Smith, he often took the lead in criminal appeals and was almost always present on larger panels called, as per standing court practice, for more important appeals. McGillivray tried to set a

good example, taking his share of the sittings and writing as best he could, but the extra administrative duties of the chief justice were becoming more onerous and time-consuming, a trend that only accelerated in the years to come.

Some Trends in the Law

The work facing the Court in many ways continued the trends seen in the Smith years. Public and administrative law matters were increasingly prevalent. Many of these appeals were directly related to the development boom that accompanied the thriving economy and involved rulings from development appeal boards for cities and municipalities. Clement had a real stranglehold over these judgments, usually writing for the Court, but Prowse and Kerans also had an affinity for the subject. In general, the Court continued to give the decisions of boards and tribunals considerable deference. At the same time, the justices were very willing to step in and correct administrative boards and tribunals when those bodies were not fulfilling their quasi-judicial duties. For example, the Court reversed a Calgary development appeal board decision involving a proposed uranium-processing plant on the grounds the board had not properly heard evidence about possible hazards.[110]

Family Law Shows Innovation: *R v R*

Family law filled a larger share of the Court's calendar. Towards the end of the 1970s, the Court saw many more cases dealing with support and custody in the wake of the 1968 *Divorce Act*. Although *Murdoch* cast a shadow in Alberta until 1978, when the *Matrimonial Property Act* was passed, the appellate court established a good reputation with family law, with some decisions breaking new ground.[111]

One experienced divorce lawyer called Kerans' judgment in *R v R*[112] "a breath of fresh air."[113] McGillivray, Kerans, and Laycraft heard the child custody decision. The trial judge had awarded custody to the father because he could spend more time with his preschool daughter than the mother. His decision explicitly rejected the long-standing "tender years" doctrine that held that young children were best left with mothers. Kerans' sweeping analysis of the doctrine concluded that the principle was no more than an expression of historical attitudes towards family and child-rearing, which no longer adequately reflected modern realities and were primarily sexual stereotyping. It was a good example of his style. McGillivray dissented, arguing that there was an irreplaceable element to a mother's care. However, McGillivray also pointed out that daycare was a reasonable avenue for childcare, and that the mother was being penalized for working.

R v R was also interesting as an example of the difficulty in assigning labels such as conservative or traditional, or liberal and progressive, to judges and their decision-making. Many might see Kerans' decision as liberal because it reflected changing social realities, while McGillivray's decision might be characterized as conservative because it upheld the status quo. Yet, the Chief Justice also showed an appreciation for social conditions with his comments on women's changing roles, such as the need to work, hardly old-fashioned attitudes on his part. Both judgments were richly contextual, often seen as a liberal rather than conservative approach to jurisprudence. Yet Kerans cautioned that "our role is not to reform society; our role is to make the best of a bad deal for the child."[114] And, as will be seen in the next chapter, McGillivray was very cautious regarding the expanded role of judges that developed due to the *Charter of Rights and Freedoms*.

As can be easily appreciated from this example, it is often difficult to separate judicial philosophy from political and social views. This is not surprising. Active law-making, especially with purposive interpretation and broader inquiry of context, usually responds to social change and thus seems to condone or approve of such change. Formalism tends to favour the status quo and thus seems politically and socially conservative. And, to at least

some extent, the underlying political, social, and economic views of judges are probably reflected in their preferred judicial philosophy.

Yet activist judges can be politically conservative, as was notoriously true of US Supreme Court in the nineteenth century. On the flip side, a judge with very liberal, even radical social views might be very formalist, feeling judges should not be the ones determining the law on such issues. The complexity in judicial decision-making arguably mirrors the realities of life. It is not simple. And neither are the decisions balancing competing values that judges are called on to make. As one politician once said, in words that might ring true for many judges, "I am a small c liberal." Or perhaps the reverse, a small 'l' conservative.

A Nuanced Approach to Criminal Law

With criminal law, the Court demonstrated that a liberal or activist approach to jurisprudence can often go hand in hand with what might be thought of as conservative social attitudes. Ironically, the "crime wave" that Albertans had feared in the 1960s appeared with a vengeance in the late 1970s and early 1980s. This was due to a combination of demographics and migration to Alberta. Crime rates, especially for property crimes, rose very substantially from 1974 onward.[115] The Court took crime very seriously indeed, and the Court had a merited reputation locally and nationally as being very hard-nosed with respect to crime, perhaps not much different from Smith and his confreres.[116] Deterrence remained primary, and, while some judges had an obvious civil libertarian bent, there was little patience with technical defences.[117] The Chief Justice left no doubt that the Court was a bulwark of law and order:

> We are of the view that an attack of a woman minding her own business on the streets is something that we are not going to tolerate and the streets of this city, as best we can make them, are going to be safe for members of the public.[118]

Crimes involving violence attracted comparatively long sentences, as did those committed by "professional" criminals.[119] As Kerans wrote: "Those in any way involved in house breaking should know that we seek to establish an inhospitable climate for these crimes in Alberta."[120] The Court was most overtly policy driven in trying to deter crime.

The McGillivray court was, however, quite nuanced with sentencing. Deterrence and safeguarding the public were primary goals, but rehabilitation was now recognized as equally important. In a 1982 decision, Lieberman stated that to deny the importance of rehabilitation was an error in law.[121] In *R v Hall,* Lieberman, with a strong interest in mental health issues, also called for reform of the province's treatment of mentally ill offenders, writing that they were "the forgotten man in our correctional system."[122]

The Court collectively felt that tough sentences could be counterproductive, particularly for youthful first offenders in non-violent crimes. In *R v Piper*, Stevenson pointed out: "We have repeatedly said that youthful first offenders should not be gaoled for property offences if another disposition is appropriate."[123] The logic was simple – jails make jailbirds, and leniency at the first instance might make an offender think twice and take the opportunity to follow another road. As McGillivray put it to one lucky malefactor:

> We dislike sending young men to jail…we are going to give him a further break and not put him in jail. We think that the circumstances are perhaps exceptional and this is not to be regarded as a precedent for youthful offenders not going to jail, when they break and enter into people's homes…He is being most leniently treated here and we express the hope he will respond, and try and make something of himself.[124]

At the same time, the appellate judges were not naïve. There was little patience with the repeat offender. As McGillivray stated in another judgment:

We have considered the submission that Mr. Spitery wants to turn over a new leaf. I regret to say that we have heard that submission on so many occasions that we tend to be a little unbelieving that it is so. That assertion seems to come on when a matter is either before a trial judge or a Court of Appeal, and indeed the person may, at that stage, mean it himself, but with some eleven earlier convictions, he has had plenty of time to turn over that leaf.[125]

The Starting Point Sentence: Balancing Consistency with Deference

A more controversial policy of McGillivray's court was "starting point" guideline sentences. It was an example of the Court's efforts to create more consistency and predictability in the law, but it also raised fundamental questions about appellate interference in the trial judge's domain. Based on English tradition, Canadian trial judges had wide discretion in sentencing. The trial judge was best suited to weigh aggravating and mitigating circumstances around a crime and form an accurate appraisal of the offender and his or her degree of responsibility for the crime. The problem, however, was that sentences could be unjustifiably inconsistent for the same crime – and often were. Unfit sentences also created more work for the appellate court.

The starting point sentence was designed to reconcile the trial judge's discretion with greater consistency. As Kerans explained, the aim was "not uniform sentences, for that is impossible. The end is a uniform approach to sentencing."[126] Starting points were not intended as minimum sentences. The Court set a "norm" for an offence for trial judges to use as a point of reference, and then the trial judge was to apply the relevant circumstances in the case to determine a fit sentence. *R v Johnas* was the definitive starting point judgment of the McGillivray court, with a five-judge panel laying out the principles to be applied in passing sentences.[127]

The starting point approach became a signature of Alberta's appeal court. It did attract criticism, certainly from those content with the prior status quo, particularly defence counsel. One observer thought it unduly promoted incarceration in sentencing. Inevitably the concept was attacked on the grounds that it improperly interfered with the discretion of trial judges.[128] Within the Court, too, there was debate about its usefulness. McClung and Harradence argued that judges tended to treat the starting point as a minimum sentence.[129]

Ultimately, in the 1994 *MacDonnell* decision, while the SCC affirmed the utility of starting point sentencing and the role of courts of appeal in ensuring its integrity, it also stated it was not an error for a trial judge to ignore a starting point.[130] This did not much dampen the Court's enthusiasm for the approach. Undoubtedly, this was because the Court itself had stressed that the starting point was just that, a starting point, and not an ending point. Later yet, in *R v Stone*, the SCC again affirmed the legitimacy of starting point sentencing.[131] Despite this, philosophical differences about the appropriate role of courts of appeal in sentencing were to re-emerge inside the Court once again. And when they did, culminating in the Court's decision in *R v Arcand*,[132] the renewed debate focused not only on starting point sentencing but also on how a modern appeal court ought to be dealing with *stare decisis*.

R v Brown and Rethinking Rape

A routine sentence appeal, *R v Brown* in 1983, embroiled the Chief Justice in considerable controversy.[133] The panel, consisting of McGillivray, Kerans, and Moir, reduced an eight-year sentence for sexual assault to four years. The disabled victim, who wore leg braces and walked with crutches as a result of polio, had been sexually assaulted, that is, raped, in her assailant's apartment after accompanying him home from a bar. In the course of the rape, Brown had kicked her crutches away and punched her in the face. McGillivray's remarks in the bench judgment allowing the appeal created public outrage:

We think the circumstances were such that it would not have been surprising to that young woman that something

might well happen to her going up to the man's apartment…having been drinking beer all evening, with the expressed intention of smoking marijuana and drinking more beer. That, however, is no answer to his using violence when she rejected his overtures, but we think it is a very different situation from the rapist who breaks into somebody's home and attacks them or who picks somebody off the street.[134]

McGillivray seemed to be making the point that this rape was less serious than one where the rapist had broken into someone's home. Leaving aside whether this notion was sound, his comments inescapably implied that the victim was to blame for her rape. Public condemnation, if not outrage, was widespread.[135] A representative from a women's group was quoted as saying said that the decision was an example of "pretty twisted justice, one that places too much onus on the victim, as is too often the case in rape trials."[136] The public reaction served notice that the courts were coming under increasing public scrutiny, not just for particular decisions, but also for the attitudes and ideological preconceptions of the jurists.

Brown also highlighted a long-standing problem that still bedevils Canada's criminal justice system: the difficulty for women, as victims of sexual crimes, in obtaining proper redress. Although rape was always a very serious crime, historically judges and juries showed an obvious bias against female victims, depending on their place in society and moral behaviour, which made it difficult to obtain convictions and suitable punishment.[137] Judges were particularly complicit through superimposing judge-made limitations on the statutory requirements for rape and other sexual offences, such as requirements for corroboration of testimony and allowing questioning of character and prior sexual history.

The extent of the problem was made clear in 1976. After much lobbying from women's rights advocates, the federal government amended the *Criminal Code* to limit questioning about sexual history in rape trials, eliminating one bias. The amendment was not a success, creating confusion among the judiciary.[138] Two Alberta appeals, *R v Moulton* in 1979 and *R v Konkin* in 1981, demonstrated this.[139] Despite the amendment's clear intent, in these appeals the Court divided on whether the ability of an accused to question his accuser on sexual history for the purpose of challenging her credibility had been restricted – or *extended*. Ironically, McGillivray was one of the judges who understood the amendment's purpose.[140]

Against this, McGillivray's comments in *Brown* might seem surprising. Perhaps his comments in *Brown* were nothing more than a clumsy, off-the-cuff justification for a reduced sentence, on the theory that a rape where the victim knew the perpetrator might be less traumatic than rape by a stranger.[141] Or it may very well be that the Chief Justice's comments expressed an attitude widely held by many of his generation: "good" girls don't do things like that, illustrating just how pervasive such ideas were, and still are.

The *Brown* controversy at least made it clear that myths and stereotypes based on sexist views of a victim, her lifestyle, dress, or actions were no longer acceptable. It was probably no accident that the controversy coincided with a major change in the treatment of sexual crimes in 1983, when the *Criminal Code* was amended to replace the old charges of rape and indecent assault with sexual assault. Admissible evidence on recent sexual activity was strictly limited, and evidence as to sexual reputation was banned altogether by these provisions – the so-called "rape shield" laws.

Tellingly, the 1983 amendments almost immediately generated widely disparate sentencing for the new categories of sexual assault: some judges even seemed to think that rape had been replaced by a less serious charge.[142] Kerans responded with *R v Sandercock* in 1986, which might also be seen as the Court's atonement for *Brown*.[143] *Sandercock* was another starting point judgment intended to end the sentencing

disparity. But much more importantly, Kerans' judgment dispelled myths about provocation and blameworthiness of the victim. More fundamentally, it explicitly recognized sexual assault as a crime of violence, one that could severely undermine the psychological health of a victim. As Kerans wrote:

> This harm includes not just the haunting fear of another attack, the painful struggle with the feeling that somehow the victim is to blame, and the sense of violation or outrage, but also a lingering sense of powerlessness.[144]

One observer praised his insights, stating "Never has the harm of sexual assault been expressed as eloquently by a court."[145] Kerans was the author of the judgment, but it had been circulated and discussed, and it was truly a decision of the Court.[146] It reflected a very different Court, one that had evolved under McGillivray's watch.

Alberta's Appeal Court and the Return of Constitutional Law

It's deja vu all over again.

– Yogi Berra

Chief Justice McGillivray's tenure saw the resurgence of constitutional law, a subject that had been relatively dormant for several decades in Alberta. It is not hard to find the reason why. The 1970s and early 1980s were marked by a struggle between the federal and provincial governments over the nature of federalism. That struggle often ended up in the courts in jurisdictional battles about division of powers.

The Court emerged as a strong defender of provincial rights. This was not regional chauvinism. In interpreting Canada's constitutional arrangements, the Court defended a long-standing historical tradition that favoured the safeguarding of provincial powers against their erosion by the federal government. Undoubtedly, this stance appealed to many of the Alberta judges. However, the division of opinions on the Court and on the SCC, too, which was known for its tendency to support centralist interpretations, demonstrated the complexity of the issues involved. The decisions undermined any simplistic assumptions about how the judges viewed politically charged issues.

The Court considered a number of appeals disputing who had the power to legislate, the federal or provincial governments. This is referred to as a dispute on "division of powers" under the Canadian constitution. Four appeals discussed below highlight some of the Court's constitutional deliberations. *R v Hauser*[147] and *Canadian Northern Transport v Attorney General (Canada)*[148] were two influential cases that settled the division of powers with regard to criminal justice. *R v Westerdorp*[149] explored the limits of provincial authority to regulate, through municipalities, public nuisances without infringing on the federal criminal law power. *Reference re Natural Gas Export Tax*,[150] a reference to the Court by the provincial government, was part of the fallout from the infamous National Energy Program. Going directly to the heart of the conflict between Alberta and Ottawa, it was a defining moment of the McGillivray court.

The *BNA Act* and the Division of Powers

The *British North America Act* divided the responsibilities of government between the federal government and the provinces, listing them in s. 91 and s. 92 respectively. The federal government received extra powers, such as the ability to review and disallow provincial legislation, or the ability to legislate under a blanket "peace, order, and good government" clause (also known as the POGG power), for the good of the nation. Most authorities believed that the federal government received responsibility over any area not specifically assigned to the provinces – the residual power – as well as any new legislative subject that didn't clearly fit into a provincial responsibility.[151] It was also accepted that when federal and provincial jurisdiction overlapped,

the central government took precedence, that is, it had "paramountcy," as it was usually termed.

Initially, political power in Canada was more centralized in the federal government. However, the provinces fought a rearguard action and were able to reverse this tendency. Several important decisions of the Privy Council, especially in a thirty-year period from the 1890s on, helped the provinces oppose federal encroachment and maintain their primacy in the areas of responsibility assigned to them under the *BNA Act*. In doing so, the Privy Council limited the application of extra federal powers that threatened to subsume provincial rights. As a result, Lord Haldane, the Lord Chancellor of England, and Lord Watson have been called the "evil step-fathers of Confederation" due to the perceived favouritism the Privy Council appeared to show the provinces.[152]

For several decades in the mid-twentieth century, a status quo was maintained and the two levels of government were generally able to avoid conflict, usually through negotiation and compromise.[153] Two things upset this balance. The first was the emergence of Quebec nationalism. The second was the modern welfare state.[154] Through the 1960s and early 1970s, the provinces expanded their civil services and became much more active and ambitious. Meanwhile, the federal Liberal governments of the same period pursued increasingly broad national policies, such as universal health care. Especially after Pierre Trudeau became Prime Minister, the federal government was often frustrated by what it perceived as provincial intransigence against projects considered in the national interest.

Meanwhile, the provinces felt that the federal government was pursuing aggressively centralist policies that eroded their powers. A good example was the wage and price controls the federal government imposed in 1974 to control runaway inflation. The SCC upheld the legislation under the POGG power, which had fallen into disuse. That made the provinces fearful that the POGG power could be resurrected as a federalist weapon against the provinces. That fear would soon be realized.

Alberta and Ottawa at Loggerheads over Natural Resources: The NEP

The energy crisis of the 1970s led to open constitutional warfare between Alberta and Ottawa. The provinces, which controlled Crown land and natural resources, received direct revenues from them. Through its powers, especially the power over trade and commerce, the federal government had some control over natural resources. For instance, it controlled the export of oil and gas. As oil prices rose dramatically after the Arab oil embargo in 1973, Ottawa stepped forward to limit exports and restrict the domestic price of oil. The federal government also wanted a share of the revenue from oil and gas, arguing that the benefits of these resources should be available to all Canadians, not just residents of provinces like Alberta.

The National Energy Program of 1981 was a unilateral federal policy intended to create oil self-sufficiency for Canada and divert revenue to federal coffers. A dismal failure, the NEP added to long-standing historical resentment in western Canada towards what was seen as federal policies favouring central Canada. The conflict over oil poisoned federal-provincial relations and turned Premier Peter Lougheed of Alberta into a resolute defender of provincial rights.

This was the context in which the Court re-entered the constitutional law arena. In the four appeals to be discussed, the Court emerged as a strong supporter of provincial rights while the SCC, by contrast, supported a centralist interpretation in three of the four. Both courts, however, were often divided, an indication not only of the ambiguity in Canada's constitutional arrangements, but also the degree to which two different versions of Canadian federalism competed – and continue to compete – in Canada.

ALBERTA ENERGY MINISTER DON GETTY, FEDERAL FINANCE MINISTER JOHN TURNER AND ALBERTA PROVINCIAL TREASURER GORDON MINIELY, ENERGY CONFERENCE, 1974. PAA J1482.

R v Hauser: Harradence Causes a Constitutional Furor

One of the first major constitutional appeals of the McGillivray court came out of a run-of-the-mill drug case. In 1977's *R v Hauser,* a prosecutor acting as agent of the Attorney General of Canada had charged Hauser with trafficking marijuana under the *Narcotic Control Act*.[155] Defence counsel Milt Harradence applied for an order of prohibition. He asked the court to quash the proceedings. His argument: the federal Attorney General had charged Hauser, not the Alberta Attorney General, and the federal one had done so without the consent of his Alberta counterpart. He argued that, without this permission, the federal AG had no authority to lay a charge, and that a 1969 *Narcotic Control Act* amendment implying the contrary was *ultra vires*, that is, outside the power of the federal government. After his application was dismissed, Harradence appealed and the Alberta AG appeared as an intervenor – on the side of Hauser and Harradence and against the federal government.

Hauser basically posed two questions. First, under the *BNA Act*, did the provinces have inherent jurisdiction over criminal prosecutions, or had the federal government, given its jurisdiction over criminal law, simply delegated this power to the provincial governments? Under the *BNA Act*, the federal government is responsible for criminal law and procedure, but the provinces are responsible for the administration of justice. The power of prosecution is not explicitly stated to be included in either area of responsibility. Until 1969, s. 2 of the *Criminal Code* stated, "'Attorney General' means the Attorney General or Solicitor General of a province in which proceeding to which this *Act* applies are taken." This indicated that the provincial AGs were to look after prosecutions, which historically had been the case. But it was not clear whether this was a delegation of criminal law power from the federal government via the *Code,* or if the provinces had original jurisdiction.

The second question was whether the *Narcotic Control Act* was criminal law or simply regulatory control over an area within federal jurisdiction. In 1969, the federal government had signalled that it intended to prosecute breaches of the *Narcotic Control Act* and the federal *Food and Drugs Act*[156] when it changed the definition of "Attorney General" in the *Criminal Code* to include the federal AG when dealing with violation of national laws except the *Code*.[157] This case raised the issue of just how far the federal criminal law power extended. Both the provincial and federal governments could enact legislation creating regulatory regimes with penalties for breaches of those schemes. Provincial highways and health and safety were accepted areas where both governments could enact laws. The question in *Hauser* was what it took for a law to be properly characterized as criminal law. Both the *Narcotic Control Act* and the *Food and Drug Act* contained provisions for substantial jail sentences for non-compliance.

Hauser was one of several appeals on this subject that ended up at SCC. When it was heard, nine out of ten provincial attorney generals had lined up on Alberta's side. The provinces considered this an attempt by the federal government to usurp what had historically been an accepted part of provincial jurisdiction. While Harradence's application challenging the indictment on a technical point was a clever defence move, it may be no coincidence that Harradence flirted with the western separatist movement in the 1970s.

McGillivray convened a panel with five judges: himself, McDermid, Lieberman, Haddad, and Morrow. The majority agreed with Harradence. McGillivray wrote for himself and Lieberman, with Morrow writing a concurring judgment. McDermid and Haddad dissented, but on narrow grounds, and otherwise agreed with many of the points of their brethren.

McGillivray thought the problem with the federal position was that, if it was correct, the federal government could simply amend away the province's right to prosecute, contrary to the long tradition and history around criminal prosecutions. As he explained:

> It is to be observed that if the attorney general of a province by a mere amendment to the *Criminal Code* can be excluded…from having anything to do with a prosecution for a violation of a statute of Canada where proceedings have been instituted by the Attorney General of Canada, it would follow that the attorney general of a province could also be excluded…from having anything to do with prosecutions of all criminal offences…[T]his would make hollow the powers given to the province of legislating for the administration of justice in the province.[158]

In addition, since the provinces historically had always undertaken prosecutions, it was reasonable to conclude that this was part of the administration of justice and not criminal procedure. Thus, McGillivray determined that it was the provinces that had the power to prosecute criminal cases. And in his view, that power was exclusively the provinces'. He rejected the suggestion that the federal government had concurrent jurisdiction to do so. He reasoned that this would mean that once a charge was brought by the federal AG, the province would then be excluded from prosecuting the case. And, again, in his view, this would violate the province's constitutional power over the administration of justice.

While McGillivray was willing to concede that the federal government had the right to enforce many of its statutes without referring that enforcement to provincial attorneys general, he considered the *Narcotic Control Act* to be criminal law rather than a regulatory statute with penalties. That brought prosecutions under the *Act* under provincial control as the level of government with the power over the "administration of justice."

Morrow agreed with the Chief Justice on these points, although he went at it somewhat differently. However, Morrow also touched on another line of argument that would become important later – whether the federal government could invoke the blanket authority under the "peace, order, and good government" power to allow it to do prosecutions even if it trespassed on provincial prerogatives. Morrow thought the POGG power did not apply since this was not a situation of grave national concern or crisis, which historically had been the criteria for invoking that power. As he noted:

> It may be that if a situation arose which was of sufficient national urgency the power to prosecute might be considered as being in the federal field under the "Peace, Order and Good Government" doctrine, but I can find no reason for such application in the present appeal.[159]

Morrow looked to history for the answer to the jurisdictional question. As he saw it, the fact that the colonies that became provinces had previously controlled prosecutions of crime in their jurisdiction was itself strong evidence that this prosecution power would have continued with the provinces as part of the administration of justice:

Sometimes I think it is important in cases like the present to reassess the original concept or philosophy of our constitution; to remember that, before the provinces could be persuaded to join into what has become Canada, they were jealous of certain powers and would not have joined unless and, of course, until assured that these powers would be preserved to them. One of these was of course the administration of justice, including criminal justice.[160]

McDermid's dissent sought to avoid constitutional entanglements. While agreeing that the *Narcotic Control Act* was criminal law, he thought that the offending *Criminal Code* amendment was nevertheless valid. In his view, the federal AG could also prosecute matters without affecting the power of the provincial attorneys general to do so. He pointed out that while the provincial government had power over criminal prosecutions, the federal government could step in, and had, if the province was not doing so for certain offences. This is how

BILL AND KAY MCGILLIVRAY AT OPENING OF ALBERTA LEGISLATURE, LASA 48-G-7.

it had worked for years with drug crimes, where the provinces had explicitly or tacitly left these prosecutions to the feds. Therefore, it was an appropriate way to interpret s. 2 in the *Code* without making it a constitutional brouhaha.

The further appeal to SCC focused on whether the *Narcotic Control Act* was criminal law. The Alberta judges had all agreed that it was obvious that the *Act* was in substance criminal law and did not elaborate much on that point. Justice Pigeon's short majority judgment reached the opposite conclusion. He determined that because the *Act* also regulated the prescription and sale of legal drugs, it was a regulatory statute. For good measure, Pigeon also held that since drugs were a new subject matter unknown at Confederation, by constitutional convention they were now a federal responsibility. Further, illegal drugs were of such a nature that the federal government could invoke the "peace, order and good government" power as it had done with liquor in federal prohibition statutes.

Pigeon dodged the issue that had been at the heart of the problem. Not everyone was convinced. Justice Dickson wrote a long, eloquent dissent that agreed with McGillivray and Morrow's reasoning. It has been suggested that the SCC in this period had a tendency to side with the federal government and its centralizing tendencies.[161] Pigeon's convoluted majority judgment – one authority has called it "tortured" – appeared primarily aimed towards that end and was perhaps one of the more blatant examples.[162] Indeed, nearly twenty-five years later, in *R v Malmo-Levine*, Pigeon's own court was critical of his approach.[163]

Canadian National Transportation Ltd v Canada (Attorney General): Hauser Finally Addressed

The SCC decision in *Hauser* avoided dealing with the real question: did the federal government have the ability to prosecute criminal offences without the consent of provincial attorneys general?[164] Another appeal from Alberta, *Canadian National Transportation Ltd v Canada (Attorney General)*, finally settled the issue. Prowse, writing for a panel that included Laycraft and Haddad, ruled that the federal *Combines Investigation Act* was criminal law and the federal Crown could not bring charges ...Chief Justice Bora Laskin, who had missed the *Hauser* appeal due to ill health, then settled the question at the SCC once and for all.

The Attorney General of Canada had charged the Canadian National Transportation company with conspiring with others to set prices for shipping in western Canada. The company applied to prohibit prosecution under the federal *Combines Investigation Act,* which was denied. On appeal, the company argued that, as in *Hauser*, the *Combines Investigation Act* was criminal law and the federal AG could not initiate a charge. The Crown, for its part, argued that although the *Act* had already been upheld as criminal law, it could also be supported under the "Trade and Commerce" head of federal powers.

Prowse, who wrote the judgment for the Court, reached the same conclusion it had in *Hauser*. Perhaps to avoid a repeat of the subsequent SCC decision, Prowse spent considerable time demolishing the argument that the trade and commerce power could also apply. In Prowse's view, the sections of the *Combines Investigation Act* dealing with the anti-competitive practices were dependent on the criminal law power. He concluded the aims of the *Act* in sum did not fit with the two main aspects of the trade and commerce power, namely, to regulate interprovincial and international trade and to regulate trade affecting the entire country.

Prowse disagreed with other court decisions that declared legislation competent under one head of power if most, but not all, of its provisions could be supported under that head. Parliament could pass legislation that depended

on multiple heads for validity, he argued, but this was not the same as an entire *Act* being justified under any one of these heads. While parts of the *Act* might be supportable as regulation of trade and commerce, other sections could not. Therefore, the whole *Act* was not supportable under the trade and commerce power alone.

Prowse also took aim at the argument, which had found favour with Pigeon in *Hauser*, that the sanctions in the *Combines Investigations Act* were simply part of an overall regulatory scheme and that the *Act* was not in substance criminal law. In his view, regulation meant controlling an ongoing activity, whereas the section of the *Combines Investigation Act* in question prohibited certain types of business activity. To Prowse, this smacked of the criminal law. He went further, concluding that if the practices under consideration were not criminal in conduct, but merely harmful commercial activities, then they should fall under provincial authority over property and civil rights and not under the federal trade and commerce power. So even if the federal government were correct that the *Act* was regulatory only and not criminal law, it would probably be *ultra vires*.

Prowse then disposed of the federal Crown's secondary argument that the POGG power could be invoked to support the *Act*. He could see no compelling grounds for this conclusion. The price-fixing under consideration was hardly a national emergency. It was not a new problem but a very old one. And although it occurred throughout the country, it did not follow that it was necessarily a problem requiring a national response. Satisfied that the impugned provision of the *Combines Investigation Act* was criminal law, Prowse followed the Court's reasoning in *Hauser* and held that the federal government could not initiate prosecutions independently.

Prowse's judgment forced the SCC to finally deal with this issue. Chief Justice Laskin's argument was simple. He pointed out that the section of the *BNA Act* giving provinces the power to administer the courts specifically included civil procedure. But it said nothing about criminal prosecution, while criminal procedure was assigned to the federal government. In his view, this implied that the prosecuting authority was included with criminal procedure, notwithstanding the fact the provinces also set up criminal courts. He dismissed the historical record of provincial supervision of prosecution as an arrangement of convenience and not proof of a constitutional right. In Laskin's view, the federal government had recognized that it was easiest and politically expedient to continue the practice of local prosecutions, and it was not evidence that this power belonged to the provinces.

Laskin was quite critical of the Court's decision in *Hauser*, professing himself distressed at the "heavy going that is exhibited in order to preserve provincial prosecutorial authority."[165] However, his decision in favour of the central government came as no surprise: it was generally accepted that his sympathies were federalist.[166] His decision did have the virtue of settling, in a clear fashion, a question that came up again and again.

At the time, Laskin's decision was criticized for creating a very significant potential problem for no good reason.[167] Even more recently, it has been attacked for providing a legal foundation that allows provincial governments to decline to prosecute federal laws they do not like – or laws they believe would cost too much to prosecute.[168] In classic Canadian fashion, however, no dire consequences have arisen – life has gone on much as before. Just as the two governments had managed to administer criminal justice for nearly a hundred years before this decision without much worry as to their respective jurisdictions, this has also been the case since – which may speak volumes about most Canadian constitutional "crises."

R v Westendorp: Paramountcy over Double Aspect

R v Westendorp was another "division of powers" appeal dealing with the scope of the federal criminal law power. Kerans, for the Court, determined that a Calgary city bylaw to regulate street hawking by prostitutes on city streets was authorized by provincial law and was not *ultra vires* the province as an infringement of the federal criminal law power. The bylaw made it illegal to use public streets and sidewalks for the purpose of prostitution. That included approaching another person for this purpose. As such, the bylaw targeted not only the prostitutes themselves but also their potential customers.

This seemingly minor appeal attracted major attention. At the SCC, four provincial attorneys general lined up as interveners to support the provincial right to allow municipalities to regulate prostitution in this way. Given Laskin's biting comments reversing Kerans, it appears that Kerans had struck a nerve in what had become a tussle, destined to be played out in the courts, over the extent of the federal government's criminal law powers and the right of the provinces and their delegatees, the municipal governments, to regulate public nuisances within their province.

The *Calgary Street By-Law*, authorized under the provincial *Municipal Government Act* and the *Highway Traffic Act*, controlled the use of streets and sidewalks. In 1981, Calgary amended it to prohibit a person being on a street for prostitution or to approach another person for the purchase or sale of sexual services. For breach of the bylaw, it imposed fines and jail in default of payment. Calgary contended that it had the authority to pass this bylaw under s. 152 of the *Municipal Government Act,* which allowed municipalities to control disorderly conduct, including public nuisances. In the city's view, because prostitutes and their customers annoyed and embarrassed members of the public and interfered with their free movement on city streets, they were a public nuisance.

The trial judge decided the bylaw was *ultra vires* because controlling prostitution was properly criminal law and within the exclusive jurisdiction of the federal government. Kerans, writing for Prowse and Harradence, saw it differently and also in a larger context.

He first addressed whether the city had the right under provincial legislation to regulate public nuisances. He concluded that it did. The *Municipal Government Act* authorized municipalities to pass bylaws to prevent disorderly conduct, and disorderly conduct included public nuisances. On the evidence before the Court, Kerans concluded that as a result of prostitutes plying their trade on Calgary streets, a public nuisance was created. He then turned to the question of whether the legislation was constitutionally valid. He concluded it was. In his view, the "double aspect" rule applied. Under this rule, both the province (through the municipality) and federal government could effectively legislate on the same subject matter. Here that matter was the elimination of the public nuisance of street hawking by prostitutes.

Kerans rejected the argument that this was a "colourable" attempt to invade the area of criminal law. The true character of the legislation was to deal with a public nuisance on public streets in Calgary and not to strike at the evil of prostitution. As Kerans explained:

> The by-law does not strike at prostitution as such; it does not seek to suppress the market for sexual favours; it seeks only to protect the citizens who use the streets from the irritation and embarrassment of being unwilling participants in that market.[169]

As he pointed out, legislation dealing with a public nuisance is not exclusively a matter for the criminal law. That the bylaw had the same legislative purpose as the prohibition against soliciting in the *Criminal Code* – to reduce or eliminate a perceived public nuisance – did not make the bylaw invalid. In other words, identity of legislative purpose was not fatal. While the effect of the bylaw might be to restrain the growth of prostitution,

the purpose of the bylaw was not to attack prostitution as such. It was to regulate conduct on city streets by prohibiting certain behaviour.

Kerans also concluded that while the bylaw overlapped with the soliciting provision under the *Criminal Code*, there was no collision between the two. Each level of government had chosen to regulate the public nuisance in different ways, but the municipal law was not repugnant to the federal one. It could coexist with the criminal law prohibiting soliciting. Therefore, there was no justification for finding the federal legislation paramount under the paramountcy rule. Under that rule, had there been a conflict between the two pieces of legislation, the federal law would be paramount. In the result, the legislation was not *ultra vires*.

Kerans' decision provoked a surprisingly strong reaction from Laskin on the SCC. In his view, it was beyond question that the bylaw was an attempt to control or punish prostitution because prostitution was the only anti-social behaviour targeted. If its real purpose was to control the streets, it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do. He summarily dismissed Kerans' conclusion that the bylaw was designed to deal with a public nuisance, stating that the bylaw's preamble made it clear that prostitutes were being targeted. But his reasoning begins and ends there. He never explained why Kerans erred in finding street prostitution to be a public nuisance.

FOURTH STREET SW IN CALGARY'S MISSION DISTRICT, 1977. GLENBOW ARCHIVES, NA-2864-16770.

As far as Laskin was concerned, the bylaw was obviously a colourable attempt to control prostitution and therefore trespassed on the criminal law power. He called Kerans' reasoning as to why this was not a trespass on the federal criminal power both baffling and doubly baffling and ended with this jab:

> What appears to me to emerge from Kerans J.A.'s consideration of the by-law is to establish a concurrency for legislative power, going beyond any double aspect principle and leaving it open to a province or to a municipality authorized by a province to usurp exclusive federal legislative power. If a province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets?[170]

The aggressiveness of Laskin's comments reveal his decidedly centralist view on the criminal law power. Little weight seems to have been given to provincial concerns that if unconstrained in any way, the criminal law power could eventually extinguish the provincial regulatory power. Nor did Laskin appear to give any credence to the legitimate concerns of many Canadian communities about the dangers and public nuisance caused by street prostitution.

Laskin would be very surprised at how the law has developed. Kerans' judgment demonstrated a great deal of foresight and understanding of the imperative need for municipalities to be able to control and regulate a wide variety of social problems on their city streets and in the wider community. In *Shell Canada Products Ltd v Vancouver (City)*[171] the SCC took a more generous view of the powers of municipalities, given the pressures they face in contemporary society. The earlier focus of the courts on sharp division of powers and the avoidance of any "trenching" on federal powers has largely been consigned to history, in favour of co-operative federalism. The doctrine of double aspect has gradually re-emerged as the proper basis for validating provincial regulatory legislation where similar federal legislation exists.[172]

The Alberta Court has even recently ruled, in *R v Keshane*,[173] that a municipal bylaw aimed directly at street fighting was not *ultra vires*. The Court found that, in pith and substance, its purpose and effect was to regulate the conduct of people in public places to promote the safe use of property for the benefit of all citizens. Like the bylaw in *Westendorp,* the focus of the legislation was not on the harm caused to victims of fighting or those involved in consensual fights, but rather on those indirectly affected by street fighting such as neighbours and people using streets and sidewalks. The legislation clearly had a criminal law aspect, but the Court concluded, just as Kerans had, that the double aspect doctrine applied to uphold its validity.

In 2013, the SCC denied leave on *Keshane*. Laskin's rhetorical dig at Kerans – "And, may it not…seek to punish assaults that take place on city streets" – now rings ironic. Times change and so does the law, but Kerans and the Court had articulated a sound constitutional argument whose time has come.

Reference re Proposed Federal Tax on Exported Natural Gas: Political Dynamite Wrapped in Constitutional Law

During the McGillivray era, the SCC did not always overrule the Court on major constitutional issues. In one of the most important cases, the high court supported the Court and the provincial position, and this time Laskin was in dissent. The full name of the Court's judgment was *Reference re Questions set out in O.C. 1079/80, Concerning Tax proposed by Parliament on Exported Natural Gas*. The cumbersome title obscured the political dynamite involved.

The legislation was related to the introduction of the federal National Energy Program in 1981. Under this program, the federal government introduced Bill C-57,

the *Petroleum and Gas Revenue Tax Act*.[174] It amended the *Excise Tax Act* by including a new section providing for a federal tax on the distribution of natural gas and its derivatives. It did not take long before the provincial government directed a reference to the Court asking it to rule on the legality of this legislation.

The actual issue in the reference was whether the proposed tax applied to natural gas that the province owned directly as opposed to gas produced by private companies on leased Crown land. The province owned several gas wells on Crown land in southern Alberta. It contracted to have the gas it produced and owned transported via pipeline to the US border. It then sold the gas to an American company for processing and consumption in Montana. Since s. 125 of the *BNA Act* stated that neither level of government could tax the property of the other, the question was whether the federal tax applied to gas owned by the province. In other words, how far did the province's protection under s. 125 against taxation by the federal government go?

McGillivray again appointed a larger panel to hear the reference consisting of himself, Lieberman, Laycraft, Kerans, and Stevenson. Laycraft recalled that the Court wanted to present a unified opinion. No one person was credited with it; the judgment was that of the Court. After hearing the appeal, and collectively hashing out what the judgment would say, each judge was assigned a section to write. The draft was then circulated to the judges not on the panel for their opinions. It truly was a decision of the whole court.

One of the first points settled was the true nature of the tax. If the tax were properly characterized as part of a regulatory regime, it could potentially be justified under the federal trade and commerce power.[175] However, the Court found ample evidence within the National Energy Program itself that the tax was intended purely to raise revenue, or, more accurately, to allow the federal government to get a direct share of the revenue from gas production. And this was *ultra vires* the federal government.

The federal government attempted to link the money raised in the tax to expenditures for the NEP, arguing that this made it part of a regulatory measure. The Court dismissed this idea, saying it confused "the raising of the money with the object of a separate legislative program. Simply because the money would be used in furthering an object under a given federal power did not, by that fact alone, justify characterizing the tax as a levy under that power."[176] As the Court smartly observed, on that theory, one could excuse a tax on provincial property in Saskatchewan by saying it was necessary to pay for a lighthouse on Sable Island. In any event, the Court found that there was no evidence that the money would even go directly to fund the NEP as opposed to simply being included in general revenue.

Any claim that the tax was part of a regulatory scheme was hollow for another reason. The National Energy Board, a federal agency, was already tasked with administering a rigorous regulatory regime that covered every aspect of moving, exporting, and selling gas. The province itself needed an export licence to sell its gas in Montana. Instead, the Court determined that nature of the tax was very clear:

> The object of the imposition, is unequivocally, and solely, to raise revenues. Moreover, the revenues raised by the levy are not dedicated only to the energy program. The measure is brought forward in budget papers. It is described as a tax and is embedded in a taxing statute. It is our firm view that this imposition must be characterized as a tax, and only a tax.[177]

With that issue out of the way, the Court then considered whether s. 125 covered the province's natural gas as property. This was a little trickier. The meat of the argument was whether the tax was a tax on property or a tax on a transaction. In other words, did the province lose its immunity from taxation by the federal government because it was conducting a commercial enterprise by exporting its gas? The feds argued that the gas was taxed when it was received by a distributor, such as a

pipeline operator, as distinct from the province as producer. Therefore, the tax was on this transaction, not on the gas itself. Under the *Act*, an exporter of gas was deemed to be a distributor.

The Court thought the *Act* unduly stretched the definition of distributor and distribution with a view to allowing the federal government to sidestep the limitations on its powers to tax the province under s. 125. The fiction of distribution was a device to obscure the true nature of the levy, which was to tax the gas – something made clear by perusing the National Energy Program. The Court concluded that to tax a transaction regarding the gas, in this case its distribution, was still a tax on the province's property and to that extent invalid.

The next argument for the feds was that the province lost its immunity once the gas was no longer passive property but used commercially. The Court concluded this argument too was without merit. As it pointed out, there was nothing in the *BNA Act* to restrict the property ownership rights for either level of government. Therefore, why couldn't the province exploit its property in the same way as any private owner? However, the Court's conclusion that the province's dealings with its natural gas were "just primary production" seemed a little strained, and this was seen as one weakness of the judgment.

PIERRE TRUDEAU AND PROVINCIAL PREMIERS MEET AT 24 SUSSEX DRIVE, 1980. CANADIAN PRESS.

The Court did not have much time for the two last federal arguments. One was "the spectre of the extreme case" which was "so frequently encountered in constitutional matters."[178] The feds contended that a province could theoretically take control of all business activity within its borders and thereby deny taxes to the federal government. The Court pointed out that the same argument could be used against the federal government, but, regardless, until such an extreme scenario actually came up, the Court would not assume beforehand "such a suggested misuse of power."

The last argument of the federal government was that the gas producing activity of the province was a new situation not contemplated under the *BNA Act* and was therefore not protected under s. 125. In rejecting this argument, the Court endorsed the "living tree" approach to constitutional interpretation, stating:

> In our view, the argument that government activities aside from those in vogue at Confederation remove the immunity is not in keeping with the tradition of progressive interpretation of the BNA Act.[179]

Ironically, Laskin, in dissent, accused the Court of doing the exact opposite, that is, being too formalist and not sufficiently considerate of the changing needs of the nation:

> This is a rare case in which…form would triumph over substance in a constitutional matter if the confirmation of the decision of the Alberta Court of Appeal was allowed to stand.[180]

However, the majority of the SCC agreed with the Court, even quoting Laskin's own textbook on constitutional law in support of their view that s. 125 gave Alberta immunity from taxation. The majority agreed with the Court that the federal scheme was dangerous since it opened the door to the federal government using semantics to allow tax raids on provincial property.

Laskin's dissenting opinion was aggressive and cutting in its language regarding the Court's reasoning and conclusions.[181] He attacked the Court for straying, in his view, into a review of the NEP's desirability as policy rather than confining itself to its constitutional validity. But then he also criticized the Court for taking too narrow and formal a stance by substituting "an attack on the mechanics of the tax…in place of addressing the substantive issues." His judgment reflected his strong federalist predispositions. He went so far as to conclude that s. 125 should not be interpreted as absolute protection for the provinces but subject to federal paramountcy. Relying on his own landmark decision in the *Anti-Inflation Act,* Laskin argued that the NEP was an example of where the "peace, order, and good government" power could be invoked to further the national interest at the expense of provincial rights.

As fate would have it, the outcome of *Reference re Proposed Federal Tax on Exported Natural Gas* did not have much impact on the fight over the NEP. It left open the question of whether a province could effectively take over an industry for the purpose of avoiding an intrusive federal tax. Ironically, by the time the SCC had issued its decision in 1982, Ottawa and Edmonton had already negotiated a compromise and the Trudeau government was reconsidering the NEP in the face of its manifest failure.[182] Most telling, however, is the fact that in the new *Constitution Act, 1981*, s. 92 of the *BNA Act* was amended to strengthen provincial control over natural resources and their disposition.[183]

CONCLUSION

The Alberta Court strongly defended provincial rights in all these constitutional decisions. In the contest of the times, it is tempting to see this as a reflection of the desire, often strong in Alberta, to "stick it to Ottawa." But the Court's division of powers decisions were consistent with a long-standing Canadian tradition of defending the provinces from federal encroachment in their areas of responsibility.[184] This tradition can be traced

back to Privy Council decisions in the late nineteenth and early twentieth centuries that upheld provincial rights in the face of SCC decisions, which, even then, tended to favour the federal government.

A strong judicial defence of provincial prerogatives was certainly not necessarily a product of anti-Ottawa bias. The Alberta decisions discussed here showed that the Court did not have an unyielding position on provincial rights. Sometimes the Court was divided, as in *Hauser*. The SCC returned the favour. Even if it displayed an overall tendency to support the central government, it too was often divided and sometimes upheld the provincial position. It is clear that Canada's constitutional arrangements were ambiguous enough that there was generous room for differences of interpretation and opinion at every court level.

The Court's constitutional decisions also demonstrated how much it had changed during the decade of McGillivray's stewardship. In *Hauser*, the Court's judgment was marked with dissents and substantial concurring reasons. It was also very traditional in style, if sophisticated in content. The *Export Gas Reference* was a sleek product of the whole court which convinced all but one justice at the high court. The *Reference* showed

DISTRICT COURT OF ALBERTA JUDGES, 1979. MARY HETHERINGTON, FRONT FAR LEFT, ROGER KERANS, ELIZABETH MCFADYEN, FRONT RIGHT; ROGER BELZIL, JOHN BRACCO, 2ND ROW, 2ND LEFT AND CENTRE; BILL STEVENSON, STANDING, 3RD LEFT. LASA 79-G-14.

the Court using the purposive approach to analyze statutes and referring extensively to the NEP and other policy documents to find the true intent of the tax legislation. It demonstrated a new level of sophistication on the Court. If Alberta's appeal court was still regarded as conservative, this meant something quite different than it had ten years before.

Over his years in office, McGillivray had provided effective leadership, fostering an atmosphere of collegiality, collaboration, and camaraderie among his brethren where new ideas were discussed and adopted. Under his watch, the appellate judges made salutary changes to their way of doing business. McGillivray recognized that the Court had to take steps to remain effective, and, while willing to be innovative, he balanced this with respect for tradition. McGillivray also realized the vital importance of judicial independence, keeping a watchful eye on encroaching government bureaucracy.

McGillivray was not a legal philosopher. At heart, he was a traditionalist, but one with an open mind. Like his colleagues, he had an appreciation of the Court's role in developing and directing the law. Under McGillivray, the Court also showed more willingness to step outside black letter law. Although the Court's tough on crime stance looked conservative, it was actually an example of the judges taking the law in hand and moulding it with a socially desirable goal, a more transparent and fairer criminal justice system.

McGillivray died suddenly at the end of 1984, only sixty-six years old. He left the legacy of a strong, well-organized, collegial court that transitioned almost seamlessly to a new chief justice. McGillivray's court also considered the first appeals stemming from the *Charter*. As the next chapter will discuss, *Charter* cases proliferated rapidly, becoming the hot ticket in Canadian jurisprudence in the 1980s. It was left to James Herbert Laycraft to lead the Alberta appellate court into the new frontier and build on the forward-looking Court that McGillivray's leadership had done so much to establish.

Endnotes

* Quoted in Connie Robertson, ed., *The Wordsworth Dictionary of Quotations* (Hertfordshire: Wordsworth Editions, 1998), 404.

1 Kerans interview, Nov. 24, 2008.

2 Lord Chesterfield, *Letters* (1749). Quoted in John Gross, ed., *The Oxford Book of Aphorisms* (Oxford: Oxford University Press, 1987), 130.

3 LASA, fond 5, series 3, subseries 1, Executive Committee minutes, Oct. 1973.

4 Ed Ratushny, "Judicial Appointments: the Lang Legacy," *Advocates' Quarterly* 1, no. 2 (1977–78): 7. Ratushny joined the Ontario bar in 1972. He has gone on to a very distinguished dual career in government and academia.

5 Ibid., 3.

6 A trial judge appointed in 1959 under Diefenbaker, Milvain was a very strong candidate on the bench for the job.

7 Ratushny, "Judicial Appointments," 14–15, 17.

8 Ibid., 14. See Louis A. Knafla and Rick Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta, 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997), for data on age and appointments in Alberta. Some judges on the earlier courts had been appointed to trial courts at younger ages, but this was true of the 1970s as well, and the average ages for the initial appointment are 55.4 and 47.5 respectively.

9 Knafla and Klumpenhouwer, *Lords of the Western Bench*. Two of the five judges appointed between 1970 and 1974 had trial experience, contrasting with seven of the eight appointments from 1975 to 1981.

10 Kerans interview, Nov. 24, 2008, Stevenson interview, Oct. 8, 2008.

11 Kerans interview, Oct. 26, 2008. Roger Kerans was one of Decore's choices and eventually the associate chief judge. He remembered that Decore, a very active Liberal, had a direct line to the Minister of Justice and usually got whoever he wanted, if the candidate accepted the appointment.

12 Kerans interview, Oct. 26, 2008.

13 LASA, fond 56 series 3, Calgary Bar and Bench Oral History, Les Duncan interview, Sept. 21, 2006.

14 Ibid.

15 LASA, Clipping File, Sinclair William Robert, Nov. 16, 1995 Justice Ken Moore Speech, 4–5.

16 "Rarity: third generation Albertan for the new Queen's Bench Court," *St. John's Calgary Report,* March 16, 1979.

17 Laycraft interview, Aug. 18, 2008.

18 LASA, Clipping File, Moir, Arnold, *Calgary Herald*, "Justice remembered for his compassion," n.d.

19 M. Naeem Rauf, "Chief Justice Sinclair Retires," unascribed, LASA clipping file, Sinclair, William Robert.

20 LASA, fond 4, series 07, Haddad interview, June 2, 1999.

21 Ibid.

22 Kerans interview, Oct. 26, 2008. Kerans thought that Haddad, while perfectly able, was a little shy about writing and had to be encouraged.

23 William Hurlburt and William A. Stevenson, "William George Morrow," *Alberta Law Review* 29, no. 2 (1981): 137.

24 Ibid.

25 Laycraft interview, Aug. 18, 2008.

26 "Frontier 'judge' moving south," *Calgary Herald*, April 15, 1976.

27 "The Lieberman Legacy," *Edmonton Journal*, Sept. 16, 2007.

28 Ibid.

29 Lieberman interview, Sept. 17, 2009.

30 "The end of the McGillivray era," *Alberta Report,* Dec. 31, 1984.

31 LASA, fond 56, series 3, Duncan interview, Sept. 26, 2006.

32 "The end of the McGillivray era," *Alberta Report,* Dec. 31, 1984.

33 Stevenson interview, Oct. 8, 2008.

34 Kerans interview, Oct. 26, 2008, and Stevenson interview, Oct. 8, 2008: both state that judges such as Prowse and Clement, who were on the bench with Smith, told them that they had little collegiality, with judges tending to work alone.

35 Stevenson interview, Oct. 8, 2008.

36 "The Lieberman Legacy," *Edmonton Journal*, Sept. 16, 2007.

37 Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 295, speaks of the importance of collegiality in this regard, in the context of increasing court size.

38 Irving interview, March 15, 2010.

39 Canadian Centre for Justice Statistics, Catalogue no. 85-205, vol. 8, nos. 2 and 3.

40 Russell, *Judiciary in Canada,* 294.

41 *Canadian Magazine*, July 19, 1975.

42 LASA, fond 56, series 3, Calgary Bench and Bar Oral History Project, Justice A.M. Harradence interview, Oct. 13, 2006, 7.

43 Stevenson interview, Oct. 6, 2008. See also "Judge's ranks contain province's top legal minds," *Calgary Herald,* Sept. 10, 1983.

44 Laycraft interview, Aug. 25, 2008.

45 "A life dedicated to law," *Calgary Herald Sunday Magazine,* Feb. 2, 1986.

46 Ibid.

47 See, for instance, "Must be willing to relocate," *Alberta Report*, July 30, 1990.

48 LASA, fond 56, series 3, Kerans interview, Nov. 24, 1995.

49 Kerans interview, Oct. 26, 2008.

50 LASA, fond 4, series 7, William A. Stevenson interview, July 13, 1998, 1.

51 Ibid., 18.

52 For many years, Stevenson, with the assistance of J.E. Côté, produced the *Alberta Civil Procedure Handbook*.

53 "Edmonton judge finds place at the very top of his profession," *Edmonton Journal*, Sept. 18, 1990.

54 "The stormy life and times of Judge McClung," *Globe and Mail*, March 6, 1999.

55 "Judges' ranks contain province's top legal minds," *Calgary Herald,* Sept. 10, 1983. This is confirmed with his record in sentencing appeals.

56 Knafla and Klumpenhouwer, *Lords of the Western Bench,* 116.

57 LASA, Belzil, Roger Hector clipping file, unattributed biography.

58 Court of Appeal Administrative Records, box 2181, file A-8 Annual Meeting (*Judicature Act*) Ct. of App.

59 Ibid., Minutes, Nov. 9, 1979.

60 Linden & Hefferon, "The Role of the Chief Justice," unpublished paper presented to the Annual Meeting of the Learned Societies, May 31, 1978, 23.

61 LASA, clipping file, Moir, Arnold. An unattributed biography of Moir prepared by LASA staff credits him with revising list procedures.

62 LASA, Law Society fond, vol. 376, file 3145, memo Jan. 14, 1977.

63 LASA, fond 79, series 1, box 2/11, file 236, Court of Appeal, memo, Kerans to McGillivray, Sept. 13, 1982; memo, Kerans to Court, Dec. 16, 1981; letter, Duncan to McGillivray, Dec. 9, 1980.

64 Court of Appeal Administrative Records, box 2181, file A-8 Annual Meetings (*Judicature Act*) Ct. of App.; LASA, fond 79, series 2, box 1, file 102, official correspondence, 1984–85; box 35, file 102, official correspondence, 1986. The Court began experimenting with fixed dates in 1986 and adopted them in 1988.

65 LASA, fond 79, series 1, box 2/11, file 233, Council of the Court of Appeal, memo, Aug. 1, 1984, McGillivray to court.

66 Court of Appeal Administrative Records, box 2181, file A-8 Annual Meetings (*Judicature Act*) Ct. of App. A November 1981 memo mentions bi-monthly meetings. This was probably an innovation. There is no record of Smith's court holding such regular meetings.

67 Ibid.

68 LASA fond 79, series 1, box 2/11, file 233, Minutes of meeting, Nov. 4, 1981. The conferences were intended to help counsel decide on contents of appeal books, come to common agreement on facts, issues, etc. to make complex appeals run faster.

69 Ibid., box 2/11, file 233, Council of the Court of Appeal, 1980–84, memo, McGillivray to provincial court.

70 Ibid., box 2/11, file 233, Council of the Court of Appeal, 1980–84, memo, May 1, 1981; Minutes, Jan. 15, 1982 meeting.

71 Ibid., box 1, file 102, official correspondence, 1983, memo, Kerans to Court, Dec. 28, 1983.

72 Laycraft interview, Aug. 25, 2008, Aug. 17, 2009.

73 Laycraft interview, Aug. 17, 2009.

74 There is some difference of opinion about McGillivray's attitude towards consensus. Herb Laycraft believed he typically did not interfere with a judge's independence, while Roger Kerans remembered that he liked consensus, to the extent of canvassing panel members ahead of hearings. Reported judgments show a trend overall towards less dissenting on the Court.

75 The judges interviewed about this period, including Laycraft, Kerans, Stevenson, and Lieberman, tend to have somewhat hazy recollections of the circumstances around various Court initiatives, not surprising given the passage of time.

76 Court of Appeal Administrative Records, box 2181, file A-8 Annual Meeting (*Judicature Act*) Ct. of App.

77 PAA, 90.110, box 7, file 6910-8, vol. 2.

78 Ibid.

79 Ibid.

80 Jules Deschênes, *Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts* (Ottawa, Canadian Judicial Council, 1981).

81 LASA, fond 79, series 1, box 2/11, file 236, Joint Committee on Judicial Independence, Report.

82 Court of Appeal Administrative Records, box 2181, file A-6 Arbitrations, letter, April 20, 1983.

83 *Court of Appeal Act*, SA 1978, c. 50, s. 2(1).

84 Laycraft interview, Aug. 18, 2008.

85 The House of Lords was the highest appeal court for the United Kingdom. Interestingly, the US Supreme Court had long recognized it could overturn its own previous decisions, reflecting the fact that the US had never adopted a rigid adherence to *stare decisis*.

86 Philip Girard, *Bora Laskin: Bringing the Law to Life* (Toronto: Osgoode Society and University of Toronto Press, 2005), 7.

87 Girard, *Bora Laskin,* 367. See also James G. Snell and Frederick Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985), 214, 226–27.

88 Snell and Vaughn, *The Supreme Court*, 214, 226.

89 Prior to 1975, any appeal concerning $10,000 could be taken by right. *Criminal Code* provisions had kept the number of criminal appeals at a more manageable number, as there was only an appeal if there was a dissent on the provincial appeal court.

90 Girard, *Bora Laskin,* 366.

91 Laycraft interview, Aug. 18, 2008.

92 Kerans interview, Oct. 26, 2008.

93 Jan Alexander Smith and Sherrilyn J. Kelly, "William G. Morrow: A Bench with a View," *Alberta Law Review* 28, no. 4 (1990): 809.

94 Morris C. Schumiatcher, "William A. McGillivray (1918–1984)" *Alberta Law Review* 23, no. 2 (1985): 241.

95 LASA, Kerans fonds, box 7, 1988 Day files, letter to Stratton, J.A., Jan. 19, 1988. Kerans says "my mind was forever poisoned" by the book, and obviously it was a source for his judicial philosophy. The "grand style" of Llewellyn was the more activist, law-making tradition of the common law before the formalism and legal positivism of the late nineteenth and early twentieth centuries took hold. In the passage that Kerans quotes in the letter, by example, Llewellyn speaks of precedent as welcome and persuasive, but tested against the reputation of the writer, principles of law and policy, and the consequences in the application.

96 This decision is reviewed extensively in chapter 8.

97 *R v Stanger*, [1983] 5 WWR 331. McClung argued the abstract provisions of the *Charter* were insufficient to override the will of Parliament.

98 "Judges' ranks contain province's top legal minds," *Calgary Herald,* Sept. 10, 1983.

99 "Must be willing to relocate," *Alberta Report*, July 30, 1990; *Edmonton Journal*, Sept. 18, 1990; "Strength up the Middle," *Alberta Report*, Oct. 1, 1990.

100 Kerans interview, Oct. 26, 2008.

101 *Willier v Crimes Compensation Board* (1977), 2 Alta LR (2d) 25.

102 *Round v McGonigle*, 1981 CarswellAlta 557.

103 Ibid., at para. 19.

104 *Strang v Cheney*, [1981] 5 WWR 86, at para. 1.

105 Kerans interview, Nov. 24, 2008.

106 Court of Appeal Administrative Records, box 2193, Meetings, Court of Appeal, Minutes, June 14, 1985.

107 *Hlushak v Fort McMurray*, 1982 CarswellAlta 613, at para. 19.

108 *Baker v Lintott*, [1982] 4 WWR 766.

109 Reported judgments are less helpful in analyzing the output of the McGillivray court. The practice by the reports of publishing memoranda of judgment presents a skewed picture, especially in the early 1980s, when many very short sentencing appeals were reported, as these were being used as sentencing guidelines. The Court also presented some decisions *per curiam*, so no single judge is credited. And as always, great caution must be used in drawing inferences about a judge's work habits from the reports.

110 *Earth Sciences Inc. v Calgary* (1978), 5 Alta LR (2d) 124.

111 *Calgary Herald*, Sept. 10, 1983. Divorce lawyer Hugh Landerkin said in the article that "in family law they're willing to reach out and solve problems judicially."

112 *R v R*, [1983] 5 WWR 385.

113 *Calgary Herald*, Sept. 10, 1983.

114 *R v R*, [1983] 5 WWR 385, at para. 56.

115 Canadian Centre for Justice Statistics, Catalogue no. 85-205, vol. 8, nos. 2 and 3.

116 *Calgary Herald,* Sept. 10, 1983.

117 An example of the impatience is *R v Stauffer*, (1981) 22 CR (3d) 336, where the Court dismissed an appeal where the accused claimed that a certificate of analysis in a drug case had to be in French as well as English.

118 *R v Cardinal*, (1983) 48 AR 319 at para. 1.

119 See as an example *R v Morasse*, [1983] AJ No. 272, which involved a Brinks armoured car robbery, where the panel maintained the very harsh sentences given at trial.

120 *R v Lefebvre*, (1982) 41 AR 26, at para. 2.

121 *R v Maze* (1982), 39 AR 444, at para. 8.

122 *R v Hall* (1981), 16 Alta LR (2d) 289, at para. 43

123 *R v Piper* (1982), 39 AR 442, at para. 4.

124 *R v Crawford*, 1982 CarswellAlta 651, at para. 4.

125 *R v Spitery* (1982), 40 AR 353, at para. 1.

126 *R v Raber* (1983), 57 AR 360, at para. 3.

127 *R v Johnas* (1983), 41 AR 183.

128 See *R v Johnas* and Alan Manson's annotation, and Tim Quigley, "Has the Role of Judges in Sentencing Changed: Or Should It?" *Canadian Criminal Law Review* 5 (2000): 317–88.

129 Court of Appeal Administrative Records, box 2193, file M-1, Meetings, Court of Appeal, Minutes, June 14, 1985.

130 Quigley, "Role of Judges," 321.

131 *R v Stone*, [1999] 2 SCR 290.

132 *R. v. Arcand* (2011), 499 AR 1.

133 *R v Brown* (1983), 26 Alta LR (2d) 328.

134 Ibid., at para. 1.

135 See, for instance, "No excuse for Rape" and "Appeal Court lags behind mores," *Calgary Herald,* March 21, 1983, for two examples. McGillivray, it should be noted, also had some defenders in the press and the public.

136 Anne Runyan, president of Every Woman's Place, a drop-in and referral centre, as quoted in Peter Cowan, "Reduced rape sentence spurs anger," *Ottawa Citizen, 16 March 16*, 1983, 2.

137 Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: Osgoode Society, 2008), 96–99.

138 Christine Boyle, "Section 142 of the *Criminal Code*: A Trojan Horse?" *Criminal Law Quarterly* 23, no. 2 (1980–81): 255–56; Mary A. Wagner, "Canadian Rape Shield Statutes," *Hastings International and Comparative Law Review* 16 (1993): 639.

139 *R v Konkin*, [1981] 6 WWR 632; *R v Moulton*, [1980] 1 WWR 711.

140 *R v Konkin*, [1981] 6 WWR 632, at para. 16, where McGillivray wrote: "It may be that at the turn of the century if a woman indulged in extramarital sex this would reflect on her credit generally. Whether this is realistic today I have some doubt. I find it difficult to accept that because a woman has extramarital sexual experiences she is less likely to be believable than a man in a similar position."

141 See the discussion of *R v Sandercock*, [1986] 1 WWR 291, below, where Kerans articulates a specific and limited version of this idea as part of judgment widely praised for its insight and sensitivity about sexual assault. However, as a purely personal opinion, the author finds this a strange idea.

142 M. Anne Stalker, "R v Sandercock" Case Comment (1986), 40 Alta LR (2d) 276–77. Some judges were apparently taking the new provisions to mean that rape had been

replaced with an offence that carried a lesser sentence.

143 Kerans interview, Nov. 24, 2008. Kerans said that although he and Moir had concurred with the disposition of the appeal, McGillivray's remarks surprised them both. In retrospect, he felt that he should have said something in court at the time.

144 *R v Sandercock*, [1986] 1 WWR 291, at para. 16.

145 Stalker, "R v Sandercock," 277.

146 LASA, fond 79, series 2, box 9, file 233, Meeting of Court of Appeal, Minutes, June 14, 1985.

147 *R v Hauser*, [1977] 6 WWR 501.

148 *Canadian National Transportation Ltd v Canada (Attorney General)*, [1982] 2 WWR 673.

149 *R v Westendorp*, [1982] 2 WWR 728.

150 *Reference re Questions set out in O.C. 1079/80*, [1981] 3 WWR 408.

151 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009), 448–49, points out that by some interpretations the provinces have their own general areas of power that can include residual or new subjects, such as matters "of a local and private nature" and matters involving property and civil rights.

152 Peter W. Hogg and Wade K. Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism," *University of British Columbia Law Review* 38, no. 2 (2005): 342.

153 Douglas Owram, "The Perfect Storm: The National Energy Program and the Failure-Provincial Relations," in *Forging Alberta's Constitutional Framework*, ed. Richard Connors and John M. Law (Edmonton: University of Alberta Press, 2007), 393.

154 Ibid., 394. For a summary of federal-provincial constitutional negotiation, see Michael B. Stein, "Canadian Constitutional Reform, 1927–1982" *Publius: The Journal of Federalism* 14, no. 1 (Winter 1984): 121–40.

155 *Narcotic Control Act*, RSC 1970, c. N-1 .

156 *Food and Drugs Act*, RSC 1970, c. F-27.

157 Mark Carter, "Recognizing Original (Non-Delegated) Provincial Jurisdiction to Prosecute Criminal Offences," *Ottawa Law Review* 38, no. 2 (2006–2007): 175–76, 184.

158 *R v Hauser*, [1977] 6 WWR 501, at para. 24.

159 Ibid., at para. 200.

160 Ibid., at para. 199.

161 Hogg and Wright, "Canadian Federalism, the Privy Council and the Supreme Court," 347–49.

162 Hogg, *Constitutional Law of Canada*, 17–18, calls Pigeon's reasoning "tortured."

163 *R v Malmo-Levine*, [2004] 4 WWR 407. This pleased Milt Harradence, who never thought much of Pigeon's arguments.

164 It should be pointed out that Spence, in a concurring decision in *Hauser*, did face the issue head on, but his reasons seemed to have been ignored until Laskin wrote the decision in *Canadian National*.

165 *Canadian National Transportation v Canada (Attorney General)*, [1984] 1 WWR 193, at para. 48.

166 Snell and Vaughn, *The Supreme Court,* 45; Major interview, Feb. 9, 2009. Justice Jack Major, late of the SCC, suggested that Laskin was probably named Chief Justice in the hope he would favour the federal government in constitutional cases.

167 See, for instance, John D. Whyte, "The Administration of Criminal Justice and the Provinces" (1984), 38 CR (3d) 184, esp. at 192.

168 Carter, "Recognizing Original (Non-Delegated) Provincial Jurisdiction," 167–68, 188.

169 *R v Westendorp*, [1982] 2 WWR 728, at para. 42.

170 *R v Westendorp*, [1983] 2 WWR 385, at para. 22.

171 *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 244–45.

172 This has been essentially due to the ground-breaking environmental law decision of L'Heureux-Dubé J in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 SCR 241.

173 [2013] 1 WWR 1, leave denied 2013 CarswellAlta 214 (SCC No. 35227; Fish, Rothstein and Moldaver JJ).

174 *Petroleum and Gas Revenue Tax Act,* SC 1980–83, c. 68, s. 78.

175 *Attorney General of British Columbia v Attorney General of Canada* (1923), 64 SCR 377, also known as the *Johnny Walker* case, dealt with the question. The BC government had imported whisky for its new government-owned liquor stores and argued that as the whisky was provincial property, it shouldn't pay customs duties. The Privy Council upheld the SCC decision that excise taxes were also supported by the federal trade and commerce power as well as its power to levy taxes, and as trade and commerce law, the duties were also regulatory in nature and could be applied to the whisky notwithstanding s. 125.

176 *Reference re Questions set out in O.C. 1079/80*, [1981] 3 WWR 408, at para. 18.

177 Ibid., at para. 17.

178 Ibid., at para. 53.

179 Ibid., at para. 61.

180 *Reference re Questions set out in O.C. 1079/80*, [1982] 5 WWR 577, at para. 1.

181 Laskin was also increasingly suffering from ill health and reportedly had become very difficult.

182 Peter Hogg and Mark Heerema, "When the West Was Won: A Brief History of Alberta's Natural Resources," in *Just Works: Lawyers in Alberta, 1907–2007*, ed. Michael Payne et al. (Toronto: Irwin Law, 2007), 143.

183 Ibid., 143.

184 Hogg, *Constitutional Law,* 125–29, discusses the nature of Canadian federalism and supports this statement.

CHAPTER 8

THE *CHARTER* COURT, 1982–1991

Talent develops in quiet places, character in the full current of human life.[1]

James Herbert Laycraft became the eighth Chief Justice of Alberta on February 20, 1985. Since he was widely admired as a jurist, there was little need to look outside the Court for a new chief. Laycraft inherited a collegial, productive, and sometimes innovative Court and added a new dimension to its leadership. In particular, he had a well-developed appreciation for the law-making role of a modern appellate court. His ideal was a court that settled the law in a clear, concise, and consistent fashion through orderly and conscious development. This approach fit well in an era in which the judicial role in the evolution of the law took on renewed emphasis.

Nowhere was this more evident than with the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. As an entrenched part of Canada's constitution, it gave to Canadian judges new and novel responsibilities demanding great care and attention. It also had another consequence: unprecedented public attention to decisions of the courts. After the *Charter's* arrival, judges on all courts, but especially the appellate courts, were often called on to strike off into uncharted territory.

The Alberta judges worked hard to give life to the *Charter*, although not without reservations. In landmark judgments such as *Hunter v Southam, R v Big M Drug Mart*, *Black v Law Society of Alberta*, and *R v Keegstra*, – as well as many lesser known but highly significant cases, the Court started on the path of a deferential but purposive, and even generous, interpretation of the *Charter*.[2] Unlike the *Bill of Rights*, which was reduced to the status of an interpretive aid to statutes, regulations, or legal policies, the *Charter* was accepted by the Court as the last word on the reach of any law. This included an expansive approach to guaranteed rights and freedoms, especially traditional civil liberties, along with a rigorous analysis of government attempts to limit them. At the same time, the Court was cautious, deferring to the legislature as much as possible and avoiding the overt judicial law-making that critics were soon to call "judicial activism."

PIERRE TRUDEAU IN PARLIAMENT AFTER VOTE FOR NEW CONSTITUTION ACT, 1981. CANADIAN PRESS/ROBERT FLEMING.

PORTRAIT OF JAMES HERBERT LAYCRAFT. DOROTHY OXBOROUGH, COURT OF APPEAL COLLECTION.

THE LAYCRAFT COURT

Bill McGillivray's sudden death at the end of 1984 was a shock. Many judges were on Christmas vacations. Herb Laycraft, who was on the West Coast, received a call from Sam Lieberman with the news and immediately returned to Alberta. As senior judge, Lieberman became the acting chief justice until February 1985. At that time, the federal government announced Laycraft's appointment as chief justice. Given his many talents, it was unfortunate indeed that Laycraft's tenure was destined to last only seven years.

Laycraft was a logical choice as the new chief justice. Appointing him, however, posed a problem. Laycraft was taken aback when the Minister of Justice attached a condition: he would have to move to Edmonton. Since O'Connor's tenure, the position of chief justice had alternated between Calgary and Edmonton, and it was Edmonton's turn. Unwilling to uproot his family and not seeing the need to move, since he already travelled back and forth regularly between Calgary and Edmonton as did all the other judges of the Court, Laycraft nearly refused.

In the end, Laycraft decided it was his duty to accept. A pleasant surprise awaited him. As he recounted: "I received a call from the minister. He asked if I had listed my house for sale yet. I said no, and he replied, 'Good, don't bother. Your friends in Edmonton have rallied to your cause.'"[3] Lieberman had organized a protest by the Edmonton members of the Court, and the minister had also received letters from the executive of the Edmonton Bar Association and the Edmonton benchers of the Law Society requesting that Laycraft be allowed to remain in Calgary.[4]

The New Chief Justice

The new chief justice obviously had the loyalty of the Court, even though he was quite different from the personable McGillivray. Laycraft bore much more of a resemblance to the illustrious Horace Harvey. Laycraft was reserved, not given to small talk, and he presented a formidable façade. He had a reputation as a tough counsel, and in common with many an appellate judge, he did not suffer fools gladly. Like Harvey, who had spent his time with his books and in his garden, Laycraft was somewhat solitary. Instead of the constant social whirl that had surrounded McGillivray, Laycraft preferred to spend his limited free time at the family cabin, reading, operating his ham radio, or hiking and cross-country skiing with his wife, Helen.[5]

Laycraft was also modest, even a little self-effacing, but he had robust confidence in his abilities – an appealing blend. Although not easy to persuade, he was reasonable and willing to consider other viewpoints. And as with his judicial ancestor Harvey, Laycraft had a subtle, dry sense of humour. He wasn't above teasing his colleagues. In a memo about a forthcoming annual court meeting, Laycraft wrote, "Harradence, J.A. greeted with enthusiasm the thought of greeting the new day at 8:30 a.m."[6] Milt Harradence was known as a late riser.

Laycraft was widely considered one of the best legal minds of his generation in Alberta. He combined strong analytical abilities and a clear, concise writing style with a nuanced appreciation of the balance in judicial law-making between continuity and change. Laycraft also recognized the Court's responsibility to settle and develop the law, and, as much as possible in the hurly-burly of an intermediate appellate court, he wanted his court to strive for consistency and clarity. One observer wrote that Laycraft must have dominated the Court, since there were so few dissents.[7] But this might also have been attributable to the homogeneity of the Court. Laycraft himself attributed it to internal Court policy emphasizing collaboration.[8] Some colleagues recalled that Laycraft's views were usually very persuasive, while others felt that he was uncomfortable dissenting.

One of the few criticisms of Laycraft's leadership from his colleagues was that he sometimes wasn't forceful enough. He had a great deal of respect for the independence of individual judges and was mindful of the

limits of his authority. He remembered that Stevenson once told him he was "ruling the court with benign neglect" and occasionally prodded Laycraft to be tougher with judges not keeping up with their writing duties. Laycraft preferred to lead by example. Some judges also thought that Laycraft could have been more aggressive with the provincial government when the Court needed resources, a deference that was explained by his sense of duty.

Despite Laycraft's different style from that of McGillivray (according to Roger Kerans, "Bill loved meetings, Herb hated them"), the collegiality and camaraderie of the Court continued. Laycraft provided strong leadership without trying to micromanage his colleagues. While he had the respect of the Court, he, in turn, emphasized consensus in decisions affecting Court operations. Walking the line between giving direction to the Court and respecting the independence of his colleagues was not an easy task. Laycraft summed up the challenges of the chief justice's job very aptly: "Sometimes you have to herd cats."[9]

Chief Justice Catherine Fraser, who served with Laycraft and was his successor, summarized his contributions as chief justice in these words:

> Chief Justice Laycraft's tenure as Chief was characterized by his profound understanding of the litigation process, the spirit of the law, and the need for the justice system to be responsive to community concerns. His imagination, vision and wisdom are evident in the judgments he delivered and the policies he implemented. His legacy can also be seen in other values emblematic of his leadership: service to the community; self-sacrifice; hard work; commitment to principle; and dedication…He has been, and always will be, regarded as one of Alberta's finest Chief Justices.[10]

While there was continuity in the Court between chief justices, retirements, deaths, and expansion resulted in eight new judges over the course of Laycraft's short tenure. Between 1985 and 1991, Justices Irving, Hetherington, Foisy, Stratton, Côté, Bracco, Fraser, and Major joined the Court, replacing McDermid, Haddad, Prowse, Moir, and Stevenson and boosting the strength of the bench by two. Demographically, almost all the new judges were still members of the pre-war generation, although in a couple of cases, just barely. Catherine Fraser, born in 1947, was the first baby boomer on the Court, signalling the beginning of another generational shift.

Howie Irving, McGillivray's Choice

Howard Lawrence Irving joined the Court in 1985, replacing Laycraft when he was appointed chief justice. Born in Edmonton in 1924, Irving had attended the University of Alberta and received his law degree in 1951. After his call to the bar the following year, Irving went to work at the Parlee firm (now known as Parlee McLaws) and remained there until his appointment to the Court. Irving was the first appointee "off the street" for some time, the last being Harradence. A senior litigator at his firm, Irving frequently acted for the Government of Alberta. He appeared at all levels of court, including the SCC, and before Royal Commissions and other bodies. Outside the legal world, he was an avid pilot.

As a judge, Irving was straightforward and very practical, focused on the litigation before him. Colleagues praised his ability to get to the heart of an appeal quickly. By his own admission, he did not like writing; although he is not well represented in the Court's reported judgments, his decisions were concise and to the point.[11] He was also a respected mediator among his colleagues. As Chief Justice Fraser observed: "One of Howie Irving's most outstanding talents was his remarkable ability to build a consensus amongst some very strong-willed judges who sometimes held diametrically opposing viewpoints, and not just on legal issues but also on court operational matters. Howie was bright, strategic and practical, all of which contributed to his colleagues' respect for him and his views."

Irving had been active in the Conservative Party and was the first appellate appointment in Alberta

HOWARD LAWRENCE IRVING, LASA ACC. 2002-028.
> MARY MARGARET MCCORMICK HETHERINGTON, LASA ACC. 2002-028.
>> MARY HETHERINGTON WITH ROGER KERANS, ELIZABETH MCFADYEN AND JEANNIE ELLINGSON, 2001 COURT OF APPEAL COLLECTION

by the Mulroney government. McGillivray had told Irving he was lobbying for his appointment. Unfortunately, it was the chief's death that opened up a spot.[12] If Irving's party connections played a role in his appointment, it was ironic that the government that put him on the bench made a concerted effort to reduce patronage.[13] Shortly after Mulroney entered office, he ordered a review of the judicial appointment process. In 1988, Justice Minister Ray Hnatyshyn announced a new policy that instituted a formal application process.[14] It was a radical departure from the past. Now, any interested lawyer was required to apply to become a judge by completing an application for appointment to the bench. The minister also created a formal advisory committee for each province and territory to screen all applicants.

Mary Hetherington, a Historic First

A new position on the Court was created in 1985. Laycraft wanted it filled by Mary McCormick Hetherington, then a Queen's Bench judge.[15] He got his wish. Hetherington was a historic appointment – the first woman appointed to Alberta's appeal court. Yet she could be described as an accidental pioneer. As Hetherington herself emphasized, when she set her mind on a legal career around 1960, she did not regard herself as a feminist or a crusader for women's rights. She just wanted to be a lawyer. As one of the first full-time female practitioners in Calgary, she broke important ground, culminating in her elevation to the province's highest court.

Hetherington was born in Lacombe, Alberta, in 1933, the daughter of lawyer James McCormick. An older brother, Don, also became a lawyer and judge. The academically inclined Hetherington earned an arts degree at Queen's University in Kingston and then went to work as a secretary with the goal of pursuing a business career. After several years, Hetherington realized that women had few opportunities outside of secretarial work. She decided to emulate her father and entered the law program at Halifax's Dalhousie University in 1960. Her brother later recalled that while he and her father didn't discourage her, they did warn her that it might be very difficult for her to practice.[16]

Hetherington was able to get articles with the Shannon Rowbotham firm and joined the bar in 1964, one of only two women practising in Calgary. Eager to work as a barrister, Hetherington quickly hit a glass ceiling. Finding herself sidelined with minor files and little prospect of a partnership in existing firms, she took the bold step of opening her own office. She also chose one of the most difficult fields for a woman of that era to break into: criminal defence work. There, she excelled. Her determination was key to her success. As Hetherington explained, "When you start, you work so hard because you're never sure you'll be able to make it go on your own. Before you know it, it's taken over." Chief Justice Smith said that Hetherington and Milt Harradence were his two favourite defence counsel, in part because their appeals were always interesting.[17] Hetherington later branched out into family law and civil litigation.

In 1978, Hetherington (by this time married to Calgary lawyer T.D. Hetherington) joined the District Court as the first federally appointed female judge in Calgary. She quickly became a respected trial judge, particularly capable at handling difficult jury trials. Her 1985 appointment to the Court increased the number of judges by one. Hetherington immediately became an active judge and was recognized as one of the most diligent on the Court. Given her dependable organizational and personal skills, Laycraft assigned her as list manager for Calgary, a role in which she worked closely and effectively with the bar.

Described as somewhat black letter in her approach to law, Hetherington had a knack for getting quickly to the heart of an issue. In one case, a counsel had written a hodgepodge of arguments. When the appeal started, Hetherington tried to help by asking counsel to present his arguments in the order she had mentioned. The counsel, uncomprehending, said, "But I thought I could argue my argument." To this,

Hetherington replied, "Your material is not an argument. It is a tsunami. Please follow the format specified and we will all get along just fine."

Hetherington was very supportive of her colleagues and the work of the Court, always willing to volunteer to do more when the need arose. She also showed no reluctance in confronting social realities, especially in cases of violence against women, which she insisted had to be treated in the same way as street violence. In so doing, she helped bring the Court's jurisprudence into conformity with contemporary values.

René Foisy, Another Flying Judge

René Paul Foisy was the next new judge, joining the Court at the beginning of 1987 and replacing McDermid. Foisy had the distinction of being the first appellate judge to have spent his years in practice in a small town. Born in St. Paul, Alberta, in 1939, Foisy completed high school in Edmonton and proceeded on to the University of Alberta, earning his law degree at a relatively young twenty-one years of age.[18] He returned to St. Paul in 1963 to set up a law practice after articling with Roger Belzil, another St. Paul native.

Appointed to the District Court in 1979, Foisy had the distinction of being the last District Court judge appointed in Alberta. The trial courts were officially amalgamated two months later. In the year before joining the appeal court, Foisy was made the commissioner of the inquiry into the VIA Rail train collision near Hinton, Alberta.[19] Outside of his law career, Foisy had been an avid hockey player and later became a pilot, owning a succession of small planes and sometimes using them for circuit work.[20]

Foisy gave the Court another fluently bilingual judge. He was litigant focused and very much to the point, possessing a laser-like ability to zero in on the crucial issues in an appeal. Chief Justice Fraser explained why colleagues enjoyed sitting with him: "No matter how complex the case or divisive the issue, René, with his agile mind, could see through things very quickly." Foisy did not believe in saying more than was absolutely necessary, and his decisions, terse and sparse, mirrored this philosophy. Highly collegial, he worked hard to bridge differences among colleagues. He also delighted in betting fine red wine that his dissents would be upheld in the SCC, which they often were.

Foisy anticipated by some years the renewed emphasis on deference to the trial judge as a guiding principle for appellate review. His appreciation of the difficult role of the trial judge was born from experience and from his close connection to people and community values.

Joe Stratton, a Pre-eminent Solicitor Joins the Court

Joseph John Walter Stratton was born on September 9, 1925, in Calgary but moved to Edmonton when he was only two. Another of the many war veterans on the Court, Stratton, who graduated from high school at a very young age, was partway through his second year at university and only eighteen years old when he joined the Royal Canadian Naval Volunteer Reserve in World War II and served on HMCS *Peterborough* in the North Atlantic.[21] After the war, Stratton attended the University of Alberta, taking a combined arts and law degree. Finishing in 1948, he was admitted to the bar a year later. He joined the prestigious Nolan Chambers Might firm in Calgary (now Bennett Jones) and returned to Edmonton to open a branch office just after Imperial Oil, a client of the firm, struck oil in Leduc.

The two offices separated in 1974, with Stratton establishing Stratton, Lucas, and Edwards (now Davis and Company) and continuing his broad corporate and commercial practice. He also acted as an arbitrator in labour disputes and sat on several inquiries. When he was appointed to Queen's Bench in 1980, Stratton was widely regarded as one of Alberta's very best solicitors of his generation. He was also a leader at the bar and has been credited with helping to open the legal profession to women in the early 1970s. As a result, young

RENÉ PAUL FOISY, LASA ACC. 2002-028.
JOSEPH JOHN STRATTON LASA ACC. 2002-028.
> JEAN EDOUARD LEON CÔTÉ, 1987 AND EARLIER.
COURTESY J. CÔTÉ./COURT OF APPEAL COLLECTION

female lawyers of that era found a more inclusive profession in Edmonton than in Calgary.

An extremely able trial judge, Stratton was promoted to the appeal court in 1987. He was a practical problem solver whose succinct judgments reflected his wide experience and knowledge of the real world in business and in life. Conscientious and hard-working, he had a gift for rigorously analyzed and clear judgments. These resulted from long hours of careful and methodical writing, the drafts revised and corrected as he went along. His colleagues spoke of how he treated everyone's views – whether or not he agreed with them – with equal respect and tolerance, never throwing his considerable intellectual weight around. A devout Catholic, Stratton was an empathetic judge with a profound understanding of people, qualities that informed his decisions. He was also unfailingly polite to counsel and generous with his colleagues, willingly offering sound advice and guidance, especially on complex civil or commercial matters.

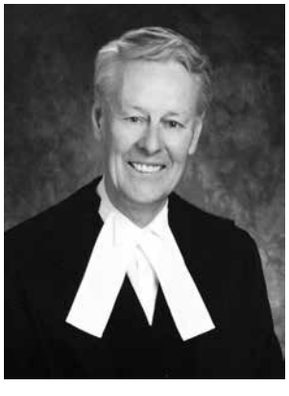
When Stratton retired, Chief Justice Fraser paid tribute to his exceptional contribution to the Court: "Joe will always be remembered for the remarkable person he is. He has the essential qualities in exceptional quantities – decency, strength, courage, wisdom, compassion, intelligence and generosity. Throughout his life, he has been a role model for many – as a lawyer, judge and father. A distinguished jurist and an outstanding Albertan, Joe Stratton has made a difference in the lives of many, many people in this province."

Jean Côté, Too Brilliant to Leave in Practice

Jean Edouard Leon Côté joined the Court at the same time as Stratton, but at the age of forty-seven, he was a much younger appointee. He was another off-the-street appointment, the second exception to the promotion from Queen's Bench, which produced the majority of the new judges during Laycraft's tenure. Although Côté had been in private practice with the Hurlburt Reynolds firm since 1968, he was the most academically inclined appointment since Bill Stevenson.

Born and raised in Edmonton, Côté attended McGill for his undergraduate degree but returned to his home province to take law at the University of Alberta, graduating as the gold medalist in 1964.[22] Côté then went to Oxford and earned another law degree. On his return to Canada, he clerked for Justice Ronald Martland at the SCC before starting private practice. While practising, Côté taught as a sessional instructor at the University of Alberta alongside his law partner, Bill Stevenson. As a student, he had started writing learned articles for the *Alberta Law Review,* often on historical topics. Later, he wrote several textbooks, and, with his encyclopedic knowledge of court rules and procedures, he co-authored with Stevenson *Annotations of the Alberta Rules of Court*, a resource to this day heavily relied on by judges and practitioners alike.

A formidable judge, Côté brought a scholarly perspective and well-honed analytical skills to the Court, as well as an inexhaustible work ethic. Upon his appointment to the appeal court, Côté asked to do a few months of trial work in order to have



an understanding of the trial judge's world and challenges.[23] This typified his intellectual curiosity and inherent sense of fairness.

Côté's judgments have been called "lively explorations of logic and legal questions."[24] Quick to identify and point out logical flaws in argument, Côté wrote with an intellectual spark and distinctive style: his judgments were replete with metaphors but also clear and concise. He also possessed a rare ability to convey complex ideas in simple terms, making for judgments that were easily understood by the public as well as lawyers and judges. He explained concepts through examples, carefully tuning them to the audience and the topic. As one colleague said: "It's like looking at a Picasso. There's never any doubt who the artiste was."[25] The high quality of Côté's judgments was matched by an equally impressive volume.

Côté was a stalwart leader on the Court, particularly as the long-serving chair of the Rules of Court Committee. This joint government, bar, and court committee is, in reality, a legislative body. As its chair, therefore, Côté had one foot planted in the judicial branch of government and the other in the legislative branch. In this role, he excelled. Also noteworthy was his equally long-serving role as the Edmonton list manager, in which he handled all the day-to-day administrative obligations with his trademark efficiency and ease. As an example of his pithy writing style, in a memo as list manager admonishing judges and court staff to reply promptly to questions from the Registry, Côté wrote, "When a telephone message is from the Registrar's office, it should not be treated like an offer of free dance lessons."

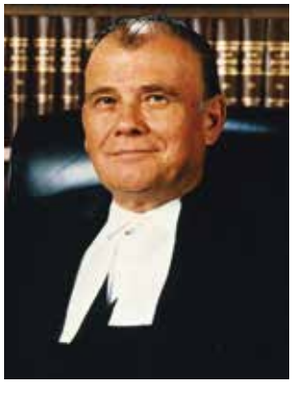
Colleagues spoke of Côté as highly collegial, as someone who invariably put the Court's interest in serving the public above all else. Incredibly accomplished and widely read, Côté was the Court's encyclopedia for everything from the mundane to the extraordinary. To this, Chief Justice Fraser added, "Whenever anyone on this Court needs help, Jean Côté can be counted on to step up. Totally selfless and without ego, he has done so time and again. It is never about him; it is always about assisting others. This is a judge to whom I often look for advice and guidance. His contributions to this Court and the law in this country have been immeasurable."

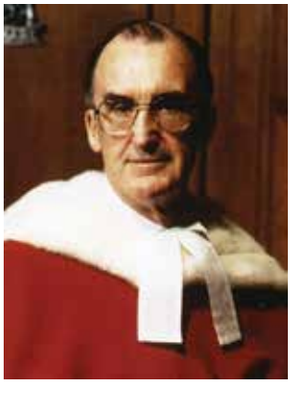
John Bracco, Teacher Turned Judge

John David Bracco joined Stratton and Côté on the bench at the end of 1987. Like some noted early Alberta lawyers and judges, he was a schoolteacher for several years before deciding to change careers.[26] Born in Edmonton in 1925 to Ukrainian immigrant parents, Bracco grew up on the family farm near the hamlet of Redwater, Alberta. He graduated from the University of Alberta with a degree in education in 1949 and taught in Strathmore, near Calgary, for several years. Returning to Edmonton in 1953 to take law, he graduated in 1956 and then practised in Edmonton and Redwater. Later, he was a partner in the Edmonton firm of Stack, Smith, Bracco, and Irwin.

Although he practised general litigation, Bracco became an authority on family law, lecturing for the Bar Association and serving as president of the Canadian Research Institute for Law and the Family. Apart from his legal work, Bracco was deeply involved with the United Church and remained very interested in education. He served as chair of the Edmonton Public School Board and even had a school in the city named after him in 1990.

Bracco's judicial career started in 1975 with an appointment to the District Court. It was reported that the chief judge, John Decore, had sought out John Bracco because "he is a good Ukrainian boy even if he does go to the United Church." Although not the first judge of Ukrainian descent on the bench in Alberta, he was the first appointed to the appeal court. It took some convincing to get him there. By his own admission, he was not sure he was suited to appellate work, since he had never had an academic bent towards law. He shared his reservations with Chief Justice Laycraft





< JOHN DAVID BRACCO, LASA ACC. 2002-028.
JOHN CHARLES MAJOR, LASA ACC. 2002-028.

and with Laycraft's encouragement, accepted the berth.[27] This humility was characteristic of Bracco.

Given his expertise in family law and abiding commitment to justice for all, Bracco was a fine addition to the Court. One interesting quirk was that he obtained special permission to move to Canmore, Alberta, on the doorstep of Banff National Park, the only member of the Court to take up permanent residence outside of Calgary or Edmonton.[28]

One colleague remarked of Bracco, "John believes in the adage that 'If it didn't make good sense, it could never make good law.'"[29] When Bracco retired, Chief Justice Fraser explained why he had had such a strong influence on the Court: "John has been an important part of the Court of Appeal family. He has always played fair and been collegial and loyal to the Court and his colleagues. A unifying force, he always takes the high moral ground. Throughout his entire judicial career, despite the burdens of office, he has never lost his youthful exuberance and his love of life. Sitting with John has always been a pleasure. Disagreements were rare and easily resolved. There is a saying: 'Legal justice is the art of the good and the fair.' John is both."

With Bracco's appointment, the Court stood at twelve full-time judges and two supernumeraries. In the fall of 1990, the Court lost Bill Haddad to mandatory retirement and Bill Stevenson to the SCC.

Jack Major, a Cameo Appearance

When Bracco elected supernumerary status, John Charles Major was appointed in July 1991 to replace him. Major was a senior member of the Calgary litigation bar and a partner at Laycraft's former firm, now called Bennett Jones. One of the most talented courtroom lawyers of his era in Alberta, Major was originally from Mattawa, Ontario. He received his undergraduate education at Loyola College in Montreal (now Concordia University) and attended the University of Toronto for law. After graduating in 1957, Major followed his older brother, Bill, to Calgary and articled with Bob Black at the Nolan Chambers firm. Staying with the firm, Major practised litigation, including a surprising amount of criminal law early in his career. Laconic and unflappable, Major was known during his lengthy career for his dry wit and tenacity.

Major was legendary for his ability to zero in on the crucial issue in a file. After becoming a firm partner in 1967, he was involved in numerous precedent-setting cases and acted as counsel to the Estey Commission and the *Code* Commission. His appointment to the Court, however, was the beginning of a mere cameo appearance.[30] Just over a year later, in November 1992, Major took his talents to the SCC, serving there with distinction until 2004.

Catherine Fraser, a Future Chief Justice

Bill Stevenson's replacement at the Court of Appeal, Catherine Anne Fraser, who came up from Queen's Bench, was appointed in March 1991. Only a year later, in March 1992, she became the new Chief Justice of Alberta, a historic moment not just for the Court and the province but also for Canada.

Delivery of Justice: Reform Continues with Practice, Procedure, and Administration

Part of the continuity between the McGillivray and Laycraft courts was the commitment to finding better ways to do business. One major innovation of the Laycraft years, sentence appeal panels, had actually first been planned under McGillivray. After Laycraft became the chief justice, however, the emphasis shifted from procedural changes to changes in the Court's role. While the judges continued to look for ways to deal efficiently with an increasing caseload, under Laycraft, the Court gave greater consideration to its role in the orderly development of the law in the province. Striving to provide clarity and coherence in the law, the Court went further with consensus

< JOHN BRACCO WITH CHIEF JUSTICE FRASER AND ELIZABETH MCFADYEN, 2000 COURT OF APPEAL COLLECTION. CATHERINE ANNE FRASER SWORN IN BY CHIEF JUSTICE LAYCRAFT, 1991. COURT OF APPEAL COLLECTION

and collaboration in decision making and judgment writing.

Laycraft did not like messy judgments that failed to state the law clearly. He was critical of the SCC's long adherence to the traditional format of judgments, in which judges issued dissenting and concurring judgments one after another as they saw fit. This could, and did, create ambiguity as to what the decision had stated about the law. In Laycraft's view, this was a great disservice to litigants. The fact that Canadian courts, including the Alberta appeal court, had decided that they were not necessarily bound by their own precedents made the need for clarity even more imperative.

Collaborative Practices for Judgments

In encouraging colleagues to seek consensus, Laycraft found fertile ground. His colleagues were of like mind, and in any event, the press of work discouraged unnecessary writing. This was fortunate, since no chief justice could tell judges on a panel whether to write, what to write, or when to write without interfering with their judicial independence.

Collaborative judgment writing was another informal technique used by the Court. Many judgments, those labelled bench and memorandum judgments, were simply ascribed to the Court *per curiam*. As well as signalling the status of the judgment, this emphasized the unity of opinion. The Court went even further on some important appeals, especially on references and constitutional issues. In such cases, Laycraft had all members of the panel write the judgment, each judge taking a section, with Laycraft editing the whole afterward. As Laycraft recounted with some amusement, an SCC justice once asked him who had written the decision – he couldn't tell from the text.[31] Even dissents could be a product of collaboration. Although rare, Laycraft recalled several instances in which one judge was assigned to write a dissent when the panel thought that another interpretation of the law should be on record.[32] Collaborative writing helped to make a big judgment more manageable and to achieve consensus on points of law.

Ensuring Input from All Judges: The Court's Circulation Policy

Under Laycraft, the Court refined its policy of labelling and circulating judgments. The judges realized that some reserved decisions did not require circulation to the Court since no new statements or clarifications of law were involved. They had been reserved simply because the issues were too complex for a bench judgment or because the members needed more time to decide how to handle the appeal.

In 1988, to cut down on unnecessary circulation, the Court established three different categories of judgments.[33] In addition to bench memoranda and reserve judgments, there would also be Memoranda of Judgment Reserved. These did not require circulation to the whole Court and were generally released a short time after the hearing. Decisions referred to as Reasons for Judgment Reserved were circulated to the Court for comment on issues of law, since these involved new law. The 1988 policy established that since Reasons for Judgment Reserved were circulated, they were endorsed by the whole Court as well as the deciding panel. The circulation policy of the Court contributed greatly to securing consensus on important points of law.

Circulation for input on questions of law also ended debate about panel size. The standard for some years had been three judges, with the Court generally sitting larger panels for important appeals such as those involving a constitutional decision or the resolution of a major point of law. When the Court had expanded in number, Smith had settled on five-judge panels for these appeals, and McGillivray had followed the practice. There was support for even larger panels on some significant appeals, and McGillivray had tried this on a couple of occasions. However, large panels were cumbersome, and since they still did not represent an absolute majority of

the Court, the judges in Laycraft's time concluded that they were an unnecessary complication.

The general policy became to use a panel of five for sentencing guideline decisions, re-argument of previous decisions, and references, and three for everything else.[34] The circulation of reserves ensured that the whole Court had a chance to comment and, in cases of serious disagreement, call for a conference or even a rehearing.[35] Hence, sitting in panels of three did not significantly impinge on the law-making role that all members of the Court shared.

Reconsideration of Precedent: A Modern Refinement of *Stare Decisis*

The Court's most novel policy under Laycraft was adopting a procedure for reconsidering its own precedents. It was not groundbreaking, the House of Lords having already taken this step in 1966. In the 1970s, it had become abundantly clear to Canadian courts that old precedents must be more readily abandoned or altered to prevent or rectify injustices. The advent of the *Charter* added more impetus to this initiative. Debate as to whether panels were necessarily bound by previous decisions had started while McGillivray was still chief justice. So, too, had the discussion about how best to allow for reconsideration.[36] Finally, in 1985, the Court announced its new procedure allowing for reconsideration of otherwise binding precedent in a practice note.[37]

The procedure allowed counsel to seek leave from the Court to reconsider a previous decision. To avoid the possibility of reconsideration applications being made as a delay strategy, precedents would only be reconsidered in limited circumstances. Internally, any judge could ask the chief justice to convene a panel to examine a point of law if he or she felt it had been wrongly decided. The renunciation of strict *stare decisis*, and the adoption of a procedure through which precedents could be reconsidered in an orderly fashion, nicely encapsulate the intellectual approach of the Laycraft Court. It was also consistent with the spirit of the times. The Alberta judges were not revolutionaries – Canadian courts, jurists, and counsel generally recognized the need to reconsider outdated precedents – but they did not hesitate to take the step. Like other appellate judges, the Alberta judges were very cautious in disturbing precedents.[38]

A Hot Court and Some Heated Words on Factums

Under McGillivray, the Court had declared itself to be "hot," meaning that it prepared thoroughly before hearings in order to make hearings shorter and more efficient. The theory was that since the panel would already know the background, facts, and legal arguments, counsel could concentrate on answering the questions of concern to the Court. In practice, though, it was not easy to get the bar to move away from excessive or over-elaborate presentations.

This led to a minor clash between the Court and the bar over factum size. Historically, factums, common in Alberta for decades, had been short, so there was no need to limit their length. Whether because those in the profession realized that the judges actually read them, or for other reasons, factums increased in length to the point of becoming less focused and unduly onerous. This led McGillivray to direct counsel to make factums short and to the point, limiting extraneous material and focusing on a concise presentation of the issues, argument, and relevant cases and authorities.

It seems that not every lawyer attended to this directive. Two Edmonton lawyers received the full ire of the Court early in 1986, when a panel with Laycraft and Kerans adjourned a hearing with the direction that counsel rewrite their factum. Kerans said of the document, "It's more than the human mind can take."[39] Adding to Laycraft's irritation, the counsel, when directed to appear in Court to address the problem, sent agents. The story appeared the next day in the *Edmonton Journal*. The Criminal Trial Lawyers' Association took exception to the panel's treatment of the counsel in question, and its president wrote a letter to the chief justice expressing the association's concerns.

Laycraft, while remaining polite, had no time for the Association's criticisms. "One theme of your letter is that no practice note limits the length of factums. I find that statement astonishing," he wrote in reply.[40] The chief justice noted that the existing *Rules of Court* directed counsel to present "a concise statement," adding that it was hardly the first time counsel had been publicly criticized, sometimes vehemently, for inadequate factums and that counsel could expect the Court to find fault with material not conforming to the *Rules of Court*.

Despite this, the Court was reluctant to impose set limits. Indeed, it was not until 1989 that the Court directed that factums be limited to thirty pages, with the result, as one judge noted, that factums were invariably exactly that long.[41] Nor was there any appetite for imposing time limits on counsel. While the judges mulled over the idea of American-style time limits on oral argument, this was ultimately rejected for pragmatic and philosophical reasons. Laycraft pointed out that quite frequently, oral presentations are educational for the judges. "Think of the *Borys* appeal," he said. "We needed a week of argument to educate the [Privy Council] judges on the issues."[42] The other objection was a matter of tradition. "Counsel have a right to be heard," Laycraft said, and the Court was reluctant to interfere with that right.

The Sentence Appeal Panel

The sentence appeal panel was one of the major innovations in the Laycraft years, instituted soon after he became chief justice. The panels were the brainchild of Roger Kerans; they were derived from British practice but were also inspired by the creation of intermediate appellate courts for routine business in the United States, where many state appeal courts were split into two to better manage their caseload. The lower "divisional" court handles routine error-correcting appeals, and the higher court, the law-making appeals. Ontario instituted a version of this in 1986, the only Canadian court to do so. The Alberta Court debated the idea in the early 1980s but decided against it, since the judges did not want to lose collegiality by splitting up into two courts, even if the assignments to each division were to be temporary. Another potential problem arose with streaming cases to the appropriate division: Kerans noted that it is not always clear whether an appeal is routine. With the tradition of oral hearings, it is not uncommon for issues to arise in argument that give a case value as precedent.

However, Kerans identified a class of appeals in which these concerns would not be as serious: criminal sentence appeals. In that era, most of these were routine and involved simple error correction. Sentence appeals also constituted a huge chunk of the Court's workload – almost half of all appeals and the lion's share of criminal appeals.[43] To expedite such appeals, Kerans envisioned panels that would sit more frequently than regular panels and would hear only sentence appeals.

More controversial was asking Queen's Bench trial judges to sit on the sentence appeal panels. The judges of Queen's Bench and the Court of Appeal remained *ex officio* members of both, and trial judges frequently sat on appeal panels. This not only gave trial judges appeal experience but also benefited the Court, given their sentencing expertise. By McGillivray's tenure, the loan of several trial judges to sit *ad hoc* through the judicial year had become established practice. Kerans' plan increased this commitment. The Court wanted two Queen's Bench judges assigned to each sentence panel, which would sit in both Calgary and Edmonton every month.

Making the panels a reality took some arduous negotiating with Queen's Bench, since the trial court had its own personnel and caseload concerns. Bill Sinclair, as the new head of Queen's Bench, had started assigning fewer judges to sit *ad hoc*, much to McGillivray's chagrin.[44] Sinclair's successor as chief justice, Ken Moore, took some convincing. Kerans originally put forward the idea in 1984, but it was not until early 1986 that the panels were instituted. The result was an

arrangement unique in Canada. No other province had specialized sentence appeal panels utilizing judges from the superior trial court.[45]

This arrangement was initially unpopular with many members of the criminal bar. The Criminal Trial Lawyers' Association lobbied against it, arguing that a fundamental principle of the appellate process was "review by a separate and independent tribunal" and raising the possibility of institutional bias with the Queen's Bench judges.[46] There was even a threat of a constitutional challenge.

The Court did not feel that the concerns were merited. Kerans closely monitored the panels' performance. After a year, the statistics showed virtually no change in the number of appeals allowed or dismissed.[47] Defendants had even odds of getting a sentence reduced. Crown appeals, though faring slightly better, were a decided minority of the sentence appeals. These percentages were quite high compared to rest of Canada.[48] The panels continued the efforts initiated under McGillivray of greater supervision over sentencing, with a focus on identifying sentencing principles. Whether because of the panels or because of a willingness to interfere more readily with the decisions of trial judges, Alberta reviewed more criminal sentences than other provinces.[49]

This arrangement with Queen's Bench lasted a quarter century before the Court ended it in 2012. In part, the panels had achieved one of their objectives: promoting a more uniform approach to sentencing among Alberta's trial judges. More important, in 1996, Parliament explicitly adopted certain mandatory sentencing principles to be followed by all judges. This greatly reduced the likelihood of trial judges imposing unfit sentences, with a resulting decline in sentence appeals. A greater percentage of those that remained involved points of law that the members of the Court considered properly the territory of appellate judges. In the end, the Court concluded that the days of the usefulness of the sentence panels had come and gone.

Early Adopters: Technology and the Appeal Court

Kerans was credited with being the primary driver behind another major court initiative: computerization. Computers were not yet ubiquitous in the 1980s, but Kerans was an early adopter, using a word processor while working on the complex *Black v Law Society of Alberta* appeal in 1986. Immediately impressed with the potential of the computer, he researched its current use in law courts in the United States and lobbied his colleagues to pursue the technology.

Alive to the possibilities revealed by Kerans' research, the Court wanted electronic versions of appeal books. A great deal of material in appeal books was often of marginal relevance to the appeal, and searchable electronic versions could sort the wheat from the chaff. Appeal books in electronic format became particularly attractive as the Court saw more and more complex corporate litigation, which created massive appeal books that were quite impractical for judges to reference in a hearing. The ability to access appeal books electronically was an enticing prospect.

The Court surprised the government with its interest in computers. When Laycraft asked for funding to buy laptops, the answer was no – money had not been budgeted for this. Undeterred, some judges, including the chief justice, purchased laptops with their own funds. Soon thereafter, the Attorney General happened to visit Laycraft in his office. Intrigued with the chief's new laptop, he asked if he could examine it. Laycraft closed it, telling him: "No, you wouldn't buy me one so you can't see it."[50] Chastened, the Attorney General promised to make computerization of the Court a higher priority.

Achieving the Court's goals was not easy. The province's budgets were tight because of the severe recession. The provincial bureaucracy was slow and cumbersome. To add to these problems, no clear standard for operating systems and software

had yet been established, and changing or upgrading software was frequently slow and painful. Kerans was instrumental in the entire computerization project. He acted as the liaison with consultants and government and spent a great deal of time researching hardware and software options and giving seminars and workshops for his colleagues. Hetherington and Côté were also involved in different aspects of court automation and training for the judges in those early days.[51]

Not everyone on the Court embraced computers. For the many judges with deficient typing skills, using a laptop was less efficient than old-fashioned dictation. Some members of the Court found new legal databases bewildering or cumbersome and stuck to published reports.[52] Those judges who could adapt did so; the rest relied on judicial assistants and students. In time, new additions to the appellate bench were more technologically literate as computers became an everyday part of life.

The Court's efforts had some success. In 1988, the Court ran a trial project with electronic appeal books. Laycraft remembered vividly the first time he sat on a panel where each judge came equipped with a laptop.[53] As arguments were presented, counsel directed the panel members to specific pages in the appeal books, which they could then call up on their computers. It was, he recalled, really quite amazing. Alberta had emerged on the leading edge among appellate courts. Attending a conference at the law school of New York University, which specialized in studying courts of appeal, Laycraft was told that the Alberta Court was the first in North America to introduce computers into the courtroom.[54] If more vindication was needed, when the Ontario Court of Appeal pursued the same course, they contacted their Alberta brethren for direction.[55]

The Appellate Caseload: Expanding Litigation and Mega-appeals

The promise of computers was tantalizing because the workload of the judges was becoming quite onerous. The Alberta Court took on a very heavy caseload. While some American appellate courts had a ratio of one day of hearings to seven office days for preparing for hearings and writing judgments, the Court maintained a one-to-one ratio.[56] Kerans claimed that at that time, the Alberta appeal court "heard more cases per judge than any in Canada."[57] He was right. It was a rare evening or weekend that a briefcase of work did not accompany the chief justice home from the courthouse, and it was the same for most of his colleagues. Nor was age necessarily a respite. Lieberman became a supernumerary in 1987 and noticed no decrease in his workload.[58] Indeed, the continued hard work of Haddad, Lieberman, and Belzil very materially helped the Court stay on top of its caseload.

The number of appeals stabilized and actually dropped slightly in the late 1980s, but the Court's workload did not diminish.[59] Civil litigation, although it constituted a minority of appeals, consumed much of the judges' time. The litigation explosion of the 1970s was followed in the next decade with long, expensive mega-trials, leading in turn to mega-appeals. In many instances, this reflected the complex corporate and commercial problems that go hand in hand with a rapidly expanding economy. But even formerly straightforward injury cases lengthened and generated a lot of paper. As early as the mid-1980s, Canadian appellate judges reported that their preparation time for civil appeals had risen noticeably.[60]

Throughout Laycraft's tenure, the Court continued to strive for improvement. Although Laycraft's personality was very different from that of McGillivray, the Court maintained exceptional collegiality, a testament to the new chief justice, his predecessor, and his colleagues. Under Laycraft's leadership, the Court was focused and efficient, more self-aware than ever of the changing role of an appellate court, all of which stood it in good stead in dealing with the challenges of the *Charter*.

THE LAYCRAFT COURT AT LAW: THE *CHARTER* TAKES OVER

It is desirable at times for ideas to possess a certain roughness, like drawings on heavy-grain paper. Thoughts having this quality are most likely to match the texture of actual experience.

– Harold Rosenberg, *Discovering the Present*[61]

The coming of the *Charter* in 1982 was a momentous event for Canadian judges. With the *Charter*, the nation embarked on a bold experiment that not only enhanced the power and prestige of the courts but also exposed judges to new levels of public scrutiny and criticism. It was a period of great creativity for jurists, and Alberta's were no exception. For most appellate judges on the bench during the early years of the *Charter*, it was an exciting time. Certainly, this was the attitude of many of the Alberta appeal justices, who, while mindful of the potential pratfalls, looked forward to the challenges of applying the *Charter*. The Court contributed significant and important *Charter* decisions, sometimes setting the law of the land when upheld at the SCC and at other times highlighting different conceptions of *Charter* rights and preferred values when overturned.

Over the *Charter*'s first ten years, noteworthy decisions from Alberta involved freedom of speech, freedom of religion, mobility rights, freedom of association, and language rights. *Hunter v Southam*, *R v Big M Drug Mart*, *Black v Law Society of Alberta*, *R v Keegstra*, and *Mahe v Alberta,* all discussed in detail below, were landmark cases.[62] These appeals, while not exhaustive of important *Charter* cases in the province, provide an instructive cross-section of early decisions of the Alberta Court.

In these decisions, the Court demonstrated a willingness to give full expression to individual freedoms. In part, this reflected the SCC's direction to interpret rights and freedoms broadly, which formed the predominant theory of constitutional interpretation. However, the Court needed no encouragement to do so; it was already moving towards this interpretive approach. Even *Mahe v Alberta*, which dealt with peculiarly Canadian minority language education rights, showed the Court trying to provide a full expression of that right in the Alberta context. If an underlying stance of the Court can be identified in its early *Charter* decisions, it is the tradition of liberal individualism, which had arguably given birth to the *Charter* in the first place. A broad interpretation of rights was certainly agreeable to the Court, since it also happened to be congruent with an obvious libertarian leaning within the Court. Asked what the fundamental issue was in *R. v Keegstra*, which dealt with hate speech, Kerans gave an unequivocal answer: "Freedom."

However, while concerns about individual freedoms are identifiable themes in major Alberta *Charter* decisions, this is not the entire picture. Within the Court, the judges' attitudes towards the *Charter* varied from openly enthusiastic to skeptical. The potential for conflict between civil liberties and equality rights was also yet to come. And despite its liberal decisions on some issues, the Court was criticized for being too conservative in its treatment of due process rights, such as the right to retain and instruct counsel. There were grounds for this criticism. The judges often remained highly deferential to the legislature, preferring to let lawmakers find solutions to *Charter* violations. As a result, the Court's interpretation of the *Charter* was a combination of boldness and caution.

The *Charter*: Conception, Birth, and Responsibility for the Baby

The *Charter* emerged for two basic reasons: the first was the obscurity and vulnerability of constitutional values (including fundamental rights and freedoms) when such values consisted only of unwritten notions threaded, sometimes faintly, within centuries of judicial writing. The second was the essential failure of Diefenbaker's *Bill of Rights* to establish any supremacy of such values over other laws. In particular, the *Bill of Rights* had never gained traction, its scope and efficacy diminished

because it was an ordinary, easily repealed statute of Parliament that only affected federal laws. The courts had then done the rest. The weakness of the *Bill* was one reason judges did not give it more effect: that it was an ordinary act of Parliament. But their reluctance went much deeper. Running through many of the court decisions that stripped the *Bill* of any meaning seems to be a judicial viewpoint that could be expressed thus: "Surely, Parliament cannot have meant what it said in the *Bill*. If an *Act* of Parliament does not comply with the *Bill*, who are we to say what should be done? That is for Parliament, not the courts, to decide." In other words, the judiciary could not fathom, and did not accept, that it might have a true supervisory role in reviewing state laws to determine whether they contravened "guaranteed" rights and freedoms.

Pierre Trudeau was a strong supporter of a new bill of rights and, like other constitutional reformers, thought it should be entrenched in the *British North America Act*, in the style of the US constitution. When Trudeau pushed for repatriation of the *BNA Act* as his legacy as Prime Minister, he was determined to include the *Charter* as part of Canada's *Constitution Act, 1982*. And he succeeded.

For the first time, the *Charter* explicitly conferred on the courts the constitutional duty to determine whether challenged state action met *Charter* standards. Equally important, the *Charter* was given primacy over other laws, whether federal or provincial. The sweep of the rights protected under it was also much broader. Those rights include civil rights, such as freedoms of religion, expression, and association; the right to mobility; the right to counsel; and the right to security of the person. They also include human rights, such as equality, linguistic rights, aboriginal rights, and multiculturalism. As part of Canada's constitution, the *Charter* can only be changed or rescinded through a laborious and politically fraught process, giving it much more durability and, concomitantly, enhanced authority.

The Limits of the *Charter*

The conception and birth of the *Charter* were both difficult. Trudeau's quest for agreement on an entrenched *Charter* encountered some serious opposition. Debate over rights to be included and the wording of the guarantees took considerable time. Finally, to allay the continuing concerns of some provincial premiers, s. 33, commonly referred to as "the notwithstanding clause," was added.

A classically Canadian compromise, s. 33 allows a government to override certain rights and freedoms. These include the fundamental freedoms in s. 2 of the *Charter* (including freedom of religion, freedom of the press, and freedom of association) and the legal rights in ss. 7 to 15 (including right to counsel; freedom from unreasonable search and seizure; right to life, liberty and security of the person; freedom from arbitrary detention and imprisonment; and right to equality). Minority language rights, education rights, aboriginal rights, and equality rights between men and women were off-limits. But it should be remembered that women's groups had to fight hard to ensure that s. 28, which guarantees equality rights between men and women, was not subject to the s. 33 override.[63] Only in Canada would language and education rights be absolutely inviolable while all sorts of fundamental rights remained at risk.

Section 33 was, however, a necessary compromise to obtain provincial support, including Alberta's, for the *Charter*. While concerns were raised that s. 33 would effectively gut the *Charter*, that has not occurred. Fear of negative public opinion has been very effective in restraining governments, both federal and provincial, from regularly invoking s. 33. Since 1982, it has been used, but only exceptionally. Thus, s. 33 has fulfilled its role as a safety valve to be used when necessary; to date, government has not found it necessary to use it frequently.[64]

The *Charter* contains another limitation designed to avoid the problems flowing from the absolutist language

QUEEN ELIZABETH AND PIERRE TRUDEAU GREET CROWD AT CEREMONY FOR REPATRIATION OF THE CONSTITUTION, OTTAWA, 1982. CANADIAN PRESS/ROBERT FLEMING.

in the American constitution.[65] Section 1 of the *Charter* states that the enumerated rights and freedoms are subject to "such reasonable limits prescribed by law as can be justified in a free and democratic society." It, too, has proven to be a compromise that makes the *Charter* workable.[66] If government can convince the courts that the challenged legislation meets the high standard in s. 1, then the legislation will be "saved" and the *Charter* breach excused. Section 1 is a primary battleground in *Charter* litigation. Courts are frequently called on to decide whether s. 1 saves legislation that otherwise breaches the *Charter*. In doing so, the courts are often required to balance individual rights against the collective needs of society. Herein lies the challenge – and the scope for criticism about the choices the courts make and the values they prefer.

A New Duty for Judges, and No Shirking this Time

It is true that under Canada's constitutional arrangements, the courts have always exercised a review function over laws passed by legislatures. These traditional powers of review allowed some limited scope for judges to protect citizens' rights. For example, in *Reference re Alberta Statutes*, the SCC struck down the *Press Bill* of Alberta's Social Credit government in the 1930s on the basis that it was *ultra vires* the provincial government.[67] The SCC's main concern was to protect freedom of speech in the form of freedom of the press.[68] But the *Charter* greatly increased the responsibilities of the courts in reviewing and even amending legislation. The courts were given the duty to define the reach and scope of *Charter* rights, to determine whether challenged laws violated those rights, and, if so, to decide whether they were saved under s. 1 or should be declared invalid. The courts were also expressly granted the power and duty to provide remedies for rights violations. Section 24 of the *Charter* directs judges to apply "such remedy as the court considers appropriate and just in the circumstances" to deal with a *Charter* violation.

With the *Charter,* a deliberate and conscious decision was made to make the courts defenders of constitutional rights with full judicial review powers and an arsenal of remedies to match those powers. It was a choice that elected and accountable governments made just over three decades ago when they decided to entrench rights and freedoms in the *Charter*. Thus, the judiciary's role as defender of constitutional rights is now itself a part of the Canadian constitution.

The Backlash: Damned If You Do...

The *Charter* made the Court's role as lawmaker more explicit, more pronounced, and, especially when interpreting constitutional rights, more controversial. Interpreting rights means determining the extent to which minority rights are entitled to interfere with majoritarian ones, and thus, with the status quo. This, perhaps inevitably, has led to accusations that the affirmation of rights for certain groups is "judicial activism." The anti-activist argument is that for courts to determine the scope of rights amounts to an impermissible judicial intrusion on legislative supremacy. Indeed, the judge's decision may be challenged, even to the extent of questioning the legitimacy of the judicial role.[69]

That has certainly happened. Critics charged that the *Charter* gave judges too much power, and that unelected judges could impose their own social and political agendas on the nation. As courts began to apply the *Charter*, some observers claimed that judges had become excessively activist in their approach to the law and had usurped the powers of legislatures by judicial fiat.[70] Others have refuted these assertions. Indeed, exactly the opposite claim has been made: that judges have been excessively conservative in applying the *Charter*, even in criminal law, and have not given proper expression to many rights and freedoms.[71] Judges themselves shy away from acknowledging either viewpoint, usually pointing out that they have always had a role in reviewing legislation. And, more to the point, if the *Charter* has increased this responsibility, it has been thrust upon them and not sought by them.

The Alberta Court was ready for the *Charter* in a way that Canadian judges had not been for the *Bill of Rights*. Although the judges differed in the degree to which they embraced the *Charter,* their outlook and approach to their role had changed sufficiently enough that they were able to step into that new role and fulfill the demands imposed on them. It was, however, no easy task, since it required judges to move more overtly into the realms of public policy and competing social, political, and moral values.

The Court of Appeal and the *Charter*

Searching for the Right Balance

It is easy to see the Laycraft Court as the *Charter* court in Alberta terms. The narrative is not quite that tidy. Bill McGillivray still presided over the Court when the *Charter* arrived in 1982. But while he participated on the panels of some of the first major *Charter* litigation, he did not take a leading role in developing the Court's *Charter* jurisprudence. This task fell to a group of judges who had emerged as strong, prolific writers: Prowse, Laycraft, Kerans, McClung, Harradence, and Stevenson. These judges set the tone of early Alberta *Charter* decisions, and they continued to be the core of such decision writing through Laycraft's term. Although several very important and well-known *Charter* decisions were made in Alberta while McGillivray still headed the Court, the early age of the *Charter* belonged fundamentally to his successor. Hence, these decisions are discussed in this chapter.

In terms of fundamental judicial character, the Court did not change much from McGillivray's to Laycraft's tenure. It remained pragmatic, not doctrinal; open-minded, but perhaps more conservative than other appellate courts. Lieberman described it as balanced between progressive judges and those who were more traditionalist. Lieberman himself combined elements of both: he was a self-described constructionist, but one who welcomed the *Charter* and favoured the policy for reconsidering precedents. Certainly, by the time Laycraft became chief justice, the Canadian judiciary had evolved. Purposive interpretation was common, with academic and secondary sources ordinarily used to augment case law. Judicial conservatives and liberals approached problems with more awareness of context, policy, and the role of judicial law-making. This was important for *Charter* litigation.

The Alberta judges were alive to the potential impact of the *Charter* before it became the law of the land. Finding efficiencies was, in part, done in anticipation of a rush of *Charter*-related litigation.[72] The judges also felt varying degrees of trepidation, largely because of the uncertainty of how the *Charter* would be drafted. Lieberman, for instance, was concerned that it would lead to the rights absolutism seen in American jurisprudence.[73] Thus, the Alberta judges greeted the existence of modifying sections like s. 1 with some relief. Lieberman remembered that a New Zealand judge told him that it was the "ultimate weasel section," but his colleagues were glad to see it.

Roger Kerans remembered a certain amount of excitement at the challenge. "We wanted to get it right, and we worked very hard on it on our Court," he said.[74] In his opinion, the Court's efforts were reflected in a good record of affirmations at the SCC and in the praise that the Chief Justice of Canada gave to the Court.[75] The consensus on the Court was that the *Charter* should not suffer the fate of the *Bill of Rights*; the judiciary had a responsibility to give it life. For the most part, the judges agreed that the guaranteed rights and freedoms had to be construed broadly to give them full effect. This meant avoiding narrow, legalistic interpretations of *Charter* rights that diminished their efficacy, as had happened with the *Bill of Rights*.

The willingness of the judges on the Laycraft Court to embrace the *Charter* went against their early training in law. Duty was a key motivation for taking on the new role. Laycraft found it easy to reconcile the new role demanded by the *Charter*. In his view, the *Charter* was

the will of Parliament; therefore, he was giving effect to the intention of the legislature. As Kerans has put it, the *Charter* came about because Canadians are good at saying they support human rights but are not always so good at honouring them.[76] With the *Charter,* judges had been given the sometimes unpopular job of holding them to this commitment.

Complementing the judges' willingness to interpret *Charter* rights broadly was the desire not to see the *Charter* "trivialized" – that is, invoked for inconsequential or absurd claims. This, the judges felt, would lessen the *Charter*'s lofty ideals and would ultimately undermine the protected rights and freedoms through erosion of public trust and confidence. In the back of everyone's mind was what was termed "the American experience." Lieberman remembered an American judge warning him to be very careful of trivializing the *Charter*, since this is one of the pitfalls that has afflicted *Bill of Rights* cases in the United States.[77]

The *Charter* and the Court's Take on Criminal Law

The Court's concern about possible trivialization of the *Charter* complemented its general skepticism towards narrow procedural, technical appeals in criminal matters. Most *Charter* litigation in this era concerned due process rights and, generally speaking, had a salutary effect. In Laycraft's opinion, "We had some criminal law I think needed correcting. It had been passed by Parliament in another age and never changed."[78] In the decade before the *Charter,* it had become obvious that unwritten traditions of civil liberties were insufficient to serve as a valid check and balance on the power of the state. The *Charter* was this check, and through it, the courts were called on as never before to guard legal rights and due process.

Sorting substantive due process violations from those that were trivial or ludicrous was a challenge, and the Court was sometimes criticized for erring on the side of the prosecution. Section 10(b) of the *Charter* gave rise to many appeals. This section gives an accused the right to "retain and instruct counsel without delay and be informed of that right." This imposes upon police the duty to give a caution to the accused that alerts them to this right, much like the American *Miranda* procedure. Appeals on the grounds of s. 10(b) were particularly common with impaired driving cases, and the Court often ruled that these challenges did not involve *Charter* breaches. One example was *R v Frazer*, in which the caution was not properly given but police gave the accused a half hour to consult with his lawyer.[79] Hetherington, for the Court, concluded that this was a minor, inconsequential violation. Because of decisions like this, at least one critic thought that the judges were not taking s. 10(b) violations seriously enough.[80]

An answer to such criticism was *R v Perras*.[81] An early consolidated appeal, *Perras* dealt with the tardiness of police in making sure a caution was given. The Court held that such violations were serious and instructed police to be proactive rather than take a wait-and-see attitude about *Charter* rights. Further, *R v Williams* considered imposing a positive duty on police to make certain that an accused not only understood his or her right and had the opportunity to consult counsel, but actually did so.[82] In her concurring opinion, Hetherington drew up a five-point guideline as to how this might be done. But the Court ultimately decided not to impose this greater burden; the police only had to ensure adequate opportunity to consult counsel.

The Court's approach to s. 24(2) of the *Charter* was also criticized. Under this subsection, a court shall exclude evidence obtained from a *Charter* violation when its admission "would" bring the administration of justice into disrepute. Case law allowed judges to frame the question in reverse: Would excluding the evidence bring the administration of justice into disrepute? Although it was unclear whether Alberta judges were more likely to decline to exclude evidence under s. 24(2), there was no shortage of such rulings. It was invoked, for instance, in cases in which the tainted evidence would

have been discovered independently of the *Charter* breach. The Court relied on this principle of discoverability in a number of cases. For example, in *R v Greig*, an accused had received a caution but had not spoken with a lawyer.[83] He then led the police to a body. Hetherington agreed with the trial judge that there had been a *Charter* violation of his right to counsel but that the body and subsequent autopsy should be admissible as evidence on the grounds that the police would probably have found the body even without the aid of the accused.

Generally, the Court of Appeal was criticized for being too concerned with controlling crime in its application of the *Charter*.[84] Yet the Court often relied on the SCC decision *R v Collins* as authority to dismiss minor *Charter* violations.[85] This raises the question of whether the Court's jurisprudence was really out of line with the mainstream, despite its reputation for being tough on crime.

Indeed, the Court's rulings favouring civil liberties were sufficiently robust to increasingly conflict with other rights like equality. In *R v Wald*, Hetherington and Harradence concluded that the "rape shield" law, which prevented questioning of rape victims on their past sexual history, violated ss. 7 and 11(d) of the *Charter*.[86] Two years later, the SCC reached the same conclusion in *R v Seaboyer*.[87] This led to public calls for reform. Parliament concluded that both courts had gone too far. As in other instances in which Canadian courts had made decisions failing to support women's equality rights, Parliament intervened, overruling the result in the SCC by amending the *Criminal Code* to put in place a new rape shield law that essentially adopted L'Heureux-Dubé's dissent in *Seaboyer*. *Wald* and *Seaboyer* were a taste of controversy to come.

Charter Predilections of Individual Judges

If the Court was not sufficiently solicitous of legal rights, it had an ameliorating counterweight in Milt Harradence. Harradence came into his own with criminal *Charter* appeals. His previous career as counsel clearly influenced his views. As one colleague put it, "Harradence never lost his defence perspective. He just moved to a more advantageous seat in the courtroom." That same background, however, meant that Harradence had considerable understanding of how the criminal justice system operated at ground level. One of his strengths was distinguishing when a *Charter* breach really did matter. In *R v Greffe*, for example, Harradence, in dissent, found that a police body-cavity search of an accused for drugs after arrest on traffic warrants violated the *Charter*.[88] The SCC agreed. His dissents in other important cases, such as *R v Brydges*, were also upheld on appeal to the SCC.[89]

The *Charter* also tapped into a strong libertarian streak among the Alberta judges. Lieberman credited Prowse with having been very influential on the Court's early thinking about the *Charter*. In the *Southam* appeal discussed below, Kerans remembered that Prowse was far ahead of the counsel in understanding the *Charter* implications. *Southam* was the first significant *Charter* decision for not only the Court but also the SCC, which, in its decision, set out many of the principles subsequently used for *Charter* litigation. Prowse's judgment led to a much broader application of the right against unreasonable search and seizure under s. 8 of the *Charter*.

Kerans was the Court's most prolific author of *Charter* decisions, participating as a panel member on nearly every important *Charter* appeal. His sophisticated and nuanced understanding of the *Charter* included noticeable libertarian leanings. The requirements of *Charter* litigation also meshed perfectly with his appreciation of the new, more robust law-making function of the Court. He was a contextual thinker who rarely saw things in black and white. Kerans often tried to create principled frameworks for the analysis of *Charter* rights, as in *Black v Law Society*, in which he expanded the *Oakes* test for assessing s. 1 arguments. Kerans worked hard to give *Charter* rights meaning, although towards the end of the Laycraft era, he became skeptical of the *Charter*'s

lasting value. In his view, a broad interpretation of s. 1 to save legislation, coupled with the resources of the state, allowed government to make an end run around rights.[90]

Laycraft, for his part, forcefully called for broad interpretations of rights in his landmark judgment, *Big M Drug Mart,* the first significant freedom of religion case. *Big M,* like *Southam*, represented much of the Court's general approach to the *Charter*, and it too influenced the SCC.

Bill Stevenson also participated in many of the important appeals, although he had relatively few major judgments to his credit. When he did write, it was with a clear grasp of the implications of the *Charter*. In *R v Stanger*, Stevenson, anticipating the principle that developed later, elegantly argued that limits on *Charter* rights were best considered under s. 1 rather than by creating narrow definitions of the rights.[91] He also explicitly adverted to the new role for judges, noting that the *Charter* limits legislative powers of the legislature and that the Court has a different role given the end of parliamentary supremacy. But he was also cautious. In *Black v Law Society of Alberta*, he praised Kerans' s. 1 analysis but concluded that it was probably too early in *Charter* litigation to adopt his proposed test.

Jean Côté wrote two judgments that contain some of the province's earliest jurisprudence on s. 15, the equality guarantee against discrimination. *London Drugs v Red Deer* dealt with a municipal bylaw mandating Sunday closing for businesses, with the option of closing on a different day.[92] London Drugs challenged the bylaw under ss. 2 and 15 of the *Charter*, arguing that it impairs freedom of religion, does not treat all businesses equally, and is therefore discriminatory. Upholding the bylaw, Côté raised an important point on s. 15 that he also discussed in other appeals. In his view, any statute will at some level affect individual freedom of action, so a distinction must be made between *pro forma* and real, substantial violations of rights.[93]

Singh v Dura concerned the application of the *Charter* to private law. Côté held that the Rules of Court requiring out-of-province litigants to post security for court costs did not violate s. 15 equality rights (or s. 6 mobility rights, for that matter). Côté disposed of the *Charter* arguments concisely, ruling that there was no substantive discrimination towards the litigant and that remedies already existed. He also addressed the reach of the *Charter* into private law matters:

> If the *Charter* could only be used to advance public or government objectives but never the objectives and interests of citizens, then the *Charter* would have the opposite effect to that for which it was enacted.
>
> Indeed, I repudiate the suggestion that a free and democratic society's objectives ignore civil lawsuits. Every citizen of a free and democratic society expects, and must get, justice in his dealings with his fellow citizens.[94]

Although not the main focus in either judgment, Côté's concise s. 15 analysis staked out a position on how to approach discrimination claims. He was writing very much in the same vein as Stevenson and Laycraft, alive to the implications and requirements of the *Charter* but careful not to go further than necessary in deciding the issue before him.

Enthusiasm for the *Charter* varied on the Court. Justice Lieberman remembered that some of the Court's judges did not favour the *Charter*, while others were only comfortable with some of its aspects. Lieberman, for instance, opposed *Charter* interpretations that looked like social engineering. Harradence shared this reservation, but, like Lieberman, he was an enthusiastic supporter of due process rights. Of the newer judges, Hetherington was quite active on criminal *Charter* appeals. Although perhaps more skeptical than her colleague Harradence, she demonstrated good balance in separating important, substantive *Charter* issues from minor or trivial appeals.

McGillivray, chief justice when the *Charter* arrived, did not take a leadership role on the jurisprudence. According to one colleague, McGillivray was not opposed to the *Charter*, but he was concerned about unintended consequences. Roger Kerans recalled that when a counsel quoted philosopher John Stuart Mill in argument on one of the first significant *Charter* appeals, McGillivray asked sharply what Mill had to do with it. Later, in conference, McGillivray moaned, head in hands, "Oh Lord, what have we done to the law?"[95]

In a significant *Charter* decision, *Big M Drug Mart*, discussed below, McGillivray sided with Belzil's more conservative *Charter* interpretation. Belzil authored several other opinions in *Charter* cases in which he demonstrated a preference for a much more restrictive interpretation of *Charter* rights in line with earlier *Bill of Rights* jurisprudence. For example, in *Re Public Service Employees Relations Act*, Belzil essentially argued that there was no *Charter* violation given his much more restrictive definition of freedom of association.[96] Belzil's judgment in *Big M* also revealed his fear that status quo

social stability might be rapidly undermined through excessive assertions of rights, especially those out of the mainstream.

Buzz McClung also demonstrated reservations with the *Charter*. His primary concern was the erosion of legislative authority. In an early dissent in *R v Stanger*, McClung argued, quite powerfully, that abstract provisions of the type found in the *Charter* are not sufficient to overrule the will of the legislature as expressed in a statute.[97] Like Belzil, McClung preferred a definition of rights in the *Charter* consistent with their existing historical – and limited – character. As an example, in *Moysa v Alberta Labour Relations Board*, McClung declared that there was no basis in statute or common law to find that freedom of the press was part of freedom of speech.[98] His position seemed oddly anachronistic when contrasted with the approach the SCC had taken in the 1930s in *Reference re Alberta Statutes*.[99]

One of McClung's concerns was that too enthusiastic an application of *Charter* rights might erode public confidence in the criminal justice system. In *R v Cutforth*, McClung warned that "the protection of the public...will be eased to the sidelines as the accused trades the equities of his arrest and detention against the Crown's proof of his guilt."[100] McClung expanded on this idea in *R v Greffe*, in which he was overruled by the SCC:

> I suspect that a substantial majority of such Canadians, concerned with the contagion of serious crime and the social devastation directly traceable to the trade in heroin, would be querulous that the *Canadian Charter of Rights and Freedoms* ruled out the evidence in this case.[101]

However, McClung also penned many decisions upholding *Charter* rights, especially legal rights, with which he was more familiar and comfortable.[102] And in *Mahe v Alberta*, discussed below, McClung concurred with Kerans' judgment supporting the right to minority language education contained in s. 23. In the 1990s, especially as the ground shifted to the expansion of equality rights and more obvious conflicts with civil liberties, McClung became more outspoken with his concerns. Like Harradence, Hetherington, and others on the Court, McClung was educated at a time when civil liberties were the primary focus of their legal education. Equality rights were in an entirely different, and seemingly controversial, category. When those civil liberties ran up against equality rights, the overwhelming tendency was to favour the former over the latter. It remained for the next generation of appellate judges on the Alberta Court and elsewhere to come to grips with the intersection of civil liberties and equality rights.

Hunter v Southam: The Living Tree Approach to *Charter* Interpretation

The Court's first leading *Charter* decision was *Hunter v Southam*.[103] Written by Cliff Prowse, *Southam* became an important early ruling on s. 8 of the *Charter*, which guarantees the right to be secure against unreasonable search and seizure. As such, it represents one of the first significant *Charter* rulings on legal rights. Prowse's judgment reflected the Court's desire to interpret the *Charter* broadly but without unduly impacting legislative authority, a hallmark of many of the Court's early decisions.

The background to the appeal involved the Combines Investigation Branch, which was responsible for investigating price fixing and other illegal monopoly practices among businesses under the federal *Combines Investigation Act*.[104] That included conducting searches and seizures. Oversight of the latter was quite weak, there being no judicial supervision whatsoever. All the director of the branch had to do was obtain an authorizing certificate from the Restrictive Trade Practices Commission established under the *Act*.

In 1982, four Branch investigators entered the offices of the *Edmonton Journal*, owned by Southam Inc., and demanded access to the newspaper's files. Southam's application for an injunction to stop the search led to

a court order sealing all seized material until a determination could be made on the constitutionality of s. 10 of the *Combines Investigation Act*.

Prowse, writing for the Court, held that the *Act* violated s. 8 of the *Charter*. In his view, the Restrictive Trade Practices Commission was not sufficiently impartial and independent from the Combines Investigation Branch to be a proper safeguard in authorizing searches. In defining reasonable search and seizure for the purposes of s. 8, Prowse concluded that the law on search warrants for criminal offences should conform with certain principles. He found that search warrants, a legacy of the historically limited right in the common law for authorities to conduct searches on private premises, had traditionally been based on four principles: (1) the power to authorize a search and seizure was given to an impartial person acting judicially, (2) there had to be evidence showing reasonable grounds for suspecting that an offence had occurred, (3) the evidence had to convince the justice that the search would reveal an offence, and (4) and the evidence had to be entered under oath. These principles were minimal standards under the *Charter* and had not been met in this case.

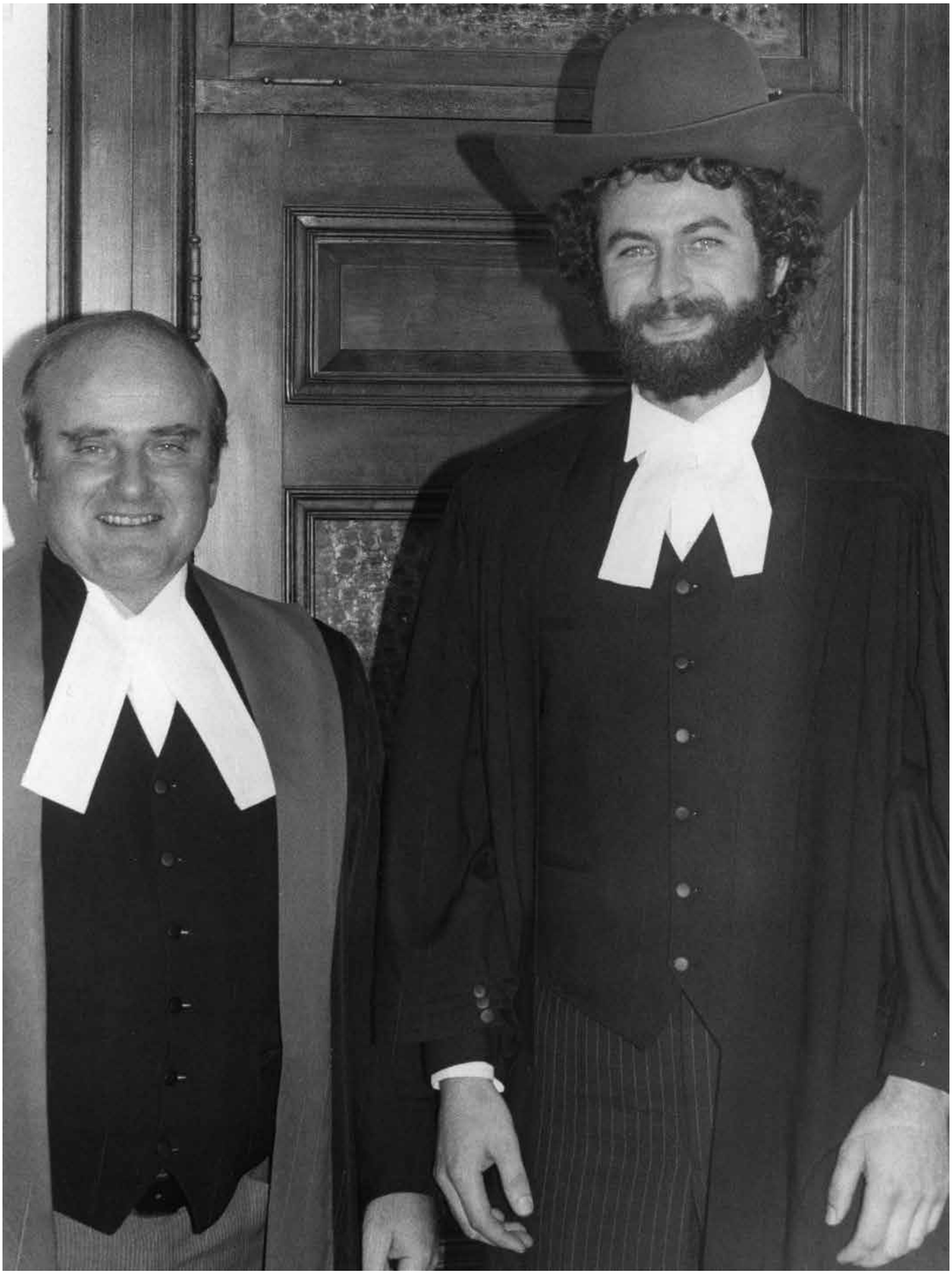
More important than Prowse's conclusion was his approach to the interpretation of the *Charter*. He expressly invoked Lord Sankey's "living tree" metaphor for constitutional interpretation from the 1930 Privy Council decision in *Edwards v Attorney-General of Canada*. The living tree doctrine is based on the premise that constitutions should be treated as evolutionary in nature and be adapted to changes in society. Prowse also quoted from a 1980 Privy Council decision, *Minister of Home Affairs v Fisher*, regarding the need to give "full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences." These became popular quotations in *Charter* judgments.[105]

However, Prowse also set a definite limit on what he considered the proper role of the courts by declining to use the remedy of "reading in." Under this approach, a judge may add or alter the offending statute to make it *Charter* compliant. In these early *Charter* days, Prowse held that the Court should not try to "read in" provisions for warrants into s. 10 of the *Combines Investigation Act* but should instead find the section authorizing the searches of no force and effect. To his mind, "reading in" was tantamount to legislating:

> In my view, it would be a departure from the established tradition of separation of function for the court to promulgate a set of rules to effect a purpose not expressed or clearly implied in the Act. If the *Charter* is to have its intended effect, then legislation touching upon the rights set out therein must be expressed clearly and unambiguously. Furthermore, it must be formulated in a public forum subject to public debate and public control. This leaves the court to carry out its judicial function and does not involve it in a legislative capacity.[106]

The SCC upheld Prowse. Dickson, writing for the SCC, agreed with his reasoning on nearly every point while expanding some. Most importantly, Dickson explicitly recognized the same constitutional principles that Prowse had expressed, including the living tree doctrine. Today, the living tree doctrine is a bedrock element of constitutional interpretation in Canada.[107]

With *Southam,* Prowse set the tone for the Court's *Charter* decisions. He strongly defended the individual's right to be protected from the intrusive power of the state. Yet while expressing the need to give broad effect to the provisions of the *Charter*, he rejected any notion that judges should trespass on the role of the legislature. Courts are guardians of the *Charter,* he asserted, but judges should let the legislature take the appropriate action when courts find a statute lacking. With this, he anticipated the future: "reading in" is today used cautiously and sparingly. This combination of boldness in defining and defending a right, with deference to the



legislature in deciding how best to make the law conform to that right, became a hallmark of the Alberta Court.

R v Big M Drug Mart: Sunday Shopping Prohibitions and Freedom of Religion

While *Southam* dealt with an area of legal rights familiar to Canadian judges, the Court's next major *Charter* decision ventured into unfamiliar territory: freedom of religion. Considered the leading case on freedom of religion in Canada, *R v Big M Drug Mart*, which is often raised as an example of judicial activism, was instrumental in defining the scope of that freedom.

McGillivray assigned a panel of five for the appeal: himself, Laycraft, Harradence, Stevenson, and Belzil. Laycraft wrote the majority judgment, with Belzil and the chief justice dissenting. The split in the Court captured two very different approaches, one reflecting a determined effort to give the *Charter* life and the other reflecting the conservative approach that had neutralized the earlier *Bill of Rights*. Laycraft's judgment in *Big M Drug Mart* went beyond deciding the immediate question of religious freedom and the *Lord's Day Act*. His decision clearly stated the duties and responsibilities of judges under the *Charter*.

The *Lord's Day Act*, passed in 1906, was a federal statute that mandated the closure of businesses on Sunday, with a few exceptions for the necessities of life. The courts had established that the *Act* was criminal law despite its obvious religious component. The first serious challenge on grounds of freedom of religion came with the *Bill of Rights*. In *R v Robertson*, the SCC upheld the conviction of a bowling alley operator under the *Act*.[108] Conceding that the statute enforced the Christian Sabbath as a day of rest, Justice Ritchie's majority judgment stated that freedom of religion in the *Bill* meant that individuals had the right to hold whatever religious beliefs they wished. But it did not mean that they were free from impositions that might have some religious basis. Justice Cartwright dissented, arguing that logically, the purpose and effect of the *Lord's Day Act* was to impose Christian values on non-Christians. Therefore, it violated their freedom of religion.

Robertson was an example of how the courts had neutered the *Bill of Rights*.[109] *Big M Drug Mart* was a test of whether the courts would treat the *Charter* differently. In the twenty years since *R v Robertson*, many things had changed in Canada. In 1963, Canadians were more religious and overwhelmingly Christian. By 1983, they were less religious and less Christian, with other faiths like Hinduism, Buddhism, and Islam becoming more common. There was also pressure to end Sunday closures because of the practical inconveniences they imposed on members of the public. As in *Robertson*, a commercial interest attacked the *Lord's Day Act* in *Big M Drug Mart*.[110] The charge against the store was one of a number laid in Alberta as more and more businesses chose to flout the law.[111] The trial judge acquitted the business, declaring the *Lord's Day Act* invalid, first, because it was not properly criminal law, and second, because it contravened the *Charter*.

Laycraft, for the majority, concluded that the *Lord's Day Act* infringed freedom of religion and could not be saved by s. 1. In his view, it seemed incontrovertible that the terms of the *Act* enforced Sunday as a day of rest because it was the Christian Sabbath. It followed that this necessarily infringed the rights of non-Christians by forcing them to refrain from certain commercial activities on a specific day determined for Christian religious reasons. Laycraft could not see how a statute with an obviously religious basis that restricted the behaviour of citizens would not be considered an imposition of a particular set of religious values, and therefore a potential violation of freedom of religion.

Like Cartwright in the *Robertson* case, Laycraft gave a wider interpretation to the meaning of freedom of religion. Perhaps more radically, although Canada had never had a constitutionally entrenched

BUZZ MCCLUNG WITH UNIDENTIFIED LAWYER, LIKELY AT BAR CALL, LASA FOND 62.

separation of church and state, Laycraft essentially argued that this was what the *Charter* now required:

It is not desirable, in my view, at this stage of *Charter* history to attempt a comprehensive definition of "freedom of religion" or "freedom of conscience."...Whatever is comprehended by the terms, however, at the very least they mean that henceforth in Canada government shall not choose sides in sectarian controversy. Standards shall not be imposed for purely sectarian purposes. Sectarian observance shall neither be enforced nor forbidden whether by economic sanction or the more subtle (but even more devastating) means of imposing the moral power of the state on one side or the other.[112]

Laycraft did not see much scope for s. 1 to save the *Act*. Society's need for a mandatory day of rest or relaxation, in Laycraft's opinion, was the only grounds whereby s. 1 might rescue the *Act*. Although the Crown had argued that the use of Sunday could now be seen as a historical relic and that the *Act* therefore served this second purpose, Laycraft did not agree. As he put it:

The difficulty with this argument in my view is the undoubted religious aspect of the *Lord's Day Act*. As criminal law it is federal legislation because it is religious legislation. That is its fundamental purpose and effect; it is almost accidental that it also achieves aims of rest and recreation for our citizens. It enforces not merely a day of rest, but the Christian Sunday. If a statute in some other form would be unobjectionable the obvious answer is for the legislative body with the competence to do so to enact it.[113]

The only remaining consideration was whether the Court was bound by previous decisions regarding freedom of religion, such as *R v Robertson*. Since the *Charter* was a new law and, more importantly, a constitutional document, Laycraft concluded that this allowed for a new and much broader interpretation of rights. The *Bill of Rights*, he noted, had avoided abstractions, choosing to define rights and freedoms as they had existed in Canada rather than in universal terms. That approach had justified imposing limitations on the reach of the *Bill*, but in Laycraft's view the *Charter* was new law, and with much greater effect. Like Prowse, Laycraft determined that the courts must interpret the constitution as a living tree, one that changes and grows with society.

This, fundamentally, was where the *Charter* was different. Comparing the language of the *Charter* to the *Bill of Rights*, he wrote:

This language does not require that the definition of either the right or protection of the right be limited by the law in existence when it was enacted. The *Canadian Charter of Rights and Freedoms* will grow with Canada; it will survive and flourish with changing perceptions and a changing society.[114]

Laycraft's judgment striking down a long-standing practice like Sunday closure was probably exactly what *Charter* critics expected – and feared. And his conclusion about the need for a broad interpretation of the *Charter* did not convince all his colleagues.

Belzil, with McGillivray concurring, dissented, holding that the majority decision in *R v Robertson* was still valid. Freedom of religion meant simply freedom to have whatever religious convictions one wished. Belzil contended that no one was compelled to observe Sunday as a religious holiday. They were simply restricted from certain secular activities, and this did not violate the more restrictive definition of freedom of religion that he favoured. Belzil also felt that to interpret the *Charter*'s right to religious freedom as meaning that the state could not favour a particular faith was to read a meaning into the document that was not intended. Canada did not have a tradition of strict separation of church and state, and the *Charter* should be interpreted in light of that historical context.

Clearly, Belzil feared the consequences of Laycraft's interpretation. As he wrote:

> I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter or Thanksgiving be next? What of the use of the Gregorian calendar? Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless, and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.[115]

It seems clear that Belzil shared some of the critical views of *Charter* opponents, including the spectre of the courts being used to radically refashion society. Fundamentally, Belzil and McGillivray supported a very different approach to the *Charter*.

The SCC agreed with Laycraft. In a unanimous judgment, Dickson upheld the Court's majority decision with remarkably little variance.[116] *Big M Drug Mart* not only settled how to interpret *Charter* rights but also further defined the scope of the responsibilities now on the judiciary's shoulders.[117] And if this meant an end to parliamentary supremacy, Laycraft's answer was that Parliament had promulgated the *Charter* to be the supreme law of the land.

Black et al v Law Society of Alberta: The *Charter* and the Guilds

Black et al v Law Society of Alberta was a seminal case on the reach and scope of mobility rights under s. 6 of the *Charter* as well as s. 2(d) (freedom of association), and s. 1 (the limitation clause).[118] The case involved a challenge to the rules of the Law Society of Alberta, passed under provincial authority, restricting practice by out-of-province lawyers. The Court thus had to consider just how far mobility rights go and how professional firms may be structured.

In his judgment, Kerans followed Laycraft's lead in *Big M* by giving a broad interpretation to the *Charter* rights in question. He also demonstrated the new style of judging required in *Charter* cases, employing the purposive approach and considering not just case law, statutes, and authorities but also works on political theory and history as well as the intent of the framers of the *Charter*. Kerans also provided an approach to s. 1 that placed the promotion of individual freedom at the heart of any s. 1 analysis.

One consequence of Canadian federalism was that significant barriers existed for interprovincial trade, including the movement of labour. Many of those barriers remain intact even to this day. At that time, professional accreditation in one province rarely granted the ability to practice that profession in another. While national law firms are now commonplace, they did not exist in 1986. Provincial law societies regulated lawyers, requiring them to be members of the provincial bar and, generally, residents of the province as well. Law was essentially a closed shop at the provincial level.

Alberta was the site of an early experiment to set up a law firm operating in two provinces. A major Toronto firm, McCarthy and McCarthy, entered into a partnership arrangement with Black and Company of Calgary.[119] All the partners of Black and Company were also partners in McCarthy, and some members of McCarthy in Toronto were partners in Black, making them non-resident members of the Law Society of Alberta. This did not sit well with the Law Society, which passed two new rules. The first restricted lawyers to membership in one law firm, and the second prohibited active, resident law society members from practising with non-resident members. Black and Company challenged these rules as violations of mobility rights and freedom of association.

In Kerans' view, there was little doubt that the Law Society rules violated s. 6(2) of the *Charter*, which gives all citizens the right to move and reside wherever they wish within Canada and to "pursue the

gaining of a livelihood in any province." No one disputed that the rights were subject to the laws that might govern work and workplaces in each province. The question was whether those laws could discriminate on the basis of whether someone "resided" in a province. In the law society's view, s. 6 meant that everyone had the right to work, but not all types of work were necessarily open. Kerans rejected this, finding that the right should be construed in the wider sense of pursuing one's chosen livelihood.

Kerans also concluded that both law society rules violated s. 2(d), since the ability to associate with others in pursuit of a livelihood fell under freedom of association. The law society rules breached this right by preventing lawyers from freely associating with each other in pursuit of their profession. Thus, they were invalid. In so holding, Kerans expanded the definition of freedom of association. Under the *Bill of Rights*, judges had construed "association" as simply being the right to associate with whom one wished. In Kerans' view, the right also protected the end for which people associated – in the case of Black, to practice law.

Kerans then turned to s. 1. He decided it was necessary to analyze the reach of s. 1 and develop a framework to apply it consistently. By 1986, *Charter* jurisprudence had developed into a two-step process, with courts interpreting rights broadly and then applying limits through s. 1. As with other *Charter* provisions, s. 1 was set forth in general terms, guaranteeing rights and freedoms "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

It was obvious to Kerans and other jurists that the courts had to create a functional test to determine the meaning of elastic terms like "reasonable," "demonstrably," or even "free and democratic." Having written and lectured extensively on the subject, Kerans understood that s. 1 was a crucial element in much *Charter* litigation.[120] In his view, the application of s. 1 required the courts to balance the protection of individual rights in the *Charter* against other valid societal values. The key to finding the right balance was understanding that the *Charter* aimed to enhance and protect democracy through protection of individual liberties. Therefore, the guiding principle for deciding if a right should be limited under s. 1 should be what approach would better enhance a democratic society. As he put it:

> In my view, significant violations of important human rights in a society committed to freedom and democracy cannot be demonstrably justifiable except to advance freedom and democracy. In consequence a Canadian court must be convinced not only that the violation is in furtherance of a legitimate legislative object, but also that it advances our commitment to our ideals.[121]

Kerans set the bar high for the state to justify limiting a right under s. 1. He reasoned that since democracy depends on individual rights, these should not be infringed unless the challenged law promotes freedom and democracy. With a test this strict, though, it is difficult to see how many challenged laws could ever survive. Most challenged laws involve government choices about how best to balance competing interests in a democracy and do not typically involve advancing freedom and democracy as objectives in their own right. In his approach to s. 1, Kerans went so far as to imply that unless freedom and democracy were somehow directly engaged or at stake, the challenged law could not be saved once a *Charter* breach had been established.

In Kerans' view, the *Charter* reflects the Canadian ideal that minorities are to be given not just protection but equal respect. The role of the courts is to protect the minority against majority tyranny. This means that courts should not allow governments to use s. 1 as an easy way out. According to Kerans, "If the majority wish to prevail over individual liberty in such a way, they should be required to face up to it and accept the unequivocal political responsibility which comes upon invocation of s. 33."[122]

Kerans thus refined the s. 1 test that had recently been created by the SCC in *R v Oakes*.[123] The *Oakes* test, as it became known, required that a court consider two central criteria to decide whether a challenged law could be saved under s. 1. First, was the government objective pressing and substantial? Second, was it proportionate? Proportionality included three components: (1) the government measure must be rationally connected to the objective, (2) the means used must impair the right or freedom "as little as possible," and (3) there must be proportionality between the objective and the effects of the measure.[124] To reflect his conclusions about s. 1, Kerans modified the *Oakes* test by also asking whether a limitation enhanced the promotion of a free and democratic society.

Applying his analysis of s. 1, Kerans allowed the appeal and declared the two rules of the law society invalid. Kerans thought that the restrictions, if intended to ensure the competence and trustworthiness of the profession, could arguably be seen as better enhancing a free society. However, they failed on the question of minimal impairment, there being less intrusive methods of achieving the same end. Indeed, there were myriad less draconian ways for the Law Society to monitor the behaviour of non-resident lawyers and to ensure that they met professional and ethical standards and avoided conflicts of interest.

His fellow panel members offered a short concurring judgment, written by Bill Stevenson. In his economical fashion, Stevenson agreed with Kerans' arguments except on one point. Kerans' two colleagues were not quite ready to give his analysis of s. 1 their full support. As Stevenson wrote:

> His admirable analysis of s. 1 of the *Charter* is a highly important and valuable contribution to the discussion of that section but, in keeping with his acknowledgment there will be refinements as his comments are analyzed and argued, I consider it too early in the *Charter*'s development for the court to express fixed views on the interpretation and application of the section.[125]

Stevenson and Lieberman's gentle disagreement demonstrated not only caution but also the fact that among the Alberta judges, the differences in dealing with the *Charter* were often more a matter of degree than a matter of different philosophies.

The SCC upheld the result but not on the same grounds, finding instead a breach of s. 6 that was not saved under s. 1.[126] Kerans' analysis of s. 1 attracted little comment. However, the Court's decision, upheld in Ottawa, had tremendous implications. Among others, it made possible the transnational law firms that are now commonplace. *Black* also provided valuable insight into the Court's approach to the interpretation of the *Charter*. Like Laycraft in *Big M,* Kerans and his colleagues interpreted the *Charter* rights in question liberally, reflecting that the Court wished to interpret the *Charter* first and foremost to protect liberty.

R v Keegstra: Setting Limits on Freedom of Speech

Freedom played the central role in one of the most controversial early *Charter* decisions of the Alberta appellate court. The issue in *Keegstra* was simple: To what extent should freedom of expression allow offensive or dangerous speech? The scope of the *Charter*'s protection of freedom of expression arose in the context of the hate crime provisions in the *Criminal Code*.

Jim Keegstra was a schoolteacher and former mayor in a small central Alberta town. He was fired from his position at the local high school for teaching that the Holocaust had not occurred and that a Jewish conspiracy existed to destroy Christian civilization. After some hesitation, the provincial Attorney General charged Keegstra under s. 281.2 (now s. 319[2]) of the *Criminal Code*, the so-called hate crime provision, for promoting hatred against an identifiable minority group.[127] The reluctance in laying the charges stemmed from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the fact that although Keegstra's views were very offensive, Keegstra did not advocate violence. The prevailing view was that the hate speech law was unenforceable. Nevertheless, the prosecution persuasively argued that Keegstra painted Jews as the central villains in his paranoid teachings and that they were likely to be targeted by someone incited to violence by those teachings. After an exceptionally well-publicized trial, a jury found Keegstra guilty. He appealed. Kerans wrote the judgment of the Court for himself, Stevenson, and Irving.

In his judgment, Kerans found that given the key importance of freedom of expression in a democratic society, any limits on it were difficult to justify, especially when directed to objectionable speech. Not surprisingly, given his decision in *Black*, Kerans' view was that saving a challenged law under s. 1 required that the end must be very compelling and more supportive of an open democratic society than the guaranteed *Charter* right. His analysis of the claimed *Charter* violations, as well as his conclusions about s. 1, again demonstrated his libertarian streak. His analysis also raised serious questions about the utility of criminalizing hate speech and about how best to discourage and eliminate offensive speech.

What was then section 281.2(2) of the *Criminal Code* read: "Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty" of either an indictable or a summary offence. There was no doubt in Kerans' mind that the law breached s. 11(d) of the *Charter*. It created a reverse onus on an accused to show that his or her speech was true or in good faith, both on a balance of probabilities. This exposed the accused to conviction even if the accused raised a reasonable doubt, but since this was a criminal offence, proof beyond a reasonable doubt was required. As Kerans explained,

> The problem with a defence that must be proven on the balance of probabilities is, of course, that it is possible that an accused might not meet it. As a result a jury would be bound to convict even if the accused did succeed in leaving them in doubt about the defence.[128]

In addition, Kerans found that the law infringed the right to free speech under s. 2(b). Part of the difficulty was that if the state could impose too high a standard of truth or accuracy on what people said, freedom of speech could too easily be restricted. Explaining why this would imperil freedom of speech, Kerans stated:

> Indeed, it would be a hollow right if, to assert it, we first had to demonstrate what we had to say was correct. The toleration of at least some error is part of our tradition and has been justified on both practical and philosophical grounds.[129]

This was especially true of ideas that many find reprehensible. Invoking philosopher John Stuart Mill's "marketplace of ideas," Kerans argued that democratic interchange required protection of imprudent and inflammatory speech and that s. 281.2 could easily make such speech a crime.

Kerans then turned to the question of whether s. 1 could be relied on to justify the hate crime law. Applying the *Oakes* test, Kerans concluded that the hate crime law failed on the last criteria, which dealt with whether the limitation of the right was "proportionate" to the importance of the reason for limiting it. Kerans recognized that beyond physical harm, damage to the reputation or psyche of the victims of hate propaganda was a valid competing claim to freedom of speech. But in his view, there had to be evidence that there was such damage and that it was serious enough to justify limits. As Kerans put it, "the danger asserted must be more than that of a possibility of a possibility."[130] On this basis, Kerans found that the hate crime law failed the proportionality test because it did not require any real evidence that the accused had caused harm.

He offered as an example the heated comments that arose from public discourse on controversial subjects.

PG. 316 JIM KEEGSTRA WITH LAWYER DOUG CHRISTIE AT RED DEER COURTHOUSE, 1985. CANADIAN PRESS.

This could sometimes arguably incite hatred at identifiable groups and lead to prosecution, a possibility that Kerans viewed as inappropriate. The safeguards in s. 281.2 were not sufficient to prevent this occurring. In Kerans' opinion, the hate speech law went too far given the fundamental freedom involved, and he declared it invalid.

The SCC, although deeply divided, overturned Kerans' judgment for the Court. Dickson, for the majority of four, concluded that the "possibility" of harm to identifiable groups was sufficient to save the hate crime provision, especially given the difficulties in quantifying harm outside of actual violent acts. Dickson also determined that the value of the speech in question should be put on the scale. In his view, specious racial propaganda had much less importance or value as free speech and thus less worth in comparison to possible harm. The minimal contribution of such speech in a democratic society made a restriction on it easier to justify.[131]

However, Justice McLachlin, for the three dissenting judges, concluded that there was a danger that the law could sweep up legitimate, though possibly offensive, speech. Unfortunately for Kerans, the SCC's decision meant that he would be considering Keegstra's case again. The SCC directed a new trial, and when this was appealed, Kerans once again wrote the judgment. That appeal, however, was on matters other than freedom of expression.

The SCC's decision in *Keegstra* continues to be debated among academics. It is sometimes criticized on the pragmatic grounds that hate crime laws rarely succeed in containing racist propaganda; other critiques are based on more abstract grounds.[132] But there are probably as many or more who support the SCC's analysis and result. As both the original appellate and SCC decisions showed, it was a subject where judicial opinion could – and did – differ widely. It also revealed a wide variety of opinion on what the right of freedom of expression should encompass. The Alberta Court chose to interpret the *Charter* right broadly and advocated great caution in allowing state abridgement of that right. In contrast to the SCC, which was willing to consider a much lower threshold of harm and find that some speech had less intrinsic value, Kerans and the Court sought to keep the bar high because of the fundamental importance of freedom of speech.

Twenty-three years later, in 2013, the SCC would return to the subject of hate speech in the context of human rights legislation in *Saskatchewan (Human Rights Commission) v Whatcott*.[133] In that case, the SCC explicitly recognized that the prohibition against hate speech involves balancing freedom of expression (or freedom of religion) and equality rights. The SCC found that while the legislation prohibiting hate speech is constitutional, the challenged speech must be more than rude, insulting, or offensive. To qualify as hate speech, it must meet the comparatively high threshold of language that is said to vilify or detest the intended target. Whether the SCC raised the bar on what constitutes hate speech is debatable.

Mahe v Alberta: Education and Language Rights Defined

Not every important *Charter* case to come from Alberta dealt with fundamental or universal rights and freedoms. Section 23 guaranteed "Minority Language Education Rights" – that is, the right of speakers of the two official languages to have their children receive an education in French or English. Despite Alberta's relatively small number of francophones, *Mahe v Alberta* was the country's first significant litigation dealing with s. 23 rights. In contrast to many early *Charter* decisions, the panel of Kerans, McClung, and Moir were required to determine whether and to what degree positive government action was necessary to realize a right and the responsibility of the courts to bring this about.

Sections 16 to 23 can be called the "national unity" sections of the *Charter,* reflecting as they do historical

accommodations of minority francophones and anglophones and Canada's commitment to official bilingualism. Guaranteeing anglophones and francophones the right to educate their children in their first language, and the right to have them receive instruction in educational facilities provided out of public funds, s. 23 defines some conditions under which this right would apply. In particular, there must be a sufficient number of children to justify paying for this instruction from public education funds.

However, s. 23 is silent on the threshold for providing instruction or facilities, as well as on the form that minority language education facilities would take: immersion programs, French- or English-only schools, or even entirely separate school boards. In part, the vagueness of s. 23 is no doubt in deference to the fact that education falls within provincial jurisdiction. A central issue in litigation was whether the administration of the instruction should be under the control of "s. 23 parents," as they became known.

In Alberta, the first school dedicated to instruction in French opened in 1984, the École Maurice Lavallée elementary school in Edmonton. This was the result of francophone parents lobbying first the Ministry of Education and then the Edmonton Roman Catholic Separate School Board. However, the board maintained control over the administration of the new school. A group of parents, including Mahe, argued that a school district run by s. 23 parents and their representatives, providing a fully francophone learning environment, was necessary to give full expression to their s. 23 rights, and there were sufficient francophones to warrant this. The plaintiffs also enlisted s. 15 of the *Charter*, the "equality before the law" provisions, to argue that s. 23 children and their parents had a right to have schools equivalent to English-language schools, which included "management and control."

The plaintiffs were partially successful at trial, with a ruling that the number of potential "s. 23 students" in Edmonton met a reasonable threshold to require French instruction and that s. 23 bestowed "a degree of exclusive management and control over provision and administration of minority language schools."[134] However, the trial judge stopped short of declaring that s. 23 parents should have sole control, which led to the appeal.

Kerans wrote the judgment for the Court. In his view, the fundamental issue was whether s. 23 parents had the "constitutional right to manage and control their own schools from public funds and in total independence from...the local public and separate school districts." Kerans' answer was yes, but that it essentially depended on the number of students. However, Kerans concluded that s. 23 had to be approached differently than other *Charter* rights because it was a product of political circumstance and compromise rather than being founded in universal principles of human rights. This meant that the right should be construed in a more limited and pragmatic fashion. The SCC had made this same point about other language rights enshrined in the *Charter*, and in Kerans' view, s. 23 was obviously closely akin to those.[135]

Kerans also found that the absence of precise definition of instruction and educational facilities was intentional to preserve the provinces' ability to set education policy. He concluded that the language of s. 23 made the most sense if viewed as a compromise between constitutionally entrenching language rights and acknowledging provincial control over education. Thus, terms such as "educational facility" might have a number of different interpretations as long as those with s. 23 rights received an education in keeping with those rights. In his view, there were practical considerations involving the number of students and cost, and the parents' rights under s. 23 were clearly meant to be balanced against these – hence, the "where numbers warrant" limitation in s. 23. Kerans interpreted s. 23 as creating a minimum threshold at which it became reasonable to impose greater requirements, and costs, on the education system to properly support minority language instruction.

BILINGUAL PARKING SIGN IN CALGARY, 1975. GLENBOW ARCHIVES, NA-2864-28239.

Still, Kerans thought it important to maximize the rights of s. 23 parents in order to realize the provision's intent: preserving linguistic minorities and preventing assimilation. As he put it, this was not about learning conversational French but about the right to be taught so that one was "sufficiently fluent in that language to participate fully in one or the other of the two language communities in Canada protected by s. 23."[136] He accepted that effective pedagogy requires teaching all subjects in French and creating a cultural environment that includes strong ties to existing francophone institutions or organizations. That includes institutional separation to the point of an alternate school board. However, Kerans rejected the argument that providing sufficient educational facilities *necessarily* means an entirely separate school system under the control of s. 23 persons. It seemed self-evident to him that s. 23 contains an intrinsic limit to the right of minority language education – namely, "where numbers warrant." While the *Charter* does not speak of cost or practicality directly, this is clearly what sufficient numbers was meant to take into account.

Kerans also concluded that it was flawed logic to use s. 15 of the *Charter*, the right to equality before the law, to support the s. 23 claim. For one thing, s. 23 grants special rights to two linguistic groups only. Therefore, if anything, it is an exception to s. 15 as, in essence, an "affirmative action program." Kerans also could not see why s. 15 would support a demand for a particular type of school system in any event. This was both too broad and too specific a reading of the right, especially since there might be several different ways to meet s. 23 obligations.

Another important question in *Mahe* was whether the *Alberta School Act* violated the *Charter* because it did not make adequate provision for satisfying Alberta's obligations under s. 23. Kerans agreed with the trial judge that the *Act* does not interfere with the establishment of s. 23 instruction and facilities, but it also does not mandate such establishment. The decision was left to a local school board to authorize French instruction upon an elector's petition, subject to review of the Minister of Education. Kerans agreed that this was insufficient to give proper effect to s. 23 but declined to find that the lack of positive measures meant the *Act* was invalid. Rather, the *Act* was incomplete in the post-*Charter* reality. Kerans expressed doubt that the government could properly fulfill s. 23 without adding to the *Act*, but he felt it was for the legislature, not the Court, to decide how the provincial government should better implement s. 23.

The bottom line for Kerans in the *Mahe* appeal was that the actual numbers in Edmonton did not warrant the establishment of a separate francophone school district, at least not without further proof that it was required. There was obviously a need for French first-language instruction, which, to some extent, was being met. But again, since no one had argued that the existing school, operated by the Edmonton Roman Catholic Separate School Board, was insufficient or that the school's administrative structure failed to adequately recognize the francophone community, Kerans declined to comment on these arrangements. As a result, the appeal was dismissed, although Kerans, through his declaration defining the full extent of s. 23 in the appellants' favour, pointed out that they had in part succeeded.

The SCC agreed with much of Kerans' analysis but decided differently on the result. Dickson ruled for a unanimous court that in Edmonton, the numbers warranted dedicated schools and proper representation on the separate school board but not an independent francophone board. He also spelled out more specifically the requirements of s. 23 for legislatures, particularly the extent of management and control that s. 23 parents should have short of an independent school board. Dickson declared several principles, including guaranteeing a proportionate representation of minorities on existing boards and granting these representatives exclusive authority for decisions relating to minority language instruction while leaving the curriculum under provincial control. Dickson also held that governments had a positive obligation to take action to realize s. 23. Taking a page from Kerans' judgment, however, he left the legislative scheme up to the Alberta government.

Kerans' judgment demonstrated again the Alberta Court's approach to the *Charter*, one that he played a major role in formulating. On the substantive issue of the extent of the s. 23 right, Kerans gave it broad expression while pointing out its intrinsic limitations. This included a bold declaration as to the best way to ensure proper minority language instruction. However, Kerans deferred to the legislature as far as determining the best way to realize the right, respecting provincial prerogatives on education. Philosophically, he was closely aligned with the SCC in the analysis of s. 23, although the SCC decided on a lower threshold for action. The SCC was also willing to go a step further in requiring a legislature to act. The Alberta Court, while supportive of the rights under the *Charter*, clearly wished to go no further than necessary in addressing the appropriate policy for realizing these rights.

By 1991, nearly ten years had passed since the *Charter* first appeared. The early, perhaps heady days when much *Charter* litigation dealt with obvious and serious breaches of rights, such as found in *Big M Drug Mart,* were coming to an end. Arguably, these early decisions were well within the comfort zone of the Alberta appellate bench. Even if some judges had misgivings about the invitation to a more proactive role that came with the *Charter* or the danger of too much "rights talk," dealing with *Charter* violations in appeals involving civil liberties was familiar ground. The Court was willing to take bold stances in support of freedom of expression and religion, which were recognized as universal human rights, or due process rights. The Court responded to the *Charter* by interpreting it very much from the perspective of individual freedom and liberty.

However, the Alberta judges had not yet seen much in the way of litigation generated from s. 15 of the *Charter*, the right to equality. Section 15 took courts into much more uncertain ground, where the simpler idea of individual freedoms was complicated with concepts of "substantive" justice and other complex – sometimes sophisticated, sometimes vague – analyses of rights. Critics tied these more difficult analyses of rights to the so-called "identity" politics of the 1990s. Others felt strongly that they tackled the true nature of discrimination.

CONCLUSION

At the end of 1991, beset by poor health, Herb Laycraft decided to retire. The decision was informed by his profound sense of duty. Feeling unable to adequately fulfill his duties as chief justice, Laycraft felt that it would be best for the Court if he stepped aside and allowed for fresh leadership.

The *Charter* distinguished Laycraft's years as chief justice. Although *Charter* litigation may have made up only a minority of the Court's work, it had a disproportionate impact. The *Charter* profoundly influenced the legal landscape in Canada and changed the way in which appellate judges approached the law and their role in its evolution. In Alberta, appellate judges did not all agree on the appropriate scope of the *Charter*, but they were determined to make it work, feeling that it was their responsibility as judges to do so.

The Alberta judges were in accord with the SCC dicta to give a broad construction to rights and to find the proper limits through the application of s. 1. Ironically, this probably made the Court less willing to allow s. 1 limitations, since a broad interpretation of rights presumably meant viewing s. 1 arguments skeptically. In criminal law, where the *Charter* had enormous relevance, the appeal judges' approach to *Charter* rights fit in with long-standing tendencies of the Court. In interpreting the scope of other fundamental rights and freedoms, the Alberta judges tended to favour maximizing the liberty of the individual.

At the same time, the judges were careful: they were very aware of the magnitude of the new responsibility they had been given and were determined not to overstep the bounds of what they perceived to be their new role. The Court showed significant deference to the legislature in keeping with the view that this, not the courtroom, was the appropriate forum to deal with any violations of *Charter* rights. The Alberta judges were quite aware of the criticism that unelected judges would be given too great a role in determining the law of the land. The Court also worried that there would be a flood of conflicting interpretations across the country.[137] Furthermore, they did not want to be put in the position of directing social policy; they maintained that courts were not equipped to take on such a role since they did not possess the resources commanded by the legislature in terms of research, studies, or statistics. Despite their legal expertise, they were poorly situated to write laws.

Laycraft's retirement also signalled the passing of the war generation. His successor was a baby boomer. Most subsequent appointments to the Court received their education and started their careers at a time when Laycraft, Prowse, and McClung had reached the heights of the profession as practitioners or were beginning their judicial careers. The new generation experienced a different environment, with the practice of law becoming increasingly more business-oriented. Disputes involved ever more complex litigation, and entire new fields of law and specialization had developed.

By the time the boomers and near-boomers came onto the appellate bench, computers were commonplace, the Internet era was well underway, and the *Charter* was no longer a revolution. As the ninth Chief Justice of Alberta, Catherine Anne Fraser would oversee the transition of generations and would deal with new and demanding challenges.

Endnotes

1 Johann Wolfgang von Goethe, *Torquato Tasso* (1790), i.2.

2 *Hunter v. Southam,* [1983] 3 WWR 385, aff'd [1984] 2 SCR 145; *R. v. Big M Drug Mart* [1984] 1 WWR 625, aff'd [1985] 1 SCR 295; *Black v. Law Society of Alberta* [1986] 3 WWR 590, aff'd [1989] 1 SCR 591; *R. v. Keegstra* (1988), 87 AR 177, rev'd [1990] 3 SCR 697.

3 Laycraft interview, Aug. 26, 2009.

4 Ibid.; also Lieberman interview, Sept. 17, 2009.

5 McGillivray and his wife had a rural retreat at Gull Lake but appear to have spent most of their time there socializing with the neighbours rather than looking for solitude.

6 Court of Appeal Administrative Records, box 2193, file M-2, Annual Meetings, memo, May 30, 1988.

7 LASA, fond 56, Calgary Bench and Bar Oral History Project, Laycraft interview, April 23, 2003, 15.

8 Laycraft interview, Aug. 26, 2009.

9 Laycraft interview, Aug. 18, 2008.

10 Chief Justice Catherine Fraser, at the ceremony sponsored by the Legal Archives Society of Alberta for the unveiling of the bronze busts in honour of Chief Justice Laycraft and Chief Justice McGillivray held June 28, 2006, in Calgary, Alberta.

11 Irving interview, March 15, 2010.

12 Ibid.

13 One keen observer, Roger Kerans, felt that the Liberals had slipped back into patronage mode in the last years under Trudeau and that the Conservatives did good work to reverse the trend. Kerans believes that after Mulroney came to power, a fairly large number of judges in Canada were generally appointed from the ranks of Conservative supporters but that they were, by and large, good candidates. As he put it, "There was a lot of pent-up demand" (Kerans interview, Oct. 24, 2009). Most of the new appointments to the appeal court were from the trial courts, so in a sense, they were actually Liberal-era appointees.

14 Andre S. Millar, "The New Federal Judicial Appointments Process: The First Ten Years," *Alberta Law Review* 38, no. 3 (2000): 617.

15 Kerans interview, Nov. 24, 2008. Kerans mentioned in an aside that Laycraft had wanted Hetherington but had difficulty securing her appointment.

16 "Woman makes court history," *Calgary Herald,* Oct. 23, 1985.

17 PAA, acc. 80.146, S. Bruce Smith interview, 1980.

18 Louis Knafla and Richard Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Supreme and District Courts of Alberta 1876–1990* (Calgary: Legal Archives Society of Alberta, 1997), 43.

19 *Calgary Herald*, March 10, 1987.

20 *Law Society of Alberta Newsletter* 10, no. 4 (Aug./Sept. 1985): 3.

21 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 176.

22 Ibid., 30.

23 Côté interview, Dec. 9, 2009.

24 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 31.

25 Justice Frans Slatter, in comments made to the Court on November 16, 2012, to celebrate Jean Côté's twenty-five-year anniversary with the Court, which occurred on October 27, 2012.

26 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 22. Examples are C.C. McLaurin, Chief Justice of the Trial Division from 1952 to 1968, and W.A. Macdonald of the Appellate Division.

27 LASA, fond 56, series 3, John D. Bracco interview, January 4, 1996.

28 The *Court of Appeal Act*, like the *Judicature Act* before it, stipulated that the judges reside in or near the two principal cities of Alberta. SA 1978, c. 50, s. 6.

29 Justice Buzz McClung said this about Bracco just before Bracco's retirement. Personal communication from Chief Justice Fraser of the Alberta Court of Appeal.

30 Stevenson resigned after less than two years on the SCC because of health problems. Major is profiled only briefly here, since his time on the Court was so short. According to Laycraft, when Major was appointed to the SCC, a law professor opined that his judicial proclivities were unknown because he hadn't written any judgments. Major found this claim both amusing and annoying, because he had written a large number of unreported memoranda of judgment.

31 Laycraft interview, Aug. 26, 2009. Examples include *Farm Credit Corporation v. Holowach*, [1988] 5 WWR 87, which also had a seven-judge panel, a real rarity on the Laycraft court, and *Reference re Bill C-62*, [1992] 1 WWR 1.

32 Laycraft interview, Aug. 26, 2009.

33 LASA, fond 79, series 2, box 32, file 233a, Court of Appeal meetings, re: circulation of drafts, memo, June 14, 1988.

34 LASA, fond 79, series 2, box 9, file 233, Council of the Court of Appeal, 1985-88, minutes, Court meeting, June 14, 1985.

35 LASA, fond 79, series 2, box 32, file 233a, Court of Appeal meetings, re: circulation of drafts, minutes of meeting, May 24, 1990.

36 LASA, fond 79, series 2, box 2/11, file 233, Minutes of Meetings, Court of Appeal of Alberta, Part 1, 1978–88, minutes of meeting, Sept. 16, 1981. See also Kerans interview, Nov. 24, 2008. Kerans remembers a good-natured argument with Carl Clement on this point.

37 *Alberta Rules of Court*, Appendix, January 1991, Consolidated Practice Directions.

38 But it did happen. For example, in *Trace v. Institute of Chartered Accountants Council*, [1989] 2 WWR 86, a five-judge panel reconsidered *German v. Law Society of Alberta* and reversed that decision.

39 Court of Appeal Administrative Records, box 2195, file C-16, clipping, *Edmonton Journal,* "Court lowers the boom," 1986.

40 Court of Appeal Administrative Records, box 2195, file C-16, letter, Laycraft to Davies, April 14, 1986.

41 Côté interview, Dec. 9, 2009.

42 Laycraft interview, Aug. 26, 2009.

43 Peter McCormick, "Sentence Appeals to the Alberta Court of Appeal, 1985–1992," *Alberta Law Review* 31, no. 4 (1993): 626. In 1989, 73 percent were criminal appeals, which was the highest percentage among Canadian appellate courts. However, nearly half of all appeals were sentencing appeals, probably because of the creation of sentence appeal panels.

44 Court of Appeal Administrative Records, box 2193, file M-2, Annual Meeting, letter, McGillivray to Sinclair, June 13, 1983; letter, Sinclair to McGillivray, June 3, 1983.

45 McCormick, "Sentence Appeals," 638.

46 Court of Appeal Administrative Records, box 2193, file Jasper Meeting 1987, letter, CTLA to Institute of Law Reform, Jan. 19, 1987; memo, Stevenson to Court, May 26, 1987.

47 Ibid., R.P. Kerans draft report, May 14, 1987.

48 McCormick, "Sentence Appeals," 630.

49 Ibid., 627.

50 Kerans interview, Nov. 24, 2008.

51 LASA, fond 79, series 2, file 252(a)(ii), memo, Kerans to Laycraft et al., Feb. 5, 1990.

52 Court of Appeal Administrative Records, box 2193, file M-2, Annual Meetings, letter, Kerans to Huggard, Feb. 29, 1988.

53 LASA, fond 79, series 2, box 7, Day files, letter, Kerans to Dunster, Sept. 30, 1988; letter, Kerans to Hunter et al., Dec. 16, 1988. The appeal was *Nova v. Guelph Engineering* (1989), 70 Alta. L.R. (2d) 97.

54 Laycraft interview, Aug. 18, 2008.

55 Kerans interview, Nov. 24, 2009.

56 Court of Appeal Administrative Records, box 2193, file M-2, Annual Meetings, memo, Kerans to Court, May 16, 1988.

57 Ibid., Court Meetings, Sept. 10, 1991, memo, Kerans to Court, Aug. 8, 1991.

58 Lieberman interview, Sept. 17, 2009.

59 Annual Reports, Court of Appeal. Department of Attorney General of Alberta, Edmonton, 1976.

60 Ian Greene et al., *Final Appeal: Decision Making in Canadian Courts of Appeal* (Toronto: James Lorimer, 1998), 46–49, discuss increasing caseloads and pressures on judges. As an aside, the authors mention that judges interviewed in the mid-1980s report putting an increasing amount of time into civil litigation. In extensive interviews with counsel and judges for the Legal Archives Oral History Program, I have heard many narrators make reference to the increasingly time-intensive nature and sophistication of civil litigation, and to the consequent expense. This opinion is by no mean monolithic, but there seems little doubt that civil litigation was changing not only in scope but also in nature.

61 Harold Rosenberg, *Discovering the Present: Three Decades in Art, Culture, and Politics* (Chicago: University of Chicago Press, 1973).

62 *Southam v Director of Investigation and Research of the Combines Investigation Branch et al*, [1983] 3 WWR 385; *R v Big M Drug Mart*, [1984] 1 WWR 625; *Black v Law Society of Alberta*, [1986] 3 WWR 590; *Mahe v Alberta*, [1987] 6 WWR 331.

63 Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: The Women's Press, 1983), 83-95. See also Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005), 17 CJWL 45 at 51; Mary Eberts, "Sex-based Discrimination and the Charter," in Anne F. Bayefsky and Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), 183 at 204; Peter Hogg, *Constitutional Law in Canada*, 5th ed. (looseleaf supp.) (Toronto: Carswell, 2007), 55-65n317.

64 One of the best examples is the *Vriend* case, in which the SCC ordered Alberta to explicitly add sexual orientation as a prohibited ground of discrimination in provincial human rights legislation. The government of Premier Ralph Klein considered using the "notwithstanding" section but decided against it, probably because of the high cost in negative publicity.

65 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2009), 819. In the United States, a body of legal conventions and court decisions has been created to allow necessary limitations on constitutional rights, but literalist interpretations of rights can be a major problem, as is illustrated by American attempts to grapple with gun control.

66 This section is similar to that found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222, Eur. TS 5. For example, art. 8(2) states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

67 *Reference re Alberta Statutes*, [1938] SCR 100; *Accurate News and Information Act,* Legislative Assembly of Alberta, 1937 (3rd Sess.), Bill 9. A highly entertaining and informative article on this case and freedom of the press is Peter Bowal, "Whatever Happened to... the Edmonton Journal and Freedom of the Press in Canada," *LawNow Magazine* 37, no. 1 (Sept.–Oct. 2012), available at http://www.lawnow.org/the-edmonton-journal-freedom-of-the-press-canada/.

68 Dale Gibson, "Bible Bill and the Money Barons: The Social Credit References and their Constitutional Consequences," in *Forging Alberta's Constitutional Framework*, ed. Richard Connors and John M. Law (Edmonton: University of Alberta Press, 2007), 209.

69 Catherine A. Fraser, "Constitutional Dialogues between Courts and Legislatures: Can We Talk," unpublished paper presented at the Centre for Constitutional Studies Conference, Banff, Alberta, July 2004. This paragraph and the preceding remarks are from that paper.

70 F.L. Morton and Rainer Knopff are the leading proponents of this and other criticisms of the *Charter*; see, for instance, "The *Charter* Revolution and the Court Party," *Osgoode Hall Law Journal* 30, no. 3 (1992).

71 See, for example, Michael Mandel, *The Charter of Rights and Freedoms and the Legalization of Politics in Canada* (Toronto: Thomson, 1992).

72 Laycraft interview, Aug. 17, 2009.

73 Lieberman interview, Sept. 17, 2009.

74 Kerans interview, Nov. 24, 2008.

75 Kerans remembered Dickson's visit in 1987, when he gave the Court high compliment, and while he may not have singled out *Charter* decisions, it seems likely, given the timing, that these would have at least partly motivated his praise. See also Peter McCormick, "Alberta's Court of Next-to-Last Resort: Appeals from the Alberta Court of Appeal to the Supreme Court of Canada, 1970–1990" *Alberta Law Review* 29, no. 4 (1991): 268. He found the reversal rate for Alberta at the SCC was generally lower than that of most provincial appeal courts, though many variables are hard to control.

76 Kerans interview, Nov. 24, 2008.

77 Lieberman interview, Sept. 17, 2009.

78 LASA, fond 56, series 3, Laycraft interview, 26.

79 *R v Frazer* (1986), 70 AR 102.

80 See Bruce P. Elman, "The Right to Counsel Denied: Recent Cases on Section 10(b) of the *Charter*," *Alberta Law Review* 22, no. 3 (1984).

81 *R v Perras,* [1986] 1WWR 429.

82 *R v Williams* (1986), 73 AR 388.

83 *R v Greig* (1990), 103 AR 385.

84 See Ziff and Elmans' annotation on *R v Cutforth*, [1988]1 WWR 274.

85 *R v Collins*, [1987] 1 SCR 265.

86 *R. v. Wald*, [1989] 3 WWR 324.

87 *R v Seaboyer*, [1991] 2 SCR 577.

88 *R v Greffe* (1990), 57 Alta LR (2d) 161.

89 *R v Brydges* (1987), 55 Alta LR (2d) 330.

90 Kerans interview, Nov. 24, 2008. See also Kerans, "The Future of Section One of the *Charter*," *University of British Columbia Law Review* 23, no. 3 (1989). Interestingly, Kerans also expressed to the author his opinion that the SCC had "dropped the ball" with criminal *Charter* cases, creating significant problems for the criminal justice system.

91 *R v Stanger*, [1983] 5 WWR 331.

92 *London Drugs v Red Deer*, 1988 ABCA 271.

93 *Mohr v Scoffield and Attorney General* (1991), 83 Alta LR (2d) 1. Côté argued again that "all legislation discriminates against someone" and stated that a sound evidentiary basis was needed for any claims under s. 15.

94 *Singh v Dura*, [1988] 4 WWR 673 at para. 48.

95 Kerans interview, Nov. 24, 2008.

96 *Re Public Service Employee Relation Act (Alberta)*, [1985] 2 WWR 289.

97 *R v Stanger*, [1983] 5 WWR 331.

98 *Moysa v Alberta Labour Relations Board* (1987) 52 Alta LR (2d) 193.

99 *Reference re Alberta Statutes,* [1938] SCR 100.

100 *R v Cutforth*, [1988] 1 WWR 274, at para. 21. This decision drew the ire of two Alberta law professors who, in the annotation of the report, argued that the Court was sacrificing a full protection of rights on the altar of expediency of fighting crime.

101 *R v Greffe* (1990), 57 Alta LR (2d) 161, at para. 14. The accused in this case was arrested on outstanding traffic warrants at which point police carried out a full body cavity search for drugs. Harradence's dissent, mentioned above, was upheld at the SCC.

102 See, for example, *R v Dennis*, 1984 CarswellNWT 31, where McClung was very critical of Crown conduct of a trial. A later judge of the Court and long-time crown prosecutor, Peter Martin, thought that McClung and Hetherington had an even-handed approach to *Charter* due process rights.

103 *Hunter v. Southam*, [1983] 3 WWR 385.

104 RSC 1970, c. C-23.

105 *Hunter v. Southam*, [1983] 3 WWR 385, at para. 12.

106 Ibid., at para. 70.

107 It stands in marked contrast to the originalist view of constitutional interpretation favoured by some judges on the US Supreme Court, wherein the original intent of the framers is the guiding principle.

108 *Robertson v R*, [1963] SCR 651.

109 Hogg, *Constitutional Law*, 723; Peter Brett, "Reflections on the Canadian Bill of Rights," *Alberta Law Review* 7, no. 2 (1969): 299–300.

110 Justice Laycraft believed the owners of the business were Jewish, which introduced individual conscience into the appeal. Laycraft interview, Aug. 17, 2009.

111 See, for example, *R v Horne & Pitfield Foods*, [1982] 5 WWR 162.

112 *R v Big M Drug Mart*, [1984] 1 WWR 625, at para. 44.

113 Ibid., at para. 63.

114 Ibid., at para 56.

115 Ibid., at para. 114.

116 Laycraft recounted that the Alberta judges thought in *Big M Drug Mart* that the SCC made no point not already made in their judgment, and that it had been said first and better in Alberta.

117 *Big M Drug Mart* also settled two other points important to *Charter* jurisprudence. Laycraft ruled that a corporate entity could raise the *Charter*, and as a corollary that a litigant could make a *Charter* challenge even if a violation did not affect them directly. Laycraft also disposed of Alberta's argument that provincial courts were not competent to consider *Charter* defences when he pointed out the "remarkable inconvenience" of this interpretation of s. 24 of the *Charter*.

118 *Black v Law Society of Alberta*, [1986] 3 WWR 590.

119 McCarthy's had originally planned just to open an office but, while the Law Society of Alberta was pondering their proposal, opted to partner with Black. Christopher Moore, *McCarthy Tetrault: Building Canada's Premier Law Firm, 1885–2005* (Vancouver: Douglas and McIntyre, 2005), 132.

120 See, for instance, Kerans, "The Future of Section One of The *Charter*."

121 *Black v Law Society of Alberta*, [1986] 3 WWR 590, at para.132.

122 Ibid., at para. 152.

123 *R v Oakes*, [1986] 1 SCR 103.

124 Robert J. Sharpe, and Kent Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2005), 65–66.

125 *Black v Law Society of Alberta*, [1986] 3 WWR 590, at para. 203.

126 Justice La Forest, for the majority, thought the law society offended s. 6 and was not saved under s. 1, and did not even consider the freedom of association angle. McIntyre in dissent thought that neither rule violated s. 6 but both violated s. 2, but that s. 1 saved the rule against multiple partnerships.

127 *Criminal Code*, RSC 1970 c. C-34, s. 281.2 [en. RSC 1970 c. 11 (1st supp.), s. 1].

128 *Black v Law Society of Alberta*, [1986] 3 WWR 590, at para. 16.

129 Ibid., at para. 35.

130 Ibid., at para. 54.

131 Dickson agreed with Kerans that the law also violated s. 11(*d*) of the *Charter*. He felt, however, that it could be justified under s. 1, in the same terms as for s. 2(*d*), and as a legitimate attempt of Parliament to balance the law by providing an accused with a defence and giving recognition of the value of truth, but also allow the law to be effective. See [1991] 2 WWR 1, at para. 156.

132 For some of the range of opinion, see Richard Moon, "Hate Speech Regulation in Canada," *Florida State University Law Review* 36, no. 1 (2008), and "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights," *Osgoode Hall Law Journal* 40, no. 3 (2002); Victor V. Ramraj, "Keegstra, Butler, and Positive Liberty: A Glimmer of Hope for the Faithful," *University of Toronto Faculty of Law Review* 51 (Spring 1993); and Sanjeev S. Anand, "Beyond Keegstra: The Constitutionality of the Wilful Promotion of Hatred Revisited," *National Journal of Constitutional* Law 9 (1997–98), a very small sample indeed.

133 2013 SCC 11.

134 *Mahe v. Alberta* (1985), 39 Alta LR (2d) 215.

135 *Societe des Acadiens due Nouveau-Brunswick Inc. et al v Association of Parents for Fairness in Education*, [1986] 1 SCR 549, was the leading decision. Interestingly, the principle Beetz J. elucidated in this decision was later refuted by the SCC.

136 *Mahe v. Alberta*, [1987] 6 WWR 331, at para. 87.

137 Laycraft interview, Aug. 26, 2009.

CHAPTER 9

FRASER'S HISTORIC COURT, 1992–2002

Leadership is wisdom and courage and a great carelessness of self.[1]

The appointment of Catherine Anne Fraser as the ninth Chief Justice of Alberta was a historic milestone for Alberta and for Canada. Fraser became the first woman to head a provincial court of appeal. Her appointment also marked the beginning of a surprisingly fast march to gender equality on the Court, another first for Canada and, indeed, the common law world.[2]

Fraser could be seen as the new face of the Canadian judiciary. She advocated more separation of the judiciary from government to enhance judicial independence. She championed a judiciary more diverse and representative of society, better informed through judicial education on social issues, and more transparent and accountable institutionally. An example of what might be called the "post-*Charter*" judge, Fraser was comfortable with the more explicit role of judicial review under the *Charter*, and with the incorporation of wider contextual considerations in judicial decision making. This was apparent in her approach to equality rights, which focused on substantive equality, a deeper analysis of discrimination.

Fraser's tenure marked a shift in judicial culture, following the lead of the SCC. And in Alberta, other judges, many of whom were new appointments and also women, shared the Chief Justice's outlook. While the Alberta Court remained largely pragmatic and litigant-focused, the Court was also very much alive to its law-making role, which called for an analysis of the big picture and long view of the law. There was a detectable shift from the classically liberal view of law that had characterized it previously and towards a more equality-based one. This was reflected in the jurisprudence of the Fraser court and in several leading and controversial decisions such as *Reference Re Firearms Act* and dissenting judgments in *Vriend v Alberta* and *R v Ewanchuk*.[3] Some judges still hewed to more conservative judicial traditions and in some instances were sharply critical of the newer style, reflecting different philosophies but perhaps also a generational gap.

THE COURT OF APPEAL, CA. 1997. L–R: PICARD, BERGER, IRVING, CONRAD, MCCLUNG, CÔTÉ, FRASER, RUSSELL, HETHERINGTON, HUNT, O'LEARY, MCFADYEN, SULATYCKY, BRACCO. COURT OF APPEAL COLLECTION.

The constitution and jurisprudence of the Fraser court might also answer the question that Justice Bertha Wilson of the SCC once posed: Do women judges make a difference? The answer, based on Alberta's experience, would be an undeniable "yes."

The first decade of Fraser's tenure was also defined by her determination to put her view of judicial independence and accountability into action. Under Fraser, the Court sought a reordering of its relationship with the provincial government that can only be called radical, the first step in a transformation of the Court that is still ongoing.

THE FRASER COURT

Fraser's 1992 appointment was a major step in the ascension of women to the top levels of Canada's judiciary. Bertha Wilson was the first woman appointed to a Canadian appeal court and then the first woman appointed to the SCC. Nova Scotia's Constance Glube became the first female chief justice of a superior trial court in 1982, followed quickly by the 1983 appointment of Mary Batten in Saskatchewan.[4] Beverley McLachlin served briefly as head of British Columbia's trial court before joining the SCC and later becoming the first woman appointed Chief Justice of Canada in 1999.

More remarkable was that within four years of Fraser's appointment, the Alberta Court was at gender parity. In fact, at one point, the Court had more female than male judges.[5] When Fraser was appointed Chief Justice in 1992, she and Mary Hetherington were the only women judges. They were soon joined by Carole Conrad, then Elizabeth McFadyen in 1993, Anne Russell in 1994, Constance Hunt and Ellen Picard in 1995, Adelle Fruman in 1999, and Marina Paperny in 2001, at which point the number of full-time judges who were women outnumbered men on the Court. The Alberta Court of Appeal was the first s. 96 court to reach that particular benchmark, and as of 2009, only the British Columbia Court of Appeal had also achieved gender parity.[6]

This achievement in Alberta was the result of several factors. Fraser believed that it was no accident that her appointment coincided with the tenure of Brian Mulroney as Prime Minister and Kim Campbell as Minister of Justice. The Mulroney government appointed many women judges, and subsequent Chrétien Ministers of Justice, including Allan Rock and Anne McLellan, were also committed to a more diverse judiciary. By the 1990s, a larger pool of qualified female candidates existed, and women could apply directly for judicial appointments. The Court was relatively small, and a significant turnover of personnel and new positions had a much greater impact. Fraser too, who spoke often about the importance of a diverse judiciary, played a role in her capacity as Chief Justice.[7] Queen's Bench also added significantly more female judges, but the trial bench never came close to achieving gender parity.

The New Chief Justice

Catherine Anne Fraser was born in 1947 in Campbellton, a small town in northern New Brunswick.[8] She had an interesting ethnic background, with Ukrainian roots on her maternal side and Lebanese on the paternal – her family name was Elias.[9] The family moved to Edmonton in 1958, and Fraser attended the University of Alberta for the combined arts and law program, where she won a number of scholastic awards. She graduated with her BA in 1969 and LLB in 1970 as the silver medallist in her class, receiving the O'Connor Silver Medal along with the Clinton J. Ford Moot Court Shield. Fraser was active in campus politics as a member of the Progressive Conservative Party youth wing. Fraser then went on to the London School of Economics (with her lawyer husband Richard Fraser), graduating with her Masters of Law in 1972. While articling in 1970–1971, and with the encouragement and approval of the Dean of Law at the University of Alberta, Gérard La Forest (later appointed to the SCC), she taught what is believed to be the first course in Canada on Women and the Law.

Fraser articled with Joe Stratton, QC, a future colleague on the Court of Appeal, at the Edmonton office

CATHERINE ANNE FRASER, 1998 AND EARLIER. COURTESY C. FRASER/COURT OF APPEAL COLLECTION.

of Saucier, Jones, Black, Gain, Stratton and Laycraft. Stratton indicated he was initially not sure whether he should hire her since the firm already had one woman lawyer.[10] Leaving the interview after an outspoken exchange on a wide range of subjects, Fraser was surprised when Stratton called the next day and offered her articles. Fraser's story was not unusual among women lawyers of her vintage. The strong commitment to equality rights held by judges such as Fraser, Picard, and Russell had roots in personal experience. According to Fraser, Stratton became a mentor, partner, and friend, and she could not have accomplished what she did without his unfailing support and guidance.

Fraser stayed with the firm after it separated from the Calgary office as Stratton Lucas and Edwards and had a broad corporate and commercial practice with a focus on major corporate clients. As a young lawyer, she was involved in the early stages of the Syncrude project and continued to act for Syncrude until her appointment to the bench. Fraser became a partner at the firm and in 1983 was appointed Queen's Counsel and chair of the Public Service Employee Relations Board, which governed the public sector in Alberta. Fraser was also a frequent lecturer, teaching courses for the Legal Education Society of Alberta and the Law Society Bar Admission Course.

Appointed to Queen's Bench in 1989, Fraser then joined the Court of Appeal after only two years. Less than a year later, on March 12, 1992, she was made Chief Justice of Alberta, the youngest appointee to the position at the age of forty-four. Relative youth was certainly an asset for the new Chief Justice. Along with her impeccable academic credentials and extensive practical experience in the corporate and commercial world, Fraser brought an incredible energy to the position and was exceptionally dedicated. Lynn Varty, the Court's Registrar from 1994 to 2007, reported that fourteen-hour days were the norm with Fraser through her first decade.[11] The Chief Justice proved determined to the point of stubbornness in pursuing goals set for the Court, an important quality for the campaign she undertook to secure more resources for the Court from the provincial government.

As a judge, Fraser was known for her quick grasp of argument, but also for her preparation and thoroughness in examining all aspects of an appeal. She embraced the broader role of judges made explicit in *Charter* litigation, and was not afraid to engage in wide-ranging analysis that included the greater historical and social context of a legal issue. A strong and fearless leader, Fraser was determined to see the Court excel. According to her colleague, Jean Côté, she succeeded:

> Against all odds, Chief Justice Fraser managed to surmount the challenges facing the Court, fend off the various threats (and even some attacks), and secure some economical but workable new premises in Calgary. Indeed, she went further and actually gained the support staff necessary to bring the Court and its methods from a model generations old to twenty-first-century practices. She did all that while staying on good terms with both the federal and provincial governments. Those achievements are all the more notable because lawyers are not trained in such matters. Chief Justice Fraser accomplished this because of her uniquely strong character traits, as well as her obvious ability, diligence and courage.

Carole Conrad, an Independent and Courageous Judge

Fraser's promotion created a new opening that Queen's Bench justice Carole Conrad filled in 1991. Shortly after her appointment, Conrad sat with Fraser and Hetherington on the first all-woman appellate panel convened in Alberta.[12] Conrad came with an excellent reputation as a trial judge and had done several stints as an *ad hoc* judge on the appeal court. She was one of three women appointed in 1986 to Queen's Bench, bringing the trial court's complement up to six. A woman judge was then still something of a novelty. In a bail hearing, when she asked the accused a question, he stuttered out, "What do I call you – your majesty?" To which Conrad, known for her quick wit, replied, "Your majesty will be fine."[13]

< THE SMALLWOOD FAMILY, COURTESY C. CONRAD. THE CONRAD FAMILY, DAUGHTER CARA, KEITH, BRAD, CAROLE AND, DERREN COURTESY C. CONRAD.

Carole Mildred Smallwood was born September 30, 1943 and grew up in the farming community of Irma, Alberta. Her father, Clifford, was a farmer and Member of Parliament for the riding of Battle River & Camrose from 1958 to 1968.[14] While Conrad later moved away from the farm, she never forgot her rural roots. That can be seen most clearly in her dissenting judgment in the *Firearms Reference* discussed later. After finishing high school in Irma, Conrad enrolled in the University of Alberta. She earned her BA in 1964 and, with her father's encouragement, entered law, graduating in 1967 with a number of scholastic and citizenship awards and prizes. A popular student, Conrad was elected and served as Vice-President of the Students' Association while in law.

She articled in Calgary at the firm of Gill, Conrad and Cronin and remained after her call to the bar in 1968, later making partner. Conrad began her practice at a time when there were only a handful of female lawyers in Calgary. It did not take her long to prove herself. Her intellectual strength and talent for quickly untangling tough legal issues made her a force to be reckoned with. It also made her one of the handful of women who opened up the practice of law for women lawyers in Calgary. Her practice consisted of a mix of labour law, usually for corporate clients, family law, general litigation, and some criminal work.[15] After the firm split up in 1972, she co-founded Conrad, Bloomenthal and Carruthers, where she practised until her appointment to the bench. By that time, she had practised law in Calgary for some twenty years and also had a short two-year stint as the vice-chair of the Calgary Rent Control Board. In addition, she served on the Board of the Legal Aid Society of Alberta, chairing its Appeal Committee for a period, and taught business law at Mount Royal College as a sessional lecturer.

As an appeal court judge, Conrad excelled. Always thoroughly prepared for oral argument, she often challenged accepted wisdom and tested underlying principles. If such were found wanting, she would critically analyze where the law should be going. Counsel needed to be well prepared if they were to hold their own. Conrad's judgments often dug deeply into first principles and used policy arguments to justify her conclusions on what the law then was, or should be. She never hesitated to write and she never lost her passion for the cause of justice.

Conrad also played a central leadership role on the Court. She served as list manager in Calgary for many years, handling this administrative burden with ease. An attendee of the Harvard program on judicial dispute resolution, Conrad was an acknowledged expert in the field and hugely successful at settling matters. She was also one of the prime proponents for the Court's adoption of judicial dispute resolution. She served on all the key Court committees from the Strategic Planning Committee to the Court Case Management Committee. Nationally, the Canadian Judicial Council appointed her to serve on its Independence Committee, a position she held for four years. Even when Conrad elected supernumerary status, she did not slow down much. In addition to her sitting duties, she chaired the federal Electoral Boundaries Commission for Alberta. In that role, she and her fellow commissioners were praised for their equality-based approach in dividing up new seats for Alberta, one that minimized disparity among ridings.

Fraser regarded Conrad as her right-hand judge, someone she could call day and night – and did – to discuss strategy in dealing with difficult issues facing the Court. Calls up to midnight were not uncommon. Together, they made a successful team. While court administrative reforms were at the top of their list, they did not stop there. They also turned their attention to ending the discriminatory aspects of the federal pension scheme for judges across Canada. They were deeply involved in formulating the arguments explaining why the existing pension rules were unfair, particularly to young appointees, most of whom happened to be women, and why the long sought after Rule of 80 was required to rectify this unfairness. They also largely wrote the submission ultimately accepted by both government and the quadrennial commission on the rationale for the Rule of 80.[16]

< CAROLE MILDRED CONRAD, COURT OF APPEAL COLLECTION. CONRAD, CHIEF JUSTICE FRASER, AND JONATHAN FRASER, AT BAR CALL, COURTESY C. FRASER.

Fraser emphasized Conrad's important role on the Court: "I cannot possibly overstate the contribution that Carole has made to this Court in all aspects of its operations. That includes always being there to provide sound advice and support. Creative, with a lightning quick mind, Carole sees things other do not readily see. I do not know what I, or this Court, would have done without her. She is truly an exceptional judge and equally important, an exceptional person."

Elizabeth McFadyen, another Historic First Joins the Court

The next appointment to the Court was Elizabeth Ann McFadyen in 1993, replacing Jack Major.[17] McFadyen had a long and distinguished career in the trial courts. In a historic first for Alberta, McFadyen was appointed to the District Court in 1976 at the tender age of thirty-five, the first woman on a s. 96 court in Alberta.[18] Born in Saskatoon in 1940, McFadyen was one of many Saskatchewan lawyers who came to Alberta. McFadyen attended the University of Saskatchewan for her bachelor of arts and law degrees. She entered the law school in 1963 just as Otto Lang became Dean, and also numbered Walter Tarnopolsky among her instructors.[19] The sole woman in her class of twenty-eight and one of only three in the law school, McFadyen graduated first in her class and won several scholarships in law. She articled with the Saskatchewan Attorney General's Department and was called to the bar in 1966. Drawn to criminal work, McFadyen became a Crown prosecutor in Regina.

In 1970, she joined the Tax Litigation Section in the federal Justice Department, based in Ottawa. The Justice Department sent her to Alberta in 1971 as the director of the department's new Edmonton office. Over the next five years, McFadyen set up and supervised the expansion of the office, which prosecuted narcotics and tax offences and provided litigation services for the federal government. Head-hunted by Kerans and Decore for the District Court, McFadyen was offered an appointment to the bench as soon as she attained the requisite ten years at the bar.

While a trial judge, McFadyen authored a string of decisions that helped shape impaired driving laws in the province.[20] She was also instrumental in preparing model jury charges for all judges. Colleagues praised her skill at criminal law, but McFadyen was a strong, well-rounded judge. No issue was too big or too small for her, and she always stood ready to assist her colleagues when they needed help. She authored numerous decisions, and one of her judgments that had a profound effect is *R v Nepoose*.[21] Faced with a jury array with a skewed gender balance, McFadyen's unconventional remedy was to order the sheriff to draw additional names from the master list with the proviso: "The names of all men will be rejected." She ordered that the list include a specified number of women to generally match the number of men. McFadyen's judgment led to major changes in how jurors are summonsed in Alberta, and a much fairer justice system.

Well respected by judicial colleagues across Canada, McFadyen was repeatedly elected to the Canadian Judges Conference (now the Canadian Superior Courts Judges Association), rising to become its vice-president. Côté said this about McFadyen: "No one can list her accomplishments on the bench, not merely because they are so numerous, but because they are so integral a part of our Court's fabric." During her thirty-six years as a judge, as the composition of the bench changed dramatically, McFadyen had a front row seat to history. When asked whether the increased number of women on the bench had made a difference, she never hesitated. McFadyen's answer: "Oh, unquestionably."

While McFadyen did not make an issue of her gender, the burden she faced as the first woman in Alberta's history appointed to a superior court should not be discounted. As McFadyen explained: "I needed to try to do my absolute best all of the time because of the fear, I guess, that it wouldn't be that I had blown something...but the take would be that the woman did it." Fraser said that McFadyen needn't have worried: "Elizabeth more than met the essential challenge. She entered what was then a

ELIZABETH ANNE MCFADYEN, COURT OF APPEAL COLLECTION.

man's world and proved beyond any doubt that women belonged there too. She was an invaluable member of the Court – never judgmental; always willing to consider other viewpoints; thoughtful; and incredibly hardworking. She lived up to the highest ideals of the judiciary."[22]

Anne Russell, an Inclusive Judge Who Served on All Alberta Courts

Anne Russell was the next judge appointed, this time to an Edmonton expansion position in 1994. Russell's background fit well with efforts to diversify the bench. Russell had been a trial judge since her appointment to the Family and Youth Division of Provincial Court in 1984, moving to Queen's Bench in 1992. When she joined the appellate court, Russell was the first person to have served on every court in Alberta. Prior to her judicial appointment, Russell had been a legislative planner for the provincial government, working on major statutes, including the 1985 *Child Welfare Act* and Alberta's contributions to the federal *Young Offenders Act*. She also served as Director of Legal Services for the Department of Health and Social Development.[23]

Born Anne Helen Lucas in Winnipeg in 1940, Russell was the daughter of an RCMP officer who later went into the insurance business.[24] After several years in Regina, the family moved to Edmonton when she was eight. Even as a child, Russell was interested in a legal career and cited meeting pioneering Edmonton lawyer Grace Hope as an inspiration.[25] Russell earned her BA at the University of Alberta in 1961 and her LLB in 1963. She articled with J.W.K. Shortreed, but not before having to lobby persistently for a position. Shortreed kept Russell on after articles and then rehired her in 1968 after she returned from three years in Germany, where her husband, a doctor, had been stationed with the Canadian Army. Russell stayed with Shortreed until 1972, acting primarily as a contract Crown prosecutor.

She pursued an interest in law affecting children with the Law Reform and Research Institute and taught family law at the University of Alberta as a sessional instructor for seven years. That led to her move to the government and ultimately to the provincial court bench in 1984, the same year she received a QC.

A judgment she wrote on the Queen's Bench, *Vriend v. Alberta*, that was to change the lives of many Albertans, exemplified her courage as a judge. Delwin Vriend had argued that Alberta's human rights legislation breached *Charter* equality rights because it did not protect against discrimination on the basis of sexual orientation. Russell came to a decision she thought was just and fair, concluding that "sexual orientation" should be read into the list of prohibited grounds of discrimination. While this decision was ultimately upheld by the SCC, it was not an easy time for Russell, who faced great criticism, some of it personal. But through the process, she maintained her trademark calm, composed, and dignified demeanour.

Russell was a unifying force throughout her twelve years on the appellate court. As one colleague said, Russell "is the nicest person I have ever met." That was reflected in many ways. Russell would organize dinner parties for out of town judges, write thoughtful notes, and be there whenever a colleague needed help professionally or personally. As an appellate judge, she ably struck a balance between thinking independently and working constructively with her colleagues to resolve a case. While Russell was open to considering other viewpoints, she was firm in defence of constitutional principles. One of the Court's information technology leaders, Russell proved adept at persuading her judicial colleagues to embrace new technology. As Chief Justice Fraser said: "Anne was special. We would do things for her – and did – that we would not do for anyone else."[26]

Ellen Picard, Gifted Law Professor, Law Reformer, and Author

Ellen Picard and Constance Hunt were the next appointments, coming in 1995 to replace Howard Irving and Milt Harradence respectively. Both came from Queen's Bench but had spent most of their previous careers in academia. Picard, older than Hunt, had a mixed legal

background. Born in the coal mining town of Blairmore, Alberta in 1941, she grew up in the nearby hamlet of Bellevue.[27] Her father was first a journalist and then a mine manager. When Picard was ready to enter high school, the family moved to Edmonton so she could attend better schools. Initially, Picard had ambitions to be a doctor, but decided for financial reasons to study home economics and became a teacher while still working on her education degree, which she earned in 1964.[28]

That same year, having decided she was unsatisfied with teaching, Picard entered law school. Unlike many of her female contemporaries, Picard was offered two positions for articles when she graduated in 1967.[29] She joined the Matheson firm, where she stayed after her call to the bar in 1968, carrying on a general litigation practice including some criminal work. Highly effective as a litigator, Picard was one of the early female role models in the legal profession in Edmonton. In 1972, Gerald Fridman, the Dean of Law at the University of Alberta, recruited her for the law school, an offer Picard found attractive, being the mother of a young child.[30] Picard believed there was only one other woman teaching law in Canada at the time. A delegation of male students initially protested Picard's hiring. Why? They said they were uncomfortable being taught by a female professor. While this exemplifies the kind of barriers many women judges of this generation encountered, it also demonstrates there were members of the legal profession, like Fridman, who did not tolerate this exclusionary attitude.

Picard flourished as a law professor. Resurrecting her interest in medicine, she became an authority on health law, writing the definitive work on liability for health professionals, *Legal Liability of Doctors and Hospitals in Canada,* among a myriad of other publications.[31] This groundbreaking book enjoys an international following as the health law "Bible." Picard, who is known as the mother of health law in Canada, founded the university's multi-disciplinary Health Law Institute in 1977. Today, it is recognized as a leader in health law research internationally.[32] Picard was also a member of the Faculty of Medicine, teaching a course there on law and medicine. She also served as the Associate Dean of Law for two terms, 1974–1975 and 1980–1981.

Picard's appointment to Queen's Bench in 1986 was the first in the province of a full-time law professor. She distinguished herself as a highly capable trial judge. In 1992, the federal government asked Picard, who had been a director of the Alberta Law Research and Reform Institute for many years, to serve as vice-chair and chair-elect of the Law Reform Commission of Canada. Seconded from her judicial position, she moved to Ottawa. That same year, the University of Alberta awarded Picard an honorary doctorate of law. When the Conservative government shut down the Law Reform Commission, she returned to Alberta and was appointed to the Court of Appeal in 1995.

Picard proved to be another highly successful addition to the Court. Judges across Canada benefited from her superb teaching skills as she served for many years on the national planning committee for seminars for Canadian appellate judges. She also worked with the National Judicial Institute in setting up a series of seminars on Science and the Law. The goal was to prepare judges for cutting edge developments in science. For a number of years, she was a consultant and speaker for the Einstein Institute, which taught US and international judges about science and litigation, especially in emerging areas of science. A dedicated mentor to the Court's law students and legal counsel through the years, Picard, with her links to the University of Alberta, served as the connection between the law school and the courts, arranging "Gown and Gown" lecture series in which law professors would speak to judges on emerging legal issues.

True to her academic roots, Picard favoured intense preparation for appeals, often working up central issues in meticulous detail. With her expertise in tort law and medical malpractice, she exerted an authoritative influence on the Court in these areas. Picard was always

<< ANNE HELEN RUSSELL, COURT OF APPEAL COLLECTION. ELLEN IRENE PICARD, COURTESY E. PICARD/COURT OF APPEAL COLLECTION.

acutely aware of the big picture and the law-making role of the Court, and her carefully crafted judgments were models of clarity. In addition, Picard played a key role in technological change within the Court. With her lifelong friend, Russell (they met in high school), the two conceived of and developed an electronic bench book for duty judges sitting in chambers, one of the many technological innovations in use on the Court's one-hundredth anniversary. Colleagues spoke about how collegial Picard was and how much they enjoyed sitting with her. Fraser added: "I often call Ellen to discuss and resolve difficult problems. She has a good heart, her loyalty to the Court and to fair and equal justice is unquestioned, and her judgment is impeccable."

Connie Hunt, Dean of Law, Academic and Author

The Court's second "baby boomer" judge, Constance Hunt, was originally from Saskatchewan. Born in Yorkton in 1950, the athletic Hunt was once noted as the best young concert pianist in the province.[33] She attended the University of Saskatchewan for her combined undergraduate Bachelor of Arts and then her law degree, earning them in 1970 and 1972 respectively. After articling at a legal aid office, Hunt spent two years as counsel for the national Inuit organization Inuit Tapirisat of Canada, involved in Native land claims.[34] Hunt's understanding and concern for peoples of the north enriched the Court, and she was always willing to take on additional sittings in the NWT, where the bar held her in great regard. She also attended Harvard and earned a Masters of Law in 1976.

Hunt joined the founding faculty at the new University of Calgary Law School, becoming Associate Dean in 1979.[35] Aside from a brief stint as corporate counsel for Mobil Oil from 1981 to 1983, she taught at Calgary and became Dean of the Faculty in 1989, the first woman to serve as dean of a Faculty of Law in Alberta. Hunt remained Dean until her appointment to Queen's Bench in 1991. A prolific scholar, she penned *Oil and Gas Law in Canada*, a standard text.[36] An authority on energy law, Hunt was also known for her writing on environmental, and aboriginal law. While Hunt was Dean, the faculty established a masters program in resource and environmental law.

Hunt served on the executive of a daunting number of legal and academic organizations, such as the Canadian Institute of Resources Law, the Alberta Institute of Law Research and Reform, the Canadian Institute on Law and the Family, and community groups like the Calgary Art Gallery Foundation and the Calgary YWCA. Hunt brought impeccable academic credentials, matched with practical experience, first to Queen's Bench and then the Court of Appeal.

Fluently bilingual, Hunt was a graduate of the French language training program for judges. This was a significant asset to the Court, where she heard a number of appeals in French. Outside of law, Hunt enjoyed playing the piano and singing in a choir. An avid hiker, while on the Court, Hunt scaled Mount Kilimanjaro. She also served as the national president of the Canadian Chapter of the International Association of Women Judges, an organization committed to equal justice and the rule of law. In addition, she was the national president of the Canadian Institute for the Administration of Justice, another volunteer role she handled with ease in addition to her judicial duties.

Hunt's scholarly approach to the law was evident in her judgments. She was scrupulous in her treatment of issues before the Court and, like Picard, understood the law-making role that appellate courts now exercise in Canada. Very concerned about the direction and evolution of the law, Hunt took a keen interest in new legal issues. She was independent in thought but collegial in approach and quickly made her mark on the Court. Acknowledged as an expert in oil and gas law, Hunt was a jurisprudential leader in this area. According to Chief Justice Fraser, "Connie's writing skills, academic expertise and measured and thoughtful approach to difficult issues have been of great benefit to this Court and Albertans."

CONSTANCE DARLENE HUNT, IN CENTRE WITH SULATYKY JA, ALAN RUBIN, FRUMAN JA COURTESY C. HUNT/ COURT OF APPEAL COLLECTION.

Adelle Fruman, the Ideal Combination of the Academic and Practical

Picard and Hunt's appointments meant the Court now had more full-time woman judges (seven) than men (six). The three supernumeraries meant that male judges were still in the majority, but just barely. Retirements and moves to supernumerary status brought new appointments later in the decade. Adelle Fruman, baby boomer number three, joined the Court in December 1998. A top securities and mergers and acquisitions lawyer and partner at Atkinson McMahon in Calgary, Fruman came to the Court after six years on Queen's Bench.

Fruman was born in Regina, Saskatchewan, in 1950. An outstanding student, she went to McGill University in Montreal on a scholarship, with an unusual double major in English and mathematics.[37] Deciding on law, she earned a bachelor of common law in 1974 and civil law in 1975, first in her class for both, and won numerous awards and scholarships. While in law school, Fruman also taught a political science course at Concordia University.[38] Fruman remained in Montreal after graduating and articled with Sal Lovecchio at Doheny Mackenzie. Her principal later came to Alberta to practice and was also appointed to Queen's Bench. After articles, Fruman plunged into a complex corporate transaction practice.

In 1978, Fruman and her husband, another McGill law graduate, moved to Calgary and Fruman joined Atkinson McMahon, where she became a partner in 1981.[39] Fruman taught securities law at the University of Calgary and published articles on the topic. She also served as a director of the Alberta Law Reform Institute from 1990 until her appointment to Queen's Bench in 1993. As a trial judge, she was involved in judicial education and instituting judicial dispute resolution.[40] Interested in information technology, Fruman was instrumental in the Court's ongoing computerization. She also chaired the Canadian Judicial Council's Judges Technology Advisory Committee, working primarily on security issues.[41] This national position was extremely important in shaping policy for courts across Canada and reflected her widely acknowledged expertise in this area.

As an appeal court judge, Fruman shone. That was evident from her crisp, clear, comprehensive yet concise judgments. Fruman once said: "There is no great writing, just great rewriting." Colleagues mentioned how she rewrote and rewrote: thirty-five drafts for a judgment was not unusual. She would review and edit her judgments until the language, nuances and reasoning were up to her exacting standards. Because of her evocative writing style, her judgments provided not only solid legal analysis but memorable imagery too.

Explaining why she and her colleagues considered Fruman's retirement to return to private practice a great loss for the Court, Fraser said: "Whenever this Court needed something done, we all rested easy when it was in Adelle's capable hands. She did everything to the highest possible standard. And she made it all seem effortless. It was not. It took endless hours of hard work, personal sacrifices and late nights – Adelle was one judge I could email at 11:00 p.m. and be pretty sure of getting a reply that night."[42]

Marina Paperny, Consensus Builder and Champion of an Informed Judiciary

In 2001, Marina Paperny joined the Court from Queen's Bench, where she had been appointed in 1996. She came to the trial court from a corner office as chief executive and corporate counsel of Madacalo Investments, a diversified private company with interests in health services, real estate, and the hospitality and publishing industries.[43] Previously, she had been a litigator and the first female partner at the Calgary firm of Howard Mackie. A member of the Alberta Securities Commission since 1993, Paperny had the credentials for the trial court appointment.

Paperny was a native Calgarian, born in 1955. Her mother Myrna was an award-winning writer of children's

ADELLE FRUMAN, LEFT, WITH CÔTÉ JA. COURT OF APPEAL COLLECTION.

literature, her father a local businessman. An excellent student, Paperny studied political science and languages at the University of Toronto, graduating with her BA in 1975 and then entering Osgoode Hall Law School. She finished in 1978 and articled with the Toronto firm of Koskie and Minsky, where she worked in labour law. Her uncle, a Calgary lawyer, convinced her to return west and join his firm, Barron McBain. Paperny later joined Howard Mackie in 1983, continuing to build a practice as a litigator, focusing on corporate and commercial files and health law. She lectured widely on insolvency and family law, and after joining Queen's Bench, on judicial dispute resolution.

Paperny was highly praised as a trial judge for her excellent analytical skills and compassion. Quick thinking, well prepared, highly articulate, and convincing, Paperny was a popular choice by counsel for Judicial Dispute Resolution (JDR). Her expertise in areas as diverse as bankruptcy, securities, and family law made her an invaluable addition to the appellate court. On the appeal court, she remained one of the go-to judges for JDR and, along with Conrad, was involved in the Court's decision to offer the bar pre-appeal JDRs. With her negotiating skills and understanding of business, Paperny was particularly adept at resolving difficult commercial disputes. In one case, counsel asked her to JDR a dispute involving ten parties and of sufficient complexity that it was scheduled for three days. Paperny worked very late with all the parties – on the second night until shortly before midnight – until the dispute was settled.

Paperny excelled in another area: teaching other judges. Her expertise in insolvency and JDR in particular made her a popular lecturer on these subjects across Canada and, indeed, internationally. Paperny was also very comfortable with the judiciary's role under the *Charter*. She always carefully considered the broader implications of Court decisions and was powerfully persuasive in underscoring the importance of fair and equal justice for all.

Paperny played an important consensus-building role on the Court, not only in its judgments on new points of law but also in court administration, sitting on ten different Court committees. Her creativity and instinctive ability to mediate contentious issues made her an invaluable member of the Court. Fraser added: "Marina's contributions include her polished, well-written judgments, unfailing commitment to equality for all, and unique ability to help people find common ground between wildly divergent viewpoints. If there is any way to solve seemingly intractable issues, Marina will find it. She never gives up and her optimism is contagious."

The Impact of the Female Judges on the Fraser Court

Paperny's appointment in 2001 brought women on the Court into an absolute majority, supernumeraries included. Eight of 14 justices were women, and in Calgary four of six.

Justice Bertha Wilson of the SCC wrote an essay in 1982 entitled "Will Women Judges Really Make a Difference?"[44] She gave, in essence, a qualified affirmative answer. Wilson argued that all judges have a perspective on the world that their life experiences have moulded and women judges therefore might see issues differently. In her view, at a minimum, women judges would not show the gender biases sometimes found among male judges, and with their presence, would help dispel and discourage gender myths and stereotypes. Wilson speculated that women judges might have a different sensibility about adjudicating, more context-driven and less married to the adversarial system. Wilson also allowed, however, that in many areas of law, there would likely be no discernible difference in the jurisprudence of male and female judges.

By and large, Alberta's appellate judges have felt that the addition of women to the bench has made a noticeable and sometimes tremendous difference in many areas of law. There is some difference in opinion as to the degree and in which way. Justice Hunt's view, echoing Wilson, was that the legal profession and the common law

< MARINA SARAH PAPERNY IN HOME OFFICE, CA. 2002, AND 2001. COURT OF APPEAL COLLECTION.
> WILLIS O'LEARY. COURTESY W. O'LEARY/ COURT OF APPEAL COLLECTION.

tradition shape judges to a great degree, whatever their personal experiences and perspective.[45] Nevertheless, she thought there were areas of jurisprudence, such as family law and sexual and domestic assault, where female judges had a higher level of sensitivity and willingness to consider feminist critiques of inequities, although not necessarily showing a uniform stance. Fraser in particular took a lead in these areas, creating guidelines for child support and taking a firm, deterrent-based stance on sentencing for spousal and sexual assaults. However, Hunt pointed out that many male judges were progressive on gender issues and the appellate judges too individual to allow any simple generalizations.

Another open question has been the effect of women on the collaborative decision making of appellate courts, and whether women are better at this than men. Picard believed this question had merit and that women judges are more suited to collaborative decision-making.[46] Picard contrasted her experiences sitting *ad hoc* on the Laycraft court with the appellate bench of the twenty-first century. That older generation, in her experience, was competitive and egos were sometimes on display. In her view, the modern court not only operated more collaboratively within itself but also in its interactions with counsel during appeals. She felt that this was at least partly the result of having more female judges. One of Picard's male colleagues observed that his female counterparts generally resisted becoming personally invested in a point of view on an appeal, much more so than men. Conrad, however, disagreed with the notion that women are somehow kinder, gentler appeal judges, stating humorously: "That has not been my experience here."[47] Conrad contended it was a matter of individual personality and not gender.

Clearly, judges of the Court, including the female jurists, had different perspectives on the influence of gender. As Chief Justice Fraser has said: "It depends – on who the woman is. But on balance, the women on the Court have made a positive and notable difference in several areas." A former member of the Court, Allen Sulatycky, who left to become Associate Chief Justice of Queen's Bench, went further:

> No one can deny that the *Charter* has had a dramatic impact on justice in Canada. But I wonder if it would have had the same impact if the male bias of the bench had continued. Although it is probably impossible to measure, my experience, first from my appointment to an almost exclusively male court, then to the Court of Appeal where women were the majority, convinces me that courts and judicial culture have changed more as a result of the infusion of female sensitivities and sensibilities than as a result of the *Charter*.

No one should assume this meant the female judges on the Court were all softness and sentimentality. Like their male counterparts, they did not resile from skewering old myths – or the arguments offered in their defence.

There is no question that much was expected from the female appointees of this era, which was dominated by the fast pace of change. The role of the appellate judge was changing; the law was changing given the impact of the *Charter*; the Court's approach to its work was changing; the Court itself was changing; information technology was changing everything; and many of the judges on the Court were in tune with those changes. In speaking about her female colleagues on all Alberta courts, Picard put it this way: "The women judges in Alberta were incredibly strong. They had to be. They were tempered in the hottest of flames." That can properly be said about Picard and all her female colleagues on the Court.

Willis O'Leary, a Talented Generalist and Gentleman

There was a full slate of male appointments to the Court as well. McFadyen's appointment was followed in 1994 by that of another trial judge, Willis O'Leary, to fill a new position on the Court. Born in 1931 in Vulcan, Alberta, O'Leary had grown up in Calgary. His talent as a hockey player allowed him to go to the University of Denver on a hockey scholarship.[48] Earning a degree in business administration, O'Leary played professionally for a brief

period in Scotland before returning to Calgary and taking a job with Gulf Oil.

O'Leary was interested in a legal career, however, and in 1959 entered the University of British Columbia Law School. He finished in 1962 as the gold medallist of his graduating class, which included Frank Iacobucci, later of the SCC, and Lance Finch, later Chief Justice of British Columbia. O'Leary went on to Harvard and received his LLM in 1963, graduating with such notables as Canada's constitutional law expert, Peter Hogg. At that point, O'Leary and his wife Betty returned to Calgary, where he articled with the Fenerty firm.

In 1966, O'Leary left to start a new firm with Arthur Lutz, Brian Stevenson, and Jack Westerberg. O'Leary was a generalist with a sizable junior oil and gas clientele but also did general litigation and insurance defence work.[49] A founding director of the Legal Education Society of Alberta in 1966, O'Leary served as director of the bar admission course from 1973 to 1976. He took an unsuccessful stab at politics as a provincial Liberal in 1971. Appointed to Queen's Bench in 1983, O'Leary garnered an excellent reputation as a trial judge and sat several times as an *ad hoc* judge with the appeal court. By his own account happier on the trial court, O'Leary's easygoing demeanor hid an independent streak, and he was not afraid to dissent.[50] O'Leary was very much in the vein of the appointments to the Court made a decade earlier – a solid litigator with broad practice experience.

Picard praised O'Leary as an appellate judge, saying he had "a sharp eye and a sympathetic ear." According to Paperny: "Willis was the poster boy for the perfect judicial temperament – he listened patiently, observed keenly, and analyzed brilliantly." His judgments were carefully crafted, the product of many hours of countless revisions. A true team player, courteous and unpretentious, O'Leary wrote well and often. According to Fraser, his contribution went far beyond this: "Willis never lost sight of the fact that as judges, we serve the public interest. He understood that there are few Canadians who ever have the opportunity to hold these positions of public trust – and he felt deeply the obligations that trust imposes."[51]

David Cargill McDonald, the Court Loses a Leading Jurist Too Soon

David Cargill McDonald was appointed to the Court in February 1996 to wide acclaim in the community, at the bar, and on the bench. A well-respected trial judge, McDonald had been the head of the Royal Commission that ultimately led to the creation of the Canadian Security and Intelligence Service. Unfortunately, he only served six months on the Court before his untimely death, the shortest term of any member. McDonald had distinguished himself on Queen's Bench, and the members of the Court were particularly delighted he had finally been appointed to the appeal court. The entire Court felt the blow of his loss. What is noteworthy and reflective of his talents is that while sitting as an *ad hoc* judge on the Court, McDonald authored the Court's guideline sentencing judgment for child sexual abuse and the Court's guideline sentencing judgment on spousal abuse, both of which remain authoritative decisions on these subjects as of the Court's one-hundredth anniversary.

Ron Berger, a Criminal Law Expert

Replacing David McDonald in 1996 was Ronald Leon Berger. A highly regarded twelve-year veteran of Queen's Bench, Berger previously had an impressive reputation as a criminal and civil barrister and was a fine replacement for McDonald.

Born in Montreal in 1943, the son of a merchant father and bookkeeper mother, Berger attended McGill University. He earned his BA in 1964 and his law degree in 1967 with first-class honours, receiving numerous scholarships including the Greenshields Prize in criminal law as well as other scholarships.[52] He was active in the debating union and served as vice-president of the McGill Debating Union. Following graduation, he

DAVID CARGILL MCDONALD, COURT OF APPEAL COLLECTION.

proceeded to the University of Pennsylvania on a fellowship to pursue his interest in criminal law.

Berger came to Alberta and articled with William Henkel in the Attorney General's Department. He joined the bar in 1969.[53] After a brief stint as a Crown prosecutor, he practised with Silverman, Thachuk and Berger until 1974 and then with Hill, Starkman and Berger. Berger had a very substantial criminal practice but also did civil litigation, and he was the original commission counsel for the 1978 Laycraft Inquiry into Royal American Shows.[54] Made a Queen's Counsel in 1980, for many years Berger taught a course in criminal procedure and advocacy at the University of Alberta and was vice-chair of the Legal Aid Society. After joining the Queen's Bench in 1985, Berger taught courses for judges with the National Judicial Institute.

As a judge, Berger was known for his wit – when a defence counsel invited him to "go boldly where no one has gone before" on the law, Berger replied, "Ah yes, the Star Trek defence."[55] Appointed to the Court in 1996, Berger's background in criminal law made him an ideal successor for Harradence when the latter retired in 1997. Like Harradence, Berger was known for his criminal law decisions upholding the rights of the accused. Berger was one of the most independent judges on the Fraser court, a frequent dissenter who often followed his own

^ MEMBERS OF THE COURT OF APPEAL OF NUNAVUT: BERGER, COSTIGAN, SULATYCKY, CONRAD AND ROB KILPATRICK, COURT OF APPEAL COLLECTION.
< MEMBERS OF THE COURT OF APPEAL OF THE NWT: JUSTICE JOHN VERTES, CHIEF JUSTICE FRASER, JUSTICE VIRGINIA SCHULER, JUSTICE RON BERGER AND JUSTICE RALPH HUDSON, COURT OF APPEAL COLLECTION

reasoning even when concurring. Fraser noted: "Ron is very much his own person. His words, written and spoken, disclose carefully honed and considered thinking. He is a prolific writer who contributes as he considers appropriate, and his judgments reflect measured, thoughtful analysis."

Allen Sulatycky, a Politician Turned Judge

In 1997, Allen Borislaw Sulatycky joined the appellate court. He was another Saskatchewan import, born in Hafford in 1938 and a 1962 graduate of the University of Saskatchewan with a BA and an LLB from the combined arts and law program.[56] Before attending university, Sulatycky had been a reporter for the *Saskatoon Star-Phoenix* and nearly made journalism his career. After law school, Sulatycky immediately headed to Alberta and articled with Ned Feehan. After a brief period as an associate with the firm, Sulatycky started his own firm in Whitecourt, Alberta.

He also jumped into federal politics, running unsuccessfully as a Liberal in a 1967 by-election and then riding Trudeaumania to victory in 1968.[57] Representing the constituency of Rocky Mountain, Sulatycky was parliamentary secretary in 1971 to Joe Greene, Minister of Energy, Mines and Resources, and then to Jean Chretien at Indian Affairs and Northern Development. The 1972 election cut Sulatycky's political career short and he

^ MEMBERS OF THE COURT OF APPEAL OF NUNAVUT: COSTIGAN, SULATYCKY, CONRAD, KILPATRICK AND CHIEF JUSTICE FRASER. COURT OF APPEAL COLLECTION.
ALLEN BORISLAW ZENOVIY SULATYCKY, COURT OF APPEAL COLLECTION.

returned to the practice of law in Edmonton with the Parlee firm. In 1982, shortly after Sulatycky had moved to the firm's Calgary office, he was appointed to Queen's Bench. Very highly rated as a trial judge (both Crown and defence often requested him to preside over the most serious criminal jury trials), he was a popular promotion to the Court. A judge without ego and totally sincere, Sulatycky had the common touch and related well to others.

After only three years, however, Sulatycky went back to the trial bench to become Associate Chief Justice, limiting his impact at the Court of Appeal. Nevertheless, even in this short time, Sulatycky was an important influence on the Court in his uncompromising support for fair and equal justice. As Sulatycky himself said in a sentencing judgment: "If Canada exists for any reason whatsoever, it is to build a truly tolerant society in which every individual is equal."[58] When he retired in 2013, Chief Justice Fraser explained Sulatycky's lifelong commitment to equality this way: "Wisdom can be gained from books, learning, and experience. And then there is the wisdom of the heart and soul that cannot be easily studied or duplicated. It is linked to your willingness to understand others whose circumstances differ from yours. There is a Ukrainian proverb: 'You don't really see the world if you only look through your own window.' Throughout his career, Allen never hesitated to look at the world through many windows."

Neil Wittmann, a Rare "Off the Street" Appointment

1997 also brought Neil C. Wittmann, the first appointment "off the street" since Jack Major. Wittmann was a highly regarded litigator with the firm of Code Hunter Wittmann in Calgary, known for his effectiveness in the courtroom and often called a "lawyer's lawyer." Born in Grande Prairie in 1943, Wittmann was the son of a bank manager, and the family lived in many different towns in western Canada, including Wainwright, Alberta.[59] Wittmann attended the University of Manitoba, earning a commerce degree in 1964.

Turning to law, Wittmann went to the University of Alberta for his LLB, graduating in 1967. Articles at the well-regarded Fenerty firm in Calgary followed and Wittmann began practising there. In 1969, however, Brownlee Fryett in Edmonton hired him away for a short stint. Wittmann returned to Calgary in 1972 to join the new firm of Code Hunter, founded by two ex-Fenerty partners. Wittmann quickly built a reputation as a talented litigator, with particular expertise in construction and insurance law. He also specialized in defending members of professional organizations, especially engineers and architects, but also his fellow lawyers.[60] Wittmann was known for his dry, acerbic wit both inside and outside the courtroom. On the executive of a raft of legal organizations, Wittmann was a Law Society bencher from 1990 to 1997 and its president in 1996–1997.

In 2005, Wittmann left the Court, like Sulatycky before him, to become Associate Chief Justice of Queen's Bench, and he was then appointed Chief Justice in 2009. It was the first instance in Alberta of a judge starting on the appeal court and then moving to the trial court.[61] Wittmann left his mark as an appeal judge with a number of well-written decisions, particularly in insurance, corporate, and commercial law. According to Fraser: "With innate common sense and sound judgment, Neil insisted, as a prelude to key reserved decisions, on rigorous research and a complete understanding of the impact of proposed actions on the bar and public. He consulted his colleagues, listened and always strove to find a consensus on issues, big and small."

Changes in the Composition of the Court

The moves by Wittmann and Sulatycky to the trial court were not unprecedented, but they reflected a shift to more flexible judicial careers, including earlier retirement. This was not uncommon in the early days of the Court when judges like Sifton and Hyndman, for example, sometimes left for other opportunities. However, for over fifty years, almost no judges had resigned prematurely (although most took advantage of supernumerary

NEIL CHARLES WITTMANN, N.D COURT OF APPEAL COLLECTION.

status), staying until carried out on their shields or later forced by statute to retire.

Ironically, the dedicated Laycraft was one of the first judges to retire early for health reasons. It then seemed to dawn on other judges that they needn't stay until "statutory senility," especially once the Rule of 80 was implemented. Some remained judges but in a less demanding capacity. Foisy retired from the Court in 1999 but continued to sit as a part-time trial judge in the Northwest Territories and later Nunavut. Others stayed active in the law but in a new role. Kerans, after a very long career on the bench, stepped down early and became a busy and highly successful mediator. Fruman was lured back to the private sector in 2007. Early retirements may also indicate the increasingly burdensome nature of the position; it was a pattern also seen on the SCC.

Peter Costigan, Quietly Exceptional in All Respects

After Wittmann, Peter Costigan was the next appointment in the fall of 1999. Costigan was originally from the Crowsnest Pass area. Ellen Picard had taken piano lessons from his mother.[62] Costigan shared in his family's musical talents, playing violin for the University of Alberta symphony orchestra.[63] The family had a long history in the law and in the Crowsnest – Costigan's grandfather had started his practice in Stettler, Alberta, in 1911, and his father Thomas Costigan practised in Blairmore for over fifty years.[64]

Peter Costigan was born there in 1946, qualifying as another baby boomer. He left the Crowsnest Pass to attend the University of Alberta in 1964, initially for an education degree, which he attained in 1968, the gold medallist for his class. He only taught one academic year in Edmonton before entering law school. Graduating in 1972, Costigan was again the gold medallist and also served as the editor-in-chief of the *Alberta Law Review*. A clerkship followed at the SCC with Justice Martland. Costigan did his articles with Brownlee Fryett in Edmonton, was called to the bar in 1974, and was made a partner only two years later in 1976.

Costigan established a wide-ranging litigation practice, with particular strengths in insurance, municipal, and employment law. Recognized as a constitutional expert, he frequently acted for the provincial government. Not surprisingly, Costigan was also very active teaching law. A long-time sessional instructor at the University of Alberta, he taught real property and insurance law. Costigan was also a regular lecturer for the Legal Education Society of Alberta, where he was a director, teaching litigation, public law, family law, and insurance. In addition, he was a contributing author to the book *Injury Evaluation: Medicolegal Principles*.[65]

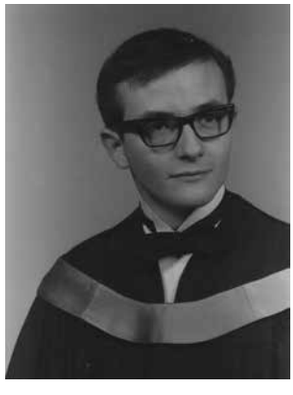
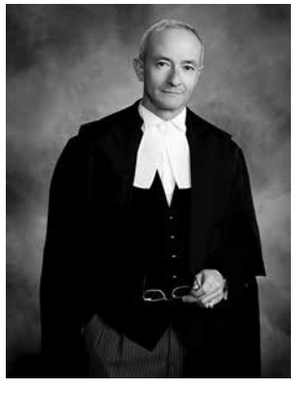
Costigan was only six months into his term as a bencher of the law society when he joined Queen's Bench in 1994. He was very active on the trial court, chairing the Long Range Planning Committee, and working on the Family Court project and the institution of judicial dispute resolution. A strong addition to the Court of Appeal, Costigan was not even sworn in yet when he wrote the decision on whether the federal *Marketing of Agricultural Products Act* was *ultra vires* – surely an auspicious start.[66]

Colleagues praised Costigan for his low-key consensus-building role on the Court and willingness to undertake any task. He was quietly influential. When he spoke, his colleagues listened very carefully to what he had to say. Fraser added: "Peter is superbly organized and extremely effective in his own calm, cool, collected way. A true delight to work with, for years, he served not only as list manager but also as the judge responsible for law students in Edmonton. He excelled in both roles. He is also masterful at dissecting legal issues and producing quality judgments in short order."

Keith Ritter, Rural Practitioner Excels as Trial and Appellate Judge

Keith Ritter was the final appointment in the first decade of the Fraser court, coming from a small-town practice in Barrhead, Alberta, via a ten-year detour at Queen's Bench. Born in Kerrobert, Saskatchewan, in 1949, Ritter grew up on the family farm and attended



school in nearby Major.[67] He went to the University of Alberta, where he received his BA in 1970 and his law degree in 1972. Remaining in Alberta, Ritter articled in Edmonton at the Hurlburt, Reynolds, Stevenson firm and was called to the bar in 1973. Wanting to practice and raise a family in a small town, he immediately joined the MacCallum and Logan firm in Barrhead, remaining there until appointed to the bench in 1993. By that time, the firm was known as Ritter, Roy and Driessen.

Ritter was a classic general practitioner. The firm was agent for the Attorney General, so there was prosecutorial work as well as defence work in the criminal field, and Ritter did much of the firm's litigation in his early years. When partner Ed MacCallum was appointed to the bench, Ritter took over his commercial and corporate practice.[68] Ritter was very involved in his community, serving as a director and then chair for Barrhead Recreation Board and the Barrhead Special Planning Committee. Ritter also served as a member of the Canada Pension Review Board.

Ritter earned a sterling reputation as a trial judge, and while on Queen's Bench, he served as head of the judicial education committee, a role he was later to reprise on the Court of Appeal. Ritter brought strong writing skills, common sense, and a feel for social change when appointed to the Court in 2002.[69] He was the first judge on the appellate court since Foisy whose practice had not been in Calgary or Edmonton. One of the peculiarities of appellate appointments in the province had been the shortage of appointments from Alberta's smaller cities, such as Medicine Hat, Lethbridge, Red Deer, or Grande Prairie. Fraser firmly supported a diverse bench including representation from rural Alberta. As she explained: "Keith's years in practice in Barrhead allowed him to witness first-hand how the law affects all of us as regular folks at a very personal level. Throughout his time on the bench, Keith never forgot this. He stood up for what he believed in and remained loyal to the values that have guided him throughout his life."

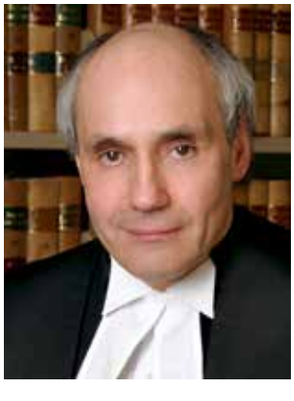
Colleagues report that Ritter was highly attentive to the needs of others and never treated a request for help in a perfunctory manner. He had a knack for listening carefully, posing just the right probing questions and letting the person figure out the answers themselves. A discussion would usually conclude with Ritter's trademark: "I'm sure you're on the right track." Côté added this: "Keith was always helpful and collegial, eager to help everyone get on and work smoothly together. He never injected himself into a problem. Doing the right sensible thing was his goal, not advancing his interests or burnishing his ego. He never blew his own horn."[70]

The Boomers and the Court

With Ritter's appointment, the Court saw thirteen new judges in the space of ten years: only Jean Côté and Buzz McClung had served under the previous Chief Justice. Ritter was another baby boomer. Just as the previous Court had belonged to the "greatest generation," with a high proportion of veterans, under Fraser the leading edge of the "boomers" took over. Most of the judges present in 2002 were clearly part of the postwar generation.[71] Ironically, the "boomer court" was not that youthful. The average age of the judges on appointment – fifty-two – was only a year less than under McGillivray. But, as with the McGillivray court, it was an important generational shift that had reverberations in the Court's jurisprudence.

Another important factor affecting the Court's jurisprudence was the greater diversity of pre-judicial careers. The appointments to the Court for over twenty years had been almost exclusively barristers. This changed with Fraser: she had been a high-powered corporate and commercial practitioner. Fruman was a securities lawyer, Picard and Hunt primarily academics, Paperny a top-flight corporate lawyer and entrepreneur, and Russell a government lawyer and legislative planner. Ritter had practised in a small centre and was a strong generalist. A common thread for appellate appointments, however, was trial court experience. Of the thirteen appointments made to Fraser's court from 1992 to 2002, only one



– Neil Wittmann – came straight from practice. While the Fraser court was the most diverse appellate bench seen in Alberta, nearly all its members had all done "hard time" in the Queen's Bench trenches.

The Court in 2002 presented a different face than in 1992. A decade into Fraser's tenure, her court better fulfilled the representative judiciary that the Chief Justice advocated. The complement of female judges made the Court unique in the common law world. It had also grown, with two more full-time judges, to a regular roster of thirteen. There was still a healthy contingent of barristers, but better representation of women also helped increase the diversity of backgrounds among the judges, bringing academics, solicitors, and government lawyers to the bench. And while some of these appointees may not have been as well known in the bar as the barristers, they quickly demonstrated their unquestionable ability as appellate judges.

Judicial Independence 1990s Style: Transforming the Court

Revamping Court administration soon emerged as one of the major priorities for the new Chief Justice, and at the heart of the challenge was finding more resources. McGillivray and Laycraft had made changes in practice and procedure to deal with growing appeal lists. Administration, however, remained somewhat *ad hoc*, with a shockingly small number of support staff for the judges – there were only three judicial assistants in Edmonton.[72]

The matter of resources became inextricably linked to judicial independence. The Chief Justice discovered she had very little control over the Court's budget and staffing. Early in her tenure, Fraser decided that true judicial independence and its partner, judicial accountability, meant establishing administrative and fiscal independence. Fraser understood that judicial independence and a better model of court administration were not ends in themselves but merely a means to an end. As she put it:

> Justice is about people, their lives, welfare, happiness and freedom. The ultimate goal of the reform of court administration must therefore be enhancing the courts' responsiveness and accountability and improving the quality and delivery of justice to the people of this country. Improved models of court administration are merely a means to achieve this goal.[73]

Historical Background

Traditionally, the provincial Attorney General was responsible for court administration, and the court staff were civil servants. For decades, the administrative needs of courts, much like the needs of the legislative and executive branches of government, were minor and there was little conflict. However, inherent difficulties exist in this dominant model of court administration.[74]

The easiest to identify is the conflict of interest implied in having one of the biggest litigants – provincial attorneys general – also responsible for most aspects of court administration. A second difficulty is a vagueness in the dividing line between those areas controlled by the attorney general and those controlled by the courts. A third problem involves the operational difficulties and pressures created by divided loyalties among court staff. A fourth is the fact that the responsibilities for court administration are so divided and diffuse, which weighs heavily against meaningful reform. But the most serious problem is that all these difficulties are symptomatic of a larger fundamental flaw, one that runs contrary to good governance principles. As Fraser explains: "The executive model fails to align authority over courts and expenditures, controlled by the executive, with responsibility for results, which remains with the judiciary."

Judicial administration first became a live topic in Canada during the 1980s as governments and the judiciary clashed over funding. Dealing with a vastly increased amount of litigation, Canadian courts found themselves in

PG. 342 PETER COSTIGAN, CA. 1999 AND EARLIER. COURTESY P. COSTIGAN/COURT OF APPEAL COLLECTION.

PG. 343 KEITH RITTER, CA. 2002 AND EARLIER. COURTESY K. RITTER/COURT OF APPEAL COLLECTION.

the uncomfortable role of mendicants, begging for funds from recession-strapped governments as they struggled with caseloads.[75] More profoundly, as the ones the bar and public looked to for "outcomes" in the justice system, judges recognized the need for systemic reforms. To accomplish this required at a bare minimum that the judiciary set priorities for spending.

In 1981, the Canadian Judicial Council commissioned the Deschênes Report, which concluded that government control over court administration threatened judicial independence.[76] The British Columbia Court of Appeal and the Quebec courts acted upon the report, and in BC the court was successful in negotiating partial control over its budget.[77] With the co-operation of the federal government, the SCC too was allowed to move forward with reforms as government made the SCC's Registrar a deputy head of the department of Justice and gave the SCC control over its budget.[78] But for other courts, it was largely business as usual.

The SCC weighed in on judicial independence during the 1980s. In *R v Valente*, which mostly concerned judicial salaries, it concluded that independence of a tribunal from administrative decisions bearing on its judicial function was one of the essential principles for independence.[79] However, the SCC stopped short of deciding that full administrative independence for courts was necessary for judicial independence. In a later 1997 ruling on setting provincial judges' salaries, the SCC explicitly stated that adjudicative independence did not necessarily require full administrative independence.[80] However, it remains an open issue precisely where that proper dividing line lies. Nor was the SCC dealing with good governance principles in any event.

Unsurprisingly, Canadian judges continued to find the status quo unsatisfactory. American appellate courts were influential models of administrative and budgetary independence. In 1939, federal judges had succeeded in establishing an independent administrative office which took direction from a judicial council of chief justices and was the liaison with Congress for funding.[81] Each federal district had its own council of judges to direct administration. Individual appellate courts generally had a chief administrative officer, usually the Registrar, who answered to the judges. That American federal judges successfully ran their own affairs was appealing to many Canadian judges, as was the fact that American appellate courts were well resourced, with plentiful research and administrative assistance for judges.

Up to McGillivray's tenure, the appeal court in Alberta had so little administrative structure that there were no serious issues to address.[82] Judges, outside of the chief, did not have judicial assistants and very few office staff were required. For many years, the Court did not even have registry clerks. The counter staff of the trial division did the work. This easygoing relationship changed during the McGillivray years because of the increased workload. The judges needed more clerical help, and the government, worried about delays in the court system, started intruding into the judges' territory. While McGillivray complained about the lack of control over the court budget and tabled the idea of the judges taking over court administration, he did not pursue it.

Moving Forward with Administrative Change

As Fraser soon discovered, the Alberta courts were, despite the province's wealth, in a poor position. Fraser likened it to a Hollywood set. It looked great on the outside, but walking behind the façade, one discovered there was little there. The Court did not have a specific budget appropriation but was instead wrapped into the budget allocated for Queen's Bench and was one line item among many. Neither court had any direct control over how the budget was spent, and both courts had to painstakingly negotiate for new staff positions or new projects and initiatives, all of which took considerable time away from other duties. Change management was unheard of. And the budgeting was parsimonious – over thirty provincial bodies,

including various boards with quasi-judicial duties over whose decisions the Court ultimately had authority, received more funding.[83]

When she became chief justice, Fraser did not even have an assistant dedicated only to the chief justice. The previous chief justice had been in Calgary, and so was his assistant, and the Court could not easily move the position to Edmonton. Fraser had to request that a judicial assistant be assigned to her office, and the assistant deputy minister of court services agreed to provide this one position.

Also an influence on Fraser was the Canadian Judicial Council, and more accurately, Chief Justice Allan MacEachern of British Columbia.[84] With a serious recession and deep government deficits on tap across Canada, other courts were feeling the pinch, and as in Alberta, experiencing frustration over the lack of control over administration and court budgets. At Fraser's first council meeting, administrative and budgetary independence was on the agenda. Largely due to MacEachern's impassioned arguments, the council resolved that individual chief justices should approach their respective provincial justice ministers and request greater control over their budgets. As Fraser recounted, after mulling this over with the Court, she asked to meet with the new Attorney General, Brian Evans, and advised him, naively she said, that the chief justices had resolved that they should administer their budgets, and she would appreciate it if he could arrange this.[85]

For Fraser, control over budget and administration was inextricably connected with her conviction that the Court seriously needed resources if it was to respond to legitimate public expectations and maintain access to the Court. It was in danger of falling behind. The judges on the Court in the 1990s attested to the much increased workload as appeals became increasingly complex. There was still a great deal of *Charter* litigation coming before the Court, which could be very intricate. Further, the 1990s were arguably the heyday of major commercial litigation in the Alberta courts. These were true monsters. Mega-trials led to mega-appeals, with appeal books that filled bookshelves and appeal hearings that could take days after trials that had taken months.

Although not every judge was certain that administrative independence was necessary, they nevertheless enthusiastically backed Fraser's efforts to secure more resources. A Planning and Requirements Committee composed of Fraser, Kerans, Côté, Conrad, and Irving was struck in 1992 to decide on Court priorities. The shopping list was long.[86] First and foremost were more support staff, a minimum standard being a judicial assistant for each judge. Second was sufficient computer resources. Another high priority was legal researchers to help the judges. Initially, the focus was on more articling students, but this soon became a plan to hire legal counsel. By the end of 1994, a vision had emerged. The Chief Justice ultimately wanted the Court to have full control over its internal administration and spending, answerable to the Minister of Justice.

Creating the Registrar's Position

The Registrar was a key element. The position had always been a figurehead. When the Appellate Division was first established, the government simply appointed the Edmonton trial division clerk of the court as the Registrar. By the early 1990s, the Queen's Bench court managers, positions in the Courts Services division of the Ministry of Justice, were the registrars in each city but essentially did nothing for the Court.[87] The deputy registrars, one in Calgary and one in Edmonton, assisted the list management judges and supervised registry counter staff, but they were not court managers.

Fraser wanted the Registrar to act as "chief operating officer" for the court, overseeing all the administrative staff and operations, working with the judges on projects like computerization initiatives, working with her on operational planning and budgeting, and being the liaison with government for everything not

requiring the chief justice's authority.[88] Most importantly, the Registrar, although still a government employee, would be hired by, and report to, the Court (through the chief justice), not the government (through the assistant deputy minister of court services). In the lexicon of court administration in Alberta, the position would be functionally and administratively accountable to the chief justice. The Chief Justice wanted it to be a senior executive management position, one rank under assistant deputy minister status.

Fraser's campaign began well. The government agreed to hire a Registrar. However, it initially defined this as a junior management position. It would take another six years and a binding arbitration between the Court and the Ministry to upgrade the Registrar's classification within the public sector. In 1994, Conrad and Irving interviewed candidates, and after Fraser further interviewed the short list they had selected, Lynn Varty was hired near the end of the year. Varty was a twelve-year veteran of Court Services who had started out in the Red Deer District Clerk's office and managed the courts in Grande Prairie for a number of years. Varty remembered one of the Chief Justice's first questions: "Can you write? Because we need a business plan."[89]

Developing an Operational Business Plan – The Court Takes the Initiative

A business plan for an appellate court was a first in Canada – so much so that Fraser confessed that she, Conrad, and Varty essentially "winged it" as best they could. They found inspiration by comparing the Court with an American appellate court of comparable size – Alabama's. Fraser regarded the drafting of a proper business plan as a crucial element in the quest for resources and control. It would explain to government what the Court needed, what it hoped to accomplish in reforming the delivery of justice at the appellate level, and how it planned to implement its objectives. It would also demonstrate that the Court would manage its funds responsibly.

Beyond reassuring the government, the business plan also set goals for the Court. Although by Fraser's reckoning the first plan was relatively unsophisticated compared to later ones, it helped convince the government that the Court was serious about proposed reforms. Operational business plans became a standard practice for the Court, and years later, both Queen's Bench and the Provincial Court would follow suit.

Once Fraser's campaign began, the Court was able to make progress, albeit slowly on some fronts. Some of the strongest resistance came from within the court services bureaucracy, mostly over control of staff. Fraser credited the immeasurable assistance she received from Conrad, who was there for the long haul through late nights, disappointments, and hurdles. And so too, she said, was Varty, who worked tirelessly for the Court above and beyond the call of duty.

Securing Administrative Independence

After discussions back and forth, the provincial government approved the Court's proposal for control over its budget and operations along with the Court's business plan. It was agreed the Court and government would work together to implement the business plan over time. The budget would be set by government after consultation with the Court. Fraser singled out Minister of Justice Brian Evans and his deputy minister, Neil McCrank, as being open to change, committed to improvements in the delivery of justice, and fully supportive of the Court's reform initiatives.[90] Fraser stressed that none of these reforms would have been possible without the leadership of Premier Ralph Klein, who had the final say in approving administrative independence for the Court. Fraser recounted that Klein offered the same opportunity to Queen's Bench and the Provincial Court, but both chiefs declined. It would be almost another two decades before the trial courts sought similar independence.

Ironically, the wisdom of administrative independence was a matter of some debate among the judges. The vast majority of the Court was behind the Chief Justice in this pursuit but not without reservations by a few. Russell, a great supporter

of Fraser's initiatives, was nonetheless concerned about the legal implications of judges running their own affairs, such as the possibility of labour disputes.[91] Another was concerned about the time taken up with administrative tasks. It is an old joke that lawyers become lawyers to avoid administration and generally aren't much good at it. While Fraser believed that administrative duties as members of court committees were the reality for any judge on a modern appellate court, there was still a school of thought that judges were there to judge, and distractions from this function should be minimized. However, change required the co-operation and initiative of the whole Court. As Fraser pointed out, reforms, particularly systemic ones, could not realistically happen without judicial input and leadership. Fraser admitted that fostering a culture of change within the Court was one of her top priorities – and biggest challenges – as a new chief justice.

The flip side to seeking more independence *for* the Court was the independence of judges *on* the Court. This was a concern for some, who saw danger in creating their own bureaucracy. The proposed job description of the Registrar was closely scrutinized until the judges were satisfied that the position's managerial function did not interfere with their independence.[92] Even a fairly innocuous idea like compiling a procedures manual was a fraught exercise. Kerans and Hetherington spent a great deal of time on one, but the document was never adopted by the Court, as some judges felt it could be interpreted as prescriptive, rather than descriptive, of how they ran appeals, thus interfering with independence.[93]

Starting in 1995, the Court received its own budget and subsequently control over most internal spending, subject to general government guidelines. The transition was not entirely smooth. The Court discovered that it essentially received a funding cut when their first separate budget allocation did not take into account shared services with Queen's Bench.[94] That led to making the case for, and securing, an appropriate budget, all of which occurred within a couple of years.

As envisioned, the Registrar took over control of the Court's internal administration. Upgraded to a senior executive manager, the Registrar was the liaison to the court services bureaucracy, minding day-to-day affairs, but was also a central figure in new initiatives the Court undertook. The Court essentially achieved a collaborative model of court administration, short of the kind of separation found in the US federal court system.[95] It was still administered within the Department of Justice, but the Court had considerably more control over its affairs.

The other accomplishment was increased resources. The Court was able to acquire up-to-date information technology, at least in terms of adequate personal computers, internal networks, and access to innovations like email. More ambitious initiatives, discussed in the next chapter, encountered barriers from budgetary constraints as well as ministry policies on technology. Although new staff were acquired in dribs and drabs, by the end of the decade, the complement of administrative assistants had much improved, and both Edmonton and

COURT OF APPEAL AT DINNER, CA. 1994. STANDING L-R, FOISY, CÔTÉ, KERANS, MCCLUNG, HETHERINGTON, BRACCO, IRVING. SEATED, HARRADENCE, MCFADYEN, FRASER, CONRAD, LIEBERMAN. LASA ACC. 2010-016.

Calgary had several legal counsel available to assist judges with research and other tasks. The Court was moving closer to the standard set in its initial business plan, wherein each judge would have the services of a legal counsel and a judicial assistant. This better judicial support also laid the foundation for what became fundamental changes in the Court's processes during Fraser's second decade.

The Courthouse Imbroglio

While the Court and the provincial government had been able to work together constructively on the Court's agenda, it was not always a smooth process. And one sign of this was the peculiar incident involving the Calgary courthouse.

In 1986, the Court moved into Calgary's historic sandstone courthouse. The handsome 1914 edifice, restored and renovated, seemed a fitting location. Unfortunately, for the judges and staff, problems related to poor air quality soon emerged. Some judges and staff complained about fatigue, headaches, and difficulty with concentration. Previously in robust health, within months of joining the Court in 1998 Adelle Fruman developed respiratory problems so severe she needed supplementary oxygen.[96] A respirologist she consulted suspected the courthouse. The Court hired an environmental consultant, who discovered the building contained stachybotrys mould and other contaminants, with some of the highest concentrations found in Fruman's office.

With the Court's concurrence, Fraser ordered an evacuation of the Calgary courthouse in December 2000 and cancelled the Calgary sittings for February 2001.[97] Alberta Infrastructure rented temporary offices for the Court in the Monenco building. The space was wholly inadequate, cramped and lacking storage and meeting space. Many judges and court workers continued to suffer poor health – possibly because mould had migrated to the new quarters as belongings were transferred from the old courthouse.[98] After several months, the Court abandoned Monenco, and in July, Fraser announced that Calgary sittings were cancelled effective September 1 with extra sittings added in Edmonton.[99] Later, the Court was able to hold some hearings in the Queen's Bench courthouse when space was available.

What followed was a surreal period for the Calgary judges. Infrastructure dragged its heels over new offices, complaining of the expense. O'Leary remained at Monenco and was promptly dubbed the "last of the Monencans." The other judges worked from home, travelling to Edmonton for court. Calling each other to discuss an appeal, they might ask, "Are you still in your pajamas?" The relatively solitary nature of appellate work allowed the Court to function, but with great difficulty. Staff in biohazard gear painstakingly scanned and reproduced the active appeal files left behind in the old courthouse and the Monenco building.

Also surreal was the government's attitude. Infrastructure and Justice had been unresponsive to the complaints about the courthouse for years. The judges were distressed to discover that Infrastructure had been aware of the poor air quality prior to their independent study.[100]

JUDGES AND COURT REGISTRAR IN HAZARDOUS MATERIAL SUITS IN CALGARY COURTHOUSE, CA. 2001. COURT OF APPEAL COLLECTION.

Premier Klein then insinuated in comments to reporters that the judges were claiming to be sick because they didn't like their offices. In response, the Court took the unprecedented step of giving an interview to the media, with Fruman diplomatically stating that the premier was "misinformed."[101] A public apology from Klein soon followed. The government finally procured quarters for the Court in TransCanada Tower, a new highrise with excellent environmental standards. Fraser emphasized that the government ensured that the Court was fully involved in the design of the premises and that highly talented architects from Infrastructure were assigned to work on the project. Regular Court sittings resumed in Calgary at the beginning of 2003.

Klein had a reputation for speaking off the cuff. But perhaps tellingly, the provincial government had recently finished drawn-out litigation with its provincial court judges over salaries. The litigation ended with the Appeal Court ordering the government to follow the recommendation of an independent salary commission, itself the product of an earlier SCC decision.[102] One of the issues in the litigation had been the provincial government's tendency to view judges as civil servants. The Court had also issued several other decisions (including the *Firearms Reference* and *Vriend,* discussed below) that were political hot potatoes for the Klein government. There was obviously some frustration in the government with the judiciary. The courthouse episode certainly raised intriguing questions about the relationship between the government and the Court, even as the two worked together to better the delivery of justice.

Judicial Education on Social Issues

Another defining feature of Fraser's first decade as Chief Justice was her singular focus on judicial education. She was convinced that judicial education on social issues should be provided for federally appointed judges. A year following her appointment as chief, the Canadian Bar Association's Gender Equality Task Force headed by retired SCC justice, Bertha Wilson, issued a landmark report: *Touchstones for Change: Equality, Diversity and Accountability*. It laid out an action plan to promote equality within law societies, law schools, law firms, the government, and the judiciary. Fraser believed, as the Touchstones Report had recommended, that judicial education needed to extend beyond skills training and substantive law to embrace far more difficult and complex issues affecting the way courts applied the law.

The Touchstones Report made over two hundred sweeping recommendations, and a number were directed to the judiciary and education. In September 1993, at the first Canadian Judicial Council meeting following the issuance of the Touchstones Report, Fraser proposed the creation of a Council committee to deal with equality issues. With the support of Chief Justice Ed Bayda of Saskatchewan, the Council agreed to set up a Special Committee on Equality in the Courts. Fraser and Bayda were appointed along with Council stalwarts Chief Justice Dick Scott of Manitoba and Chief Justice Connie Glube of Nova Scotia.

This committee was the vehicle for the Council's ultimate adoption of judicial education on social issues, including gender equality, racial equity, and aboriginal justice. Fraser credited the reform-minded federal Minister of Justice Allan Rock for stressing the need for this education, and the federal government for providing the necessary funding to do so through the National Judicial Institute, the judiciary's education arm. Fraser also paid tribute to the former Executive Director of the Council, Jeannie Thomas, an important ally in this initiative, and to Justice Douglas Campbell, whose groundbreaking work on social context education when he headed up the Western Judicial Education Centre had pointed the way forward.

The Council's decision to approve social context education for federally appointed judges was not made overnight. Fraser recalled how it took the better part of six months on and off for the Special Committee to agree on three words to describe its scope. The three words: comprehensive, in-depth, and credible – and credible

meant credible in the eyes of the community, not only the judges. After Council had approved this education, the National Judicial Institute went on to become a world leader in this field.[103] Frank Iacobucci, a member of the SCC who served on the NJI board, would later describe social context education as the "jewel in the crown" of the NJI.

Fraser also served as chair of the Council's Judicial Education Committee, a role she first took on in 1995. This was the first of two productive terms as chair of that Committee. Her view of why education on social issues was critical to judges was set out in numerous speeches: "If the judiciary is to maintain its integral role as part of a justice system that the public expects will deliver justice, then we must ensure that we ourselves meet justice's highest standard[104]....Without informed education about the realities of the world in which judges live, it is difficult to see how we can be expected to judge it fairly."[105]

Delivery of Justice and the Fraser Court: Change Picks up the Pace

The Court's decision making remained collegial. With rare exceptions, no major decision on court policy, whether administrative or judicial, was made without full consultation. According to Fraser, finding consensus on some issues took years, and on others, never happened. This underlines one of the difficulties for a chief

STUDENTS AT THE ST. MARY'S RESIDENTIAL SCHOOL , BLOOD RESERVE, 1911. GLENBOW ARCHIVES, NC-7-746.

justice. Chiefs have the responsibility for the administration of the court, but in regard to other judges, they are caught in a paradox: wielding considerable power, but also having none at all. Their authority is based on a complex interplay of tradition, moral suasion, and the fact that most judges are happy to let someone else take care of court administration.

Of course, the Chief Justice was not left to run things on her own. She emphasized it was a team effort. Other judges took a lively interest in the Court's direction and were prepared to take up some of the burden. At the top of this list in the first decade were Conrad, Fruman, Côté, and, prior to retirement, Kerans. There was an established committee structure and any new issue was usually delegated to a committee where puisne judges frequently took the initiative.

Regular Monthly Sittings for Each City

One idea that had been considered for almost ten years – regular monthly sittings in each city – was finally adopted early in Fraser's tenure. Starting in 1993, sittings were added, and the norm was for Calgary and Edmonton to each have one week of court each month outside of the summer break.[106] The change of policy helped control the number of special sittings (urgent appeals where a panel was pulled together to hear it), which were becoming a headache.[107] It also spread out the caseload, ending the periodic crunches as parties tried to get on the lists and avoid waiting two months for the next sitting in their city.

Part of the resistance to changing sitting policy was concern about collegiality, and this did change. The gathering of visiting judges in a hotel room to "drink whisky and tell war stories" became a thing of the past as the Court moved into the 1990s, largely because of the changed sittings and assignments. The dynamic of having two or three judges travelling for sittings rather than half the Court was certainly not the same.[108] Yet this older style of conviviality was also not all that inclusive or appropriate to the changing bench, and very much reflected the habits of an older generation. As it turned out, collegiality did not suffer, as the judges quickly found new ways to connect socially as well as professionally.[109]

In retrospect, it seems almost comical that it took the Court so long to make such a logical change. But it showed how consensus could be difficult to achieve. Even with a very dynamic and determined chief justice, there would be much more evolution in Court processes in Fraser's second decade than the first.

Fast-Tracking Maintenance Appeals

The Court as a whole was actively looking for ways to improve policy and procedures, and it found one in maintenance appeals. Counsel often asked for expedited appeals or special sittings because of the importance to their clients of receiving support payments. The Court, recognizing that delays in these appeals were negatively affecting families and children, was determined to fast-track these appeals. It did so by adding them to the sentence appeal list. Started as a pilot project in 1992 in Calgary, this soon became permanent in both Calgary and Edmonton. In later years, the appeals would be fast-tracked onto the regular sitting lists.

Legal Counsel: The "Game Changer"

In the view of many judges, hiring legal counsel for the Court was the "game changer." This idea was first mooted in 1992 following Fraser's appointment as chief and put into effect in 1995.[110] Fraser was concerned that the judges have the support services required to allow them to do their jobs more effectively and efficiently. Counsel changed the way judges dealt with appeals from beginning to end. Having counsel at hand, doing research, providing briefs, editing, and even assisting in the initial drafting of judgments as directed by the judges, was instrumental in allowing the bench to keep up with the caseload and improving the quality of its judgments. It started a more fundamental shift in how the judges worked, moving their efforts from after, to before, the hearing. As a result, the Court also saw the utility of

other possible changes, such as assigning pre-hearing responsibility and time limits on oral argument.

The main justification originally for hiring counsel was research assistance. Canadian judges knew that American appellate courts used both articling students and staff lawyers extensively, with each judge having one or even two lawyers as well as students on some courts. The SCC also used counsel for various functions, such as preparing preliminary opinions on leave applications, while each judge had three students to assist with research. The Court had used articling students for a number of years, but even in the early 1990s, there were only six split between Calgary and Edmonton, and they were shared with Queen's Bench. While the students could be very useful as research assistants, any single judge had very limited access.

Hiring and using counsel was initially a matter of considerable debate for the Court. In the United States, there had been criticism of the perceived influence that staff lawyers wielded in appellate courts, including the fear that they were actively shaping judgments.[111] There was some concern that the local bar might have the same suspicions.[112] The Court decided to keep counsel on short contracts as a way of preventing any from becoming too influential. At first, some judges questioned the need for counsel at all, on the grounds that they preferred to do their own work or, more philosophically, on the basis that research should be the judge's responsibility, in order to avoid unintentional biases. The majority, however, felt the advantages outweighed potential problems.

The Court hired the first counsel in 1995 for Calgary, far short of the initial goal of two counsel in each city but nevertheless a start. The following year, one was hired in Edmonton, and the complement was gradually increased. When first retained, legal counsel prepared pre-hearing summaries and briefs of appeals (which has remained an important duty).[113] As the complement of counsel slowly increased in each city, judges used them to research and brief law pre-appeal or assist with various aspects of drafting judgments, including editing. Some judges were comfortable having counsel assist in composing judgments. However, the judge remained fully responsible, using or rejecting drafts as the judge saw fit. Counsel also helped with committee work. Impressed with their usefulness, the judges quickly affirmed the goal of having a counsel assigned to every regular judge.

As several judges recalled, it created a virtuous cycle. The appointments in the 1990s took being a hot court seriously and tended to do more than simply read the factums. More counsel and students made the process more efficient, allowing judges to go even further with preparation. Indeed, Picard has said that the panel often knew an appeal better than counsel. It motivated the Court to reorder its approach to hearings, as the judges found that age-old traditions, like the oral hearing without any time limits, were increasingly inefficient.

Revising the Court's Circulation Policy: A Consensus for Less Consensus

The practice since the McGillivray days of circulating major judgments was further formalized in 1988 when the Court decided that a judgment should be reserved whenever a change in the law was involved, with reserves circulated to all judges for comment. Any judge on a panel could call for a reserve. If a judge off-panel strongly disagreed with the panel, they could also call for a conference and ultimately (depending on the numbers off-panel opposed to the point of law in a draft judgment) a rehearing. A reserve judgment was therefore considered to represent the opinion of the whole court. The central point of the policy was to ensure consistency and clarity. Alberta was the first, or one of the first, provincial appellate courts to adopt such a policy. Other courts followed, but this was not universal. Ontario, for example, was an exception.[114]

The Fraser court endorsed the "long-standing practice of the court" at a 1992 meeting.[115] However, seven years on, in 1999, the Court decided to modify its policy and

end conferencing. Judgments would continue to be circulated for comment on points of law, and the chief justice could still order a rehearing, but there would be no more conferencing. Motivations for the change were several. Conferencing had become a real burden. Meetings to discuss reserves were time-consuming. A few judges joked they labelled judgments that should have been reserved as memoranda to avoid circulation. More important, many judges felt the conferences were divisive. One judge recalled it was easy for a writer to feel put upon. There were rumours of heated arguments over contentious reserves. Others commented that the policy created gridlock.[116]

Watering down circulation policy generated other debates. Some contended that the Court's policy of labelling judgments and assigning value as precedent lost much of its rationale. But the Fraser court continued to use the time-honoured system of labelling judgments as bench judgments, memoranda, or circulated reserves, with bench judgments in criminal sentencing having little weight as precedent. The approach to sentencing memoranda was always a tricky concept because these decisions were still considered binding on lower courts. In practice, many counsel and even some judges ignored labelling. There was also debate within the Court, by one or two judges, whether panels were bound by decisions of other panels. The Court confirmed in a 2000 Practice Direction endorsed by the Court that, with reference to reserve decisions, "lower courts are bound by such judgments, as is this Court."[117] As will be seen in a 2010 decision, *R v Arcand*, however, not everyone on the Court agreed with this statement. Indeed, one judge challenged circulation itself, arguing that it was incompatible with independence. And some members of the bar disliked that judges not at a hearing might influence decisions.

However, the benefits to circulation remained. Circulation represents part of the honour system that exists within an appeal court. It allows everyone on the court the opportunity to comment on points of law; as such, it is the trade-off for those points of law binding all members unless and until changed by that court. The circulation policy had tried to solve a quandary that arose when appeal courts became larger and the full court never heard an appeal: was the decision of panel on a point of law the decision of the court, or just the panel? The answer in Alberta was that the decision of the panel bound the members of the whole court. The Court had the right to change precedent, but this was to be done in an orderly manner in accordance with the Court's reconsideration procedures agreed to by the members of the Court.

The Fraser court in its first decade saw some bigger changes than ever before. As always, old judges left and new judges came, but the generational shift well underway by the new century was more radical than any previously, as the Court achieved gender parity and greater diversity. Fraser's ambitious agenda for greater independence was the most significant institutional development for the Court since the founding of the Appellate Division. The judges deemed more resources vital for the Court to continue to perform its role in a timely and efficient fashion, and they were proven right. Over the first decade of Fraser's tenure, the Court continued to hear more appeals per judge than any other appellate court in Canada and had an enviable lack of backlogs. The greater budgets and autonomy allowed the Court to pursue initiatives that later led to other equally significant changes, a subject addressed in the next chapter.

THE FRASER COURT AT LAW: THE FIRST DECADE

In law context is everything.

– Lord Steyn, in *Regina (Daly) v Secretary of State for the Home Department* (2001)[118]

When Catherine Fraser became Chief Justice, the *Charter* had been in force for ten years. In Alberta, the

judges of the McGillivray and Laycraft court, many of whom remained in the first part of Fraser's tenure, had done a remarkable job dealing with the *Charter*. In the 1990s, however, more challenging *Charter* litigation arrived, and the courts increasingly had to adjudicate legal questions with difficult social ramifications, such as the nature of equality.

This required that judges enter into more challenging territory. Arguably, Fraser belonged to a new generation of judges coming in the wake of the *Charter*'s first decade, more comfortable with the expanded powers of judicial review and open to context-driven, even policy-laden, legal analysis and decision making. The demands of *Charter* litigation had done much to reinforce changing attitudes and approaches to jurisprudence, whether *Charter*-derived or otherwise. At the same time, the Court was also conservative in many respects, conscious of and sometimes sympathetic to the criticisms of judicial activism common in the 1990s. Three judgments of the Court were examples of this change and also the dynamic between the new and the old: the *Firearms Reference*, a major constitutional reference case; *Vriend v Alberta*, a landmark s. 15 *Charter* case; and *R v Ewanchuk*, a sexual assault case very influential to this day.

Changes in the outlook and approach of judges can also be linked to another theme of this chapter, the impact of female jurists. There was at least some correlation between the more diverse and atypical backgrounds of the wave of female appointees to the Alberta appellate bench and what might be called "post-*Charter*"

THE COURT OF APPEAL, WITH WOMEN JUDGES THE MAJORITY. CA. 2001. L-R: WITTMANN, RITTER, MCFADYEN, BERGER, COSTIGAN, HUNT, CONRAD, PICARD, FRASER, FRUMAN, MCCLUNG, O'LEARY, PAPERNY, CÔTÉ, RUSSELL. PHOTO BY NOEL ZINGER.

judges. The question posed earlier was whether women judges make a difference. *Ewanchuk*, which is particularly suited to this inquiry, also achieved widespread notoriety because of a subsequent public dispute between Justice McClung and Justice L'Heureux-Dubé of the SCC. But even this dispute throws some light on the question of how the perspective of a female judge might differ on certain legal issues from that of her male colleagues, as with some other areas in the Court's jurisprudence which directly affected the lives of women and children.

Fraser the Jurist

As befitted the traditional role of the chief justice, Fraser was a leader in the Court's jurisprudence and well equipped for the role. She was frequently described by her colleagues as "brilliant," a "first-rate legal mind" with an unparalleled ability to quickly absorb an appeal and grasp the key issues, combined with an astounding recall of the record. She sometimes confounded counsel with exact quotes from factums during argument.[119] Many counsel also discovered, usually the hard way, that if there was a weakness to be found in their argument, Fraser would find it.

Fraser was exceptionally thorough in her judicial writing, considering a massive amount of case law, authorities, and secondary sources in her major decisions, sometimes plunging into long historical analysis of the development of the law. As one colleague said, "She leaves no stone unturned, and finds new stones to turn over." It was put to good service: Fraser wrote impressive judgments, clear and logical, precisely reasoned, sometimes as much a treatise as a decision.

Not surprisingly, one of Fraser's qualities was also an incredible appetite for work. Like her predecessor, Fraser took her share of sittings and writing duties as much as possible, despite the ever more onerous administrative duties of her office. She usually sat on the larger panels, which in the long-standing practice of the Court were convened for references, guideline judgments, and other appeals deemed particularly important. By her own admission, it was a killing pace, which Fraser has somehow managed to sustain for more than twenty years. Stories abound from colleagues of coming into the office to be greeted by a string of emails from the Chief Justice with drafts, comments, or queries that had arrived in the small hours of the night. Even among a group of dedicated and hard-working judges – she wasn't the only one to burn the midnight oil – Fraser stood out.

Apart from her decisions, Fraser's many speeches and papers provided considerable insight into her judicial philosophy, which can be described as embracing modern appellate judging. In Canadian terms, she might be called a "post-*Charter*" judge – incorporating the broadening of judicial perspectives, largely brought about with the *Charter*, into her jurisprudence. Fraser was blunt in her assessment that common law judges, despite protestations to the contrary, always had a significant law-making role, one where considerations of public policy played a part.[120] The *Charter* had simply made this more explicit. The Chief Justice was clearly comfortable with the new demands the *Charter* had placed on the judiciary as constitutional watchdogs and sometimes arbitrators between competing social values. She saw this as a positive development for Canadian society, though entailing great responsibility for the judiciary.[121]

Fraser was also a great defender of equality rights, and s. 15 of the *Charter*, as the logical vehicle for such rights, entered into much of her jurisprudence. She put it this way: "Inequality is injustice. It's just that simple."[122] She endorsed, when required, substantive equality, a context-based analysis of discrimination emphasizing social, economic, and political relationships that had been approved by the SCC in *Andrews v. Law Society of British Columbia*.[123] This approach stands in contrast to formal equality, in which everyone is treated exactly the same all the time, a theory that had previously dominated legal thought.[124] Formal equality was criticized

for allowing or even perpetrating inequality or discrimination because it assumed a level playing field existed for all individuals in society. Substantive equality recognized that sameness of treatment is not necessarily equality; as the SCC stated, "for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions."[125] In Fraser's comments on s. 15 and equality, gender considerations were clearly in her mind, and it is not a stretch to say that Fraser brought a feminist sensibility to her legal thought.

Philosophical Approach of the Court

Substantive equality is a convenient departure for discussing what can be described as a split in the Fraser court. Although Fraser presented the clearest philosophy, other judges obviously shared many of the same views – Paperny, Russell, Fruman, Hunt, and Picard immediately spring to mind, as well as Conrad and Berger in their own very idiosyncratic fashion. These judges followed very much in the path of their Chief Justice in their embrace of a post-*Charter* sensibility.

Other judges were perhaps more conservative, and Buzz McClung emerged as a foil. Articulating his reservations with the "new" style of judging, especially the danger, as he saw it, of judges moving into the realm of legislatures, McClung called for a return to legislative deference. To some degree, there was a correspondence with age and gender. The classical liberal individualism that strongly characterized the Court through the 1980s was still present, especially as many judges who joined the Court then, and belonged to that generation, were still sitting. For some, the move towards a more equality-based approach to certain legal issues, especially those involving a conflict between an accused's civil liberties and equality rights for others, ran counter to their predilections.

However, great caution must be used in making these generalizations. Roger Kerans, for instance, belonged to that earlier generation but was in many respects a judge very much in the "newer" mould – in sum, something of a transitional figure. Conrad demonstrated a very libertarian viewpoint in the *Firearms Reference* discussed below but could also comfortably invoke policy and refer to outside studies in her argument in a way many judges previously would have found unthinkable. Hunt may be characterized as a progressive thinker, but by her own testimony believed in incrementalism in developing the law. Côté, to use another example, was a very intelligent and thoughtful judge who seemed impossible to pigeon-hole in terms of judicial outlook and would probably dismiss the utility of doing so. All this said, a dividing line may usefully be drawn between judges who were more equality-based in their approach to the law and those who favoured a more civil liberties–based or civil libertarian approach.

Unlike some appellate jurists, the Alberta judges almost universally avoided extraneous analysis, sticking to what was necessary to decide the particular appeal. The main philosophical consideration driving many in the Court was to provide certainty in the law. Willis O'Leary saw it this way: "Most of us thought we were there to hear the litigants and give them the best decision." Others agreed but added that some cases were about more than the litigants, since the Court had to settle the law for millions of Albertans. Thus, when the Court was in its law-making role, the big picture was of critical importance. In law-making cases with manifest policy considerations, the Court expected counsel to provide all relevant materials, including legislative history, academic articles, and comparative law. Even then, the Court exercised great restraint in not going beyond the core legal issues. As Hunt said: "My assumption is that anything we say will be used against us – or at least used."[126]

As always, the Court's main function was error correction, with opportunities to set the law in new directions being more limited. But when those opportunities arose, the Court invariably took up the challenge. The Fraser court was perhaps

best described as a combination of the "incrementalist," moving the law along carefully when necessary, and "innovative," revisiting old issues through a new *Charter*-based lens and making bold decisions when called for.

Law and Order: A Women's Perspective?

Domestic and sexual violence was one area where a number of judges on the Court felt a woman's perspective made a difference. These were pressing social issues in the 1990s, and while they had received considerable attention from legislatures and courts, historically they were areas where women had suffered bias in the justice system.[127] The jurisprudence of the Fraser court marked a shift towards a more equality-based approach. The Court emphasized deterrence on matters like spousal abuse, child abuse, and sexual assault. The question was whether this was a matter of the changing gender composition of the Court, a more modern judicial outlook sensitive to social conditions, the Court's traditional law and order orientation, or, as is likely, a combination of all three.

The Fraser court took a stance strongly favouring deterrence in sentencing for domestic violence. Typical was McFadyen's statement in a bench judgment: "This court has repeatedly indicated that spousal violence will not be tolerated."[128] In 1994, David McDonald's guideline sentence decision, *R v Brown*, set out for the first time the Court's guidelines for sentencing for domestic assaults. Henceforth, spousal assaults were to be treated the same as an assault between strangers.[129] *Brown* also put to rest the persistent idea that because the victim was a spouse, sentence should be mitigated. The Court said in no uncertain terms that this was an aggravating, not mitigating, factor. The Court saw it as a breach of trust and an abuse of power, as women (the victim typically being female) were generally in a position of vulnerability or dependency in abusive relationships. General and specific deterrence were the most important sentencing factors, along with denunciation, and the Court advocated zero tolerance.

Hetherington, too, was outspoken in providing guidance on sentencing with spousal assault, and did not hesitate to correct outdated judicial attitudes. As she put it in *R v Ollenberger*: "I can think of no reason why the courts should wait until a wife or companion has been repeatedly assaulted to move to deterrent sentencing."[130] The trial judge had implied that marital discord and the victim's suspected infidelity was a form of provocation. Hetherington stated in response: "Mrs. Ollenberger did not provoke the assault, nor did she do anything that justified it. Even if she had been unfaithful, a fact never established, her husband would not have been justified in assaulting her."[131] Hetherington's remark was a clear message to trial judges not to be led astray by outdated assumptions about provocation.

Hetherington was not alone. In *R v Kuznetsov*, Fraser, sitting with Queen's Bench justices Bielby and Cairns, made the point that the victim's desire to reunite with an abusive partner was not a mitigating factor for sentence: an "individual's desire to reconcile cannot be allowed to override society's interest in controlling and condemning wife abuse."[132] The panel also reprimanded the trial judge for not following *Brown* and *Ollenberger* and thus failing to treat a spousal assault seriously: "Indeed, we are bound to say that we were disturbed by the tone of his comments which may, if repeated, prompt further futile appeals."[133]

The Fraser court addressed child sexual abuse in a similar fashion. To some extent, it was following earlier developments. In the early 1980s, the Court had dealt with child physical abuse sternly. The 1988 sentence judgment of *R v Sandercock*[134] had set guidelines for sexual assault on adult victims, and a number of subsequent judgments in child sexual abuse had applied the same principles. However, there had also been some contradictory Court decisions. The Court felt it necessary to settle the law in sentencing those convicted of sexual abuse of children.[135] Building on *Sandercock*, the Court issued *R v S (WB)* in 1992.[136] This guideline sentencing judgment, written by David McDonald, exhaustively

canvassed recent developments in child sexual abuse cases and set a starting point of four years for a single major sexual assault. The message was obvious: sexual offences involving children were serious offences and would attract serious jail time. Two reasons stood out. The Court found that these offences involved a high degree of moral culpability since the child victims were essentially defenceless. And the Court noted that child sexual abuse often had devastating lifelong consequences for the victims.

The Alberta appellate court was a national leader in reflecting society's growing concern about domestic and sexual violence. It is difficult to say to what degree the Court's strongly deterrent stance on spousal assault and child sexual assault was a direct result of the gender balance on the Court. A panel of male judges had decided the *Brown* appeal and *S (WB)*. Yet the fact that both were circulated reserves reviewed by all members of the Court suggests that the female judges on the Court had significant input into these decisions. Further, the Chief Justice, Hetherington, and McFadyen were all prominent in determining the Court's stance on domestic violence. The first generation of women judges helped bring the problem forward, and probably ensured it would be given proper treatment. On sexual violence, Fraser, in her dissenting judgment in *R v Ewanchuk* (discussed below), showed a perspective that owed something to being a woman. Certainly, colleagues on the Court – some from the perspective of their previous lives as counsel and trial judges – felt that Fraser provided a great deal of leadership on the issue of sexual violence, leadership that was felt outside Alberta as well.

Family Law: The Court Takes the Lead in Child Support

Family law was another area where the presence of more female judges might be expected to have noticeably impacted the Court's jurisprudence. The connection between divorce, single parent households, and child poverty became a major social concern in the 1990s. The federal government passed a new *Divorce Act* in 1985, which introduced no-fault grounds for divorces. Under the *Act*, judges continued to have considerable discretion in setting spousal and child support payments. This discretion was identified as the cause of an endemic, systemic problem: inadequate support awards and consequent struggles for custodial households. Custodial households, overwhelmingly headed by women, tended to suffer a substantial drop in income after divorce, in part because of disparities in salaries for working women. For less advantaged families, the loss of the financial advantages of a single household was more critical, but for families with higher incomes, the culprit was often inadequate support awards, inadequate enforcement of awards, or both.

The Court addressed the child support issue head-on in *Levesque v Levesque* in 1994.[137] The basic legal problem was how to effectively divide up child support in cases where there was no spousal support involved and one parent had custody of the children. In recognition of the seriousness of the issue, Chief Justice Fraser originally convened an unusually large seven-judge panel.[138] Ultimately sitting five, including Fraser and Hetherington, the

POSTER FROM ALBERTA JUSTICE CAMPAIGN AIMED AT PARENTS IN ARREARS WITH SUPPORT PAYMENTS, COURTESY ALBERTA JUSTICE

Court invited counsel to consider a number of questions about the issues around child support and make submissions to give the Court required contextual information for its law-making analysis.[139]

The judgment was indicative of the Fraser court's willingness to more openly consider policy implications and the law's impact on a crucial social issue. In tackling this issue, the Court demonstrated great awareness of the realities of divorce and single parenthood. In the Court's view, there were several potential causes for inadequate awards, but one was the lack of understanding of many judges of the real costs of child care. The Court made no bones about the need for a guideline judgment, on the basis that the *Divorce Act* did not adequately instruct judges on the principles for determining proper support payments. *Levesque* adopted the "guideline" approach the Court used in criminal sentencing and for the same reason: to minimize the pitfalls in uncontrolled judicial discretion. The idea was to provide judges with guidance but not dictate outcomes. "We do not demand uniformity of result, because every case is at least a little different from every other case. But justice requires uniformity of approach."[140]

The Court's starting point was the well-accepted tenet that the welfare and well-being of children was the chief concern and divorcing parents should make sacrifices towards this end.[141] Great emphasis was put on the latter, the Court stating: "If living apart increases costs, these should be absorbed by the parents, not the child. If the cost of living of the spouses increases because they live apart, and the standard of living for that reason must be reduced, the standard of living of the parents should diminish before that of the child."[142] This included the possibility that the adequate support of the children might lead to a better quality of life for the custodial parent than the non-custodial.

Although the language was largely gender-neutral, it was clear the Court was concerned about cases in which the non-custodial parent, usually the father, ended up with a higher standard of living than the children. The Court instructed that reductions in support obligations for the non-custodial parent should only happen in very clear cases of need:

> The parent who invokes poverty as a reason to adjust an award should be prepared to make the fullest disclosure, and show how there is no unavoidable expense. A newly divorced noncustodial parent, for example, has no right to the lifestyle of unmarried friends. One does not begin the count for the children after first securing the car, the stereo, and the like.[143]

The same emphasis was true of *Levesque's* five-step framework for calculating income. The Court laid down a broad approach that included assets, ability to earn income, and future income, emphasizing earning potential over reported income to guard against parents unfairly diminishing their child support payments. The Court's approach addressed long-standing inequities, namely, non-custodial fathers historically not paying sufficient funds for child support. In doing so, it indirectly recognized that these inequities were attributable in part to the judiciary's own failure to set adequate child support amounts. *Levesque* was noteworthy in coming to grips so overtly with a social problem through developing the law. Although framed around properly supporting children, the decision indicated a strong awareness of the disparity that affected women, and it is hard not to conclude this was at least in part a result of a female chief justice very much alive to equality and gender issues.[144]

It might seem ironic that the decision had a short shelf life. Only three years later, in 1997, the federal government radically amended the support provisions of the *Divorce Act* and instituted tabular calculations based on income, greatly reducing judicial discretion. But others saw this as an example of the powerful influence the Court's judgment had across Canada. Child support prior to this time had frequently been

paltry. *Levesque* laid out a far more equitable approach to child support, one connected to the reality of life for many parents. It would have been unthinkable for custodial parents elsewhere in Canada not to have benefited from a similar approach.

Rather than leaving reforms to the uncertainties of courts in other jurisdictions, the federal government stepped in with reforms that reflected the Court's thinking in *Levesque*. That could be seen in the approach of the new child support guidelines, which emphasized gross income, as had *Levesque*, as a starting point in determining support obligations. It could also be seen in the restrictions on judicial discretion. While the Court had eschewed rigid numbers, it had set out percentages to be used as a litmus test for reasonableness of awards. The federal government took this further, setting out defined numbers. The Court's thinking was also evident in the actual amounts set out in the tables, which raised the bar for child support in most other provinces across Canada.[145]

Ironically, another Court judgment regarding the new child support guidelines demonstrated, once again, how difficult it is to make assumptions about gender and legal perspective. The two main issues in *Hunt v Smolis-Hunt* involved the point at which, under the 1997 federal *Child Support Guidelines*, awards could be retroactively dated.[146]

The majority, Berger and Wittmann, agreed with the trial judge that child support could be made retroactive to the point of separation in a divorce action, rather than from the start of proceedings and an interim order of support. They found that although not explicitly allowed in the statute, a "liberal reading" of the intent of the *Guidelines* and the inherent equitable powers of the courts justified such awards. However, they then arguably undid the benefits of their liberal interpretation by adopting a narrow interpretation of the section in the guidelines dealing with imputing income to a parent for calculating support payments. This was the far more significant issue given its potential impact on the right to claim child support.

The section allowed judges to go beyond actual income reported by a parent and inquire into potential income, in order to defeat a strategy of deliberate under-employment to lower support awards. The majority decided it was permissible for a non-custodial parent – typically the father – to change jobs even if it reduced income, noting that career changes with negative economic consequences happened within intact families all the time. In essence, they argued there had to be some limit to judicial power. The standard they required the non-custodial parent to establish – specific intent to avoid child support – was high and difficult to prove. From that point, many Queen's Bench judges declined to rely on the section, choosing instead to use circumstantial evidence to attribute income at a more rational level, rather than imputing it.

Picard in dissent came to the opposite conclusions, deciding there was no ambiguity in the statutory language and retroactive awards were not permitted. However, she favoured the trial judge having the discretion in regard to career changes, income, and support obligations. It might seem surprising that Picard would disagree on the first point. She agreed with her colleagues that retroactive support was a good thing but thought the *Guidelines* simply could not support the majority's interpretation. Good policy took a back seat to what she saw as an unambiguous law. But on the second issue, Picard took a much different approach. The decision demonstrated how difficult it can be to point to a legal conclusion and connect it easily to the gender of a judge. In this decision, the judges were essentially on the same page at least on the merit in being able to claim back child support, but their interpretation of the law led to differing results which, while not correlating to gender on the first issue, might well be seen as doing so on the second.

As a postscript to this, Paperny later wrote a leading judgment (for herself, Fraser, and Côté) dealing with retroactive child support, *DBS v. SRG*.[147]

She found that since a parent's obligation to support a child begins at the birth of the child, the parent has a continuing obligation to pay what is appropriate for the child's care. Therefore, if that parent's income increases, then a custodial parent's claim for increased child support should in most circumstances go back to the date of that change and not when a court application was filed. Paperny understood it would otherwise be unfair to children, as circumstances might have prevented the custodial parent from taking legal action, including lack of funding or lack of disclosure. Moreover, Paperny emphasized that the child's rights were not for a parent to waive or bargain away. The SCC overruled the Court in a split 4–3 decision. While it agreed that a parent could sue for retroactive maintenance, it limited how far back a custodial parent could go in claiming child maintenance. Barring blameworthy conduct by the custodial parent, the SCC set that limit at three years.[148]

At the very least, having a chief justice who had an abiding interest in equality issues influenced the Court's approach to the issues discussed above, and it seems a reasonable supposition that the presence of other female judges and their perspective reinforced this. However, to some extent, this may also have been related to their relative youthfulness as part of a generation who were educated and started their careers as legal modernism gathered

WOMEN'S RIGHTS DEMONSTRATION IN FRONT OF THE CALGARY COURTHOUSE, 1981. GLENBOW ARCHIVES, NA-2864-44414-9A.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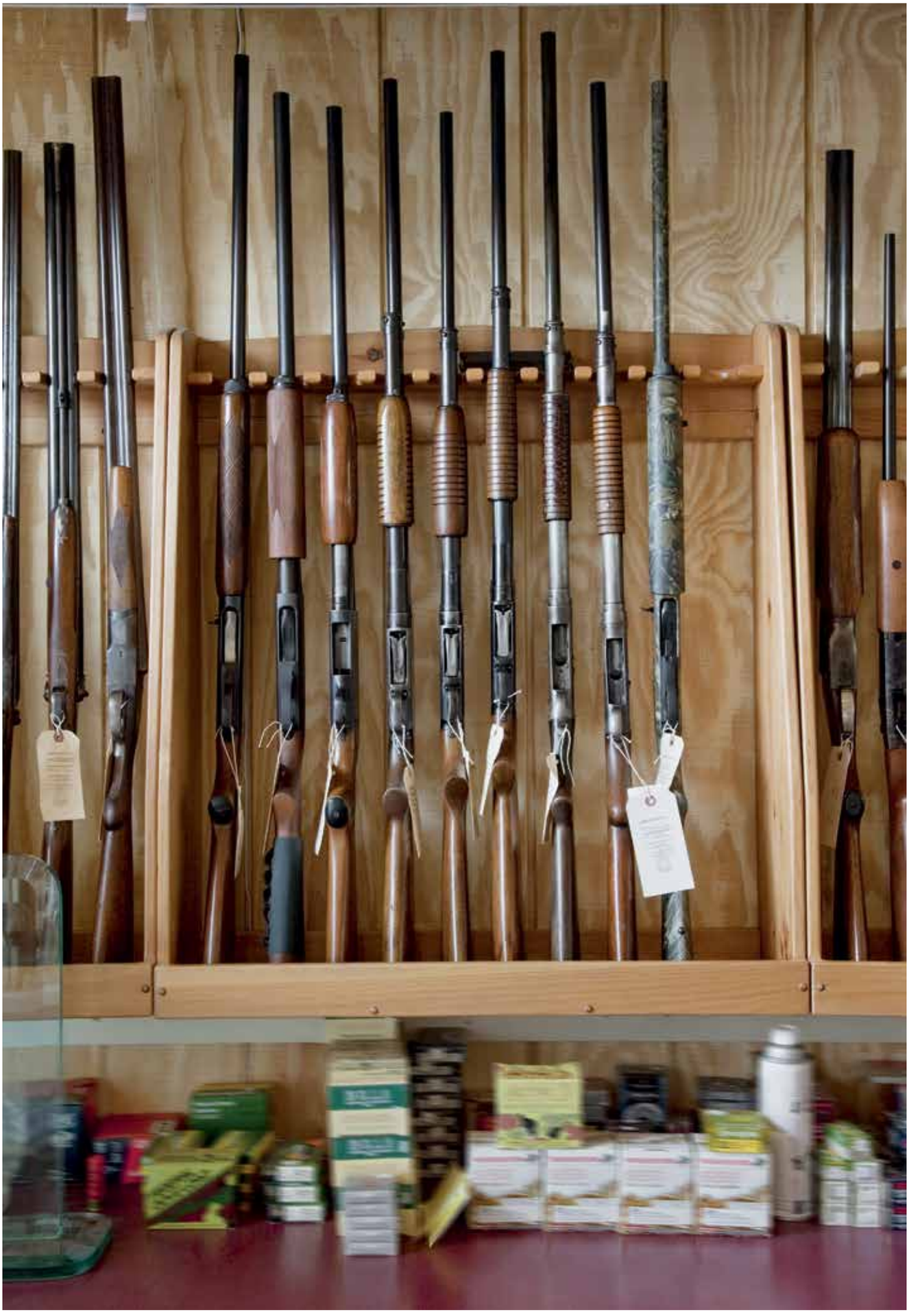


momentum in Canada. Three major and controversial decisions of the Court further demonstrated this.

Reference Re Firearms Act (Canada): Guns and Division of Powers

Bill C-68, the *Firearms Act*, was given royal assent on December 5, 1995, the grim anniversary of the murder of fourteen female students at Montreal's École Polytechnique in 1989.[149] Motivated by the widespread outrage after the shootings, the federal government introduced the *Firearms Act*. Bill C-68 was the latest in a long line of federal statutes regulating guns under the *Criminal Code*.[150] The first regulation of long guns occurred in 1979 when an amendment required a Firearms Acquisition Certificate (FAC) to purchase any firearm but otherwise placed no restrictions on rifles and shotguns.

Bill C-68 introduced a new approach to gun control. Rather than amending the *Criminal Code*, the *Firearms Act* created a comprehensive licensing and registration regime for all Canadian firearms, including rifles and shotguns – the so-called "long guns" – previously exempt from most gun control measures. The licensing requirement expanded on the FAC by mandating a licence to possess as well as acquire a firearm. Every individual firearm had to be registered, including long guns. Non-compliance penalties could include jail time. From the beginning, Bill C-68 was controversial. Nowhere was opposition stronger than in Alberta. High rates of gun ownership, strong identification with rural values, and antipathy for the federal Liberals created a vocal outcry, especially about the long gun registry. The provincial government decided to challenge the constitutionality of the *Act* and submitted a reference to the Court.

The reference was the first major constitutional case for the Fraser court. The Chief Justice set up a panel of five, including herself, to consider the reference, which challenged Bill C-68 on the basis of division of powers. The issue was whether the *Firearms Act* was *ultra vires* Parliament because it violated the province's power to regulate property and civil rights under s. 92 (13) of the *Constitution Act, 1867*. Although regulatory schemes could be considered criminal law, setting up a separate regulatory statute muddied the constitutional waters. Alberta and other intervening provinces argued that rifles and shotguns were generally owned by law-abiding individuals for legitimate utilitarian and recreational purposes. Since existing criminal law already provided sanctions for the misuse of firearms, the licensing and registration provisions of the *Act* infringed on regulation of property, a provincial matter. The federal government argued that the *Act*, like previous gun control legislation, fell within its criminal law power under s. 91(27) of the *Constitution Act*.

The Court upheld Bill C-68 as within Parliament's jurisdiction. The constitutional argument has been called straightforward, but the decision was important for what it revealed about the Court.[151] The Chief Justice, as part of the majority, and Justice Conrad in dissent, demonstrated several elements characteristic of the Fraser court in its first decade. Unlike the division of powers cases from the 1970s, the *Firearms Reference* thrust policy considerations forward much more conspicuously, and demonstrated the higher level of comfort with incorporating such analysis into a judicial decision. Yet Conrad's dissent could have come from the McGillivray or Laycraft court, aligned as it was towards provincial rights and informed by a libertarian outlook.

As Fraser pointed out in her exhaustive lead judgment, at the heart of the difference between the federal and provincial positions were two different conceptions of ordinary firearms. As her opening paragraph stated:

> Guns preserve lives; guns employ people; guns are used for legitimate recreational pursuits; and guns are the tools of some trades. At the same time, guns intimidate; guns maim; and guns kill. It is precisely because of this paradox – that guns are used for good as well as evil – that controversy surrounds government efforts at gun control.[152]

PHOTO COURTESY DREAMSTIME.

In Fraser's view, however, while guns could be tools, the ease with which a gun could be misused made it different from other property and put the regulation of firearms squarely into the realm of public safety and under the federal government's criminal law power:

> [A]ll property is not a dangerous weapon. But all guns are…Unlike other tools or objects in our society which can, if misused, cause death, firearms almost universally have as their purpose the function of killing, maiming or intimidating other living creatures.[153]

The province argued that the law was a case of colourability, as demonstrated by its likely outcome. Since criminals would ignore licensing and registration, the *Act* only targeted the law-abiding and therefore was not really about crime control or public safety but controlling property. Fraser dryly noted that the reality of gun crimes and accidents in Canada often involved the previously law-abiding, especially in cases of domestic violence. Fraser held that the province was essentially using the wrong measure. In her view, the practical effect of the *Firearms Act* was irrelevant – and speculative. The intent was clear: increasing public safety. Whether it succeeded in doing so was not within the domain of the courts; the case was about division of powers, not efficacy of legislation. She noted that two recent SCC decisions, *RJR-Macdonald v Canada* and *R v Hydro-Quebec*, had found that the federal criminal law power included preventive measures to enhance public safety, and this was precisely what the *Firearms Act* sought to do.[154] Fraser concluded there was a clear, logical connection between crime control and public safety and controlling the availability of firearms.

In her analysis, Fraser also linked gun control with equality rights, demonstrating how she took a wide-ranging look at the issues and made broad policy considerations part of her analysis in interpreting the scope of Parliament's preventive criminal law power:

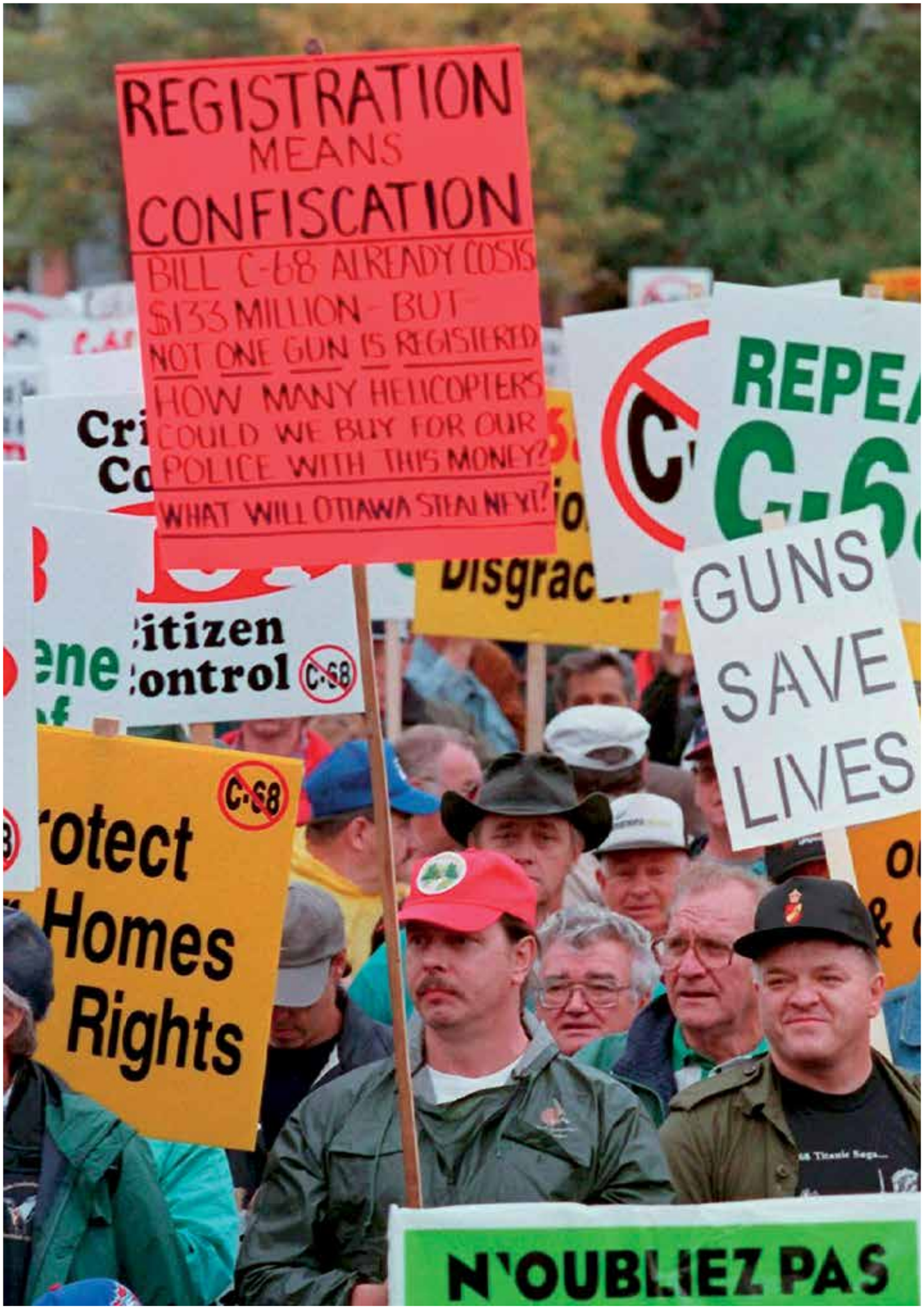
> Though gun control affects all Canadians, the point has been made that women tend to experience guns and gun possession differently from men…Focussing almost exclusively on property rights concentrates primarily on the owners and possessors of ordinary firearms. But equally important is the perspective of those put at risk by guns.[155]

Like Fraser's judgment, Conrad's dissent largely went down a well-trodden constitutional path, but staking out the "provincial rights" position. As Conrad put it, in a dramatic introduction that echoed Fraser's:

> Misuse of ordinary firearms, like misuse of all firearms, is dangerous. But to focus on the danger of guns misapprehends the real issue of this Reference. Whatever the power of long guns, it pales in comparison to the untrammelled power of the federal government to arbitrarily take over the field of regulation of firearms in this country, thereby ignoring the division of federal and provincial powers enshrined in the Constitution.[156]

Conrad concluded the *Firearms Act* was colourable. Its true intent was regulation of guns, dressed up as crime control and public safety, and was "so broad and all-encompassing as to be, in pith and substance, property and civil rights."[157] Conrad agreed with Alberta that the potential effectiveness of the registry should be considered in deciding its constitutionality. In her view, there was no real nexus between the regulations under the *Act* and valid criminal law and public safety concerns. Criminals were never going to participate in licensing and registration, nor would this necessarily prevent misuse of a firearm by a previously law-abiding, legitimate owner. Therefore, the only criminal behaviour being controlled was essentially created by the *Act* – not getting a licence or registering a long gun. Because of the otherwise tenuous connection to crime control, Conrad concluded that the impugned provisions of the *Act* failed the usual constitutional tests and interfered with the province's jurisdiction over property and civil rights.

OPPONENTS OF FEDERAL FIREARM REGISTRY PROTEST ON PARLIAMENT HILL, 1998. CANADIAN PRESS/TOM HANSON.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Conrad's dissent harkened back to the division of powers cases in the 1970s, defending provincial rights and resisting the use of the criminal law power to expand federal jurisdiction. As she put it: "The trick is to ensure that the life afforded the criminal law power is not the death of federalism."[158] Like the Chief Justice, Conrad also made a connection to equality rights, but not from the perspective of victims of crime. In her view, the *Act* violated equality rights because all gun owners were treated the same even though the use and utility of long guns varied widely, and some people, such as aboriginals, would be more affected. As she wrote: "Firearm regulation that is safe for urban Canadians may be unsafe for rural Canadians...Allowing decisions to be made at the local level serves to enhance the respect and tolerance for different societal values in this country and allows local needs and conditions to shape and structure a regime for the safe use of firearms informed by those values."[159]

Conrad's emphasis throughout her decision on the utility of firearms for rural dwellers did seem to slide from analyzing the *Act*'s purpose to simply attacking its efficacy and fairness. Fraser, too, was seen as being drawn into defending the potential effectiveness of the legislation, despite her express statement that assessing the efficacy of the legislation was not the role of the courts.[160] In the view of one commentator: "Their disagreement is primarily the product of sharply discrepant perceptions as to the purpose and effect of the particular legislative scheme; and those differing perceptions are probably rooted, despite disclaimers on both sides, in the judges' personal views about the desirability of gun control legislation."[161]

While concurring with the Chief Justice, Berger wrote:

> The intense public debate on the issue of gun control has been dominated by a pre-occupation with that which is thought to be the core question: "Are ordinary firearms inherently dangerous?"...Declarations of inherent dangerousness echo the rallying cry of those constituencies who either ignore or fail to fully understand the legislative choice. Such declarations, in any event, are unnecessary to a dispassionate assessment of the competing constitutional arguments."[162]

Hetherington, while showing sympathy for Conrad's views, also concurred with the Chief. Like Berger, she saw the central legal point as relatively straightforward.

The criticism of Fraser and Conrad might be taken as a warning of the perils of policy in judicial decision making. Conrad, however, made the argument that considering the real effects was necessary to truly apprehend the purpose of the legislation. Fraser maintained that doing so was unnecessary in deciding the division of powers issue, but her analysis may show how difficult that is, or that a richer, more contextual approach may be more readily misinterpreted by some. Certainly, Fraser's decision was a good example of her jurisprudence – a thorough canvassing of legislative and legal history behind the issue, creating a broad and deep context for a more focused interpretation of the law. Her judgment was instructive, taking the reader through the historical background of gun control in Canada and the constitutional principles used in analyzing a division of powers cases. One critic conceded that Fraser's decision was "informative and insightful, and could well become a *locus classicus* on the subject."[163]

Perhaps emboldened by Conrad's dissent (with which Irving concurred), Alberta appealed to the SCC, which, in a concise judgment, essentially summarized and agreed with the key points in Fraser's analysis. Despite the intense controversy over the *Act*'s content, as public law it was not very contentious. Fraser and Conrad's decisions were, however, examples of the very contextual analysis of their generation of judges. Conrad's dissent also demonstrated the robustness in the Alberta judiciary of classical liberal individualism, if not libertarianism, and protection of provincial powers in Canada's federal arrangements – a blend of old and new.

DELVIN VRIEND (RIGHT) AND PARTNER ANDREW GAGNON KISS AT EDMONTON RALLY, 1998. CANADIAN PRESS/KEVIN FRAYER.

As a postscript, the SCC decision did not end the debates and disagreements about the long gun registry. They continued for years. Eventually, concerns about the efficacy and cost of the long gun registry, along with ideological disagreement by the governing Conservatives with the registry, led to Parliament's repealing the challenged legislation in 2012, seventeen years after it had been passed.

Vriend v Alberta: Equal Rights for Gays and Lesbians Come to Alberta

The 1990s might be considered act two for the *Charter*. In the first act, much of the *Charter* litigation involved "classic" civil liberties. Some of these decisions were controversial, but also familiar ground. But the second act required Canada's judiciary to consider the right to equality, territory more contentious because it potentially affected entrenched interests and challenged deeply held beliefs by some. Section 15(1) of the *Charter*, which came into effect in 1985, proclaimed:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[164]

Litigation invoking s. 15 became headline news in the 1990s as historically marginalized groups in Canadian society used the *Charter* to end or redress discrimination. This litigation was part of a larger debate on the nature of equality and how it was best achieved. *Vriend v Alberta*, which dealt with the rights of gays and lesbians, was the major s. 15 decision to come from Alberta. Given the Chief Justice's view on equality rights, the majority decision represented a retrenchment. The difference between the majority and minority decisions, and ultimately between the Alberta Court and the SCC, highlighted two different ideas of equality, different judicial approaches to the *Charter*, and different views on judicial deference to the legislature.

The facts in *Vriend* were simple. A young gay man, Delwin Vriend, was fired from his position at King's College, a private Christian school in Edmonton. The college's hiring policy did not allow homosexual employees on religious grounds. Vriend complained to the Alberta Human Rights Commission, but sexual orientation was not a specified ground of discrimination in the province's *Individual Rights Protection Act* (IRPA).[165] The commission concluded it had no jurisdiction. Vriend then applied to Queen's Bench for a declaration that IRPA violated s. 15(1) of the *Charter*. Justice Anne Russell granted the application. Taking judicial notice of

historic and contemporary discrimination against gays and lesbians, Russell held that sexual orientation was analogous to grounds of discrimination listed in s. 15 of the *Charter*.[166] By not including sexual orientation, IRPA infringed the *Charter*. As a remedy, she directed that sexual orientation should be "read in," that is added, to IRPA, a remedy available under s. 32 of the *Charter*. Russell's decision was controversial and immediately criticized as "judicial activism."

McClung, O'Leary, and Hunt considered Alberta's appeal. Before it was heard, the SCC issued three decisions, "the trilogy," settling two points important in *Vriend*.[167] The first was that it was appropriate to take judicial notice that homosexuals were a distinct group who suffered discrimination because of their sexual orientation. The second was that sexual orientation should be considered an analogous ground for purposes of s. 15(1).

McClung and O'Leary allowed the appeal. In separate judgments, they concluded there was no *Charter* violation if IRPA did not include sexual orientation as a ground of discrimination. The essence of their position was that IRPA treated heterosexuals and homosexuals equally. By this, they meant that whatever someone's sexual orientation, they had recourse to the commission if they were discriminated against on the grounds the *Act* did include, like race or religion. McClung and O'Leary agreed that the government's failure to include sexual orientation did not directly discriminate. Therefore, there was no breach of s. 15(1). While not denying that discrimination might exist in society, they argued this was in the private realm whereas the *Charter* applied to government action, and, as it stood, IRPA was neutral.

McClung went further and held that the *Charter* could not apply where a legislature had not passed a law, regardless of whatever ill might not therefore be addressed. To decide otherwise, he believed, would severely diminish the law-making power of the legislature by requiring it to mirror the *Charter*. He reasoned that this could force legislatures to include more and more grounds of discrimination in their human rights statutes, including those of marginal utility or potentially outrageous to the larger community. O'Leary took a different approach. While holding that the recent case law, including "the trilogy," had established that legislative inaction could attract *Charter* scrutiny, he nevertheless concluded that Vriend's claim failed. There was a high initial hurdle for proving a breach of s. 15, and he agreed with McClung that Vriend had not established that the omission was directly causing discrimination. Their judgments called for judicial deference when the legislature had, for its own considered reasons, declined to act.

O'Leary quoted recent SCC comments about giving due deference to the legislature on contentious social issues. McClung, however, unleashed the dogs of war against judicial activism in a contentious judgment. To borrow from his own colourful but disputatious rhetoric, McClung aimed a thunderous broadside at judges who "choose to privateer in parliamentary sea lanes."[168] In McClung's view, while judges now had the duty under the *Charter* to review laws and find remedies for impugned legislation, restraint was vital:

> We judges are now permitted, sparingly, to correct legislative excess, but we should remain co-servants with the law-makers in the business of representative government and should never allow ourselves to evolve into their second-guessing surrogates. Yet we seem to be moving, incrementally but steadily, from the role of parliamentary defenders of that of its nemesis.[169]

McClung saw in *Vriend* what some commentators had feared with the *Charter* – that judges were making an end run around legislatures and imposing their own values on society, even if well intentioned. As he put it:

> In our cloistered station it is our priorities, our privileges, our experience, our spending and comfort levels, what we have been taught and our own stereotypes that shade our attempts to pronounce the ideal laws.[170]

McClung predicted serious consequences: that politicians would send controversial issues to the courts and let judges instead of politicians take the flak for unpopular policies. However, McClung did his argument no favour with a number of passages unnecessarily pejorative of homosexuality. Even informed commentators from the academic legal community wondered if it was judicial activism that raised McClung's ire or merely activism he didn't like.[171] McClung clearly thought, however, that on an issue like gay rights, where there was no clear societal consensus, judges should wait for the legislature.

Hunt, in her dissenting judgment, had no hesitation in finding that IRPA offended s. 15(1). While the omission appeared neutral, Hunt concluded that it clearly was not when compared to judicially accepted facts about discrimination based on sexual orientation. The claim that the existing grounds of IRPA applied equally to everyone, including homosexuals, missed the point. Heterosexuals were not refused employment on the basis of their sexual orientation. But homosexuals were. The omission of sexual orientation therefore allowed discrimination against them. And this omission had to be viewed in the context of the overall aims of IRPA to further human dignity and equality. Since IRPA, like most human rights codes, had been amended to broaden its scope, the reason why some things had been included and others not was important. Hunt found that the Alberta legislature had declined to amend IRPA to include sexual orientation despite repeated ministerial advice to do so. In her view, this meant the legislature specifically decided not to include sexual orientation, and this therefore constituted government action which was subject to *Charter* scrutiny. As Hunt wrote:

> Given these considerations and the context here, it is my opinion that the failure to extend protection to homosexuals under the IRPA can be seen as a form of government action that is tantamount to approving ongoing discrimination against homosexuals.[172]

Hunt then shifted to whether the breach could be justified under s. 1 justification and concluded it could not. "There has been a total denial of his rights and a total failure to justify that denial," Hunt wrote.[173] On the subject of the remedy, however, the panel agreed, for different reasons, that reading in was not the best solution. Given IRPA's relative complexity, Hunt felt there might be too many unintended consequences from reading in and instead sent the statute back to the government for a proper fix. By taking this approach, Hunt demonstrated the caution and legislative deference common to the Alberta appellate court. At the SCC, Justice Major, while concurring with the majority otherwise, also agreed with his Alberta brethren on remedy.

The split in the panel reflected the views of two different generations of judges. Aside from the significance of *Vriend* for gay and lesbian rights and the reach of s. 15, the decision also revealed the difference between formal and substantive equality post-*Charter*. McClung and O'Leary proceeded from the perspective of formal equality, the "classical liberal" view of equality before the law, the same one the judiciary had used to neuter the *Bill of Rights*. They were content to simply note that the legislature had declined to act, and it was not necessary to inquire deeper whether, on the face of a law, it did not discriminate. Hunt approached the problem as one of substantive equality, where it was essential to consider the broader context, including the legislative history and position of homosexuals in society, to determine the true effect of the law.

The differences in the panel also disclosed a different attitude towards the evolving role of the judiciary because of the *Charter*. Unlike most early *Charter* decisions, s. 15 litigation drew the courts into the messy worlds of sociology, psychology, social policy, and most importantly, politics. It also made more transparent the role of the judges in law-making. Hunt was comfortable with the post-*Charter* environment in which this role was openly acknowledged. Hunt could write quite bluntly:

> Courts must do the duty entrusted to them by Parliament and the legislatures and assess whether claimed *Charter* breaches have been established. This will often require the courts to second-guess legislative choices and make social policy; this is an inevitable part of the *Charter* task, especially in the context of the s. 15(1) guarantee of equality.[174]

McClung was obviously very uncomfortable with this reality and its implications. His warning about activism was not at all surprising given his reservations expressed relatively early about the *Charter*. O'Leary's view acknowledged the new reality but still argued for a more deferential approach.

The SCC overturned the Court's decision. Justices Cory and Iacobucci wrote the decision, which had the full concurrence of the members of the SCC, except on remedy.[175] The SCC agreed that Russell had been correct to read in sexual orientation. Otherwise, the SCC decision was similar to Hunt's, with Cory elegantly expanding on some of the arguments found there. Neither Iacobucci nor Cory rose to McClung's bait, although Iacobucci refuted some of his specific contentions about judicial interference and reiterated the SCC's stance that the *Charter* had placed a constitutional limit on parliamentary supremacy and given the courts the role of determining if those limits had been breached.

Vriend illustrated that even after fifteen years, tension over the *Charter* and its application was alive and well among judges on the Court. McClung and O'Leary thought that a narrower and restrained application of s. 15 of the *Charter* was the better approach. McClung went further and explicitly framed the *Charter* as a threat to parliamentary democracy unless the judiciary was particularly cautious and took a narrow approach to equality rights. Hunt and Russell, however, ably expressed an approach to the *Charter* that, like decisions on other rights, would give real meaning to s. 15 and to those seeking to enforce equality rights in Canada.

Vriend had one last point of significance. Alberta had threatened to use s. 33 of the *Charter*, the notwithstanding clause, if the SCC overruled the Court. In the end, the government of Premier Ralph Klein decided to abide by the SCC's decision. One commentator speculated that the wily Premier had taken the opportunity to allow sexual orientation into IRPA without losing face with his socially conservative base. The courts had made possible a difficult legislative change at little political cost.

R v Ewanchuk: No Really Means No

The *Ewanchuk* appeal was significant for many reasons and marked a very difficult moment for one judge in particular, McClung. The subsequent SCC decision, largely following Chief Justice Fraser's dissent, brought clarity to the law on consent after the 1992 *Criminal Code* amendments designed to better protect sexual assault victims. The Court's decision in *Ewanchuk* also showed how a female perspective might make a difference in the law. Fraser showed a deep understanding of the dynamics of sexual assault and a willingness to interpret the new consent laws to give them the fullest expression to achieve Parliament's objectives. McClung's judgment reflected his apprehension that long-standing criminal law principles were somehow being lost in the initiatives to protect sexual assault victims.

The legal significance of *Ewanchuk*, however, was almost immediately overshadowed by the contretemps that arose involving McClung and Justice Claire L'Heureux-Dubé of the SCC. Without dwelling on a painful episode, the public controversy that resulted from *Ewanchuk* also revealed much about the growing division over the role of the courts as instruments of public policy. Ironically, it also revealed how those resisting changes in the law sometimes used Parliamentary supremacy as a reason for failing to give effect to the very laws Parliament itself had passed. Viewed from this perspective, it was a continuation of the same refrain heard in the *Bill of Rights* era: "Surely Parliament cannot have intended that," whatever the "that" might be.

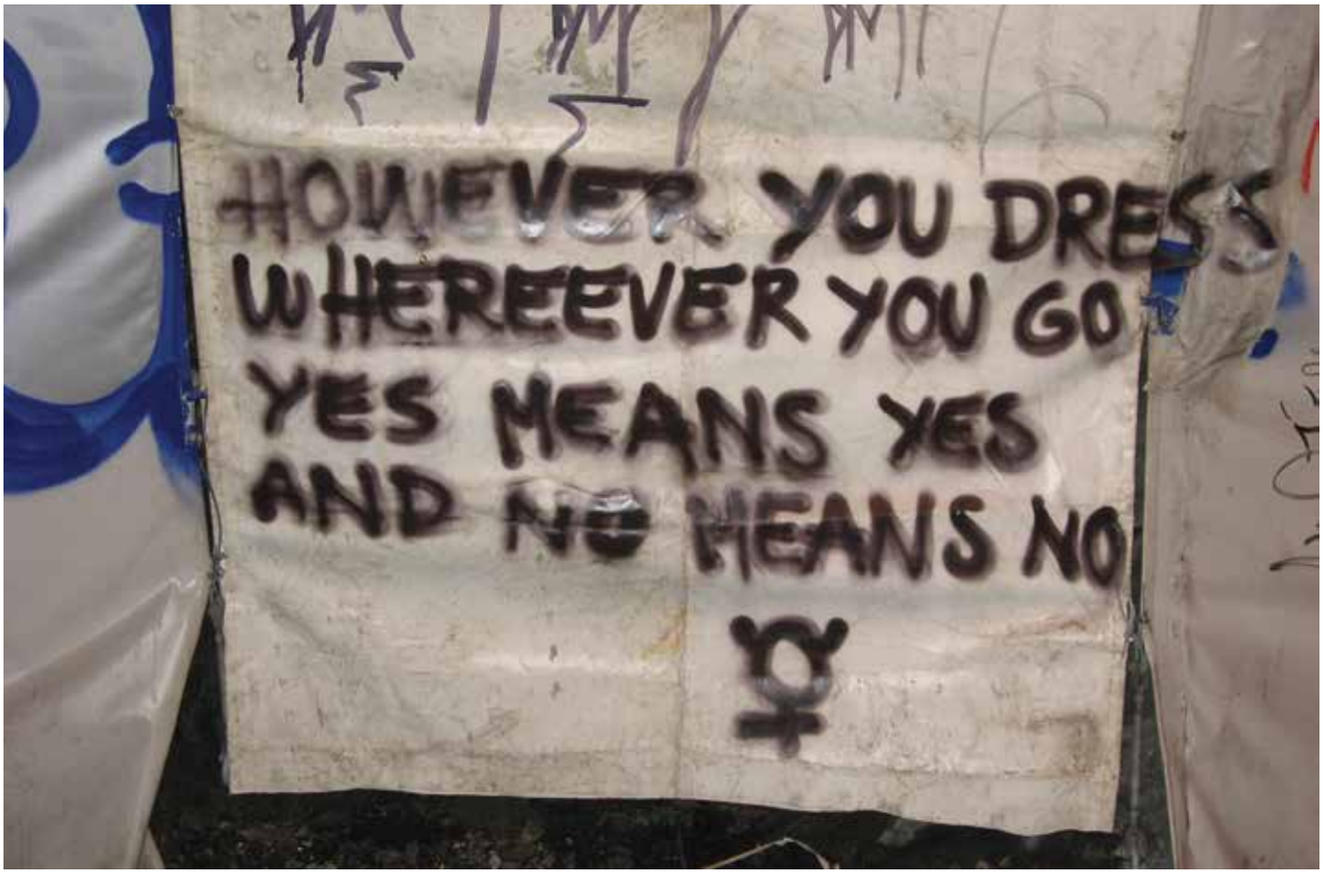
STREET POSTER CAPTURES THE MESSAGE AT THE HEART OF BILL C-46 PHOTO: SVENNEVENN.

At the heart of *Ewanchuk* was Parliament's ongoing attempt to craft sexual assault laws that removed long-standing biases against victims, in this case on the issue of consent.[176] The federal government brought in Bill C-46 to replace the so-called "rape shield" law that the SCC had struck down in *R v Seaboyer*. The new amendments also created a statutory definition of consent for sexual offences as "voluntary agreement...to engage in the sexual activity in question" and tightened the defence of mistaken belief in consent.[177] Previously, an accused could make an essentially unconstrained claim that the accused honestly, but mistakenly, believed that the complainant had consented to the sexual activity. Under the amendments, an accused had to take "reasonable steps," appropriate to the circumstances, to determine that the person was consenting. Only then could the accused raise the defence of mistaken belief in consent.

The facts in *Ewanchuk*, as found at trial, were straightforward. Ewanchuk had conducted a job interview for his woodworking business with the complainant in a trailer parked at a mall. He initiated physical contact with a massage that culminated in sexual touching and exposing his genitals. The victim testified that, believing she was trapped in the trailer, she hid her fear and initially did not resist Ewanchuk. But she finally told him to stop on three separate occasions. Despite this, he continued to the point where he had his penis exposed while lying on top of her. He let her go, and she promptly contacted the police. Ewanchuk was charged with sexual assault. The trial judge acquitted Ewanchuk. In a muddled judgment, while the judge believed the complainant's testimony, he held that the complainant had given her "implied consent" to the sexual activity on the theory that her disguised fear meant Ewanchuk did not know she was not consenting. The Crown had accordingly not proved beyond a reasonable doubt that Ewanchuk had the required intent, that is, *mens rea*, to commit a crime.

Fraser, McClung, and Foisy heard the Crown's appeal of the acquittal. In dismissing the appeal, McClung held that the Court could not interfere because the trial judge made fact findings that the complainant had given her implied consent to Ewanchuk's sexual activity and Ewanchuk had a mistaken belief in consent, findings outside the scope of appellate review. Foisy wrote a short one-paragraph judgment concurring on this point and dismissing the appeal.

Fraser dissented in no uncertain terms, basically emphasizing that not only does "no" mean "no," but only "yes" means "yes." She found that the trial judge had misapprehended the meaning of consent as it existed after Bill C-46. This was an error of law, not fact, thereby opening his verdict to appellate review. In her judgment, Fraser



clarified how the C-46 amendments had changed the way consent and belief in consent should be approached. In her view, what the amendments were designed to do was remove the unfair reliance on the assumption that, unless a woman said "no" to sexual activity or actively resisted it, she was "consenting" to it. Parliament's intent was to make it clear that consent required "positive agreement" such that an accused could no longer rely on lack of overt resistance as "consent" to sexual activity. This removed a persistent problem: in the absence of overt resistance, verbal or physical, an accused could simply assume consent.

Fraser thought Parliament's intent was equally obvious from the way the defence of mistaken belief in consent had been redefined. To rely on that defence, an accused was now required to point to the "reasonable steps" taken to determine that the complainant was consenting. Parliament had imposed this reasonable responsibility on an accused to redress the unfairness inherent in an accused simply presuming consent unless the victim actively resisted. An accused still had ample protection: the judge or jury could still believe or not believe a complainant's testimony about their consent, and there was still considerable leeway for a claim of mistaken belief in consent. The trial judge had simply not understood how to approach consent, and had then compounded his error by treating "implied" consent as a defence. Fraser rejected the existence of this defence:

> [I]t is wrong in law to assume that a woman gives her "implied consent" to sexual activity unless and until she overtly signals her non-consent. With the 1992 *Code* amendments, Parliament rejected this discredited theory of "implied consent"…Women in Canada are not walking around this country in a state of constant consent to sexual activity unless and until they say "No" or offer resistance to anyone who targets them for sexual activity.[178]

Nor could Ewanchuk rely on mistaken belief in consent, because he had not established he had taken reasonable steps to ascertain the presence of consent. Fraser was clearly mystified as to how there could be any question of consent in the case. The complainant had clearly said no more than once, only to be subjected to an escalation of sexual contact. This was more than sufficient to convict Ewanchuk. As Fraser explained:

> When a woman says "No" to unwanted sexual activity, she is not required to give a list, whether oral or written, of what the "No" includes…Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner. Any other interpretation of s. 273.1(2)(e) would fall prey to the rejected myth that "No" really means "Try harder."[179]

It is apparent from McClung's judgment that he did not believe Parliament's amendments on consent had the effect that Fraser contended.[180] Although he did not articulate it exactly this way, it seemed clear that McClung was concerned that Fraser's interpretation of the new consent rules in C-46 risked overly criminalizing an often ambiguous area of human interaction. He felt that a common law defence of implied consent did exist independent of a defence of mistaken belief. Aside from a very different reading of the law than Fraser's, McClung's judgment also expressed his discomfort with what he saw as the consequences of Fraser's interpretation:

> [W]e must…remain aware that nothing can destroy a life so utterly as an extended term of imprisonment following a precipitately decided sexual assault conviction. In the search for proof of guilt, sloganeering such as "No means No!", "Zero Tolerance!" and "Take back the night!" which, while they marshall desired social ideals, are no safe substitute for the orderly and objective judicial application of Canada's criminal statutes.[181]

Quite apart from the very different interpretations the Chief Justice and McClung brought to the Parliamentary changes to the law on consent was the way in which

each interpreted the circumstances of the offence. McClung saw an ambiguous situation, mostly harmless and quickly put to an end with a little assertiveness, "a well-chosen expletive, a slap to the face or, if necessary, a well-directed knee." Fraser, on the other hand, saw something different: a vulnerable young woman coming to a job interview and being subjected to a violation of her person, someone who had done nothing to indicate she consented to Ewanchuk's sexual advances, indeed having said no on three separate occasions. McClung viewed the incident as clumsy seduction, "more hormonal than criminal," and no harm done. Fraser viewed it as example of a reality that women face – predatory sexual behaviour enabled and excused by outmoded societal views about women.[182]

Unfortunately, McClung endorsed some of these views in *Ewanchuk* itself. While stating that any violence towards women was deplorable, McClung also made a number of comments, some dealing with the victim's dress and lifestyle, that were "boisterous at best and stereotypic and gratuitous at worst," in the words of one commentator.[183] One example involved the complainant's dress: "[I]t must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines."[184] While McClung was known for his colourful style and literary allusions, he seemed to be courting controversy. And he got it.

At the SCC, Justice Major allowed the Crown's appeal and substituted a conviction. His majority judgment came to conclusions similar to Fraser's. Like Fraser, he found that consent was to be assessed subjectively from the complainant's perspective and that no means no. But he did not explore, as Fraser had done, the relationship between consent and reasonable steps.[185] L'Heureux-Dubé, with Justice Gonthier, added concurring reasons and took square aim at McClung's reasoning: "This case is not about consent, since none was given. It is about myths and stereotypes."[186] McClung, stung by L'Heureux-Dubé's portrayal of his position and her rebuke, broke with tradition and publicly replied to her judgment with a letter to a national newspaper. He then poured fuel on the fire with some gratuitous and hurtful personal remarks. Ultimately, McClung came out the loser on this exchange, forced to make a public apology and narrowly avoiding more serious action from the Canadian Judicial Council than a letter expressing serious disapproval of his comments.[187]

McClung did have his defenders. The *Ewanchuk* decision and the public dispute between judges became a lightning rod in the debate over judicial activism in the 1990s. Certain commentators, from the media and the legal community, defended McClung's decision as being "common sense."[188] Others disagreed equally strongly.[189] Time revealed that the criticisms of those attacking *Ewanchuk* were unfounded. The horrors paraded in an attempt to discredit the SCC's decision never came to pass.

The debate took on symbolic importance far beyond the actual events. Some of the harsh criticism directed at the SCC, and at L'Heureux-Dubé, misapprehended the record. Those intent on personally attacking L'Heureux-Dubé studiously avoided noting that two other SCC judges also agreed with her characterization of McClung's thinking as based on stereotypical thinking. Charles Gonthier signed L'Heureux-Dubé's judgment. And Beverley McLachlin, at present the only one left on the SCC from that time, added her own short concurring judgment, stating in part:

> On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.[190]

The *Ewanchuk* controversy was a very unfortunate footnote to an otherwise respected judicial career. The episode did not reflect well on McClung. The temptation to simply brand McClung a misogynist, however, should be resisted. His decision raised questions about his

attitudes, but he should not be criticized, at least for expressing those views in his judgment. By putting his thinking in writing, he enabled the SCC to review the rationale for that thinking, and the errors in it. In his decision, however, McClung also demonstrated all too well the difficulty for even a talented jurist in setting aside beliefs apparently part of his world view.

Ultimately, *Ewanchuk* was an instance where a female perspective added immeasurably. Also instructive was the degree to which the courts, and two judges (L'Heureux-Dubé in particular and Fraser) took the heat in a larger debate on women's rights and sexual violence in society. Finally, it showed how difficult it is for Parliament to reform laws rooted in stereotypical thinking about women and how vital judicial education on equality remains for all judges.

CONCLUSION

The first decade of Chief Justice Fraser's leadership of the Court was a highly productive, if tumultuous, period. Under Fraser, the Court's relationship to government changed as the Court engaged the provincial government in a transformative, at times contentious, and still incomplete, reordering of their relationship. The pursuit of greater administrative independence raised questions about the better use of resources. This led to further administrative changes internally. These were designed to ensure the Court had the necessary operational staff internally, including a Court Registrar, to avoid unduly burdening the judges with administrative tasks. Chief Justice Fraser believed the model used in American federal courts was on balance preferable but fell short of fully implementing this goal despite the Court's best efforts. Important progress was made, however, and one very concrete accomplishment of the drive for independence was securing much-needed funding and resources for the Court along with more control over the setting of priorities and greater attention from the government to the Court's requirements.

The Fraser court also saw a changing of the guard among the justices of appeal. The most significant aspect was the increase in the number of women to the point of gender parity in the Court. The members of the Court came from a wider selection of backgrounds, with academics and legislative planners mixed with the traditional barristers and solicitors. While not particularly youthful, the Court did represent that great demographic bulge known as the baby boomers. Gender and generation both had a part in the broadening of the Court's jurisprudence. The judicial attitudes of the Chief Justice – embracing the law-making and review function of the judiciary, and a more contextual and policy-driven analysis of law – was shared in whole or part with other judges. This resulted in a more equality-based analysis of legislation where the balancing of competing values was explicitly recognized, as was the Court's obligation to provide transparent reasons for the choices made. At the same time, older, more orthodox values like deference to legislative authority, the incremental development of law, and the civil liberties approach that had previously characterized the Court were still alive and well.

The contrast – and occasional clash – between different judicial perspectives, the new and the old, can sometimes be seen in the major jurisprudence of the Court. This same jurisprudence provides some evidence that, in response to the question posed at the beginning of the chapter, female judges do make a difference. Part of the problem, though, is defining what exactly this difference might be. In areas of law where gender played an obvious role, and where historical biases were often still in play – sexual violence, family law, discrimination, and equality issues – the female judges on the Court, including the Chief Justice, brought a different and beneficial perspective. In part, this was a function of being from a generation who were approaching the role of judging with a different perspective and from a time when social attitudes and beliefs on gender issues were fast-changing, as reflected in public expectations and judicial education on social issues.

Internally, the Court saw several changes in how the Court functioned. Regular court sittings were instituted in both Edmonton and Calgary. Computerization was quickly moving forward and the Court soon joined the email revolution, speeding up communications between the judges in both cities. Concerned about the divisive nature of case conferencing, the Court ended this practice. The increased transparency in the judicial law-making role with the *Charter's* advent led to other changes, including the obligation of judges to provide proper reasons for their decisions to allow for appellate review. No longer would it be possible for the thinking behind decisions to be obscured or simply not disclosed. Decisions that might never have attracted serious public attention could now be spread through the Internet in minutes. This was also a period in which the courts began to rely more extensively on international law as an interpretive tool in determining the meaning of *Charter* rights. And the courts extended judicial review to include many aspects of state action previously considered beyond the judiciary's reach – the rule of law required no less.

Of course, Fraser's time as Chief Justice was not over. In the second decade and following of her tenure, the Court would undergo further transformation, this time driven by another element picking up speed – information technology. The resources and flexibility garnered from government made possible changes in the way the judges approached their function that had profound effects, combining new processes and technology to create a Court for the twenty-first century.

Endnotes

1 Jack Valenti, LBJ Lecture, April 3, 1997.

2 As of early 2009, women made up not quite a third of Queen's Bench justices and less than 20 percent of Provincial Court judges, but half the appeal bench. *2009 Legal Directory* (Calgary: Canadian Bar Association Alberta, 2009).

3 *Reference Re Firearms Act*, 1998 ABCA 305, 219 AR 201, aff'd 2000 SCC SCC 31, [2000] 1 SCR 783; *Vriend v Alberta*, 1998 ABCA 305, 219 AR 201, aff'd 2000 SCC SCC 31, [2000] 1 SCR 783, 1998 ABCA 305, 219 AR 201, aff'd 2000 SCC SCC 31, [2000] 1 SCR 783; *R v Ewanchuk*, 212 AR 81, [1998] 6 WWR 8, rev'd [1999] 1 SCR 330, 169 DLR (4th) 193.

4 Batten was Chief Justice of Court of Queen's Bench in Saskatchewan. Glube was later made Chief Justice of Nova Scotia in 1998 and retired in 2004.

5 Between 2002 and 2006 the balance was 8–6 and 9–7 but as of 2008 it became 7–9, with three of the female judges supernumerary. I have chosen to include full-time and supernumerary judges in calculating the gender split.

6 Christopher Moore, *The British Columbia Court of Appeal: The First One Hundred Years* (Vancouver: UBC Press, 2010), 164. Moore stated that BC achieved gender parity among full-time judges in 2001. Alberta had the same gender parity in 1995, six years earlier than BC, while in 2001 in Alberta, the gender parity was absolute, that is, including both full-time and supernumerary judges.

7 Fraser interview, October 13, 2010. The chief justice has historically been consulted on prospective appointments, and these consultations have been opportunities to suggest qualified female candidates along with possible male candidates. The degree to which ministers and cabinet give serious consideration to that input varies from government to government.

8 Louis Knafla and Richard Klumpenhouwer, *Lords of the Western Bench* (Calgary: Legal Archives Society of Alberta, 1997), 46–47.

9 *Edmonton Journal,* May 4, 1992.

10 Catherine Fraser, "Tribute to the Hon. Joseph John Stratton," unpublished speech, Dec. 22, 1995, 2.

11 Varty interview, Sept. 10, 2012.

12 October 5, 1992, in *R v Habib* (1992), 135 AR 162.

13 Catherine Fraser, "Swearing-in Ceremony for Madam Justice Carole Conrad," unpublished speech, Sept. 28, 1992, 7.

14 Ibid., 3.

15 LASA, fond 56, series 3, Carole Conrad interview, Jan. 4, 1999, 6–7.

16 As a result, judges today can elect to retire or go supernumerary once their age and years of service equal 80. In addition, judges who choose to keep working full-time are no longer required to pay 6 percent of their income into the pension plan on the basis that their pension contributions are fully paid up at that point.

17 Jean Côté, "Family Tree of the Court of Appeal of Alberta," *Architypes* 15, no. 2 (2006): 6 (Legal Archives Society of Alberta newsletter).

18 Knafla and Klumpenhouwer, *Lords of the Western Bench,* 120.

19 LASA, fond 56, series 3, Elizabeth McFadyen interview, Nov. 26, 2006, 7.

20 Knafla and Klumpenhouwer, *Lords of the Western Bench,* 120. For summary convictions (minor crimes), appeal lay initially from the Provincial Court to a single judge of Queen's Bench.

21 (1991), 128 AR 250, 85 Alta LR (2d) 8.

22 The preceding two paragraphs are from a speech given by Chief Justice Fraser on May 11, 2012 on Elizabeth McFadyen's retirement from the bench.

23 "Madam Justice Anne Russell," *The Edmontonian,* March 1993.

24 LASA, fond 4, series 7, Anne Russell interview, May 3, 2004, 5.

25 Ibid.

26 The preceding two paragraphs are taken from a speech by Chief Justice Fraser on June 16, 2006 on Anne Russell's retirement from the Court.

27 Ellen Picard interview, Dec. 2, 2003, 1.

28 Ibid., 4.

29 Ibid., 10.

30 Ibid., 13.

31 The fifth edition of this textbook (now written with Gerald Robertson), *Legal Liability of Doctors and Hospitals in Canada*, will be published in 2014.

32 In 2012, the Institute was folded into the internationally recognized Health Law and Science Policy Group at the University of Alberta Faculty of Law.

33 Catherine Fraser, "Swearing-in Ceremony of Madam Justice Connie Hunt," unpublished speech, June 5, 1995, 11.

34 Hunt interview, July 21, 2010.

35 Fraser, "Swearing-in Ceremony of Madam Justice Connie Hunt," 7.

36 Ibid.

37 Catherine Fraser, "Swearing-in Ceremony, The Honourable Madam Justice Adelle Fruman," unpublished speech, Feb. 1, 1999, 6.

38 Ibid., 10.

39 "Adelle Fruman Appointed to Queen's Bench," *Canadian Bar Association Newsletter* 18, no. 3 (1993): 9.

40 Fraser, "Swearing-in Ceremony," 13.

41 Fruman interview, Sept. 21, 2010.

42 The preceding two paragraphs are from remarks given by Chief Justice Fraser at the dinner held in honour of Fruman's retirement from the Court on June 28, 2007 in Calgary.

43 Catherine Fraser, "Swearing-in Ceremony, The Honourable Madam Justice Marina Sarah Paperny," April 19, 2001, 12.

44 Bertha Wilson, "Will Women Judges Really Make a Difference?" *Osgoode Hall Law Journal* 28, no. 3 (1990): 507.

45 Hunt interview, July 21, 2010.

46 Picard interview, Nov 18, 2010.

47 Conrad interview, Nov 4, 2010.

48 LASA, fond 56, series 3, W.E. O'Leary interview, 14–15.

49 Ibid., 37–38.

50 O'Leary interview, Jan. 14, 2010.

51 The comments in this paragraph come from a speech given by Chief Justice Fraser on October 13, 2006 on Willis O'Leary's retirement from the Court.

52 Catherine Fraser, "Swearing-in Ceremony, The Honourable Mr. Justice Ronald Leon Berger," unpublished speech, Sept. 3, 1996, 11.

53 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 19.

54 Fraser, "Swearing-in Ceremony," 13. This was a complex affair involving a police investigation into influence peddling by an American carnival company, which then led to further inquiry into RCMP wrongdoing. Berger had to resign as counsel and then appear as a witness on the inquiry after bringing to light irregularities in the RCMP investigation. The Laycraft Inquiry was something of a cause célèbre for Alberta criminal counsel, with luminaries such as Harradence playing roles as well.

55 Ibid., 6.

56 Catherine Fraser, "Swearing-in Ceremony, The Honourable Mr. Justice Allen B. Sulatycky," unpublished speech, Oct. 7, 1997, 5.

57 Knafla and Klumpenhouwer, *Lords of the Western Bench*, 178.

58 *R v Hamilton* (1989), 110 AR 31, 1989 CarswellAlta 574, at para. 15.

59 Catherine Fraser, "Swearing-in Ceremony, Neil C. Wittmann," unpublished transcript, June 25, 1999, 6.

60 *Canadian Bar Association Newsletter* 24, no. 4 (1999): 2.

61 Charles Mitchell had left the Appellate Division, appointed 1926, to become Chief Justice of the Trial Division in 1936, but he had been on the District Court from 1907 to 1910 before resigning to go into politics. Bill Sinclair had left the appeal court to become Chief Justice of the newly created Queen's Bench, but he had first been on the Supreme Court.

62 Catherine Fraser, "Swearing-in Ceremony, The Honourable Peter Thomas Costigan," unpublished transcript, Oct. 5, 1999, 7.

63 Ibid., 8.

64 Ibid.

65 Edward Lyle Gross, ed., *Injury Evaluation: Medicolegal Principles* (Toronto: Butterworths, 1991).

66 *Leth Farms Ltd. v Alberta Turkey Growers Marketing Board*, 2000 ABCA 32, 255 AR 50.

67 *Edmonton Bar Association Bulletin*, Sept. 1993, 1.

68 Ibid.

69 Catherine Fraser, "Swearing-in Ceremony, The Honourable Mr. Justice Keith Gregory Ritter," unpublished speech, May 27, 2002.

70 From a speech by Chief Justice Fraser at a dinner held May 17, 2013 in honour of Ritter's retirement from the Court.

71 Technically, only six were boomers, using the 1946 marker usual for the baby boom in Canada: David Foot, *Boom, Bust & Echo: How to Profit from the Coming Demographic Shift* (Toronto: Macfarlane Walter & Ross, 1996), 24–25. Arguably, individuals at the tail end of the previous generation had much in common with their younger compatriots.

72 LASA, fond 79, series 2, box 34, file 288, Planning and Requisition Committee, letter, Fraser to Schulz, Nov. 8, 1993; also box 33, file 304, Internal Operating Procedures, 1994–96, organization chart, May 16, 1995.

73 Catherine Fraser, "Transforming Models of Court Administration and Enhancing Justice: We Are All in This Together," Address to the Association of Canadian Court Administrators Annual Conference, Aug. 2008, 12.

74 Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995), 175.

75 Ibid., 189.

76 Jules Deschênes, *Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts* (Ottawa: Canadian Judicial Council, 1981).

77 Moore, *The British Columbia Court of Appeal*, 155–56.

78 Canadian Judicial Council, *Alternative Models of Court Administration* (2006), 14.

79 *R v Valente*, [1985] 2 SCR 673, 24 DLR (4th) 161.

80 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3, [1997] 10 WWR 417.

81 Friedland, *A Place Apart,* 208–10.

82 Moore, *The British Columbia Court of Appeal*, 215, notes a similar situation in British Columbia, the BC Court of Appeal in 1964 having had virtually no staff apart from a part-time librarian.

83 LASA, fond 79, series 2, box 34, file 288, Planning Requirements Committee, 1992–93, memo, Fraser to committee, Oct. 8, 1993. Fraser asked Kerans to do some sleuthing to get budgets of other agencies. The Court discovered that among other bodies, the government funded the Alberta Racing Commission to the tune of $7 million, as opposed to just over $1 million for the Court. And unlike the Court, the Commission had expenditure authority.

84 Fraser interview, Oct. 17, 2010.

85 Ibid.

86 LASA, fond 79, series 2, box 34, file 288, Planning Requirements Committee, 1992–93.

87 Varty interview, Sept. 10, 2012.

88 LASA, fond 79, series 2, box 34, file 288, Planning Requirements Committee, 1992–93, memo, Kerans to committee, Feb. 26, 1993.

89 Varty interview, Sept. 10, 2012.

90 Fraser interview, Oct. 13, 2010.

91 Russell interview, Aug. 5, 2010.

92 LASA, fond 79, series 2, box 32, file 233, Court of Appeal Meetings.

93 Ibid., box 33, file 304, Internal Operating Procedures, 1994–96; box 32, file. 233b, Yellowknife Meeting, June 20–21, 1995.

94 Ibid., fond 79, series 2, box 32, file 233b, Yellowknife Meeting, June 20–21, 1995, memo, Fraser to court, June 6, 1995.

95 Catherine Fraser, "Alberta Court of Appeal: Making the Traditional System Work for You," unpublished speech for National Judicial Institute, Oct. 2001, 3.

96 Fruman interview, Sept. 21, 2010.

97 Court of Appeal, Notice to Profession, Feb. 1, 2001.

98 Conrad interview, Nov. 4, 2010. Conrad reported that one long-time court worker to this day is hypersensitive to environmental triggers. Another had a stroke at a very young age, having worked in one room of the old courthouse that had a significant degree of oxygen deprivation.

99 Catherine Fraser, Speaking to List Notes, unpublished speech, July 30, 2001.

100 Fruman interview, Sept. 21, 2010.

101 "Argument's Mouldy," *Calgary Sun*, July 10, 2001.

102 *Alberta Provincial Judges' Association v Alberta*, 237 AR 276, [1999] 12 WWR 66.

103 The first Council resolution approving the concept of social context education was passed in March 1994. Two others followed in September 1997 and 1998.

104 Catherine Fraser, "Judicial Independence, Impartiality and Equality: The Ties That Bind," Jan. 29, 2002 speech in Taiwan, 11.

105 Catherine Fraser, "Judicial Independence: What It Takes to Achieve This Objective," speech to Birzeit University, March 29, 2012, 12.

106 While appeals were heard in July, these were limited to those considered urgent or where the passage of time would render an appeal redundant, for example, a sentence appeal where the sentence was comparatively short.

107 LASA, box 32, file 233, Court of Appeal Meetings, memo, Kerans to court, Sept. 18, 1992.

108 As described in the previous chapter, although judges still travel to sit in their non-resident city, changes in sitting policy starting in 1988 ended the practice of the majority of judges in each city decamping for the other and gradually reduced the number of judges travelling to either Calgary or Edmonton at any one time. They still travel, but not all together at the same time.

109 For example, the judges in Calgary instituted an informal, regular afternoon tea which was extremely popular.

110 The Planning and Requirements Committee first endorsed the idea in 1992, and shortly after, the judges decided that staff lawyers might be very useful, able to assist in a number of areas.

111 Norman Dorsen, "Law Clerks in Appellate Courts in the United States," *Modern Law Review* 26, no. 3 (1963): 269.

112 Watson interview, Sept. 1, 2010. This was confirmed by several judges. Laurel Watson, the longest-serving court counsel, asserted this was not merited. As she put it, "I've had cases where judges will say, if you disagree with me, let me know. And I will say, well, I think this is wrong, or this and this. And I've yet to persuade anyone."

113 Ibid. According to staff lawyer Laurel Watson, Alberta is unusual in this regard. Most provinces use students to do research and briefing. See also Melanie R. Bueckert, "Legal Research in Canada's Provincial Appellate Courts," *Manitoba Law Journal* 35, no. 1 (2011): 181.

114 Jean Côté, *Well-Run Appeals* (Ottawa: Canadian Judicial Council, 2006), 139–40.

115 *Hutterian Brethren Church of Starland v Starland (Municipal District) No. 47* (1993), 135 AR 304, 1993 CarswellAlta 313, at para. 55 (CA). Hetherington further reinforced the point a year later in *R v Bonneteau* (1994), 157 AR 138, 1994 CarswellAlta 238, at para. 15.

116 Côté, *Well-Run Appeals*, 141.

117 Court of Appeal, Notice to the Profession, March 27, 2000.

118 Lord Steyn, in *Regina (Daly) v Secretary of State for the Home Department,* [2001] UKHL 26, [2001] 2 AC 532, at para. 28.

119 Several colleagues interviewed made this point about the Chief Justice. It is a quality, it might be noted, shared with several of her predecessors.

120 Catherine Fraser, "Fairness to the Judiciary," unpublished speech, June 17, 1992, 4.

121 Catherine Fraser, "Constitutional Dialogues between Courts and Legislatures: Can We Talk?" unpublished speech, Centre for Constitutional Studies, July 2–5, 2004.

122 Fraser interview, Oct. 13, 2010, quoting her good friend Claire L'Heureux-Dubé.

123 [1989] 1 SCR 143.

124 Catherine Fraser, "Judicial Awareness Training," Address to the Australian Legal Convention, Sept. 25, 1995; "*Charter*s and Bills of Rights: Are they a Good Idea?" unpublished speech, Family Court of Australia, Sept. 21, 1995, are examples.

125 *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 169.

126 Hunt interview, July 21, 2010.

127 Mary Jane Mossman, "Child Support or Support for Children: Re-thinking Public and Private in Family Law," *University of New Brunswick Law Journal* 46 (1997): 63; Brenda Cossman and Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper," *Canadian Journal of Family Law* 15, no. 1 (1998): 13.

128 *R v Ames* (1994), 149 AR 157, 1994 CarswellAlta 495, at para. 3.

129 *R v Brown* (1992), 125 AR 150, 73 CCC (3d) 242.

130 *R v Ollenberger* (1994), 149 AR 81, 1994 CarswellAlta 323, at para. 31.

131 Ibid., at para. 21.

132 *R v Kuznetsov* (1995), 165 AR 99, 1995 CarswellAlta 576, at para. 8.

133 Ibid., at para. 10.

134 *R v Sandercock* (1985), 62 AR 382, 22 CCC (3d) 79.

135 For example, in *R v ABC* (1991), 120 AR 106, 1991 CarswellAlta 772, the accused had sexually assaulted his sedated 16-year-old daughter, fondling her breasts and vagina and possibly penetrating her vagina with his penis. The Court of Appeal vacated the two-year suspended sentence and imposed a custodial sentence of one year.

136 *R v S (WB)* (1992), 127 AR 65, 73 CCC (3d) 530.

137 *Levesque v Levesque* (1994), 155 AR 26, 116 DLR (4th) 314. The decision involved two appeals, the other being *Birmingham v Birmingham*.

138 Because of the appointment of Major to the SCC, neither he nor Conrad signed the judgment.

139 *Levesque v Levesque* (1994), 155 AR 26, at para. 1. See also Alastair Bissett-Johnson, "Reform of the Law of Child Support: By Judicial Decision or by Legislation?" *Canadian Bar Review* 74, no. 4 (1995): 589, n21.

140 Ibid., at para. 3.

141 The Ontario Court of Appeal decision in *Paras v Paras*, [1971] 1 OR 130, 14 DLR (3d) 546, also set forth the principle that parents should share the financial burden in proportion to their means, with the non-custodial parent paying support. As I understand it, this statement was essentially the principle used in s. 15 of the *Divorce Act*, 1985.

142 *Levesque v Levesque* (1994), 155 AR 26, at para. 8.

143 Ibid., at para. 63.

144 Justice Claire L'Heureux-Dubé, the leading feminist legal mind on the SCC, referred with approval to *Levesque* in *Willick v Willick*, [1994] 3 SCR 670, 119 DLR (4th) 405.

145 Marie L. Gordon, "The Marriage of Law and History: Family Law Cases in the Alberta Supreme Court, 1907–2006," in Jonathan Swainger, ed., *The Alberta Supreme Court at 100: History and Authority* (Edmonton: University of Alberta Press, 2007), 280–82.

146 *Hunt v Smolis-Hunt*, 2001 ABCA 229, 286 AR 248.

147 2005 ABCA 2, 361 AR 60, rev'd *DBS v SRG*; *LJW v TAR*; *Henry v Henry*; *Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 SCR 231.

148 Even though Parliament had not imposed any limitation period on claims for arrears in child support, the SCC imposed its own.

149 *Firearms Act,* SC 1995, c. 39.

150 Elaine M. Davies, "The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence," *Appeal* 6 (2000): 46–47. The following summation of amendments is based on this article.

151 David M. Beatty, "Gun Control and Judicial Anarchy," *Constitutional Forum* 10, no. 2 (1999): 45.

152 *Reference re Firearms Act*, 1998 ABCA 305, at para. 1.

153 Ibid., at paras. 152–53.

154 *RJR-Macdonald v Canada*, [1995] 3 SCR 199; *R v Hydro-Quebec*, [1997] 3 SCR 213.

155 *Reference re Firearms Act*, 1998 ABCA 305, at para. 303.

156 Ibid., at para. 425.

157 Ibid., at para. 429.

158 Ibid., at para. 572.

159 Ibid., at para. 441. Interestingly, Dale Gibson, in "The *Firearms Reference* in the Alberta Court of Appeal," *Alberta Law Review* 37, no. 4 (1999): 1083–93, thought that an argument along these lines might be used as a successful *Charter* challenge to the *Act*.

160 Ibid., at para. 136: "the focus should not be on whether the licensing and registration provisions will be effective in achieving their purpose."

161 Gibson, "The *Firearms Reference*," 1075. Beatty, in "Gun Control and Judicial Anarchy," made much the same observation, but somewhat more critically.

162 *Reference re Firearms Act*, 1998 ABCA 305, at para. 377.

163 Gibson, "The Firearms Reference," 1077–78. Beatty, in "Gun Control and Judicial Anarchy," 47, is more critical of Fraser's lengthy analysis and the multiple opinions of the Court.

164 1982, c. 11 (UK), Sched. B, *Constitution Act, 1982*.

165 *Individual Rights Protection Act*, RSA 1980, c. I–2.

166 *Vriend v Alberta*, 152 AR 1, [1994] 6 WWR 414 (QB).

167 *Miron v Trudel*, [1995] 2 SCR 418; *Thibaudeau v Canada*, [1995] 2 SCR 627; *Egan v Canada*, [1995] 2 SCR 513.

168 *Vriend v. Alberta* (1996), 181 AR 16, at para. 57.

169 Ibid., at para. 47.

170 Ibid., at para. 55.

171 In some instances, even academic writers thought there was latent homophobia involved. See, for instance, James R. Olchowy, "Inside McClung J.A.'s 'Closet' in *Vriend v Alberta*: The Indignity of Misrecognition, The Tool of Oppressive Privacy, and an Ideology of Equality," *Alberta Law Review* 37, no. 3 (1999): 648–82. McClung also had supporters. See F.L. Morton, "Canada's Judge Bork: Has the Counter-Revolution Begun?" *Constitutional Forum* 7, no. 4 (1996): 121–26.

172 *Vriend v. Alberta* (1996) 181 AR 16, at para. 142.

173 Ibid., at para. 178.

174 Ibid., at para. 156.

175 Claire L'Heureux-Dubé concurred in the result, but in her reasons advocated a much broader, context-driven analysis of discrimination to broaden the effectiveness of s. 15.

176 Earlier attempts were explored in chapter 7 in the context of the *R v Brown* controversy.

177 See s. 273.1(1) of the *Criminal Code*, SC 1992, c. 38, s. 1.

178 *R v Ewanchuk* (1998), 212 AR 81, at para. 67.

179 Ibid., at para. 95.

180 McClung's judgment in *Ewanchuk* was the culmination of growing unease not just about the treatment of consent but also other issues around sexual assault seen in other Court judgments before *Ewanchuk*. For example, in *R v W.F.M.* (1995), 169 AR 222, 32 Alta LR (3d) 153, McClung and Kerans had ruled that the trial judge's decision that the accused had no criminal intent was one of fact, outside appellate interference. Fraser had dissented, arguing that the judge had not adequately analyzed the full context around the alleged assault, a reviewable error.

181 *R v Ewanchuk* (1998), 212 AR 81, at para. 12.

182 Ewanchuk had a prior history of sex crimes, including rape, and would later be declared a long-term offender after a conviction for child molestation: *R v Ewanchuk*, 2010 ABCA 298, 490 AR 176. The panel knew none of this when hearing the appeal and deciding the case.

183 Don Stuart, annotation to decision at 1998 CarswellAlta 101.

184 *R v Ewanchuk* (1998), 212 AR 81, at para. 4.

185 In *R v Park*, [1995] 2 SCR 836, the SCC overruled McClung on a case dealing with mistaken belief in consent, and L'Heureux-Dubé analyzed the relationship between the law on consent and the law on reasonable steps, coming to essentially the same conclusions as Fraser in *Ewanchuk* on this point.

186 *R v Ewanchuk*, [1999] 1 SCR 330, at para. 82.

187 Canadian Judicial Council, file 98-128, May 19, 1999, the letter disapproved of McClung's remarks in both *Ewanchuk* and *Vriend*: see F.L. Morton, *Law, Politics and the Judicial Process in Canada*, 3rd ed (Calgary: University of Calgary Press, 2002), 204–5.

188 A number of these comments were set out in Joanne Wright, "Consent and Sexual Violence in Canadian Public Discourse: Reflections on *Ewanchuk*," *Canadian Journal of Law and Society* 16, no. 2 (2001): 183–84. Wright herself very ably analyzed the subsequent public controversy over the *Ewanchuk* decision, arguing that it demonstrated a great deal more about negative attitudes towards feminism than sexual assault.

189 See, for example, Constance Backhouse, "The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case," *Canadian Journal of Women and the Law* 15 (2003); Hester Lessard, "Farce or Tragedy? Judicial Backlash and Justice McClung, (1999) 10 *Constitutional Forum* 65." *Constitutional Forum* 10 (1999); Mimi Liu, "A 'Prophet with Honour': An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dubé of the Supreme Court of Canada," *Queen's Law Journal* 25 (2000).

190 *R v Ewanchuk*, [1999] 1 SCR 330, at para. 103.

CHAPTER 10

A COURT TRANSFORMED: 2002 AND ONWARD

Change is not made without inconvenience, even from worse to better.[1]

No one would say that the first decade of Catherine Fraser's tenure as Chief Justice was boring, especially with the fireworks as the Court went toe to toe with the provincial government over the Calgary courthouse. Those first ten years had been defined by Fraser's drive for independence and adequate resources, battles fought and, if not entirely won, with outcomes that put the Court in a much improved position. There was much work still to be done.

The second decade of Fraser's tenure was not as tumultuous as the first, but it was no less transformative, in response to both internal and external forces. The Chief Justice did not give up her campaign to see the Court properly supported, and more success was achieved. The composition of the Court was changing and aging. The bench also looked inward, further reforming the Court's processes and procedures, changes that while not radical in any one measure, added up to a substantive and substantial shift in how business was done. It was not the first time the Court had carried out such an exercise, but it had never gone quite so far before. From hearings to case management to the judges' collaborative processes, almost nothing was left untouched.

The Court's great hopes for improving the delivery of justice with technology remained unfulfilled, but not for lack of trying. Even with disappointments, however, a superb Court became even better and well positioned for new challenges. Law at the appellate level was not getting any simpler, the world was becoming more complex and more demanding, governance issues persisted, and there were some unexpected new challenges, such as increasing numbers of self-represented litigants. The Court looked towards the future as it entered a new century.

THE COURT IN 2011, BACK ROW, L–R: WATSON, MARTIN, ROWBOWTHAM, BIELBY, PAPERNY, PICARD, COSTIGAN, O'BRIEN, CÔTÉ. FRONT, L–R: O'FERRALL, RITTER, BERGER, CONRAD, CHIEF JUSTICE FRASER, MCFADYEN, HUNT, SLATTER, MCDONALD. PHOTO BY NOEL ZINGER

THE FRASER COURT: THE TWENTY-FIRST-CENTURY BENCH

One less welcome transformation was the Court's retreat from gender parity. New government appointments inevitably changed the face of the bench. Over a ten-year span, only two of eight appointees to the Court were women, and by 2012, there were only four women to nine men among the full-time judges. With the exception of the Chief Justice and Paperny, the remaining women judges appointed in the 1990s had gone supernumerary or retired. The Alberta Court now looked much the same as other appeal courts in Canada.

With the murkiness around judicial appointments, it is difficult to know exactly why this occurred. The change of government federally in 2006 played a role. It is tempting to conclude there was a conscious retrenchment to a more conservative and traditional bench, which played out in gender. Certainly some believed this was the case, whether it was a matter of patronage for a male-dominated federal party or ideological reticence about appointing women. With one exception, though, appointments continued to come from the trial bench, and nearly all the candidates had originally been appointed by Liberal governments. With the retreat from parity, the Court lost one of its distinguishing features. This was a disappointment to those in Alberta and elsewhere who saw the Court as an inspiration to women in the profession.

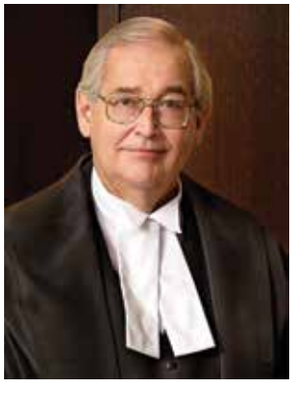
Apart from gender, the eight appointments to the Court in the second decade and after were a diverse group. They included one academic, a criminal law expert for Calgary and one for Edmonton, a civil litigator "from the street," a self-described generalist with extensive litigation experience, and a litigator with connections from outside the major cities. All the appointments except one had served on a trial court, confirming the long-standing practice of promoting from the bench. Three appointments started their judicial careers on the Provincial Court, two of whom made short stops on the Queen's Bench, and one of whom made the jump directly to the appeal court.

Cliff O'Brien, a Senior Litigation Ace Is Appointed "Off the Street"

The first new appointment was Clifton David O'Brien in 2005. Prior to joining the Court, O'Brien was a top-flight litigator with the prestigious Calgary firm Bennett Jones. O'Brien was born in Oak Lake, Manitoba in 1939.[2] His father was a minister and the family moved often. O'Brien attended high school in Edmonton and the University of Alberta for the combined arts and law program, graduating in 1962 as the gold medallist. O'Brien articled in Calgary with the Bennett firm, known then as Chambers, Saucier, Jones and Might, and had Herb Laycraft and Jack Major as mentors.[3]

O'Brien's remarkable career as a civil litigator spanned all areas of corporate, commercial, and regulatory work, including bankruptcy and insolvency. He was known as a lawyer's lawyer, a leading member of the small club of barristers who handled the major commercial litigation in the province. The chair of Bennett Jones for six years before his appointment to the Court, O'Brien was also a long-time bencher at the law society, serving on numerous committees, including the Alberta Rules of Court Committee.[4] O'Brien earned an international reputation as a lawyer, appearing on international arbitrations conducted by the International Chamber of Commerce. He was also invited to join the distinguished ranks of the American College of Trial Lawyers.

Known for his work ethic, the self-effacing O'Brien was a popular appointment to the Court. His dedication continued undiminished, and if not in a hearing, he could be found in his office working late on judgments. As the Chief Justice said: "Cliff's impressive talents – tenacity, intellectual rigour, compassion and good old-fashioned hard work – have been of immense benefit to this Court and the evolution of law in this province. His years in practice make him particularly skilled at identifying any potential problems for the practising bar that might



CLIFTON DAVID O'BRIEN, 2005. COURT OF APPEAL COLLECTION.

arise from proposed changes in court procedures. He has been ideal for the Court committee tasked with drafting new appeal court rules."

O'Brien's appointment continued the tradition of periodically bringing in a heavyweight barrister "from the street" to the Court. O'Brien candidly acknowledged that for a certain type of barrister, when they decided on the bench, it was the Court of Appeal or nothing.[5] McGillivray, Prowse, Irving, Côté, Harradence, and Wittmann might all be considered examples.

Peter Martin, Criminal Law Expert for Both Crown and Defence

The predominance of criminal appeals on the Court's docket was likely a major factor in the next two appointments, Peter Martin in Calgary and Jack Watson in Edmonton. Both long-time Crown prosecutors were experts in criminal law.

Peter Walter Lambert Martin was born in Germany in 1949 and came to Canada at the age of six.[6] His family settled originally in Murdochville, Quebec, and later moved to Winnipeg. Martin senior's first job in Canada was as a labourer; he retired as the chief executive officer of Winnipeg-based bus manufacturer Motor Coach Industries.

Martin attended the University of Manitoba for his undergraduate and law degrees, but articled with the Crown prosecutor's office in Edmonton. He later moved to the Calgary office where his principal was Paul Chrumka, later appointed to Queen's Bench. Within five years of joining the bar in 1978, Martin had taken an appeal to the SCC and was the major prosecutor in Calgary, subsequently handling over forty murder trials.[7]

In 1990, Martin became the senior appellate counsel in Calgary, a role he discharged with great skill. Extremely articulate – according to one colleague, with his mellifluous voice and impressive bearing he looked and sounded like something out of central casting – Martin enjoyed remarkable success with jurors and judges alike. He had a particular knack for focusing the court on the central points in a trial or appeal. Martin was the first full-time Crown counsel to become a bencher of the law society and, in 1995, its president.

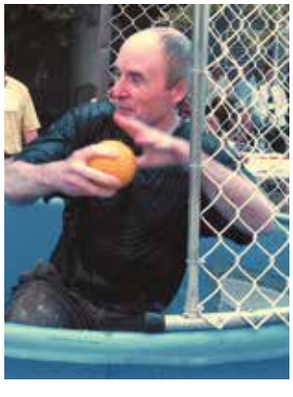
Becoming president of the law society brought about a career change. To avoid potential conflicts of interest and for a change of scene, Martin switched to defence work, founding the firm of Martin, Wilson and Evans.[8] Aside from his practice experience, Martin taught widely on criminal law at the University of Calgary, Mount Royal College, and at the Canadian Federation of Law Societies' prestigious annual seminar, as well as at the bar admission course. In 1998, he was appointed to Queen's Bench, replacing his old mentor, Paul Chrumka. Martin's appointment to the trial court was very popular, as was his 2006 appointment to the appeal court.

Martin was a solid appointment to the Court. Collegial and always willing to lend a hand to his colleagues, he quickly made the transition to the role of an appellate judge. His judgments were accessible to lawyers and members of the public alike. A grounded judge, Martin recognized the importance of maintaining public confidence and trust in the criminal justice system and judiciary. In Fraser's view: "Peter has never lost sight of the fact that the judiciary is a service profession. His writing evokes strong images of the thoughts he is expressing, making people relate instantly to what he says. Peter is very much aware of the societal implications of the law and his decisions display an open-minded pursuit of justice for all."

Jack Watson, Crown Criminal Law Star and Prolific Author

Jack Watson was perhaps the only counsel in Alberta who had more criminal law experience than Martin, particularly at the appellate level. Born in Ottawa in 1950 to parents originally from Saskatchewan, Watson, whose intellect was undeniable, graduated from high school when he was only fifteen.[9] After attending Carleton

< PETER WALTER LAMBERT MARTIN, 2006. COURT OF APPEAL COLLECTION.



> JACK WATSON, AT WORK, 2006, AND PLAY. COURT OF APPEAL COLLECTION.

University, he received his legal education from the University of Saskatchewan, graduating in 1972. He articled with Bishop and Mackenzie in Edmonton and joined the bar in 1973.

Watson then embarked on an outstanding twenty-seven-year career as a Crown prosecutor. He first worked at Justice Canada for Elizabeth McFadyen before joining the provincial Attorney General.[10] Watson became chief appellate and constitutional counsel in Edmonton, with many appearances at the SCC. He was a prolific author on criminal law topics, with over sixty articles in a variety of legal publications. Watson followed Martin's lead by becoming a bencher in 1998 with, it is said, the most votes ever cast for a candidate.

An appointment to Queen's Bench followed in 2001 and then to the appeal Court in 2006. Watson was an indefatigable writer, and colleagues joked that his motto was "why use a picture when a thousand words will do." Unbelievably hard-working, Watson began his days in the office typically by five in the morning and did not quit before seven at night.

Colleagues spoke of Watson's vital role in the life of the Court. His weekly summaries of all decisions at the SCC and the Alberta Court were legendary, often highlighting noteworthy decisions from other Canadian appeal courts and even other supreme courts around the world. The summaries were also popular with many judges outside Alberta. Watson commented on virtually every circulated draft reserve, providing additional background cases, supporting or otherwise, typically within a day, if not hours, of receiving a draft for review. And if any judge wanted advice on a point of law, Watson invariably replied within hours, with a long memo outlining cases and thoughts the judge might want to consider. Remarkably, he did this day after day, year after year, without fail.

Watson was also a prolific writer for the Court. He would prepare intensely for each appeal, and it was not unusual for colleagues on the panel to receive a lengthy email both before and after the appeal setting out summaries of relevant case law. Entirely at ease with the role of the judge post-*Charter,* Watson invariably considered the wider implications of his decisions. He was a powerful advocate for the rule of law and the principle of legality. While he subscribed to legislative deference in keeping with the traditions of the Court, Watson's judgments also demonstrated his abiding commitment to the rule of law, and he did not hesitate to hold government to account when the latter crossed into constitutionally impermissible territory.

After Carole Conrad's move to supernumerary status, Fraser increasingly relied on Watson as her Edmonton lieutenant, with myriad administrative duties requiring many hours of extra work. Watson served on numerous Court committees, generally the ones with the heaviest workloads. Fraser explained his contribution to the Court this way: "Jack willingly shoulders more than his fair share of written judgments and administrative work. He is incredibly bright, with an unparalleled knowledge of the law. Whenever I need help, I can count on Jack to get the job done to an impossibly high standard. He never quits till the task is complete even though it means working late at night or through weekends and holidays. Best of all, this is a person without ego who is totally dedicated to public service and the Court, in all respects an extraordinary colleague."

Frans Slatter, Intellectual and Pragmatist

Closely following Watson in 2006 was Frans Felling Slatter, another 2001 Queen's Bench alumnus. Before the bench, Slatter had been a partner at the Edmonton firm of McCuaig Desrochers. As well as being a leading civil litigator, Slatter had a diverse general practice spanning real estate, corporate and commercial work, securities, and even wills and estates, quite unusual for a partner of a major firm in the age of legal specialization.[11]

Born in South Africa in 1951, Slatter immigrated with his family to Canada in 1961. His father, also a lawyer,

FRANS FELLING SLATTER, 2006. COURT OF APPEAL COLLECTION.

was corporate counsel and an executive with Oxford Developments before becoming a consultant to the real estate industry.[12] Slatter earned a Bachelor of Commerce degree from the University of Alberta but decided to do law at Dalhousie in Halifax. Finishing in 1977, he won numerous academic awards and scholarships along the way, including the prestigious Dalhousie University Medal in Law for highest standing in the third-year class. Slatter clerked for Justice Ritchie at the SCC before attending Oxford for a Bachelor of Civil Laws degree. Returning to Edmonton, he articled at the McCuaig firm, joining the bar in 1981.

Slatter's partners recognized his superior administrative skills and sense of fairness by appointing him managing partner of the firm, a position he held for several years. He devoted considerable volunteer time to the profession, instructing at bar admission courses, lecturing for the Legal Education Society of Alberta and mentoring in civil litigation for the CBA Mentor Program.

Slatter had wanted to be a judge since first-year law and was appointed to Queen's Bench in 2001. There he distinguished himself before becoming another strong addition to the appellate bench. An independent judge and gifted, prodigious writer, Slatter possessed finely honed analytical skills matched by equally convincing verbal ones. One experienced barrister thought that Slatter was a fine combination of the pragmatic and intellectual.[13] Colleagues spoke of his intensity and capacity for hard work along with his ability to turn out polished judgments with dispatch. He also took on the challenging position of Chair of the Rules of Court Committee, previously held by Côté. Slatter had a key role in formulating the policies and drafting required for new appellate Rules of Court, a taxing task.

According to Fraser, "Frans's extraordinary powers of concentration and memory explain why he is sometimes described as a 'walking computer.' Ask him a legal question and he will usually give you an answer replete with the relevant principles and cases. Frans brings to every legal problem a combination of intellectual rigour and disciplined analysis sprinkled with rock solid common sense. The word 'fade' is not in his vocabulary. Always willing to take on extra tasks, Frans tackles them all with military precision, lightening the load for all of us."

Pat Rowbotham, Law Professor, Author, and Practitioner

Patricia Rowbotham in 2007 was the first female appointment since Paperny. She was in the mould of some of the earlier women joining the Court – a top student with practice experience who then excelled in academia. Born in Calgary in 1953, Rowbotham was the daughter of Justice Harry Rowbotham. She initially earned an education degree at the University of Calgary but switched careers and entered the new law school, graduating in 1981.[14] Rowbotham clerked at the SCC for Ronald Martland and Bertha Wilson and then articled at the Fenerty firm in Calgary, joining the bar in 1983. Before starting practice she earned a master's degree in law from Wolfson College, Cambridge. Returning to Calgary, Rowbotham established herself as a litigator at the new Calgary office of the Toronto firm Blake Cassells.

Teaching part-time while in practice, Rowbotham joined the faculty at Calgary's law school in 1990.[15] A popular instructor, Rowbotham was widely published and an expert on tort law and civil procedure. In 1996, the same year she received a students' union Teaching Excellence Award, Rowbotham was also elected a bencher of the law society. To cap off the year, she was appointed a Queen's Counsel. Her appointment to Queen's Bench came in 1999, and Rowbotham's subsequent move to the appellate bench had an air of inevitability. She was the first graduate of the University of Calgary law school to clerk at the SCC, the first to teach at the law school, and the first to receive an appointment to Queen's Bench and the Court of Appeal.

As an appellate judge and former law professor, Rowbotham believed in the capacity of the law to achieve

PATRICIA ADELE ROWBOTHAM, AT APPOINTMENT TO QUEEN'S BENCH IN 1999, WITH HER FATHER, JUSTICE HARRY ROWBOTHAM, AND IN 2007. P. ROWBOTHAM/COURT OF APPEAL COLLECTION.

justice. A pleasure to sit with, Rowbotham understood the importance of collegiality and was always attentive to her colleagues' views. Rowbotham also had a commitment to principle and an understanding of the larger picture along with the ability to crisply articulate both. As the Chief Justice explained, "Pat knows how to make her colleagues feel heard and valued without giving up an inch of integrity. Bright, diligent, and inclusive, Pat understands that the law is about more than precedents; it is also about being relevant and effective in helping people live their lives. Her judgments are models of common sense wrapped up beautifully in concise, principled analyses."

The spate of new appointments from 2005 to 2007 was necessary to cover shifts to supernumerary status and retirements. Wittmann went to the trial court, Picard and McFadyen became supernumeraries, Russell resigned for health reasons, and Fruman left for other opportunities. Conrad and Hunt went supernumerary in 2009 and 2011 respectively.

Bruce McDonald, Another Talented Judge Who Served on All Alberta Courts

Conrad's replacement was John David Bruce McDonald. A litigator with Bennett Jones in Calgary, Bruce McDonald was appointed to the provincial criminal bench in 2004, moved quickly to Queen's Bench in 2006, and finally to the appeal court in 2009. One colleague joked that McDonald was the "male Anne Russell" as the second judge to have served on all the courts in the province.

McDonald had a lengthy legal pedigree. His grandfather, J.W. McDonald, had practised law in Fort Macleod, become the district court judge there and finally chief judge for southern Alberta.[16] McDonald's father, John A.S. McDonald, was a well-known Calgary lawyer. McDonald was born in Calgary in 1948 and later attended the University of Calgary for his undergraduate degree in political science and history. He then went east to the University of Toronto law school, graduating in 1972. McDonald returned to Calgary and started articles with Cliff Prowse at Fenerty, which lasted only three days before his principal was appointed to the bench. McDonald finished with Bill McGillivray and then moved to Bennett Jones at the end of 1975.

After a number of years in general commercial litigation, McDonald's practice expanded into insolvency and then securities and estate litigation, with appearances at the SCC. Along the way, he pursued another passion – politics – acting as campaign manager for Preston Manning of the Reform Party. A long-time devotee of military history, McDonald chaired the Calgary Military Museum Society from 2004 to 2009, a period in which he oversaw the expansion of the old museum to include the navy and air force along with the army. He also served for many years on the board and later as chair of the 78th Fraser Highlanders.

Collegial and affable, McDonald was a good fit for the Court. A quick study, he favoured a common-sense, pragmatic approach to the law, grounded in community values. His judgments were typically blunt and plain-spoken. In criminal law, he was very much alive to the leadership role of appeal courts, including the reduction of disparity in sentencing. In the words of the Chief Justice, "Given Bruce's broad-based experience in private practice, he rightly questions the rationale of principles that appear disconnected from the practicalities of the real world. He understands the impact of decisions of this Court on the people of this province and he is very careful to ensure that new law makes good sense."

Myra Bielby, Judicial Leader and Trial Court Veteran

The Court added a trial court veteran, Myra Bielby, in 2010. Another gold medallist at law school, Bielby had been appointed to the bench at only thirty-nine years of age.[17] Born in Port Colborne, Ontario, in 1951, Bielby moved with her family to Edmonton several years later.[18] She did the five-year combined arts and law program at the University of Alberta, receiving both a history and a

JOHN DAVID BRUCE MCDONALD, 2009 AND EARLIER (FAR LEFT) B. MCDONALD/COURT OF APPEAL COLLECTION.

law degree. As well as being top of her class, Bielby was the editor of the *Alberta Law Review*.

After graduating in 1974, Bielby articled with Field and Field in Edmonton. She remained after joining the bar, primarily as a general litigator but also doing family law, continuing a practice she had started with legal aid while still a student. One major client was the Alberta Teachers' Association which retained Bielby to act for members charged with criminal offences. Bielby was frequently before the appellate court and argued before the SCC. Elected a bencher, she was a leader at the bar, serving as president of the Edmonton Bar Association, member of the Northern Alberta Legal Aid Committee, a director of the Institute of Law Research and Reform, and a lecturer at both the University of Alberta and bar admission courses.[19]

First approached by Chief Justice Bill Sinclair for the judiciary, Bielby joined Queen's Bench in 1990 as part of the wave of female appointments that started under Mulroney and continued under Chrétien. Her judicial colleagues recognized her leadership skills, and she became the first Albertan to serve as the national president of the Canadian Superior Court Judges Association, which represents the 1,100 federally-appointed judges across Canada. She later served as national co-chair of its Public Education Committee, co-writing and producing a successful multimedia program for secondary school students called "Try Judging" which is still in use. She also served for a number of years on the board of directors of the National Judicial Institute.

Bielby filled a new position on the Court, the first expansion since 1994. She was a natural for the appeal court given her almost twenty years as both a trial judge and *ad hoc* appellate judge. Yet Bielby says she was surprised when the Chief Justice approached her about joining the Court, since she was only a few years away from supernumerary status.[20] Fraser, however, thought Bielby an obvious choice, saying: "What makes Myra so successful as an appellate judge is that she has great instincts. With her lightning quick mind, she recognizes important issues and instinctively hones in on solutions to seemingly irresolvable problems. Her judgments encapsulate scholarly research, sound insight into people and a willingness, when required, to take the next step in the evolution of the law. Two words describe Myra: bold and brave."

One noticeable break with past practice was the relatively advanced ages of the appointees. Bielby was sworn in on her fifty-ninth birthday, and McDonald was sixty-one and O'Brien almost sixty-six at the time of their appointments. In Bielby's view, this may reflect a reluctance on the part of prospective candidates to go to the appellate bench, an impression shared with some colleagues.[21] Although the evidence is hearsay due to the confidential nature of sounding-outs, many lawyers in their prime are allegedly uninterested, and trial judges are reluctant to move to the appeal court. This is likely due to the nature of appellate work – relatively isolated with a difficult workload, heavy on reading and writing and collegial decision making, which is not to everyone's taste. Whatever the cause, the Court has become much older in the new century. The average age on appointment has jumped to fifty-nine, almost six years older than the 1990s, despite the fact that nearly all the new judges have been baby boomers.

Brian O'Ferrall, First Appointment to the Court Directly from Provincial Court

Brian Kenneth O'Ferrall was next to be added in 2011. With his appointment, Calgary had three judges from the same firm sitting at the same time, unprecedented in the Court's history.[22] O'Ferrall hewed to the "new normal." Another baby boomer, born in 1947, O'Ferrall earned a degree in political science from the University of Alberta in 1967 and a journalism degree from Carleton University in Ottawa in 1968. He worked briefly at the *Globe and Mail* and, with his deep baritone voice, for radio stations in western Canada, including CFCN, where future premier Ralph Klein was a friend and roommate.

MYRA B. BIELBY, 2010 AND EARLIER. M. BIELBY/COURT OF APPEAL COLLECTION.

He also started a law degree at the University of Alberta, graduating in 1973.[23]

O'Ferrall practised with the Calgary firm of Ballem, McDill MacInnes before joining Bennett Jones in 1976. Initially a litigator, O'Ferrall became a leading regulatory lawyer in energy and environmental law, later serving as a member of the legislative review panel for the Ministry of the Environment. O'Ferrall drafted amendments to the *Hydro and Electric Energy Act* and *Surface Rights Act*. The athletic O'Ferrall, who cycled, sailed, sea-kayaked, swam, ran, played hockey and baseball, and sometimes canoed, was known for frequently cycling to regulatory hearing sites in rural Alberta, preferring pedal power to the more conventional approach.

O'Ferrall moved to the McLellan Ross firm in 2002 and then joined the Provincial Court, civil division, in 2005. By his own account, O'Ferrall greatly enjoyed working in the civil division, a "people's court" where cases are handled largely without lawyers and judges tend to interact more with the parties. O'Ferrall brought the same active engagement with the parties involved to the appellate court. O'Ferrall was the first-ever appointment to the Court directly from the Provincial Court, almost certainly tapped due to his extensive experience with administrative tribunals.

With his energetic curiosity, O'Ferrall often reserved judgment where he believed the law should be clarified, never hesitating to write independent of the panels, either in concurrence or dissent. In the criminal law, O'Ferrall frequently displayed a civil libertarian approach to issues. According to the Chief Justice, "Brian is down to earth and very concerned about improving access to justice for Albertans. If a change in the law is required, he is not reluctant to change precedent, but he is equally respectful of ensuring this is accomplished in an orderly fashion. He is extremely dedicated, and most Saturdays, he can be found diligently working in his Calgary office."

Barb Veldhuis, Another Judge to Sit on All Alberta Courts

The most recent addition to the Court, Barbara Lea Veldhuis, confirmed some of the recent trends in appointments. Veldhuis had joined the Provincial Court in 2007 and Queen's Bench in 2011. Born in 1954, Veldhuis was nearing fifty-nine years old when appointed to the Court in 2013. Veldhuis's father was a grain buyer and rancher, and her mother a school teacher. She started her post-secondary education at Grande Prairie Regional College in the arts and commerce program in 1981. After two years, Veldhuis transferred to the University of Alberta and finished her law degree in 1987. She then articled in Grande Prairie, starting at Innes Hugestall and finishing at Logan Watson Walisser, where she remained after joining the bar in 1988.

Initially a general practitioner, Veldhuis gravitated to criminal law. After several years of defence work, she spent two years as a Crown prosecutor before returning to private practice with Clackson, Mochan and Veldhuis. From 1993 to 1996, Veldhuis was the vice-chair of the Grande Prairie Regional College Foundation and a sessional instructor at the Grande Prairie College.

In 1996, Veldhuis joined Alberta Justice as a senior prosecutor in Edmonton, moving to Justice Canada in 1998 as part of a special unit investigating proceeds of crime. This brought Veldhuis to Calgary in 2002, where she became a senior federal prosecutor. Veldhuis was also made chair of the Law Enforcement Review Board in 2007, only to resign almost immediately on her appointment to the Provincial Court's criminal division. Outside of the law, Veldhuis had an exciting hobby, competing in cutting horse competitions. She was arguably the Court's first "cowgirl" judge, in the vein of "cowboy" trial judges of the past like Billy Ives and Val Milvain.

Veldhuis came to the appeal court with a great deal of experience in judicial dispute resolution, a definite asset. She also took on the role as chair and the sole member of the Court's Education Committee. According to the

BRIAN KENNETH O'FERRALL, 2011 AND EARLIER. B. O'FERRALL/ COURT OF APPEAL COLLECTION.

Chief Justice, Veldhuis declined a formal swearing-in ceremony, opting instead to be sworn in as a member of the Court in the Chief Justice's office. The Chief Justice added this about the newest member: "Barb is self-effacing, quietly effective and efficient. She is also very thoughtful and does not marry herself to her views. She is always willing to listen to, and consider, the opinions of others. Equally, though, while respectful of those opinions, Barb is decisive in coming to her own conclusions on an appeal."

Increasing the Court's Judicial Complement

The other salient observation on the twenty-first-century bench was that the Court was short-handed. Through the 1990s, the Court could call upon a large number of supernumeraries, many of whom worked nearly full-time to help. This allowed the judges to stay on top of the workload. But with retirements, by 2000 the Court had experienced a 10 to 15 percent loss in judicial manpower.[24]

Alberta's appellate bench did not expand to meet the increases in the province's population or the Court's workload. This was exacerbated by the fact that the judges were also the core of both the Northwest Territories and Nunavut appeal courts. The Court's operational plans spelled it out, stating that "by working both the supernumeraries and full-time judges hard," wait times for hearings and reserves had been kept short, but "the work load is overwhelming."[25] In 2008, the province agreed to create two new positions on the Court.[26]

Only two appellate positions, however, were then available in the federal pool for judges. Since Manitoba also required one, the Court and the Alberta government agreed to reduce the number requested to one on the understanding that when the federal government expanded the appellate pool, the additional position would be provided. After all was said and done, in 2009 one new puisne judge was added to the roster to make thirteen.[27] This did not help that much with workload demands. As of the Court's one-hundredth anniversary, the Court wishes to see the additional position, for which it had earlier established a proven need, created provincially and allocated federally.

If there was one salutary result of the ongoing lack of personnel, it was that the Court was continuously looking for ways to be more efficient. The innovation and experimentation had a profound effect on the institution and its function.

The Delivery of Justice: Further Transforming the Court

As human beings, our greatness lies not so much in being able to remake the world – that is the myth of the atomic age – as in being able to remake ourselves.

– Mahatma Gandhi

Through the 1990s, the Court strove to obtain more resources, especially support staff and computer systems. Towards the end of the decade and into the next century, it became apparent that the Court should reconsider how the judges approached and dealt with appeals. Some of these changes were possible because of the Court's success in obtaining more resources, especially staff lawyers. The judges, however, found that even with such assistance, their workload was not sustainable. Concerned about the backlog of reserve judgments and maintaining the overall quality of their work, they looked to procedural changes for solutions.

As early as 1996, the Court had set up a committee to "research and identify alternatives and methods for case flow management."[28] Conrad took on primary responsibility for this matter and, with Lynn Varty, the Registrar, explored the status of both active case management and judicial dispute resolution at the appeal level in Australia, New Zealand, and the United States. They put a great deal of effort into this exercise, consulting and researching widely, and looking at the procedures

BARBARA LEA VELDHUIS, 2013. COURT OF APPEAL COLLECTION.

of other appellate courts. In late 1998, they issued a Case Management Proposal designed to modernize the Court's processes.

The Court was simultaneously looking at other areas for improvement. As Peter Costigan recalled, that effort gathered momentum with "blue sky" sessions at the annual court meeting in 1999, shortly after he joined the Court.[29] Fruman and Russell were charged with examining different options, and within a remarkably short time produced a comprehensive report with innovative recommendations. Two crucial recommendations were adopted: time limits and pre-hearing responsibility. At the same time, the Court also adopted key recommendations from the Case Management Proposal, including undertaking active case management of appeals and judicial dispute resolution. All were incorporated into the Court's operational business plans.

In 2000, the Court announced it would be implementing major formal reforms, including time limits on argument, case management, and streaming appeals into different categories.[30] Input from the bar was solicited and the Court proposed several pilot projects at the beginning of 2001. That date came and went as the Court sought to process the profession's feedback and acquire much-needed new information technology. The closure of the Calgary courthouse then effectively put the Court's plans on hold. Finally, in 2004, once the Court was relocated to new "temporary" quarters in TransCanada Tower and its operations were back to normal, it was able to implement planned reforms and new initiatives.

Technology's Elusive Promise

In its quest to improve service to the bar and public, the Court leaned heavily on technology. After the successful early experiments with computerization, there were high hopes that this would be a vehicle for materially improving the Court's business. Fraser was an enthusiast for information technology and gave it high priority. The Court tackled a number of ambitious projects: online access, electronic appeal books, electronic factums, creation of a website, improved online content, and development of management information policies and systems. The Court's original "guru," Kerans, provided leadership until retiring in 1997. Several of the new generation eagerly took up the torch, notably Fruman and Russell, and more latterly, Watson. No effort was spared, but success was mixed, as the limitations of both budgets and available technology were felt.

The Court's first operational plan in 1996 outlined a comprehensive and very ambitious strategy to create, by the new century, a completely electronic environment for all aspects of appeals.[31] Utilizing the Internet, everything from the initial notice of appeal to appeal books and factums would be in electronic format with no paper copies filed. One of the central pillars of the plan was the acquisition of a proper management information system, or MIS, as the backbone of any electronic system. These databases and user interfaces, which were becoming common in the business world, were required to run the Court's operations.

As the new Chief, Fraser had been surprised that the Court had no central filing system for internal administrative paperwork.[32] Filing and managing appeals was still mostly a paper process. There was some primitive software to help track criminal appeals, but collecting data on the status of appeals or compiling even rudimentary statistics had to be done manually. Fraser immediately decided that a proper MIS was necessary. One function Fraser particularly desired was "issue tracking," whereby a database would record the main points in an appeal and allow the Court to identify recurring legal problems. Rather than relying on anecdote, the Court would have hard data, and devise strategies such as convening a special panel to settle a contentious point of law. A good MIS could also be used for electronic case and list management, including automating the monitoring and scheduling of appeals, which Fraser and others saw as the future.

COURTROOM AND CONFERENCE ROOM, COURT OF APPEAL IN CALGARY, CA. 2003. COURT OF APPEAL COLLECTION.

There was early promise that technology would deliver. The Court quickly took advantage of Internet access, which in the early 1990s was far from universal. The appellate court actually jumped ahead of much of the provincial civil service with a local network and an email system.[33] Email exchanges and the ability to send and share documents electronically were extremely useful for a split court with judges resident in two cities.

Another related initiative that proved very successful was video conferencing. The Court pursued the technology aggressively, and permanent facilities were first installed in Edmonton in 2002.[34] The judges originally envisioned three uses: for meetings; for appearances of counsel outside the two main cities; and to allow inmates to be at hearings without physically transporting them. Conferencing has proved invaluable for court meetings, especially during the winter months. It also proved "brilliant" for summer chambers motions; one judge could do the whole province.[35] And conferencing has even allowed hearings to go ahead that otherwise would have been cancelled, when circumstances, particularly the weather, have prevented judges from travelling, particularly in the NWT and Nunavut.[36] As a matter of policy, this is a last resort: the Court decided that conferencing should not be used for hearings except in case of emergency, but it has allowed appeals to go ahead that would otherwise have been cancelled

Alberta judges also immediately saw the potential of the World Wide Web for communicating with the profession. An all-courts technology committee was set up in 1996 with the primary goal of setting up a website for all three courts. Anne Russell was the appellate representative and later chair of the committee.[37] The foundation project was an online database of all court judgments. Once the courts had this in place, a web page was designed to give the public access to the database and provide general information. Although the British Columbia appeal court was the first in Canada to go online, by 2000 the Alberta courts web page was up and running and had won a technology award.[38] The website provided access to the rules of court, practice notices and directions, dates and schedules, and, most crucially, it was capable of being used as a portal for filing electronic documents.

However, the Court still awaited a comprehensive management information system. The vision of the Court was very ambitious even for the late 1990s. Unfortunately, no off-the-shelf software then in existence was up to the task, and the Court needed a custom system. The justice ministry, however, balked. It was planning an MIS for the entire ministry and insisted the Court participate. The judges reluctantly agreed, concerned that a universal approach would take much longer, and their reservations were not misplaced. A ministry-wide system proved much too complex for the technology then available, and the project foundered after several years.

This greatly impacted other initiatives. Earlier, the Court had decided to proceed with plans to automate list management as part of its new case management initiative. In 2000, the Court decided on a four-track system, streaming appeals depending on type and urgency.[39] This required a system to manage appeals from filing to hearing, to put each appeal on the requisite track, monitor the progress towards perfection, generate deadlines and notices to counsel, and then schedule the hearings. With no MIS, this had to be put on hold. Even the existing procedures of the court were jeopardized: the software the Court had adopted some years before to help manage criminal appeals was so obsolete it was almost non-functional.

The technical requirements for a new system were not too exacting, but a substantial outlay for software and hardware was required. Once again, the ministry was opposed to a custom system.[40] The Court was forced to adapt software developed for the British Columbia Court Of Appeal for criminal appeals. It was a far cry from the comprehensive case management the Court had envisioned. As Côté succinctly put it: "Alberta spent

years trying to find or develop such a system, meeting many disappointments along the way."[41]

E-Appeals: Almost but not Quite

The creation of a website had opened up the possibility of electronic filing for appeals. Building on the work done during Laycraft's tenure, the Court concentrated initially on making electronic appeal books mandatory for all appeals. Advances in technology allowed the Court in 1994 to issue a protocol for submitting electronic appeal books on floppy discs. The Court started a pilot project requiring electronic books for appeals involving a trial longer than five days to supplement paper copies, a first in Canada. By February 1998, electronic appeal books were made mandatory for all appeals. The electronic books cut down on the amount of material physically filed by approximately 20 percent, along with related costs.[42] Judges could much more quickly search through an electronic version.

Not every judge was enamoured of electronic appeal books, and there were complaints from the profession about the expense and bother of creating them. However, the pilot project demonstrated the potential and the Court wholeheartedly pursued fully electronic appeals. It became the major technology focus in the early and mid-2000s. Enough progress was made that in 2004, the Court took an unprecedented step and declared that for trials longer than ten days, both factums and appeal books would be filed in electronic form, another first in Canada.[43]

However, e-factums proved problematic. Hyperlinks in the e-factums were desirable to allow the reader to immediately link to the case law, authority, or evidence in the appeal book. The links created exacting requirements, and preparing e-factums took considerable expertise, time, and cost. The Court still required a certain number of paper copies for permanent retention and for some judges, and this reduced the cost advantage. Law firms also needed special software to upload their e-factums to the Court, another expense. Some large firms became skilled at producing e-factums, but the profession generally was not enthusiastic. Another limitation was budgetary. The Court did not have its MIS, and e-appeals had to be stored somewhere. The data storage for all electronic appeals was considerable, and no funds were available for necessary upgrading. In 2007, after a meeting described as "contentious," the Court reluctantly abandoned plans to make e-factums mandatory.

The Rise and Fall of JIMS

The setback seemed temporary. In 2009, the justice ministry unveiled the Justice Innovation and Modernization of Services (JIMS) program, an information technology initiative that involved many projects. Among other things, JIMS was intended to provide the systems the Chief Justice had sought sixteen years earlier. JIMS' principal objective was to enhance and modernize, through technology, the delivery of justice by all courts, largely replacing existing processes with new ones. Much effort was put into developing information management policies and architecture to deliver new systems. The chiefs of courts, notably Fraser, had the leading role.

The governance of the JIMS program was unprecedented in Alberta history. In a co-operative effort, a program board consisting of the chiefs of the courts and other senior judges and the deputy minister of justice and his most senior officials and technology experts was established. While developing the governance structure was not easy, it was a remarkable arrangement. For the first time in Alberta, the executive and judicial branches were directly engaged in a collaborative process to build a court system fit for the twenty-first century.

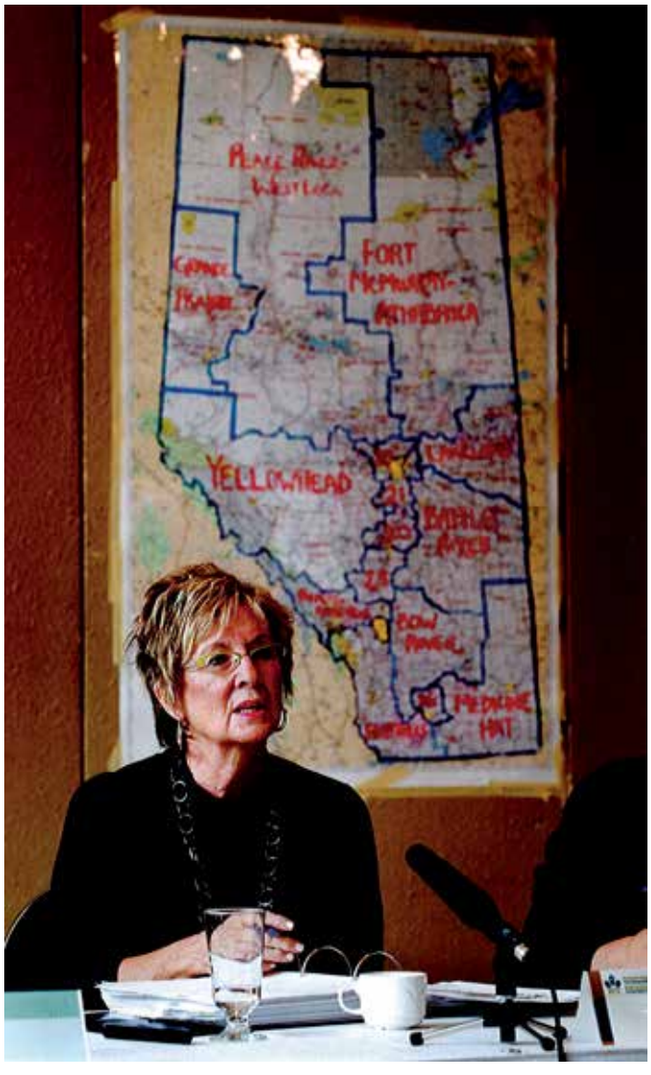
There were high hopes for JIMS. Systemic reforms were foreseen on many fronts, particularly creating an electronic environment, from e-filing to e-access to e-courtrooms and everything in between. New case management systems were to replace legacy systems, to allow active case management, streamlining of court processes, automation where appropriate, and improved

service delivery particularly through online channels. JIMS envisioned providing more thorough and accessible information on court websites to educate the public and assist those with legal problems.

Another innovative aspect of JIMS was its emphasis on privacy. The amount of personal information that would enter an integrated data management system was a very serious issue. The courts have a fundamental obligation to manage and control this information to prevent its misuse, preserve its accuracy, and protect the reasonable privacy expectations of those providing this information. The vast majority of people before the courts are not there voluntarily, and their opponent in court proceedings might well be the government itself. Thus, the courts are responsible for developing proper policies to deal with privacy, access, security, and retention of documents. JIMS held the promise of a genuinely independent information technology and information management architecture that would have constituted the modern and secure court systems the public needed.

It was not to be. Considerable progress was made with several projects and more success would certainly have been achieved, but JIMS was defunded in 2013 as part of broad government cutbacks. Unfortunately, for the foreseeable future, this meant it was back to the ineffective *ad hoc* approach that had left the Alberta courts increasingly behind technologically. In fact, it must be said that Canadian courts generally have fallen behind courts in other countries, including even some in the developing world, in leveraging technology to improve the delivery of justice. There is much to be done if the courts in Alberta are to take the lead in this area. In the meantime, the Court remains committed to JIMS when government is able to renew funding.

The Court took fully electronic e-appeals further than any other appeal court in Canada, even if full success was elusive.[44] As of the time of this writing, e-factums in Alberta remain an option, but one rarely used. However, the Court has not given up its dream of fully electronic appeals, case management, and all the other tantalizing promises of technology. Given the astonishing advances in information technology since the turn of the century, the original vision of the court is now more than feasible, even if the greatest barrier – the resources to carry it out – remains.



And one small advantage to the delay is that the bench itself is more comfortable with the brave new world at hand. Russell and others recalled that many judges

CAROLE CONRAD SERVING AS THE ALBERTA CHAIR OF THE ELECTORAL BOUNDARIES COMMISSION, 2012. COURTESY C. CONRAD.

initially did not even make use of electronic appeal books, insisting on paper books, a source of frustration to the registry staff.[45] Over the last decade, this has changed. It may seem odd that there would still be judges who find using a computer daunting. Even among the "boomer" generation, assistants, students, and juniors insulated many senior lawyers from direct use of computers for writing and research. Lawyers were a little notorious for being Luddites.[46] Thus, the Alberta Court's focus on technology was all the more impressive.

Adopting technology also illustrated how much more complex an appellate court in the twenty-first century had become. The judges were deeply involved in strategic planning and implementation, administrative work beyond their main judicial function but crucial for the Court's future. Not surprisingly, the Court also wanted control over the process to ensure that its needs were met, including timely implementation. Government paymasters did not dispute the obvious need for information technology, but the Court's priorities were not necessarily the priorities of the ministry of the day. Left to its devices and with greater funding, the Court would by now likely have implemented e-factums and e-filing, to take two examples. In fact, the Saskatchewan Court of Appeal moved to do so in recent years, opting for a go-it-alone strategy that has proven successful.

Assigning Lead Judges

Even with the assistance of counsel and students, it was still a tough proposition for all judges on a panel to thoroughly work up each appeal. One of the recommendations of the Fruman-Russell committee was assigning pre-hearing responsibility to a "lead judge." Each appeal would have a "lead judge" who would decide if extra research and briefing was necessary, analyze the appeal more deeply, and, if it seemed appropriate, prepare a draft judgment setting out that person's preliminary thoughts on the appeal. The Court adopted the lead judge recommendation in 2003.

Once the appeals were assigned to a panel for a sitting week, the head of that panel would assign a lead judge for each appeal. The other judges still did basic preparation for all the appeals, but having a lead judge ensured that issues requiring further research were done in advance. There were some potential pitfalls to this approach and initially some judges had reservations. One concern was that the other two judges would not prepare, or do so only cursorily. It did not prove to be an issue. There was no slacking off in effort by the members of the panel. Another potential concern was that the lead judge might dominate the hearing and essentially decide the appeal. In practice, however, the independence of the judges and the level of preparation by all meant the other judges had their own queries, ideas, insights, and conclusions. In addition, if the judgment was reserved, the lead judge was not automatically responsible for writing it. Other judges could elect, or be assigned by the presiding judge, to do so.

Pre-hearing responsibility led to a widespread, although still informal, practice of drafting judgments before hearings. This was largely an outcome of the degree of preparation. For many simple error-correcting appeals, the outcome was often predictable and it was relatively easy to draft a judgment that required comparatively minor editing after the hearing, especially with technology. A draft judgment could be edited in the conference room and issued as a bench memorandum. Where a reserve was clearly going to be required, typically no draft judgment was prepared. And even where drafts were prepared by a lead judge, it did not mean the panel would accept the result or reasoning suggested. Orphan drafts were not uncommon. To some extent, preparing a draft judgment early merely moved work normally done after the hearing to before. But in practice, it facilitated bench memoranda of greater quality. Previously, bench judgments had been written more hastily or given as true oral judgments. And while some judges were

very skilled at producing both quickly, the new process resulted in a better product.

One concern with preparing preliminary draft judgments was that counsel might feel the Court had decided the appeal before hearing. In practice, this too did not prove to be a serious problem. From the judges' perspective, it was impossible when reviewing factums not to form an initial opinion which might or might not be reflected in the final decision. One advantage of pre-hearing circulation of drafts was that it allowed panel members to reflect on points of view with which they might not agree or points of contention that ought to be explored with counsel. Rather than hardening positions, it enabled judges to better appreciate the substantive points on appeal. Moreover, the post-hearing discussion of the Court was inevitably better focused. More important, oral argument continued to have its place, and not infrequently, it would lead to a different result. It was easy enough to alter a draft post-hearing if argument changed the panel's initial view. Alternatively, the panel could reserve and rewrite the draft or start over again.

Case Management: The Court Adds Case Management Officers

In the 1990s, the Court had recognized the need to improve list management, which really meant implementing case management. While the dream of having an integrated and automated management information system faded, another idea took root and flowered: case management officers (CMOs). These were originally conceived of as similar to the masters in chambers found in Queen's Bench who would monitor and, when appropriate, manage appeals from filing to hearing. The concept had been used with success in US appeal courts.

The Court surveyed other jurisdictions extensively on their appellate case management practices, looking as far afield as Australia and New Zealand, before adding CMOs into the strategic plan in 1998.[47] After the Court worked closely with government on this initiative for two years, the government amended the *Court of Appeal Act* to allow for appointment of CMOs.[48] The reform then stalled for lack of funding. But by 2007, again thanks to the government's financial assistance, the Court was able to hire CMOs in Calgary and Edmonton.

In the original 2000 proposal for comprehensive case management, the Court had envisioned the CMOs taking over most list management duties and actively managing appeals to the point of hearing. The potential was obvious. The position filled a big gap between the list management judges and the registry staff. The time the former could spend monitoring the progress of appeals and dealing with procedural issues was very limited. Nor could the list management judge engage in active case management, even operating at arm's-length through clerks or the deputy registrar, since they might later be sitting on the appeals themselves. What was required was someone with the freedom to apply pressure, negotiate on deadlines, and make related routine orders. A dedicated CMO provided the hands-on management that judges could not, along with the corresponding benefits.

Once the CMOs were in place, their potential was quickly realized.[49] In essence, the CMOs were responsible for the progress of appeals from filing to hearing, ensuring appeals stayed on schedule, reminding counsel of deadlines, following up on missed dates for filings, and determining when an appeal should be struck. The CMOs also analyzed incoming appeals and suggested Judicial Dispute Resolution (JDR) and expedited urgent appeals where appropriate. They interpreted and applied the Rules of Court and practice directives when problems or unforeseen issues arose, and decided when a chamber application was necessary. Although the CMOs did not receive the same judicial powers as Queen's Bench masters, on the Registrar's authority they used a section of the *Criminal Code* to refer deficient appeals to the judges

COL. (RET'D) THE HONOURABLE DONALD S. ETHELL, LIEUTENANT GOVERNOR OF ALBERTA, THE HONOURABLE CATHERINE A. FRASER, CHIEF JUSTICE OF ALBERTA, AND RICHARD FRASER, Q.C. AT ALBERTA ORDER OF EXCELLENCE DINNER, 2013.

for summary dismissal. They have also created a similar procedure for civil appeals based on a provision in the *Court of Appeal Act*.

With the CMOs in place, "speaking to the list" rapidly became a relic. When the CMOs were first hired, there might be seventy appeals on the list in Edmonton to sort out, a very busy day indeed.[50] Now, there might be one. The list management judges in both cities soon delegated the job to the CMOs.[51] The CMOs found it simpler to simply schedule a hearing date via email or phone. Speaking to the list, such as remains, now often only serves self-represented litigants. A great deal of the CMOs' success has been attributed to their knowledge of, and relationship with, the bar. They know which lawyers require more cajoling, and they are also available to solve problems and address concerns. One concern is whether subsequent appointees will replicate the blend of experience, judgment, and interpersonal skills that have made the incumbents so successful.[52]

Expediting Interlocutory Appeals

Aside from active case management, the Court made other modifications to list management, building on the pilot projects of the 1990s. After extensive consultation with the criminal bar, sentence appeals were streamlined with automatic deadlines and quick scheduling for hearing dates.[53] The more elaborate streaming process for all appeals proposed in 2001 was not adopted, but in 2008, the Court created a new category, the Part J Appeal. The purpose was to expedite certain appeals, including child maintenance and custody matters (which were no longer heard with sentence appeals), appeals of interlocutory orders, and any others ordered expedited. The timetable for these Part J appeals was much faster – mostly automatic – and the filing requirements much less: factums, for example, were set at fifteen pages maximum.

This approach was consistent with the Court's philosophy. Maintenance and custody were matters that should not wait. The same was true for interlocutory appeals, as these affected the speed of litigation in the trial courts. The Court had a hidden agenda, which was to cut down on interlocutory civil appeals altogether by processing them quickly.[54] The Court had concluded that interlocutory motions and subsequent appeals were sometimes being used as a delaying tactic in litigation. Some judges thought many had little merit. There had been an obvious increase in such motions in the 1980s, and the Court had then considered taking action.[55] Moving interlocutory appeals to a fast track proved to be a "win-win." Once interlocutory appeals were moved to the Part J fast track, the numbers dropped dramatically, a result that seemed to speak for itself, helping both the litigants and the Court.[56] Certainly it demonstrated the advantages of active list and case management.

Implementing Judicial Dispute Resolution For Appeals

Judicial Dispute Resolution (JDR) was another innovation that began in the 1990s and picked up steam in the new century, becoming a fixed feature of court assignments. Alternate dispute resolution mechanisms arose in the 1980s and gained acceptance in the decades to follow. The popularity of mediation was not surprising. Even in Canada's adversarial tradition, most litigation ends in settlements, not in court. Arbitration, mediation, and related resolution mechanisms became popular as an alternate to the traditional courts.

As the name implied, JDR was judge-led mediation. It had an informal predecessor known to older counsel as "wood shedding." Some trial judges were notorious for bringing counsel into their chambers during a trial and cajoling them into settling. It is probably safe to say that most counsel went along grudgingly with these informal resolutions. In the 1990s, Queen's Bench experimented with a formal version, which was also strictly voluntary. JDR fit into a niche between settlement, on the one hand, and a trial. Judges would provide non-binding mediation backed by their considered opinion of the issues and the likelihood of success. JDR has proved very popular and useful in family law, particularly with self-represented parties.

JDR came to the appeal court in a slightly roundabout fashion. As with so many innovations, appellate JDR was first used in American courts. At first glance, JDR would not seem to have much application at the appellate level, since one party has already won its case. This raises the obvious question: Why would the party holding a winning judgment agree to pre-appeal JDR? There are a number of answers. Trial judgments can be reversed, and where the risk exists, the winning party may be motivated to talk settlement before the appeal is heard. An appeal might be from an interlocutory order, and settling it might resolve not only the interlocutory appeal but the entire lawsuit, thereby avoiding a trial. Also, where parties still had an ongoing relationship after the appeal, as in family or estate matters, settling the dispute might help preserve that relationship, especially if both sides felt that they "won" something.

Use of JDR began informally in Calgary. Hetherington as the list manager wanted to try JDR as a case management tool, and collaborated with Conrad, who had done mediations on Queen's Bench. The Chief Justice had also been considering pre-appeal JDRs for the Court as a routine part of its operations. (She recalled: "I thought it was an original idea for an appeal court. It was not.") After a number of years of informal availability which proved the utility and success of this option, JDR began as a pilot project in Calgary in 1998 as an option for interested parties. In 2004, it expanded to Edmonton.[57] Since January 2005, it has been part of a judge's regular assignments, with JDR days set aside in both cities each month. Although the success rate is very high, JDR is not as extensively utilized as the Court would wish, in part because of the absence of a comprehensive management information system to stream appeals appropriately.

Interestingly, appellate JDRs are far more common in Calgary than in Edmonton. It is not clear why. One judge speculated it may reflect different legal cultures between the two cities and differences in list management philosophy. One peculiarity of the Court is that Calgary and Edmonton schedule appeals differently, a situation dating back to 1980 when the Court started to apply more list management. In Calgary, when an appeal is initiated and counsel agree in writing to set deadlines for all their filings, a hearing date is assigned immediately. In Edmonton, a date is not scheduled until factums and appeal books of both parties are filed. The different approaches may reflect different schools of thought seen among appellate courts: Edmonton's approach being court-centric, with judges running the appeals, while Calgary's is counsel-centric, allowing litigators to dictate the pace. Each set of judges tend to prefer their city's system, although the Chief Justice would prefer a common approach in both cities so that the bar is not required to accommodate themselves to two systems. Although all other Court practices are now identical between the two cities (making them so was another priority for the Chief Justice), this one difference still remains.

Time Limits on Oral Argument

Instituting a time limit for oral argument was one of the most revolutionary changes the Court ever made. Even at the turn of the century, Canadian courts were still married to the oral tradition. By contrast, many American intermediate appellate courts had decades earlier adopted written argument only for appeals. If oral argument was allowed, it was usually subject to strict time limits. The US Supreme Court adopted a 30-minute limit and was known to shut off a lawyer's microphone if they went longer. The SCC set a one-hour limit in 1987. But it was some time before provincial appeal courts followed this lead and abandoned the tradition of fulsome oral argument.

Aware of American practice, the McGillivray and Laycraft courts had considered time limits and even written arguments only for certain appeals. But the Court in that era was not ready to restrict oral argument, in part due to tradition, but also because judges found it useful. Fruman and Russell recommended time limits. Given the preparation work the judges did, extensive oral argument was increasingly inefficient on many routine appeals. As a rule, the judges could learn about an

appeal much faster through reading. Their desire was for counsel to clarify their arguments and answer queries on points of concern. Despite the long-standing use of factums in Alberta and the Court's frequent directions for concise presentation, lawyers could still be long-winded, unfocused, and repetitive on appeals. Some even wanted to read their factums to the Court.

Occasionally, lawyers exploited the lack of time limits. One senior staff lawyer remembered an appeal with very senior counsel that went on for days for no good reason other than counsel stubbornly persisting with an argument going nowhere. This was despite the presence of McClung, a master at keeping lawyers to the point. There was a consensus on the Court that time limits would better focus arguments on the key issues. Time limits were also seen as useful with self-represented litigants, whose rambling presentations were often the norm, not the exception.

Although time limits were first proposed in 2000, it was not until 2004 that the Court initiated a pilot project setting a time limit of forty-five minutes per party for oral argument. Counsel could ask leave in advance for longer argument if they felt it was necessary. On an informal basis, the judges were also willing to be flexible. If a panel's questions, for instance, took up too much time, the members usually allowed extra time. The pilot project was considered a success, and in 2008 the Court made time limits permanent. After some initial grumbling, the bar generally supported the change as it became obvious to the counsel, as with the judges, that hearings were vastly improved.

In the nearly universal opinion of the judges of the Court, time limits were revolutionary. Long appeals became a rarity. Panels could "cut to the chase" and address the points where they required clarification. However, the Court never seriously considered moving towards the American practice and ending oral presentations, even for routine appeals. Aside from tradition, most judges felt that focused argument and asking their own questions of counsel still helped clarify issues. And in a persistent number of appeals – anywhere from 10 to 30 percent – the panels came out of a hearing with a different view. Other appeals had no obvious outcome, and the extra input of counsel was crucial.

Nevertheless, there was a place for written argument alone. The Court had first made this option available to lawyers in 1998. The primary reason for introducing it was to increase access to the Court for counsel from out of town and speed up some routine appeals. However, all parties had to agree in writing and the list management

judge had to approve the request. Perhaps as a consequence, while the option remains, demand has never been very great. Attachment to the oral hearing continues to be strong for bench and bar alike.

The Self-Represented Litigants

Case management was also a boon in dealing with a growing challenge for the Court – the self-represented litigant. Courts have always had litigants who acted for themselves. Aside from the incarcerated, there were those who either could not afford representation or did not trust lawyers. There were even a few serial litigants who relished being in court and treated it as a hobby. Some self-represented could be a nuisance, but most were sincere and some did an excellent job. Self-represented litigants have been successful at the SCC. In one Alberta case where an unrepresented litigant attacked Alberta's mandatory helmet law on *Charter* grounds, Stevenson complimented the man on his presentation.[58] Until the 1990s, however, "self-reps" were uncommon in the courts and rare at the appellate level.

By the turn of the twenty-first century, however, the number of these litigants had dramatically increased. One major cause was the cost of litigation. Legal representation had become much more expensive and increasingly outside the means of middle-income earners.[59] This meant a surge in self-reps, especially in family law matters. The chief difficulty with these litigants was their lack of legal knowledge and training. Navigating procedure and grasping legal principles were not easy for many. In the courtroom, judges had to balance the need to give self-reps some assistance with their duty to be impartial.

Many self-reps managed to do a reasonable job. However, there were some self-reps who could be described uncharitably as cranks and kooks. It was a category that included the mentally ill, crusaders in fringe causes, individuals looking for a soapbox, a rag-tag assortment of conspiracy theorists, anarchists, "detaxers," religious fanatics, marijuana advocates, and a loose assortment of particularly troublesome types whom one trial judge dubbed the "organized pseudolegal commercial argument litigants."[60] The "detaxers," as an example, who were very prevalent in the United States but also seen in Alberta, denied that governments had the power to tax citizens. There were many variations on this theme. Some groups even provided direction on how to tie up court resources as a way of attacking "the system."

What the self-reps had in common, from the sincere to the bizarre, was their disproportionate impact on resources. Some repeatedly revisited the same issue, constantly refiling applications and motions and appealing every denial of leave. This behaviour was also a strategy seen in family law where delaying proceedings was the objective. The greatest burden by far was on the registry counter staff and the case management officers. The clerks did their best to assist the self-reps in properly filing their appeals; one self-rep could use up hours of staff time. Staff were also subject to abuse from the fringe element. It was probably the sincere but inexperienced litigant, however, who was the biggest drain on their time. Having case management officers with the authority to intercede was invaluable, but self-reps were a significant demand on their time too.

The challenge for the judges was different. Nuisance appeals still required preparation, a hearing, and disposition, and thus judicial time, a scarce resource. More directly, some appeals were very difficult to understand and required more effort. The hearing was most burdensome as the panel tried to ensure the self-rep was given the opportunity to make arguments without being unfair to the other party. Frequently, this would involve very discursive presentations. One judge recalled a hearing, before time limits, when the self-rep appellant took two days and the represented respondent half an hour. Chronic litigants often simply treated the hearing as a chance to pursue their particular obsession or agenda. Time limits on argument made a tremendous difference.

HUTTERITE FARM WOMEN AT WORK. IN 2007, THE COURT GRAPPLED WITH RELIGIOUS RIGHTS IN *HUTTERIAN BRETHREN OF WILSON COLONY V ALBERTA*, DISCUSSED ON LATER PAGES. CANADIAN PRESS/MIKE STURK

Since 2007, the courts now have another tool, the vexatious litigant statute passed by the Alberta legislature. It had previously been possible for a court, including the appeal court, to make an order preventing a troublesome litigant from continuing proceedings without leave of the court if it was deemed an abuse of process. The statute made this simpler and more direct, allowing courts to prevent a litigant from instituting further actions without express leave. Judges are also mindful that a vexatious litigant could become more than a nuisance. One Calgary judge reported an uncomfortable incident when she ended up on the elevator with an aggressive self-represented litigant who had just appeared in front of her. Although no threats were uttered, there have been incidents in the trial courts with such litigants that required the intervention of security.[61] The incident also underlined the inadequacies of the Court's facility in Calgary, which lacked proper security and separate access for the judges.

The Court's location in TransCanada Tower also lacked the resources for self-represented litigants that became available at the courthouses. The judiciary in Alberta have always been very concerned that the public have access to the courts. Assisting the self-represented has been a priority. Both the Calgary and Edmonton courthouses have law information centres to assist self-reps, while Alberta's legal aid society has duty counsel at the courthouses to provide advice. The Court put together a short guide to filing appeals for the self-represented. Much still needs to be done for the self-represented, but it is a difficult balancing act. As one judge said, "One of the downsides of an open court system is that we have an open court system. But the alternatives are worse."

The Changing Workload

The prevalence of self-represented litigants was also one example of the Court's shifting caseload in the new century. Though not necessarily dramatic, there has been a shift from private to public law, and towards fewer appeals in total, but with each requiring more time and effort. There has been a steady reduction in civil litigation, particularly commercial litigation and corporate litigation that only a decade before was a burden on the court. At the same time, though, there have been more appeals from administrative boards and tribunals. In the result, the overall workload for the judges has in fact increased as complexity has been substituted for numbers.

The Court's lack of a management information system makes it difficult to build a detailed picture of appeals. But available statistics paint an interesting picture. In 1992, the Court heard almost twice as many criminal as civil appeals.[62] However, by 2011, only about 45 percent of appeals filed were criminal, the rest civil.[63] Declining crime rates, the settling of *Charter* law, and the application of standards of review, especially in sentencing appeals, all played a role in reducing the number and percentage of criminal matters. Family law, despite the many cases in the trial courts, made up only about 10 percent of appeals in 2011.[64] About 15 to 20 percent of appeals involved administrative law, appeals directly from boards or tribunals or judicial review in a lower court. Compared to other provinces, Alberta allows far more statutory appeals directly to the Court from tribunals. Bodies such as the Energy Resources Conservation Board are linchpins in Alberta's resource economy. This meant a large number of administrative law matters for the Court. The rest of the civil list was a mixed bag of commercial and corporate matters.

Although commercial appeals have not vanished, the considered opinion was that the Court now saw fewer of these cases. It seemed clear that much of this litigation simply left the traditional court system in favour of alternative dispute resolution mechanisms. There was a persistent story among the Alberta bench and bar that several very expensive and drawn-out instances of litigation in the 1980s and early 1990s led corporate executives to look for alternatives.[65]

It was true that North American corporations explored alternative dispute resolution (ADR) such as arbitration

or mediation as an alternative to litigation in the 1990s. Justice O'Brien certainly experienced this change while in practice. Like other top Alberta litigators, he added ADR to his toolbox in the 1990s. As he pointed out, while ADR procedures were not necessarily less expensive than litigation, there were some big advantages, including privacy in proceedings and the special expertise of arbitrators and mediators. As a result, a great deal of commercial litigation has been removed from the court system. The judges might well have welcomed this development. That litigation invariably produced truly enormous amounts of material that took up entire book shelves. Indeed, it inspired the Court to plunge into electronic appeals. Further, aside from the massive piles of paper, the appeals could be very complex and technical.

The reduction in commercial appeals has not led to a corresponding reduction in the judges' workload. Appeals today are often far more complex than those in the past. The rigorous application of standards of review (explored below) have removed many of the appeals that were easier to dispose of, leaving those requiring more work. This was confirmed by statistics which saw a jump in reserve judgments from 35 percent to almost 60 percent of all decisions in recent years.[66] Administrative law appeals are typically challenging, especially those from boards governing Alberta's energy sector. Appeals from other tribunals may also raise serious public law issues.[67]

The statistical data reveals that there has also been an increased tendency to write, as shown not just in the number of reserves but in the length of decisions. Reserve judgments became much longer in contrast to the sparseness seen in earlier courts, and the same was true of memoranda. Justice Picard opined that judgments often contained unnecessary *obiter dicta*.[68] She thought that a long bench judgment or memorandum missed the point – both formats were meant to be brief. Some colleagues agreed and noted multiple opinions were becoming more common, an undesirable development in terms of clarity. It may be one negative aspect of the judges' extensive preparation.

Other judges, however, believed more writing simply reflected the greater demands of the appeals. It was no longer sufficient for the Court to approve or reverse in a summary way. This obligation was particularly acute when, as a result of divided signals from the Court or SCC, first instance courts or tribunals were misinterpreting or misapplying otherwise binding decisions. The increase in length of reserve judgments and memoranda also reflected the more difficult appeals the Court now tended to hear. The cost of litigation often meant that matters that made it to the Court were going to be contentious, complex, and not easily resolved. As one judge observed, most of the appeals seen by the Court have significance beyond the parties. Thus, it was usually worthwhile, or necessary, not to be parsimonious with reasons.

The Standards of Review: Changing the Role of Appellate Courts

The application of standards of review was another, perhaps even more fundamental reason that appeals heard by the court were more complex and more substantive than ever. It was a trend that began in the 1990s and picked up speed over the next two decades, and had a substantial impact on the role of appeal courts in Canada. Alberta was no exception. It probably led to a smaller number of appeals but ones with greater complexity. As Roger Kerans, an expert on the subject, said: "The governing principle for limiting review should be that the sole purpose of a standard of limited review is to avoid duplication of effort by judicial actors on issues if no commensurate improvement in the quality of justice occurs."[69] The result of implementing more rigorous standards of review was to significantly narrow the scope of action for appellate courts, with both positive and negative consequences, depending on one's perspective.

Standards of review outline the rules of engagement for appellate review. They identify the degree of deference,

if any, that an appeal court should give to a trial court or tribunal on fact findings, questions of law, and issues of mixed fact and law. For example, in reviewing findings of fact, a high level of deference is called for. A reviewing court should not overturn findings of fact in the absence of overriding error, because trial judges and juries have had an advantage in determining them. This prevents appeals from becoming a rehearing of the trial evidence and instead focuses appeals on questions of law.

This and other points of deference, however, were, and often are, honoured as much in their violation as in their observance. Justice Hunt remembered being told, upon raising the standard of review: "I'm an appeal court judge and I know better than a trial judge."[70] This was why the SCC, starting in the late 1970s but more definitively a decade later, explicitly stated standards of review for the benefit of appeal courts. This prevented appeal courts from needlessly and unproductively reversing trial judges. With the SCC unable to hear more than a handful of appeals from any one province, promoting self-restraint by appellate courts was necessary.

In the 1990s, panels on the Alberta Court began to frequently refer to the proper standard of review, and by 2001, the Court required that factums state the relevant standard for each legal issue.[71] Many judges adopted the habit of stating the standard that applied before proceeding to further analysis. The reason for this greater consciousness of the standards was that the SCC had started giving more explicit direction to appeal courts to consider the standard of review. In 1994, Roger Kerans had written a definitive text on the subject, *Standards of Review Employed by Appellate Courts,* reflecting American and British appellate thought.[72] This, in turn, influenced the Alberta Court's consideration of the correct standards.

There were great benefits to an appellate court in paying rigorous attention to the standards. It was one way of reducing the caseload. Applying the relevant standard showed quickly if there was any merit to the appeal. Explicit standards also focused appellate advocacy on a more accurate assessment of the merits of an appeal. Counsel would know the threshold they needed to meet for a successful appeal, and thus, at least in theory, they were less likely to pursue an unmeritorious appeal. As another judge stated in a memo: "Once the law is clearly settled and the judges of the Court of Appeal convince counsel that they will strictly adhere to the established standards of review, our case loads should decrease."[73]

The standards were particularly useful in administrative law, where it was long recognized that appeal courts should not unduly interfere with tribunals, especially those with very specialized expertise. That said, the various boards and disciplinary bodies still required some judicial supervision. Standards of review very much helped clarify when courts should step in and when they should defer. The proliferation of such boards and tribunals and the increase in appeals and judicial review applications from these tribunals was another reason the standards became important.

The SCC altered the standard of review landscape with two decisions around the turn of the century, *Pushpanathan* in 1998 and *Housen* in 2002.[74] The former instructed appeal courts on how to determine the deference due to administrative tribunals, while the latter very explicitly spelled out the standards of review generally for reviewing decisions of trial courts. Both decisions significantly tightened the standards of review. For courts, *Housen* established "palpable and overriding error" – clearly wrong and affecting the outcome – as the standard of review for any fact findings and for questions of mixed law and fact, with "correctness" being the standard for questions of law. Along with establishing a "functional and pragmatic analysis," *Pushpanathan* set three standards of deference for tribunals, namely reasonableness, patent unreasonableness, and correctness. The principles in these decisions may not have been new, but the formulation was strict.

This did not necessarily sit well with judges of the appeal courts, including Alberta's.[75] As one judge said, perhaps a little wearily, the standards were "the flavour of the month," the prevalent appellate trend of the 2000s, but the pendulum was due to swing back. No judge denied the necessity and the value of the standards of review, but several were restive about how restrictively they were applied. For some judges and academics, the scope of appellate review had become too narrow. One judge opined that the SCC seemed intent on doing away with judicial review in administrative law.[76] Skeptical judges were concerned that appellate courts had become powerless to intervene in an unjust or unfair result because the degree of deference was too great. As one judge put it, perhaps exaggerating for effect: "The *Charter* has probably resulted in many a guilty man getting off scot-free and the standards have resulted in innocent men going to jail."[77]

Other judges were less concerned, either because they agreed with the SCC's reasoning or because they were simply following *stare decisis*. And in any event, a number felt there was not much danger of serious injustice being perpetrated, as an unfair or unjust result would certainly fall under "palpable and overriding error" or be deemed "unreasonable." Another put it more bluntly: "Any honest appellate judge would admit that whatever the standard of review, if there is an obvious wrong, they will find a way to correct it."[78]

IN 2010, THE COURT CONSIDERED ANIMAL RIGHTS AND THE FATE OF LUCY THE ELEPHANT, DISCUSSED BELOW IN *REECE V CITY OF EDMONTON*. ^ CANADIAN PRESS/JOHN ULAN, < SYLVIA LABELLE

The Alberta judges with qualms about the standard of reviews were not alone. Even at the highest court, there was some sympathy with the view that appellate intervention should not be excessively constrained. As a postscript, the SCC later changed the standards of review for tribunals, reducing them from three to two, keeping reasonableness and correctness and eliminating the "patently unreasonable" standard.[79] It also confirmed that simply because a question was an error of law, it did not follow that the standard of review for tribunals on these errors would be correctness. Much depended on other considerations as well.

Debate or consideration of how the standards affected intermediate appellate courts was not just a matter of technical interest or efficiency. It also had profound implications for the role of such courts in upholding the rule of law, especially with respect to the actions of government. And this was increasingly a concern for the appellate judges of Alberta as the new century progressed.

The Fraser Court At Law: The Second Decade On

The *Charter* permanently changed the relationship between individuals and government. And with courts, as the duty to protect the rights and freedoms of individuals and to enforce the true responsibility of government became the central role of the judicial branch. There was now a supreme law to which government had to yield under s. 32 of the *Constitution Act, 1982*. The nature of the responsibility of the courts had changed massively.

The executive and legislative branches did not forget the powers they previously possessed, ones they had granted to themselves without judicial surveillance or recourse. Both branches kept a jealous eye over their stature, power, and interests. Crown office holders often clung to a unitary vision of where the authority of government should rest. In the 1980s, the constitutional tug of war regarding the *Charter's* impact on the proper balance of state power was still in its early stages. The courts were yet to see how sophisticated the other branches could be in turning to their use any court-declared rules affecting their powers. At the same time, there was also a broad expansion in the regulatory state, a rapid increase in the involvement of state agencies in people's lives, an astounding evolution in technology, and a large increase in the range and capacity of state agents.

Necessarily, the Laycraft era had been a time of building the floors for the constitution, frequently using familiar bricks. But for most topics bruited in that time, the powers of the executive or legislative branches were never

seriously jeopardized by any judicial interpretations. The other branches adapted quickly to judicial pronouncements of reformed legal policy. It was not yet directly threatening to the state to be instructed to show more tolerance or concern about the rights and freedoms of individuals or to give equal justice to disadvantaged minorities. The momentous nature of the achievements in constitutional development in that era often involved erecting frameworks and setting outlines and occasionally blazing new trails in the process of stabilizing the new constitutional order. In the result, it produced a respectable and firm platform on which the new constitution could rest without wobbling.

The late twentieth-century and early twenty-first-century judges of the Fraser court were not necessarily more or less conservative or deferential to legislatures, nor more or less activist than their predecessors. The key difference in the judicial complement of the Court is its broader life experience and its richer understanding of the role of law in society (notably public law), coupled with increased sophistication of constitutional legal thought. The members of the Court are also generally far more comfortable with the more overt law-making role of judges, its associated array of legal remedies, and with the fact that "context is everything." The Fraser court has also had to deal with more contentious areas of dispute, especially surrounding the meaning and scope of equality rights under s. 15 of the *Charter* (with its potential impact on government expenditures), further claims under language and aboriginal rights, potential conflicts between security issues on the one hand and a wide array of affected rights on the other, with yet more to come in areas with highly personal dimensions to them, such as religion, privacy, medical ethics, freedom of thought, freedom of movement, end of life, right to proper medical care, and many more.

It is not just the judges who now understand the relevance of context. So too do the executive and legislative branches. As a result, the legislative branch, especially Parliament in recent years, has escorted enactments with declarations of what the context is. New laws often start with a prologue describing or defining the society into which the new law is being introduced. This use of "preambles" to enactments, to explain the purpose of the statute, but also to fix the factual reality against which the statute would be evaluated, is now a routine feature of laws where constitutional scrutiny is expected. Whether, and to what extent, this approach freezes out the courts from an assessment of relevant context in any particular instance remains to be seen.

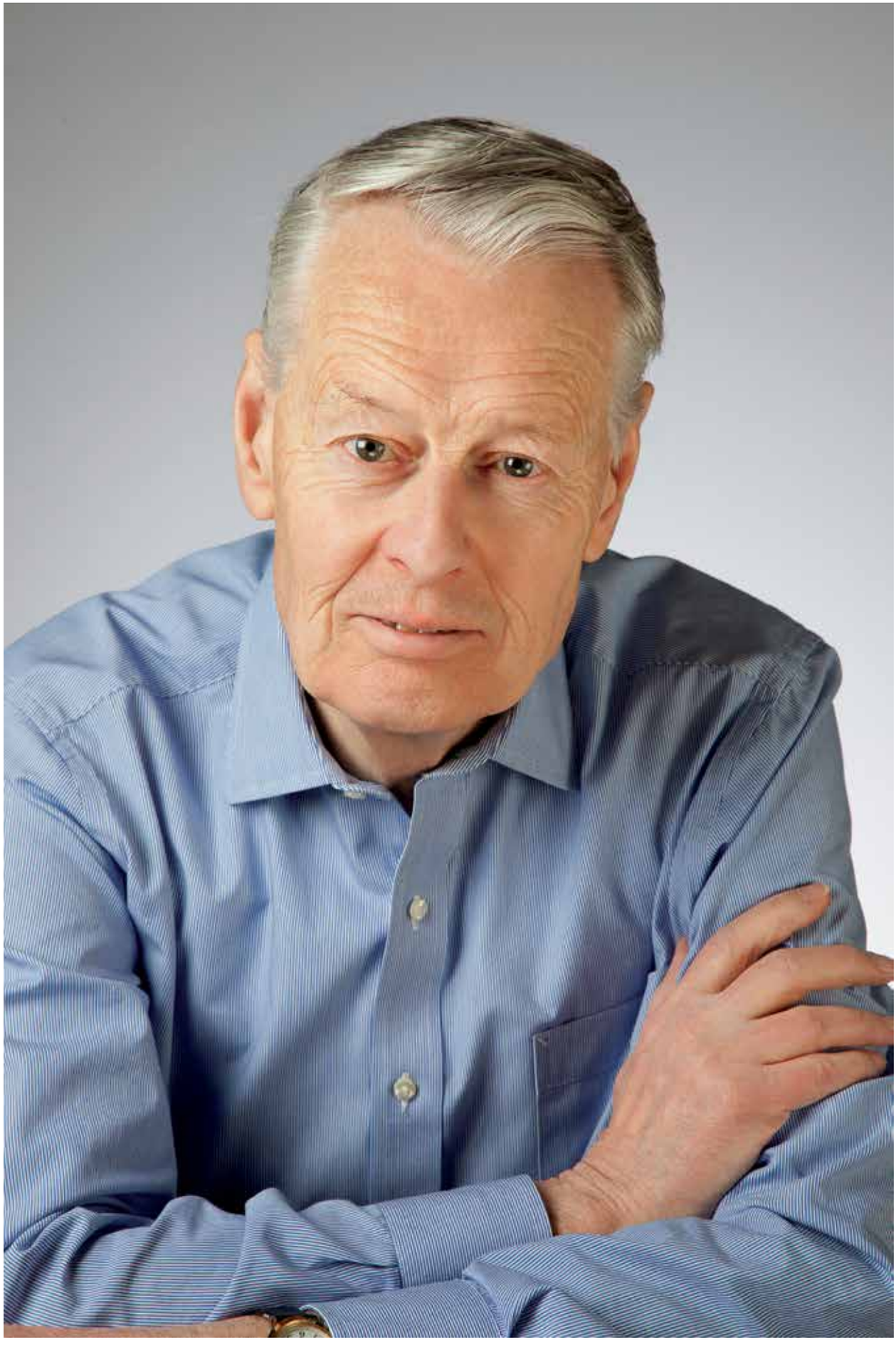
Another important change of modern law has been the emergence of the concept of constitutional "dialogue" between branches of government.

Previously the focus of constitutional evaluation of law was a matter of determining whether a particular government had the jurisdiction to pass the law under the division of powers between the federal and provincial governments. If the law was beyond the reach of the legislator, its purpose was irrelevant and the courts simply declared the fact it was *ultra vires* that level of government.

Now, if the law's purpose is within reach but the means chosen are constitutionally infirm, the courts have shown some willingness to make suggestions. Similarly, the courts have moved a long way towards supporting "co-operative federalism," adopting principles and reasoning models that allow for federal and provincial legislation to be integrated and co-exist in a harmonious manner. In a sense, a strong form of judicial deference to legislation has re-emerged. The idea of two branches of government, the judiciary and legislative, in effect engaged in a slow motion discussion with the emergence of tools like the "stay of declaration" to permit statutory amendments to catch up, would in earlier generations be regarded as heresy. But this is no longer the case.

So where is the Alberta Court today? The Court is part of a judicial branch that continues to be actively engaged in dialogue with the legislative and executive branches of government to ensure that laws conform with constitutional values. And yet, as with all Canadian courts, the Court faces the phenomenon of an executive branch in virtual domination of the legislative branch both at the provincial and national levels of government. As those branches no longer operate to check one another, but rather seem to reinforce the ability of the executive to act, the Court essentially constitutes the sole recourse for Albertans in dispute with government. It also remains the only legal authority capable of restraining the exercise of discretion by the executive and its increasingly numerous agencies.

Further, both at the federal and provincial levels, the merged branches, with the benefit of technology, now possess an increasing capacity to choose not to leave people "alone." For example, the *Hunter v Southam* requirement of judicial authorization before a search can occur did not result in fewer or less intrusive searches. Rather, Parliament and the legislatures adopted schemes for authorizing searches and seizures of all sorts, with an intensity of intrusiveness unforeseen in generations past. Given the reach of new information technology, the power of the executive branch to accumulate and aggregate data has grown exponentially.



As the Court begins its second century, striking the appropriate balance between legitimate state concerns about preserving safety and security on the one hand, and protecting constitutionally guaranteed individual rights and freedoms, along with any concept of privacy on the other, will likely be one of the Court's next frontiers. So too will be finding the appropriate balance where *Charter* rights collide. And of course, there remains the challenge of the Court's settling the scope of certain *Charter* rights in an era where concerns about privacy, the environment, and religious and social issues dominate the legal landscape. Further, given the state's gradual development into an inexorable force in the lives of individuals, the Court will be called on to ensure that constitutionalism and the rule of law, as guaranteed by the courts, continue to be the immovable foundation intended under Canada's constitution.

R v Arcand: Truth in Sentencing

The Court could be seen grappling with deference in criminal sentencing with *R v Arcand*. Alberta's appeal court had long sought to create more uniformity of approach in sentencing through the use of starting point sentences. Somewhat controversial when introduced in the 1980s despite their use in England, starting points were not enthusiastically endorsed at the SCC. The introduction of conditional sentencing in 1996 as part of a major overhaul of sentencing provisions in the *Criminal Code* only complicated matters. Alberta's Court of Appeal arguably regarded conditional sentencing skeptically and was not entirely in step with high court jurisprudence. For the Alberta Court, the ongoing dialogue with the SCC over starting point sentences and conditional sentences also led to debate and consideration of other Court policies, such as the categorization and circulation of judgments and the effect of *stare decisis*, on its own decisions.

By long-standing tradition in Canada, sentencing was the trial judge's domain. Appellate courts were only given broad powers to review sentences in 1921. Some appeal courts gave trial courts great deference in sentencing; some less so. Much seemed to depend on the trial court result. If the appeal court disagreed with it, the willingness to intervene was greater. In the early 1980s, the Alberta appeal court enthusiastically embraced starting point sentences. The purpose was to reduce unacceptable disparity in sentencing through uniformity of approach. This involved setting down a starting point sentence for offences that met certain similar criteria. The figure was to be used as a starting point, not ending point, for sentence. The trial judge continued to have the latitude to tailor the sentence to the offender by considering the aggravating and mitigating circumstances of the offender's conduct.

In *R v McDonnell*,[80] a 1997 appeal to the SCC from the Alberta Court, the high court decided that deviating from a starting point was not by itself a reviewable error. The case involved the sentencing of a foster parent who sexually assaulted a sixteen-year-old girl in his care. The Court found this to be a "major sexual assault," since he had penetrated her vagina with his penis. The accused had also later sexually assaulted a babysitter, touching her pelvis and vaginal areas. The sentencing judge imposed a sentence of twelve months in custody and two years' probation. The Court substituted a sentence of five years' imprisonment. In a divided 5–4 decision, the SCC allowed the appeal and restored the one-year sentence. At the same time, the SCC approved of starting points as a valid method to provide guidelines for trial judges.

It is fair to say that this judgment caused as much confusion as clarification. Some observers, and judges, thought that the decision meant starting points were essentially meaningless. The Court did not agree. It regarded *McDonnell* and the subsequent SCC decision in *R v Stone*[81] as affirmations of an appeal court's ability to set starting points. However, not every judge on the Court agreed with this position.

A major overhaul of sentencing in 1996 did not clarify matters. Nothing was said about starting points, but the amendments to the *Code* did place more restraint on sentencing judges. For the first time, sentencing principles were codified, the proportionality principle was set out as the overriding sentencing principle, and trial judges were expected to provide reasons for the sentence imposed. The 1996 amendments also introduced conditional sentences. Offenders could potentially serve sentences less than two years in the community, subject to conditions such as curfews, entering treatment programs, or community service. The general intent was less incarceration and more rehabilitation. *R v Brady*,[82] jointly written by Fraser and Côté, was the Court's initial guideline judgment on the subject. It concluded that conditional sentences were not appropriate for offences where deterrence and denunciation were the primary objectives.

In a later 2000 SCC decision, *R v Proulx,*[83] the SCC, as with *McDonnell*, seemed to both disagree with and endorse the Court's position in *Brady*. The SCC reasserted the principle of deference to the sentencing judge and specifically stated that any offence could potentially receive a conditional sentence as long as the statutory requirements were met.[84] Nor could starting points necessarily rule out a conditional sentence for a particular crime.[85] However, the decision also quoted approvingly from the Court's analysis in

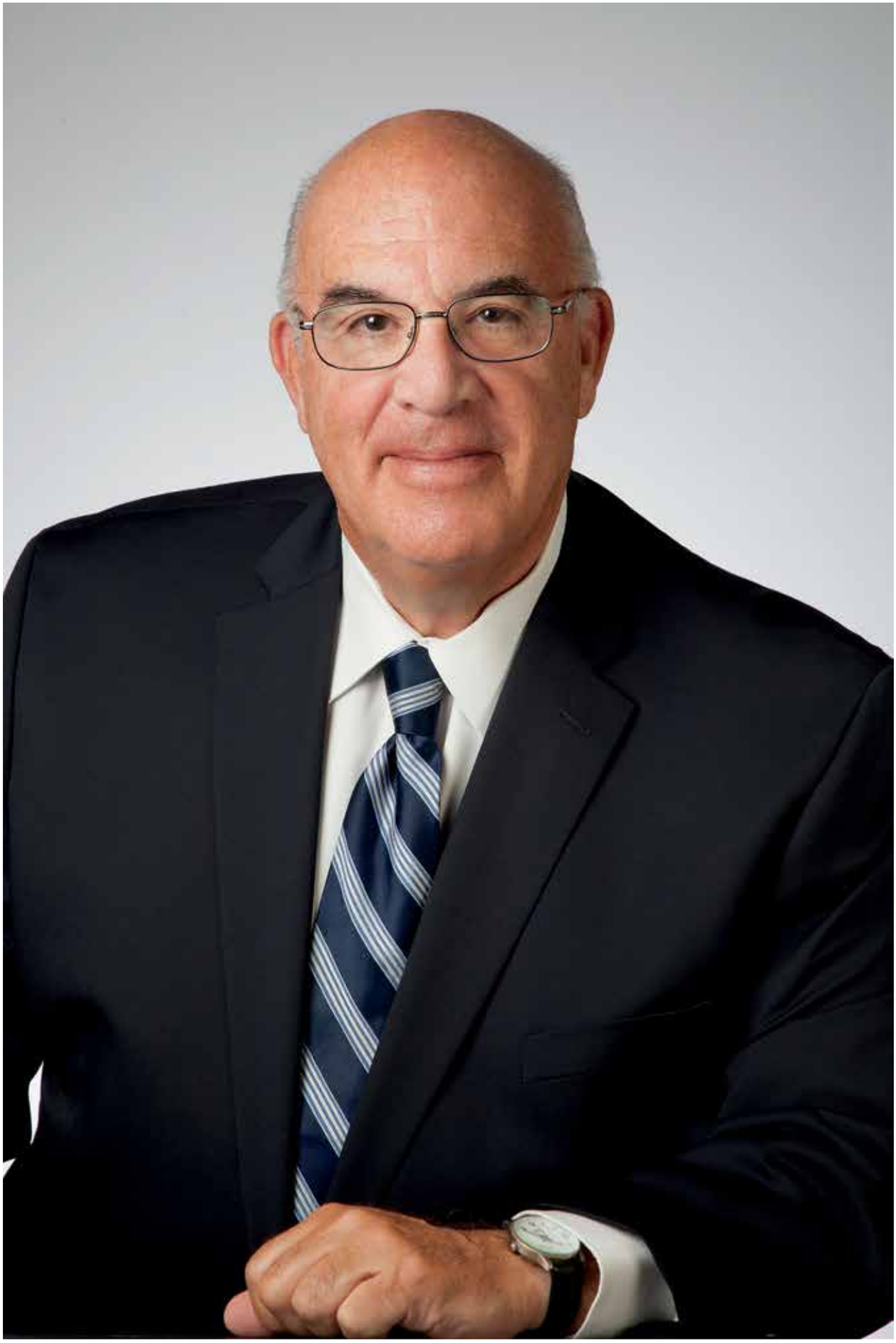
Brady, citing it several times, and again reiterating that starting points could be useful guidelines.[86]

In 2001, the Court, in *R v Rahime*,[87] noted that the SCC's decision in *Proulx* had again endorsed starting point sentencing. *Rahime* had a five-judge panel and was intended to put the issue to rest in Alberta. This was necessary because Justice Berger in *R v Beaudry*,[88] speaking only for himself, had come to the opposite conclusion.[89] Berger argued that Part 13 in the *Code* and the SCC's jurisprudence had changed the law so as to make the Court's starting point sentences outdated for conditional sentences. Thus, it was not necessary to use the Court's reconsideration process to find they were no longer binding. In taking this approach, Berger also questioned both the Court's practice of assigning different precedential weight to decisions of the Court depending on whether they had been circulated, and the degree to which any decision bound another panel of the Court.[90]

Another member of the panel, Justice Russell, while concurring in the result, firmly rejected Berger's analysis. She pointed out there were two distinct issues. The first was the doctrine of *stare decisis*, including the scope of its recognized exceptions. The second was the procedure that governed an appellate court's reconsideration of its past decisions. She stressed that the Court had the right to reconsider past precedent but this must be done in accordance with the Court's reconsideration procedure. Berger had interpreted an earlier decision by Kerans in *Barrett v Krebs*[91] as leaving members of the Court with discretion to depart from precedent in exceptional circumstances. Russell did not dispute this but said it missed the point. While Kerans had recognized, as did she, that the Court could depart from precedent, this should only be done in accordance with the Court's reconsideration procedure.

Despite the conclusive nature of *Rahime* as a circulated reserve decision of a five-judge panel of the Court, the debate on starting point sentences, conditional sentences, and precedent was not finished. Other sentencing panels on which Berger sat continued to make the same points as *Beaudry*.

Finally, in 2010, the Court again confirmed the law in *R v Arcand*, in another five-judge panel.[92] In *Arcand*, an aboriginal offender received a conditional sentence for sexual assault. The Crown appealed. The majority, consisting of Fraser, Watson and Côté, in a joint judgment, once again positively affirmed starting point sentences and restraint in applying conditional sentences, particularly with sexual crimes. After a thorough analysis of the history and principles of sentencing, the majority concluded that the 1996 sentencing



amendments, and subsequent amendments aimed at restricting use of conditional sentences, demonstrated that Parliament intended to provide a statutory framework for the exercise of discretion by trial judges. That discretion was constrained by the principles Parliament set out. The majority also reviewed the SCC's jurisprudence on starting points and concluded that the SCC had endorsed their utility more than once. It clearly interpreted the high court's pronouncements on starting points, guidelines, and appropriate deference as preserving Alberta's approach.

The majority was very concerned that if appeal courts failed to minimize unjustified discrepancies in sentencing, Parliament would move to curtail judicial discretion. The majority sought to come to grips with this concern in *Arcand* and at the same time, it reaffirmed the starting point approach to sentencing. *Arcand* also reconsidered four decisions of the Court that had more or less followed *Beaudry*. All were overruled. Not surprisingly, in addition to affirming the Court's position on starting points, *Arcand* also affirmed long-standing policy on circulation and reconsideration of precedent. The significance of the majority judgment also lies in its identifying certain sentencing truths in Canada today and why appeal courts should not abandon their central role in sentencing:[93]

> We must face up to five sentencing truths. First, it is notorious amongst judges, of whom there are now approximately 2,100 in this country at three court levels, that one of the most controversial subjects, both in theory and practical application, is sentencing. That takes us to the second truth. The proposition that if judges knew the facts of a given case, they would all agree, or substantially agree on the result, is simply not so. The third truth. Judges are not the only ones who know truths one and two, and thus judge shopping is alive and well in Canada – and fighting hard to stay that way. All lead inescapably to the fourth truth. Without reasonable uniformity of approach to sentencing amongst trial and appellate judges in Canada, many of the sentencing objectives and principles prescribed in the *Code* are not attainable. This makes the search for just sanctions at best a lottery, and at worst a myth. Pretending otherwise obscures the need for Canadian courts to do what Parliament has asked: minimize unjustified disparity in sentencing while maintaining flexibility. The final truth. If the courts do not act to vindicate the promises of the law, and public confidence diminishes, then Parliament will.[94]

While agreeing with the result, the minority of Hunt and O'Brien wrote separate reasons disagreeing with some points. The minority felt that the majority's interpretation of the SCC's jurisprudence itself pushed the bounds of *stare decisis*. Further, while agreeing with the majority that circulated

decisions generally had high precedential value, and memoranda much less, they also held that because all decisions were binding, it was quite possible for a memorandum, if it followed SCC decisions over the Court's own judgments, such as the "reconsideration cases" claimed to do, to be perfectly valid and henceforth binding.

The *Arcand* decision was fascinating on several levels. The majority view reaffirmed the Court's long-standing concern with maintaining public confidence in the criminal justice system, and the Chief Justice's concern with sexual violence. It identified concerns about the erosion in sentencing discretion that did come to pass. Parliament acted to constrain the exercise of a trial judge's discretion to the point where it is no longer possible for any conditional sentence to be given for any sexual assault, even if only a comparatively less serious one. The majority also reaffirmed that while the Court had the right to reconsider past precedent, that reconsideration must be done in accordance with the Court's reconsideration procedure unless the SCC had overruled that past precedent.

What is astonishing, however, was how the debate over precedent harkened back almost a century to earlier disagreements. For all the sophistication of the modern Alberta Court, it was still wrestling with precedent as had its forebears. Not coincidentally, some of Berger's positions in other cases mirror those of the Court's original great dissenter, Nicolas Beck. In *Beaudry*, Berger quoted with approval Beck's opinions of the importance of justice over the application of precedent.[95] But, as Russell had also pointed out in *Beaudry*, the real issue for this generation of appeal court judges was whether reversing past precedent was to be done by individual judges on an *ad hoc* basis or in accordance with the reconsideration procedure agreed on by the Court.

As the decades had passed, the ground under this issue had shifted significantly. No longer was the question whether the Court was bound by past precedent. As with other appeal courts in the modern era, the Court had long since reserved the right to reconsider its past precedent when warranted. The issue now was how this was to be done. Could individual appeal court judges reconsider past precedent on their own when exceptional circumstances existed and disregard reconsideration procedures agreed to by the Court? Or was this to be done in an orderly fashion in accordance with the Court's reconsideration procedure? The majority in *Arcand* answered both questions clearly. It was *no* to the first and *yes* to the second. In the majority's view, the orderly process the Court had developed to facilitate

reconsideration was crucial to maintaining public confidence in the administration of justice.

In late 2013, the SCC sent out a mixed signal with respect to the authority of its precedents both at and from its level as the "general appeal court" for Canada. The SCC in *Canada v Bedford*[96] seemingly acknowledged the importance of obedience to precedent both from the horizontal perspective (court consistency and predictability) and from the vertical perspective (authority of law and the hierarchy of courts).

Earlier, in *R v Henry*,[97] the SCC had adopted a more nuanced view of the difference between *ratio* and *obiter* in its own decisions. Then came *Canada v Craig*[98] and what seemed to be a step back to the traditional view that the SCC decisions were binding. However, in *Bedford*, the SCC added more variability. It indicated that where a decision it made did not expressly reach a specific issue of law or a crucial matter of fact upon which a point of law necessarily turned, any conclusion within that decision (which might otherwise be thought to have been resolved) could be considered still open for debate even in the trial courts.[99] On the other hand, trial courts cannot decline to obey merely because they disagree or think they know better.

Accordingly, if a common theme is discernible from *Henry*, *Craig*, and *Bedford*, it is that trial courts (and for that matter the appeal court itself which authored a decision) need to show self-discipline in the manner in which they address prior appellate authority if they intend to depart from it. If the court is to step past a prior decision of a higher (or in the case of the same appellate court, an equal court), it must not merely disagree but must articulate a valid and compelling reason for the change in direction.

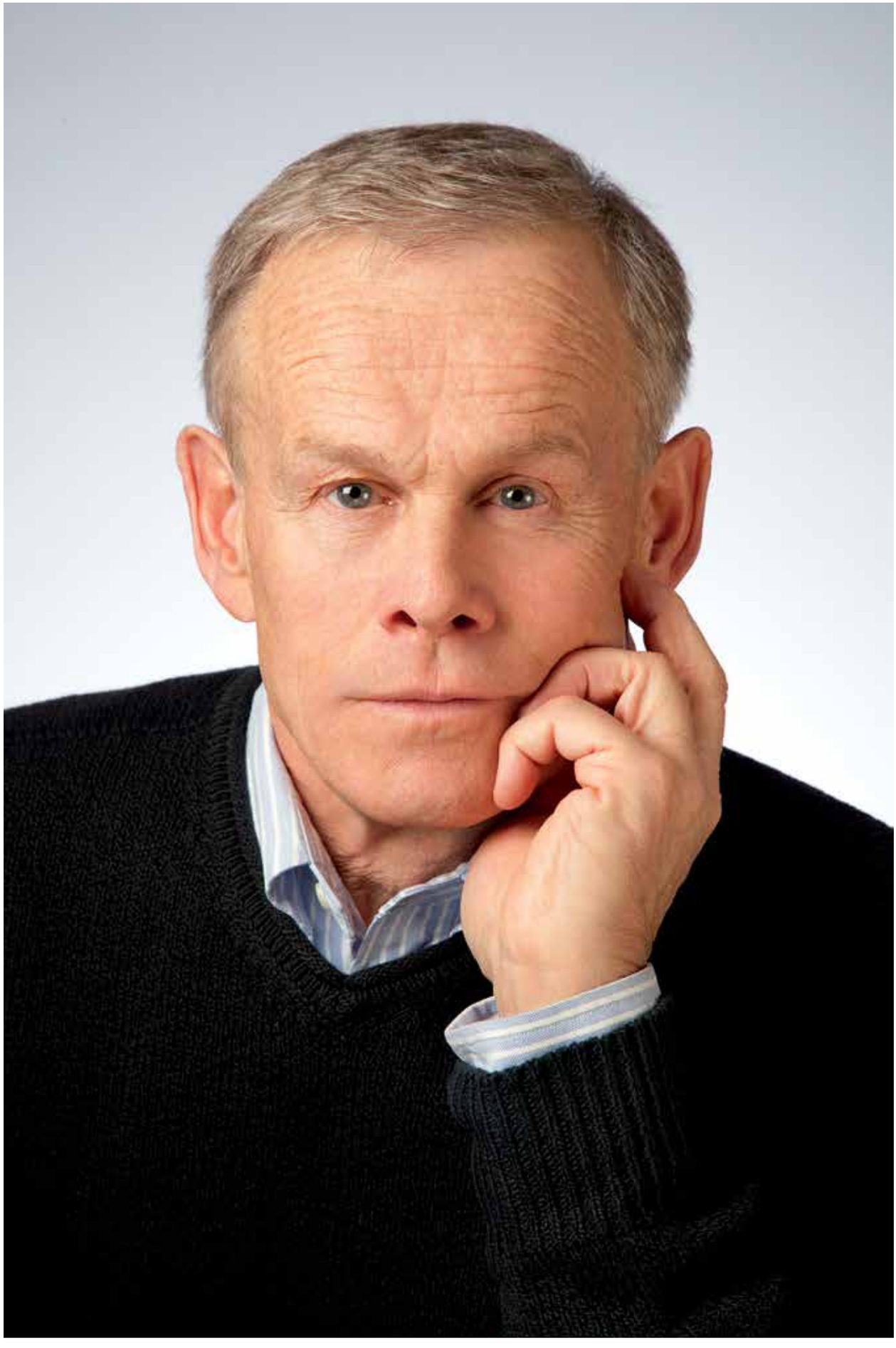
If fairness to the parties affected is to be maintained, and if legal chaos is to be avoided, it follows that the process should have two characteristics: (1) the court should rarely take such a step on its own motion, unless, presumably, a breach of the Constitution is flagrantly evident otherwise, in which case it should at least invite argument from the parties; and (2) the court should be able to identify a material and crucial change in the foundation of the earlier precedent which gives rise to a compelling need to embellish or revisit the precedent. Significantly, those characteristics are precisely the object of the Court's carefully developed reconsideration procedure, for reconsidering its own precedents, as discussed in *Arcand*.

Hutterian Brethren of Wilson Colony v Alberta: Licence to Change a Way of Life?

As the Court looks towards the future, one of the major challenges ahead will surely be the need to balance state security, on the one hand, and fundamental freedoms like religion, expression, and privacy, on the other. Understandably, governments are increasingly focused on the need to protect citizens from threats, both foreign and domestic. With the advent of new technology, governments are amassing ever increasing amounts of personal information in the quest to maintain safety and security. Yet courts will have to ensure that these security initiatives do not unjustifiably infringe on *Charter* rights. It is foreseeable that courts will increasingly be called on to review state collection of private information if Canada is to avoid becoming, as Justice La Forest of the SCC warned in *R v Duarte*, "a society...in which privacy no longer has any meaning."[100]

This theme of security versus rights arose in the context of freedom of religion in *Hutterian Brethren of Wilson Colony v Alberta*.[101] The case involved the Hutterites, a group of German speaking Christians who immigrated to Canada early in the twentieth century and have long occupied communal lands in Alberta. In 2003, Alberta amended a regulation of the *Traffic Safety Act* to require that everyone obtaining a driver's licence provide a photo. The Hutterites objected on religious grounds since they believe that willingly being photographed is a sin contrary to the Second Commandment. Since none of the alternatives that Alberta offered to accommodate the Hutterites precluded taking their image, the Hutterites refused. They challenged the law on the basis that it violated their freedom of religion and equality.

Alberta conceded the law infringed the group's religious freedom but argued that the mandatory photo requirement was justified under s. 1. It contended that requiring all drivers' licences to include a photo increased public safety and economic security by combating fraud, identity theft, and even terrorism. How? All drivers' licence photos were entered into a facial recognition database. And since a complete database better prevented applicants from acquiring a licence under a false name, Alberta argued that any exceptions would compromise the province's ability to confirm personal identity. The Hutterites responded that the government could still meet its objectives by granting a few exceptions, particularly since the thousands of Albertans without a driver's licence meant the database would not be complete in any event. The chambers judge sided with the Hutterites, concluding the law could not be justified under s. 1 as it failed the minimal impairment test.

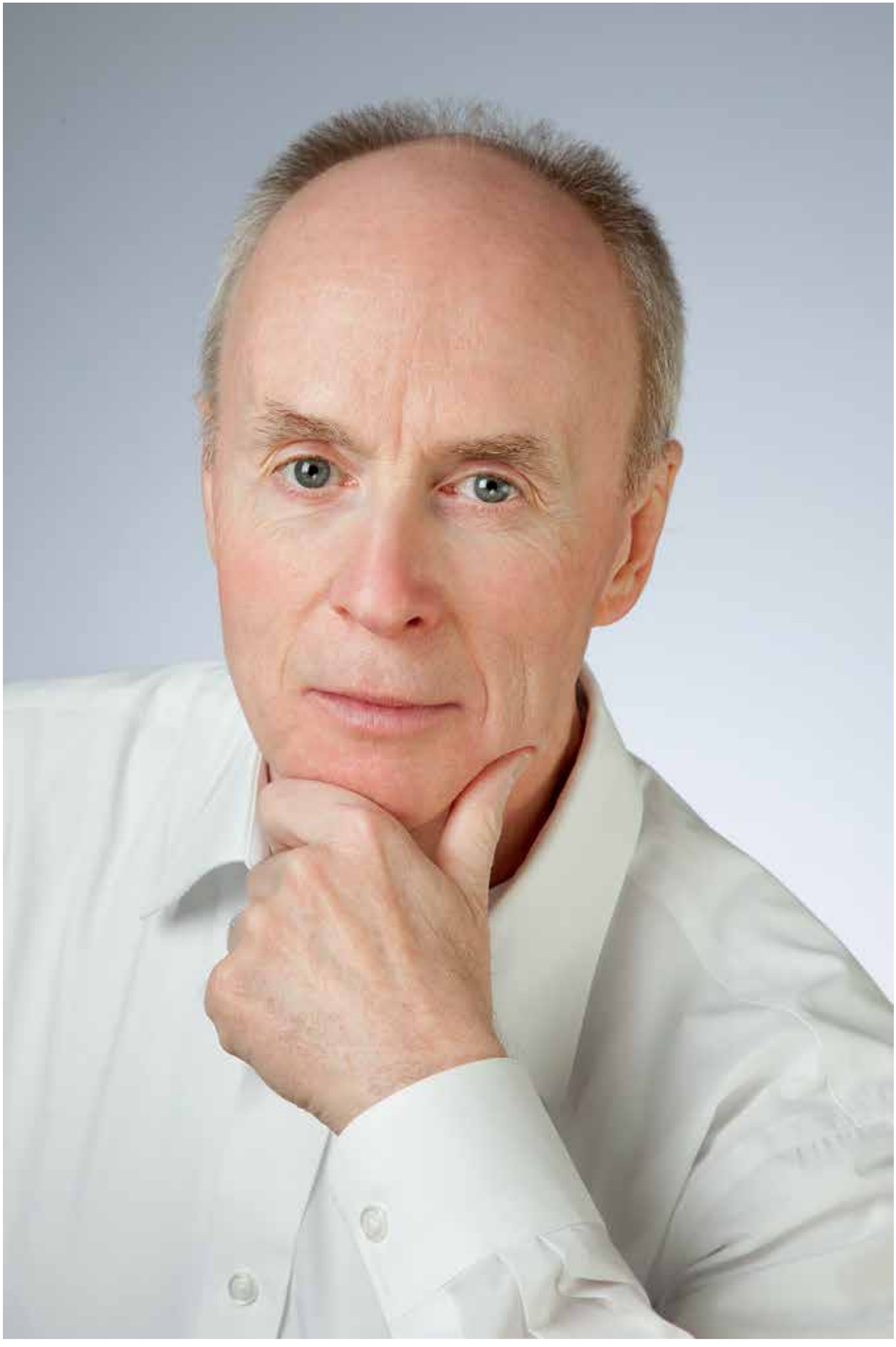


On appeal, the Court split. Conrad (with O'Brien concurring) wrote the majority judgment, concluding the law could not be justified under s. 1. Reading the law's objectives narrowly, she acknowledged that the mandatory photo requirement had pressing and substantial objectives. However, Conrad questioned whether the law was rationally connected to these objectives. In the end, she decided the matter on the question of minimal impairment, finding it to be lacking since the province could have continued to exempt the Hutterites with minimal risk. Further, in her view, because the law offered only slight protection against fraud, it was also disproportionate when compared to its significant effect on the Hutterites' way of life. This decision was a good example of Conrad's close scrutiny of attempts by the state to justify *Charter* breaches under s. 1.

Slatter dissented. In his view, the law was justified under s. 1. He focused primarily on the question of minimal impairment, which he interpreted as being satisfied once the government established it had reasonably accommodated the Hutterites. Slatter found that no other arrangement could properly satisfy the government's objective of protecting public safety:

> The government is entitled to pursue legitimate secular purposes, such as protecting other individuals from identity theft, and where any proposed accommodation would compromise the achievement of those secular purposes in a significant way, the accommodation will be undue. Here the government has shown that the issuance of licenses without photographs will introduce a significant vulnerability into the licensing system, beyond mere inconvenience, and that is sufficient hardship.[102]

Alberta appealed to the SCC where, in a narrow 4–3 decision, the appeal was allowed. The central issue was proportionality. McLachlin, writing for the majority, began by noting that courts should give governments a certain amount of leeway when crafting these kind of public programs. On the question of proportionality, she found that the salutary effects of the law outweighed its deleterious ones. While not obtaining a driver's licence would have some negative effect on the Hutterites' way of life, they would still be able to follow their religious convictions. The government's attempt to minimize the risk of fraud, conversely, was a goal of great potential benefit and not to be lightly sacrificed. The minority, like Conrad, were more skeptical about the actual benefits of the law. In their view, these claimed benefits were likely to be minimal, and thus outweighed by the serious effects on the Hutterites' ability to maintain their traditional way of life should they be unable to drive.



The split at the Court and the SCC revealed important disagreements about not only the scope of freedom of religion but also the proper level of deference the courts should accord to government policy in combatting social problems and how courts should judge the efficacy of these policies. Courts are increasingly being required to weigh the value of increased security against seemingly incommensurate values like religion. It has even been suggested that courts have reduced s. 1 considerations to a kind of cost/benefit analysis and one which the majority of the SCC misweighed in this case.[103] In any event, what is undisputed is that, as the future unfolds, the Court will be called on to consider how best to judge government claims about protecting security and how to balance those claims against the meaningful exercise of individual rights under the *Charter*.

Reece v City of Edmonton: The Elephant in the Room

Chief Justice Fraser is no stranger to dissent. With an instinct for the "big picture," her progressive, context-driven approach to jurisprudence has often produced views quite different from those of her colleagues. No appeal of her second decade brought this into sharper relief than *Reece v Edmonton (City)*.[104] The decision illustrated the continued interplay between formalism and contextualism, minimalism and expansiveness in jurisprudence, and, harkening back to the earliest days of the Court, the judge's role in making law. It was a demonstration of how judges can find themselves exploring extraordinary issues, often quite unexpectedly. It was the story of Lucy the elephant.

Lucy was an Asian elephant at the Edmonton Valley Zoo who became something of a cause célèbre. Animal welfare activists claimed Lucy's circumstances were severely undermining her health, citing her inadequate enclosure, the winter climate, and, elephants being highly social animals, her social isolation from other elephants. They wanted her moved to an elephant sanctuary in the United States. The zoo and city of Edmonton, while acknowledging the elephant's health issues, declined the request, asserting Lucy was receiving the standard of care required under relevant animal welfare legislation and the *Act* licensing the zoo. After failing to induce the Humane Society to charge the zoo with mistreating Lucy, two groups, People for the Ethical Treatment of Animals (PETA) and Zoocheck, and a private individual, Tove Reece, brought an application for a court declaration that the zoo was in violation of the *Animal Protection Act*. A chambers judge allowed the city's application to strike the action for abuse of process on grounds that a private party could not use a civil proceeding to enforce a "criminal" statute.

On appeal, Slatter and Costigan agreed that seeking a declaration was essentially a civil action to enforce "criminal" law. Slatter held that a litigant had to have a compelling private interest in the matter to do so, and even then, the different standard of proof between civil and criminal proceedings made such a declaration inappropriate in all but a small range of circumstances. He held that it was unlikely the plaintiffs had any standing to bring the action since they did not have an interest in Lucy outside their desire to force the authorities to act. There was also a process under the applicable legislation to complain about the treatment of animals, including enforcement measures, and this was the proper channel to use. In the majority opinion, the issue was a narrow legal one. Lucy's particular circumstances were not relevant or necessary to decide the matter. Further, in Slatter's view, granting the declaration was tantamount to the superior courts taking on the duty of reviewing operational decisions of government.[105]

Fraser, in her dissent, saw it quite differently. As she put it: "Lucy's case raises serious issues not only about how society treats sentient animals...but also about the right of the people in a democracy to ensure that the government itself is not above the law."[106] Fraser concluded the original application raised a number of important and novel issues of law, and it was vital they be explored at trial. Unlike her brethren, Fraser thought the central issue was whether the plaintiff had standing to bring litigation, and only then should the court consider whether there was an abuse of process – not the other way around.

But what really interested Fraser was the larger picture. Invoking purposive interpretation, Fraser explored the evolution of animal welfare and animal rights in the law, the constitutional theory of the rule of law, and the ability of citizens to hold government accountable for its actions or inactions through the courts. She also explored the particular circumstances surrounding Lucy. Fraser concluded that given the state of the evolution of animal rights, it was important that advocates be able to intervene in the interests of animals who could not speak for themselves. In her view, "courts should take a generous, not impoverished, approach to the grant of public interest standing for those attempting to enforce the restrictive animal rights that do exist."[107]

Perhaps more crucially, Fraser concluded that citizens should also have recourse to the courts in order to ensure that government itself was not above the law. In her judgment, Fraser, like her predecessor Harvey had done in 1918, spoke eloquently about the rule of law and the obligations of the courts to defend it:

> The greatest achievement through the centuries in the evolution of democratic governance has been constitutionalism and the rule of law. The rule *of* law is not rule *by* laws where citizens are bound to comply with the laws but government is not. Or where one level of government chooses not to enforce laws binding another. Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. And courts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion. Accordingly, the executive branch of government is not its own exclusive arbiter on whether it or its delegatee is acting within the limits of the law. The detrimental consequences of the executive branch of government defining for itself – and by itself – the scope of its lawful power have been revealed, often bloodily, in the tumult of history.[108]

Thus, where the duly constituted authorities were not intervening but arguably should have done so, there was a case to be made that the plaintiffs should have standing to bring an action. Like her colleagues, Fraser was deciding a narrow point, but in her view the larger context was relevant in determining how it should be resolved. Ultimately, the SCC did not grant leave to appeal, perhaps signifying approval of the majority decision, or perhaps not, as the high court does not give reasons on leave applications.

Fraser's judgment again demonstrated her rich contextual style of framing legal problems, as well as her view of the courts as an important counterbalance against the state and a forum for protecting rights. Perhaps unintentionally, her judgment resonated strongly with the libertarian outlook common in Alberta and often seen on the Court through its history, invoking freedom of action of citizens against the state.

It was also a demonstration of how, to this day, different judicial philosophies live on and co-exist. Slatter's decision was a model of incisive reasoning and minimalism, considering and deciding no more than necessary and mindful of intruding on what he viewed as legislative prerogatives, a classic "formalist" or "positivist" approach. Fraser invoked the broad social context and power of courts as legislative actors, and ones that should not be quick to characterize state action as simply operational decisions when those decisions possibly contravened the law itself. Her judgment was reminiscent of some of the decisions in the early days of the Court, where Harvey and Stuart crossed swords. Through all the intervening decades, the same tension between restraint and boldness informed the decisions of the Alberta appeal court.

As a postscript to this case, the Toronto City Council decided that all the elephants in the Toronto Zoo should be moved to a warmer climate. Recently, the Calgary City Council made a similar decision, leaving Lucy as the only elephant in a zoo in Canada – and still socially isolated. Whether she will be forced to live her life out in a cold climate or whether she will someday be permitted to enjoy the companionship of other elephants in one of the elephant sanctuaries in the United States remains to be seen.

Fraser's dissent in *Reece* might one day become a key moment in the evolution of animal rights in Canada – or forgotten like many others.[109] But Fraser's tenure will assuredly be viewed as a critically important and progressive period in the Court's history. Whether jurisprudence, judicial independence, judicial accountability, court governance, relationships with the executive branch, appellate processes and rules, the appellate role, judicial education or information technology, there was almost no aspect of the Court left untouched over her twenty-plus years as Chief Justice. Other appeal courts faced many of the same challenges and fought some of the same fights, but no other had likely seen quite so significant a transformation. This was certainly attributable to a dynamic and courageous personality

who led the Court and also to Fraser's colleagues who all brought their own often unique talents and perspectives to the Court of Appeal of Alberta.

CONCLUSION

In 2014, the Court will celebrate its centennial. It will be 100 years since the Appellate Division was first created as an appellate body dedicated to hearing appeals. Over its first century, sometimes the Court followed and reinforced consensus. And sometimes the Court showed the way to a new consensus and helped build it.

In its earlier years, the Court was cautious and traditional, but unafraid of using familiar principles of law to ensure the legality of the reach of the powerful in society. This was the traditional view of the rule of law, and it arguably remains the principal aim of the rule of law today. However, as society evolved, the delivery of fair and equal justice also became an important aim. It became increasingly apparent that barriers to the ability of some to enjoy equality under the law remained. Indeed, majority rule in a democracy always embodies a tension between that majority rule and equality for all.

A fair overview of the first century of the Alberta Court of Appeal must include the honest recognition that it was only with the advent of the *Charter* that the Court came to grips with the concept of fair and equal justice as a foundational element of the rule of law and judicial duty. The arrival of women judges can be said to have also played a role in this transition. In the end, the deepening of public respect for *Charter* values, society's recognition of the crucial need for fair hearings in all processes touched by law, and the turning of the judicial mind to the broader duties of the rule of law were all factors. These led to a heightened appreciation of the law making role of the judiciary in a constitutional democracy.

In 2021, the Court will reach another milestone, marking 100 years since the Appellate Division was made a permanent appellate court. If the outline of the Court in 2014 is clear, what the Court might be in 2021 is much less so. The date is close, but much can happen in seven years, especially in a time of accelerated change.

It could be a very different bench. The early wave of boomers will be largely gone and the next generation firmly ensconced. There might be a different chief justice, with a new leadership style, perhaps new priorities. But it is not impossible that Chief Justice Catherine Fraser might still be there. She would be turning seventy four, one year away from statutory retirement. If she stayed for that next centennial and retired the following year, her time in office would be thirty years. Only Horace Harvey will have been chief justice longer, but Fraser would have the longest continuous term in the Court's history, a record unlikely ever to be broken. However, as with others of her generation, Fraser may decide there are other challenges she would like to tackle and thus not stay to mandatory retirement. And yet, Fraser's contemporaries, considering her devotion to the rule of law and to building the Court into a durable institution, able to fulfill its duties truly independent of the other branches of government, doubt that she would leave without placing her successor in a position to finish what she started.

If Fraser remained, she would witness the realization of some cherished goals for the Court while also helping to fulfill some of its remaining needs. In Edmonton, the time is nigh for a new court facility. Whether it will replace or augment the existing law courts building is unknown, but it will likely involve a physical reordering of the courts, perhaps to different structures. In Calgary, meanwhile, the need for a proper facility for the Court has become pressing. It may well take the Court back to the original location of the city's high courts, where the old courthouse remains a landmark and connection to the past.

By 2021, the Court should have powerful information technology, fully integrated with the trial courts. Full

e-appeals with e-factums and e-filings will be unremarkable procedures, and many matters will never utilize even one piece of paper, as everything from original filings onward will be in an electronic format. This will not be an issue for judges steeped in virtual environments. Appeals will move smoothly through the system, with hardly any human intervention before hearings unless the matter moves into some form of dispute resolution. Some hearings may be held only in an e-courtroom. The Court will have a sophisticated grasp of incoming appeals, and the law making role of the Court will be that much enhanced. Further innovations will be based on personnel trained in the latest technology. Perhaps the self-represented will be streamed to different resource officers depending on their needs.

There may be innovations still to come, some very radical, some less so but perhaps more necessary. Further reform of the appointment process may occur, and appellate judges may find themselves vetted for the job in an unprecedented way to ensure they are a good fit. The Court could even split, on a permanent basis or rotating schedule, to deal with routine appeals and give even closer attention to law making on appeals that demand it. Perhaps it will become mandatory to engage in alternate dispute resolution before an appeal is set down to be heard. Other completely new ideas may come to the fore as the Court continues to strive for excellence.

With ever improving technology, the Court may break with the past practice of judges travelling city to city for appeals. Instead, they may participate in hearings with the latest in video-conferencing – as one judge said, perhaps as a lifelike holographic image. It is already feasible. An open court might take on more meaning when proceedings are available at any time over the Internet, and can be downloaded and reviewed at leisure. Perhaps the Court might find a good use for social media, and perhaps, in another break with tradition, it may proactively stimulate public interest in appeals with a public dimension, seeking to educate the layperson about the law and the Court's role.

As the Court's first century ends, this much is clear. The Court has been, and must continue to be, the bulwark of the rule of law. The rule of law is what keeps our society peaceful and free. The rule of law affirms that we all have rights and freedoms that the government must respect and that the law binds not only people but also government and all its agencies. It is the main reason why we can and are willing to put our money in the bank, wait at red lights, pay taxes, vote in elections, read news, express our opinions, let others look after and teach our children, offer help to or seek help from strangers, and know that what good we do in life will remain.

One important feature of the rule of law over the generations since 1914 has been the Court's role as the protector of individual rights and freedoms from encroachment by government. The greatly enhanced technological capacity of government and the increasing involvement of the regulatory state in all our lives must still be restrained within the boundaries of constitutional legitimacy. This will be an ongoing challenge for the Court. Another challenge relates to the protection of a person's privacy and security as balanced against the state's obligation to protect the security of its people at large. In our democratic society, the challenge to individual rights and freedoms may well emanate from those who quite sincerely wish to do good. The Court in future can expect to be the ultimate vehicle for people to respond to such challenges, since they will no doubt involve differences with government.

Institutionally, the Court must be able to continue to adjudicate disputes in the impartial, fair, and open manner that invigorates public confidence in the justice system. The role of the courts includes continuously resolving specific cases and controversies between parties, whether in relation to torts, contracts, property law, criminal law, employment law, or family law. There is also the application of regulatory law in numerous areas, such as road safety, environmental protection, licensing, and so on. In addition, there are laws with social purposes such as child welfare, human rights, and the

ongoing effort to address the needs and rights of aboriginal people. In all of these areas, the Court will find itself called upon to answer important questions. The Court must therefore be capable institutionally of handling these responsibilities effectively and credibly. It must be readily accessible to people seeking remedies at law. Without this capacity, the purposes of individual laws and the rule of law generally cannot be met and sustained. The courts recognize they must also act responsibly with public money, use it wisely, and be able to account for it. All these duties require independent judicial institutions that are not vulnerable to government pressure or direction but are nevertheless accountable for their actions.

When Alberta was a small province, the interaction between the judicial and executive branches was rather *ad hoc* and grounded on individual relationships. This approach must evolve as the province grows and the reach, power and centralization of government expands and tensions inevitably arise between the executive and judicial branches. The relationship between the branches of government, involving as it does a maturation process, will no doubt be formalized more.

As technology continues to advance dramatically, the delivery of justice by the courts will change as well. But other things will not change at all. The essential ingredients of the role of the Court of Appeal will remain. Alberta's appeal judges will still read factums and hear arguments. They will still deliberate and confer, and then render judgment, usually quickly but sometimes after much study, hard work, and even soul searching. The honour system that lies at the heart of the rule of law will still exist, and judges will have to uphold the rule of law and also prevent its abuse. And since the rule of law requires that the system be a human one, the application of the law to life will still be governed by the wisdom of judges, both individually and collectively. Judges of the Court will still have to define rights and duties, taking into account different interests and competing needs of individuals, society, and the state. They will still balance consistency and certainty with development of the law to meet society's needs, sometimes boldly but always carefully. They will still have to make difficult decisions profoundly affecting the lives of fellow citizens. Serving as an appellate judge will remain a calling, requiring extraordinary dedication and skill, even bravery. And if the past 100 years are a guide, Albertans will continue to be well served by the men and women of their Court of Appeal.

Endnotes

1 Richard Hooker, as quoted by Samuel Johnson in the Preface to his *English Dictionary* (1755).

2 Catherine Fraser, "Swearing-in Ceremony, The Honourable Mr. Justice Cliff O'Brien," unpublished speech, June 14, 2005.

3 O'Brien interview, Dec. 13, 2012.

4 Fraser, "Swearing-in Ceremony, Cliff O'Brien."

5 O'Brien interview, Dec. 13, 2012.

6 Martin interview, Nov. 30, 2012.

7 Ibid.

8 *Calgary Herald,* Sept. 24, 1995.

9 Fraser, "Swearing-in Ceremony, The Honourable Mr. Justice Jack Watson," unpublished speech, Nov. 1, 2006.

10 Ibid.

11 Slatter interview, Dec. 3, 2012.

12 Ibid.

13 Telephone conversation with Everett Bunnell, QC, Dec. 6, 2012.

14 Fraser, "Swearing-in Ceremony, The Honourable Madam Justice Patricia Rowbotham," unpublished speech, June 27, 2007.

15 Ibid.

16 McDonald interview, Dec. 14, 2012.

17 LASA, clipping file, Myra Bielby, *Edmonton Bar Association Bulletin*, n.d.

18 Bielby interview, Nov. 7, 2012.

19 Louis Knafla and Richard Klumpenhouwer, *Lords of the Western Bench* (Calgary: Legal Archives Society of Alberta, 1997), 19–20.

20 Bielby interview, Nov. 7, 2012.

21 Ibid.

22 There had been several instances where two former partners of the same firm had been on the bench at the same time, such as Porter and Allen, Smith and Clement, Prowse and McGillivray, and Fraser and Stratton, but never three, although O'Ferrall had left Bennett Jones shortly before his first judicial appointment.

23 Department of Justice, Judicial Appointment Announcement, March 4, 2011.

24 Court of Appeal, Operational Plan, 2002–2005, 2.

25 Court of Appeal, Operational Plan, 1999–2002, 4–5.

26 Court of Appeal, Operational Plan, 2009–2012, 14.

27 Province of Alberta, Order in Council 475/2009. There were only two appeal court positions left in the federal "pool" for appeal court appointments. Given similar pressures at that time in Manitoba, Fraser agreed for the Court that one position should go to Alberta and one to Manitoba, leaving the additional position that Alberta had established a need for to be filled when the federal government replenished the pool.

28 Alberta Department of Justice, *Annual Reports, 1996–1997*, 23.

29 Costigan interview, Dec. 6, 2012.

30 Court of Appeal, Notice to the Profession, July 19, 2000.

31 Court of Appeal, Operational Plan, 1996–1999, 18–20.

32 Fraser interview, Oct. 13, 2010.

33 Varty interview, Sept. 10, 2010.

34 Court of Appeal, Operational Plan, 1996–1999, 23. See also Operational Plan, 1999–2002, 17, and Operational Plan, 2002–2005, 29.

35 Russell interview, Aug. 5, 2012.

36 Paperny interview, Nov. 26, 2012; Ritter interview, Nov. 28, 2012. Paperny and a colleague were once turned back at Yellowknife because of a flight cancellation, but were able to hold sittings with the third judge present in Iqaluit with video-conferencing. Keith Ritter had a similar experience when a sudden snowstorm cancelled flights and rendered the roads to Calgary treacherous, but with another Edmonton judge he used the video-link and the scheduled hearing went ahead with just one judge present in Calgary.

37 Russell interview, Aug. 5, 2010.

38 The BC Court of Appeal began publishing its judgments online in 1996: Christopher Moore, *The British Columbia Court of Appeal: The First One Hundred Years* (Vancouver: UBC Press, 2010), 160.

39 Court of Appeal, Notice to the Profession, July 19, 2000.

40 Costigan interview, Dec. 6, 2010.

41 J.E. Côté, *Slow Appeals: Causes and Cures* (Edmonton: J.E. Côté, 2006) 38.

42 Court of Appeal, Operational Plan, 1999–2002, 35.

43 Court of Appeal, Notice to Profession, June 30, 2004 and May 1, 2007.

44 Fruman interview, Sept. 21, 2010. Fruman frequently attended conferences and was aware of other courts' efforts. More latterly, the courts in BC and Saskatchewan have started accepting e-appeals but not routinely.

45 Varty interview, Sept. 10, 2010.

46 Laurel Watson interview, Sept. 1, 2010. One of the longest-serving court counsel, Watson stated that she is still surprised by how few lawyers use laptops in hearings.

47 Court of Appeal, Operational Plan, 1999–2002, 15.

48 RSA 2000 c. C-30, ss. 13–14; RSA 2000, c. 16 (Supp.), s. 71.

49 McDevitt interview, Dec. 12, 2012. Bobbi-Jo McDevitt and Cara Schlenker were the first CMOs in Edmonton and Calgary, respectively.

50 McDevitt interview, Dec. 12, 2012.

51 Calgary, which was more experimental with list management under Kerans and Hetherington, for many years delegated speaking to the list to the deputy registrar, Jacqueline Ford.

52 Stushnoff interview, Nov. 5, 2012.

53 Court of Appeal, Notice to Profession, May 1, 2000 and Oct. 15, 2001.

54 Costigan interview, Dec. 6, 2012.

55 LASA, fond 79, series 2, box 10, file 233(a) 1988, memo, Laycraft to court, December 8, 1988. Alberta was the only jurisdiction not to limit appeals of interlocutory motions in some way. The Court did institute a leave policy in the nineties, with a single judge in chambers, which then raised interesting questions about whether there should be leave to appeal from the decision of the appellate judge in chambers to a panel.

56 Costigan interview, Dec. 6, 2012. Part of this drop-off, at least in family appeals, may have occurred because the results of appeals interlocutory decisions at the Court of Appeal were no more final than the Queen's Bench orders underneath them. The reality in family law cases is that many orders from Queen's Bench continue to be "interim without prejudice" or "interim interim" orders, all of which militate against appeals to the Court of Appeal.

57 LASA, fond 79, series 1, box 8, file 233a, Council of Court of Appeal, several memos discuss setting new procedures for the lists.

58 *R v Pennington* (1981), 17 Alta LR (2d) 173, at paras. 174, 178.

59 Trevor Farrow et al., *Addressing the Needs of Self-represented Litigants in the Canadian Justice System* (Toronto: Association of Canadian Court Administrators, 2012), 23.

60 See *Meads v Meads*, 2012 ABQB 571, 543 AR 215, a 175-page judgment wherein Associate Chief Justice J.D. Rooke of Alberta Court of Queen's Bench extensively catalogues and analyses vexatious litigants. See also J.E. Côté, *Well-Run Appeals* (Ottawa: Canadian Judicial Council, 2006), 117–120.

61 *Meads v Meads*, at para. 260.

62 Department of the Alberta Attorney General, Annual Report, 1991–1992; Court of Appeal, 12 Year Comparison. The Court

heard 629 criminal appeals to 312 civil appeals for 1991–92, compared to 256 criminal to 316 civil in 2001.

63 Court of Appeal, 12 Year Comparison, 2000–2011, unpublished statistics. While the total number of judgments issued declined, judges reported no reduction in workload because cases in that period became more complex.

64 The Court does not break down civil appeals by type for reporting. The above estimates are gleaned from opinions of several judges.

65 See, for example, *Nova v Guelph Engineering* (1989), 100 AR 241, 70 Alta LR (2d) 97), and *Jackson* v *Trimac* (1994), 155 AR 42, [1994] 8 WWR 237. These two pieces of litigation are often mentioned in this context.

66 Court of Appeal, Operational Plan, 2009–2012, 12.

67 Slatter interview, Dec. 3, 2012. For example, municipal bylaw appeals can require an extensive analysis of constitutional law.

68 Picard interview, Nov. 22, 2010.

69 Roger P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), 28.

70 Hunt interview, July 30, 2010.

71 Court of Appeal, Notice to Profession, March 19, 2001.

72 Kerans, *Standards of Review*.

73 LASA fond 79, series 2, box 33, file 233, Court of Appeal Meetings, memo, McFadyen to Fraser, Dec. 14, 1995.

74 *Pushpanathan v Canada (Minister and Citizenship and Immigration)*, [1998] 1 SCR 982; *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

75 And British Columbia as well: Moore, in *The British Columbia Court of Appeal*, 206–12, discusses a BC case where the panel split on the crucial issue of when an appellate court should upset a finding of fact made by a trial judge.

76 Slatter interview, Dec. 3, 2012. For a discussion on this idea, see also Daniel Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" *Manitoba Law Journal* 32, no. 1 (2006); Paul J. Pape and John J. Adair, "Unreasonable Review: The Losing Party and the Palpable and Overriding Error Standard," *Advocates Society Journal* 27, no. 2 (2008).

77 Ritter interview, Nov. 28, 2012.

78 O'Leary interview, Feb. 11, 2010.

79 *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras. 34, 45, [2008] 1 SCR 190.

80 [1997] 1 SCR 948, 145 DLR (4th) 577.

81 [1999] 2 SCR 290, 173 DLR (4th) 66.

82 (1998) 209 AR 321, 121 CCC (3d) 504.

83 2000 SCC 5, [2000] 1 SCR 61.

84 Ibid., at paras 79–81.

85 Ibid., at para. 87.

86 Ibid., at para. 86.

87 2001 ABCA 203, 286 AR 377. Fraser called a five-judge panel to consider a consolidation of six Crown appeals of conditional sentences for cocaine trafficking.

88 2000 ABCA 243, 271 AR 219.

89 Ibid., at paras 61–80.

90 Berger was, and continues to be, very critical of the "labelling" of judgments with assignation of different precedential weight.

91 (1995), 174 AR 59, [1995] 10 WWR 640.

92 2010 ABCA 363, 499 AR 1.

93 The majority judgment led Christie Blatchford to refer to this judgment from "the league-leading Alberta Court of Appeal, whose best minds are merely light-years ahead of the rest of the country in their treatment of sexual assault (not to mention in their use of plain and muscular English).... This case, called *R v Arcand*, provides in the majority decision, written by Chief Justice Fraser and Justices Jean Côté and Jack Watson, *the* most intelligent analyses on starting points, conditional sentences, sexual assault – and a whole hell of a lot of other things....My favourite part is the majority's frank talk on what they call five sentencing truths." ("Manitoba judge is dead wrong in rape case," *Globe and Mail*, 24 Feb. 2011.)

94 *R. v. Arcand*, at para. 8.

95 *R. v. Beaudry*, at paras. 25–27.

96 2013 SCC 72.

97 2005 SCC 76, at para. 57, [2005] 3 SCR 609.

98 2012 SCC 43, at para. 21, [2012] 2 SCR 489.

99 In *Bedford*, the SCC stated at para. 42: "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."

100 [1990] 1 SCR 30 at 44.

101 2007 ABCA 160, 417 AR 68, rev'd 2009 SCC 37, [2009] 2 SCR 567.

102 2007 ABCA 160, at para. 108.

103 Howard Kislowicz, Richard Haigh, and Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom," *Alberta Law Review* 48, no. 3 (2011): 679–714.

104 2011 ABCA 238, 513 AR 199.

105 Ibid., at para. 35.

106 Ibid., at para. 39.

107 Ibid., at para. 90.

108 Ibid., at para. 159.

109 There are academics in this field who view Fraser's judgment as significant and potentially transformative. See, e.g.,. Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011), 120: "The thorough and strenuous dissent of the chief justice could be the most important development for animals in Canadian jurisprudence to date.... While written in dissent, its premises are sound and its reasoning is compelling. It could be the source of important legal developments to come." See also Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm," *Alberta Law Review* 50, no. 4 (2013): 783–814.

THOUGHTS FOR THE FUTURE

As we celebrate the Alberta Court of Appeal's centennial, this is a time for reflection. Over the past 100 years, the Court has helped shape the province that Alberta is today. At times, it has been characterized as cautious and conservative; at others, as creative and courageous. Sometimes it has had to make unpopular decisions. But at all times, the members of the Court have acted in fidelity to the rule of law and the long-term interests of the province and its people. As the Court's second century begins, I have no doubt that this Court and its members will continue to faithfully protect the values and principles that are the foundations of our free, peaceful and democratic society.

Democracy cannot triumph over tyranny without the rule of law and an independent judiciary. Indeed, without both, there can be no democracy. The rule of law means that no one is above the law including the government. The rule of law is our common consensus, our acquired wisdom, our belief in shared values and our willingness to support and respect one another. Both its strength and its fragility arise from the fact that the rule of law is a belief and an honour system.

Nothing can be built, maintained, improved, used, saved or even spoken about without the shield and voice of the rule of law. It makes everything else possible. However, the rule of law is itself contingent on an independent judiciary able to fulfill its constitutional duty as the third branch of government.

Under the rule of law, citizens have the right to come to an independent court to enforce the law as against government. So too does government against those who might object to its actions. Independent judges have the right to review government actions to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. And independent judges have the right to review citizens' conduct under the law and, where warranted, to declare the conduct offends the law. These rights are the very assertion of democratic governance.

We are fortunate to live in a country where government recognizes how critical the separation of powers is to our democratic society and in a province in which the Alberta government has provided the resources and funding necessary through the years to support the courts.

The legislative and executive branches of government understand and accept that they will not always be able to do what they want. Sometimes, what they want may not conform to the paramount law, Canada's Constitution. As a general principle, it is the courts that make the final call on the law that binds us all. Government is committed to respecting these decisions in accordance with the rule of law. Otherwise, none of us have anywhere to turn. Most important, it understands that if the public does not have trust and confidence in an independent judiciary, people will not accede to the rule of law. And without the rule of law, all is lost.

There is a legal expression "The law is always speaking." It invites a first question, "To whom is it speaking?" The answer is brief: "Everybody." And that means everybody now and everybody to come. It also invites a second question, "What is it speaking about?" The answer: "Everything." The law constitutes the threads of orderliness in the fabric of our society. As the essential

CHIEF JUSTICE CATHERINE FRASER, PORTRAIT BY NOEL ZINGER

underpinning of our ability to live together, the law touches everything and has always done so.

Citizens may not always recognize what an independent judiciary means to them – until, that is, they run into a problem with, for example, an employer, neighbour, partner, family member, city, police, or government. There are many failed and failing states around the world. What they all share is no rule of law and no independent judiciary. They may have constitutions promising both. But the people in those countries know the promises amount to little, or worse yet, nothing because nothing can be done to enforce them. That is not so in Canada. When there is a conflict to be resolved or constitutional rights to be enforced, we have access to independent courts. However, as with so many things in life, an independent judiciary is something that may not be appreciated until it is gone.

Defending the rule of law is a duty and challenge for the judiciary. We cannot fail. This requires credible knowledge and understanding of both the law and people. If the judiciary is to maintain its integral role in the delivery of justice, we ourselves must meet justice's highest standard. That means an impartial, informed, open-minded judiciary, respectful of change when warranted and resistant to change when capricious. Our citizens expect and deserve no less.

To those who will be called to serve as judges in the future, the law will also be speaking to you, and in your role, you will be expected to understand it and to explain what it means to the people of your time. In so doing, you will be adjudicators, teachers, and administrators of justice. How you keep yourself informed, how you behave as people, and how you carry out your duty as judges are symbolic representations not only of the authority of the law but also of the crucial value of the rule of law. That is why judicial education, particularly on social issues, is so critical. Without knowledge about the real problems of real people and the world around us, it is difficult to understand how one can judge it fairly. This education must continue to be a priority.

You may question what we have said and done, just as we ourselves have sometimes questioned what our predecessors did. But there is one thing that will always endure. That is your role as members of an independent judiciary sworn to protect constitutional rights and adjudicate impartially.

You hold your positions in trust for future generations. The burden you have taken on is foundational. You will need not just intellect and the ability to communicate. You will need courage and fortitude to maintain the rule of law. This ideal is not invulnerable. It is always under threat.

We, your predecessors, inherited the blessings of democracy, freedom, human rights, and the power to maintain these things. This inheritance came at great cost. We did our best to improve the delivery of fair and equal justice and to ensure that all processes of law and government were done fairly and openly. You will do the same. But watch closely. All these blessings and the rule of law can be unravelled the same way they were originally knitted together. The subtle movement of the best of intentions may undermine the rule of law more than the forward rolling of weaponry. We do not need clashes of civilizations, or world wars, to let slip our grasp on the rule of law.

Be vigilant. Be devoted. Be fearless. Remember what you have been entrusted to do. No one else can do it but you.

Catherine A. Fraser
Chief Justice of Alberta

GLOSSARY OF ACRONYMS AND LEGAL TERMS

ADR: Alternative Dispute Resolution.

Appeal book: Materials containing the decision appealed from as well as any relevant pleadings, documents, and transcripts.

Appellate Division: The appeal court of the Supreme Court of Alberta, and the original designation for what is now the Court of Appeal of Alberta.

Black letter: In its more technical meaning, "black letter law" simply refers to the current state of the law in a given jurisdiction. However, the term is often used more informally to denote a manner of legal interpretation whereby a word or phrase is interpreted without reference to any sources outside of the text itself (e.g., purpose, context, morality, policy, history, etc.).

BNA Act: *British North America Act, 1867.* Statute of the Imperial Parliament that established the Dominion of Canada as a confederation of provinces and defined the respective powers and areas of legislative responsibility of the federal government and the provincial governments.

Certiorari: A remedy designed to bring a decision of a lower court or tribunal to a higher court for review.

Chambers: This refers at once to a judge's private office as well as to a hearing before a single judge (usually dealing with procedure or an issue preliminary to a trial or appeal).

CMO: Case Management Officer.

Colourable: According to the constitutional doctrine of "colourability," a law is colourable where it is in reality designed to address a different issue from the one stated in that law.

Conveyancing: The act of performing the functions necessary to transfer the title to real property (i.e., land and attached structures) from one person or group to another.

Court: Court of Appeal of Alberta.

CPR: Canadian Pacific Railway.

District Court: A trial court like that of the Trial Division of the Supreme Court, the District Court of Alberta originally possessed a narrower jurisdiction and tended to hear less serious matters. It was intended in part to provide better access to the courts in rural areas of Alberta. The District Court was amalgamated in 1978 with the Trial Division to form the Court of Queen's Bench.

Double aspect: A constitutional doctrine which provides that certain issues have a "double aspect" such that they can be legislated upon by both the federal and provincial governments. In other words, one aspect of a law is properly within the jurisdiction of the federal government, whereas another aspect of the law is properly within the jurisdiction of provincial governments.

Due process: The procedural guarantees necessary to ensure a fair trial or hearing (e.g., the right to be heard and present evidence). The extent of these guarantees will vary according to the nature of the proceeding (i.e., criminal or administrative) and the seriousness of the legal interests at stake. The term is usually associated with procedural rights owed to an accused in a criminal trial.

En banc: Meaning "full bench," this is where all of the judges on a particular court sit on a given matter and participate in the decision.

Ex officio: A status obtained by virtue of authority implied by one's office rather than by appointment. For example, judges of the Court of Queen's Bench are *ex officio* members of the Court of Appeal even though they are not appointed to the Court of Appeal.

Factum: Written appeal material setting out relevant facts as well as a party's legal arguments.

Habeas corpus: A court petition ordering that a person who is being detained be brought before a judge to determine the lawfulness of the detention. The purpose is not to determine guilt or innocence but only to release those whose detention or imprisonment is unlawful.

HBC: Hudson's Bay Company.

JDR: Judicial Dispute Resolution.

Judicial Committee of the Privy Council: The final appeals court for British colonies. A litigant in Canada could appeal to this British court from the SCC until 1949.

Mens rea: Meaning "guilty mind," this is the mental element of a crime. This involves proving that the accused either intended to commit the prohibited act or had the requisite knowledge or foresight as to a particular state of affairs. It is a "fault" requirement because it conveys that the offender not only committed a prohibited act but also that he or she was responsible for that act.

MIS: Management Information System.

NWMP: Northwest Mounted Police.

NWT: Northwest Territories.

Order in Council: A rule passed by a Governor General or a Lieutenant-Governor on the advice of Cabinet.

Paramountcy: A constitutional doctrine which provides that where a federal law and a provincial law are in conflict, the federal law prevails and the provincial law ceases to operate to the extent of the inconsistency.

POGG power: A residual power of the federal government under s. 91 of the *BNA Act* to make laws for the "peace, order, and good government" of Canada in areas not falling under provincial jurisdiction.

Pro forma: Meaning "for the sake of form," it often implies doing something for the sake of facilitating future action. In the

context of judgments, a *pro forma* judgment is one made solely to allow for a further proceedings or appeal.

Puisne: To be of lower rank, as opposed to the Chief Justice. On a given court, all judges apart from the Chief Justice are "puisne."

Purposive interpretation: An interpretation of a legal term or idea which relies upon the purpose behind the legislation rather than simply the intent of the legislator.

Quo warranto: A proceeding whereby a defendant is asked to show by what authority he or she exercises their office. It is designed to prevent the continued exercise of powers without lawful authority.

Reference: A request by a government for an advisory legal opinion from a court. In Canada, only the federal government can refer a question to the SCC; provincial references are answered by the province's court of appeal. Reference questions tend to be constitutional in nature, although there are exceptions. A reference decision is not technically binding in the same way as a normal judicial decision, although in practice no distinction is observed.

SCC: Supreme Court of Canada.

Seriatim: A form of judgment where each member of the panel writes a separate opinion, rather than a single opinion written on behalf of the court as a whole.

Stare decisis: A doctrine of legal precedent. Once a legal principle is established in relation to a given set of facts, courts in the same jurisdiction will continue to follow that principle in future cases where the facts are the same in all relevant respects. Based on a policy of predictability and certainty, courts are "bound" by a legal precedent in that they must follow it even if they consider the law to be incorrect. The rule applies only to courts of the same or lower rank, as a higher court in the jurisdiction is free not to follow or overturn the legal principle.

Supreme Court: Supreme Court of Alberta.

Territorial Court: Supreme Court of the Northwest Territories.

Torrens land registry: A system of land registration originated in Australia by Sir Robert Torrens, whereby the ownership of land is tracked by and judged according to a certificate of title. Proof of land ownership is determined by who is registered on title rather than the accuracy of a deed to land. Accordingly, a prospective purchaser is able to rely on the certificate of title to determine what interests attach to the land rather than having to do a historical search of the title. In Canada, some form of the Torrens system exists in the western provinces.

Tort: A civil wrong remedied by monetary damages. Examples include: negligence, trespass, defamation, false imprisonment, and nuisance. Unlike in contract law, tort obligations do not arise as a result of consent.

Trial Division: The lower trial court of the Alberta Supreme Court. The Trial Division was amalgamated in 1978 with the District Court to form the Court of Queen's Bench.

Ultra vires: Meaning to act outside of one's authority or power. A law or bylaw is *ultra vires* where the body having passed the law did not have the legal authority to do so.

Voir dire: A separate hearing undertaken during a trial to determine whether a piece of evidence should be considered admissible.

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