

THE SUPERIOR COURTS OF ALBERTA

HONOURABLE S. BRUCE SMITH, Q.C., LL.D.*

Mr. Justice H. S. Patterson has written an article about the District Court of Southern Alberta now included in the Court of Queen's Bench of Alberta; and so I have decided to exclude from my field the former District Courts of Alberta. It is therefore limited to the predecessors of the Court of Appeal of Alberta and the Court of Queen's Bench of Alberta, namely the Appellate Division and the Trial Division of the Supreme Court of Alberta, and to the Supreme Court of the Northwest Territories.

And I have imposed three limitations upon myself: one is that this is in no sense a collection of curricula vitae; the other is that I shall rely on my own memory and not formal records with the consequence that I shall deal with those personalities of whom I have a clear memory. The third one is that I shall chiefly limit myself to those members of the judiciary who have died or retired. The first part of that limitation is consistent with the practice of some biographers and the reason for the second is that it might be considered somewhat invidious for me to describe the personal qualities of present members of the bench, many of whom were amongst my associate judges. I have taken the liberty of making a few exceptions to the latter limitation. In the case of those individuals not referred to by me the omissions I hope will not be considered as in any sense a derogation from their abilities or characters.

I shall commence by dealing with some members of the Supreme Court of Alberta as it was when I commenced to have some relationship with the Courts in May 1918 as a student at law articulated to Frank Ford, K.C., D.C.L., later a justice of the Trial Division and later again a justice of the Appellate Division of Alberta. A. L. Sifton, Chief Justice until 1910, had come to Alberta from the Supreme Court of the Northwest Territories. I never saw him on the Bench but the Law Reports disclose that he was the writer of terse but very clear reasons for judgment and he was reputed to have instilled terror into the hearts of persons engaged in the occupation of horse stealing. He is said to have been an able administrator as evidenced by his record as Premier of Alberta and subsequently Minister of Justice.

Chief Justice Sifton was succeeded by Honourable Horace Harvey, a brilliant lawyer who not only acted like a Chief Justice but indeed looked like one with pure white hair and a fresh and ruddy complexion. He had a long and very distinguished career as Chairman of the Board of Governors of the University of Alberta and as Chief Justice, which office he continued to occupy for 39 years, with one short and rather extraordinary interruption. He managed the Appellate Division with dispatch and ability; he had a fantastic memory. I have seen him leave the Bench to obtain a very old note book with reference to a case having a bearing on a point

* Former Chairman of the Board of Transport Commissioners of Canada (1958), Justice of the Trial Division of the Supreme Court of Alberta (1959-1960), Justice of Appeal (1960-1961), Chief Justice of Alberta and Chief Justice of the Court of Appeal for the Northwest Territories (1961-1974).

under consideration by the Appellate Division. His reasons for judgment were, I think, invariably clear and well written, and promptly delivered. I shall mention later some of the Supreme Court Judges who, in my opinion, were able trial judges, but my former senior and partner H. H. Parlee, Q.C., later a justice of appeal, told me that Horace Harvey was the ablest trial judge he had appeared before. During the first world war he dissented in the case of *Re Lewis*¹ relating to Military Service Orders-in-Council and his conclusion was upheld by the Supreme Court of Canada in *Re Gray*². For an interesting and detailed account of these cases see an ably written article by Dean Wilbur F. Bowker, Q.C., B.A., LL.B., LL.M., relating to Chief Justice Harvey.³ As Dean Bowker states, the dissenting judgment of Harvey C.J. on the validity of the Orders-in-Council was vindicated.⁴

In 1921, just before a Provincial election, the Legislature of Alberta enacted The Judicature Act, which disestablished the Supreme Court of Alberta and set up a new Supreme Court of Alberta, made up of two divisions, the Appellate Division and the Trial Division. There were established the Chief Justiceship of Alberta and the position of Chief Justice of the Trial Division. Fresh appointments had to be made to the new Court; Horace Harvey, who had been Chief Justice of Alberta, was appointed Chief Justice of the Trial Division and David Lynch Scott was appointed Chief Justice of Alberta. Litigation between the two arose and it was decided by the Judicial Committee of the Privy Council that Scott's appointment was valid.⁵ David Lynch Scott occupied the position until his death in 1924 when Horace Harvey was reappointed Chief Justice of Alberta. Scott, a handsome older man, an able judge and fine character, was indeed a satisfactory trial judge. And Horace Harvey continued to occupy the position of Chief Justice of Alberta until his death at 83 in 1949.

I have already mentioned Frank Ford K.C. to whom I was articled for a period of three years, a privilege I shall never forget. He was a meticulous counsel, steeped in law, which was not only his occupation and profession but his hobby. He named his elder son, Armour Ford, Q.C., after John Douglas Armour, the great Ontario Chief Justice, and his younger son after the famous D'Alton McCarthy with whom he was associated as a young lawyer. By long experience and deep study he had acquired the ability to reason out many legal questions without reference to precise cases or text books, a type of ability which few lawyers ever acquire in the complicated and difficult field of the law. The area of law in which he was particularly interested was Conflict of Laws upon which he lectured to law students for many years; my recollection is that he lectured without notes and I believe without special preparation — in the cases he used, he knew both facts and law.

And now may I turn to some members of the Supreme Court of Alberta whom I, as a young law student, regarded as legal giants and for whom I still have a very high degree of respect. I well recall Honourable W. L.

1. 41 D.L.R. 1.

2. 57 S.C.R. 150.

3. 32 *Canadian Bar Review* 933.

4. *Id* at 937.

5. [1923] 3 W.W.R. 929.

Walsh, later Lieutenant Governor of Alberta, Honourable Charles A. Stuart, Honourable N. D. Beck, Honourable W. C. Ives, Honourable M. S. McCarthy, Honourable A. F. Ewing and Honourable Thomas M. Tweedie. Walsh and Ewing were two of the three outstanding trial judges remaining in my memory; the third was honourable Hugh John Macdonald, later a brother judge with me on the Appellate Division. All three were quiet judges, who said very little unless called upon to decide on the admissibility of evidence, courteous and polite to counsel, patient; prompt in the delivery of judgments and good lawyers—somewhat of a recital of the qualities of good trial judges. Charles A. Stuart was a philosopher on the bench, and a very intelligent judge, the writer of many good reasons for judgment recorded in the Law Reports. N. D. Beck could perhaps be correctly described as a precursor of Lord Denning, a liberal minded judge who believed in allowing every person accused of crime having ample, perhaps sometimes more than ample, opportunity to make his case in defence. As time passes more and more of his judgments have stood up to the 'test of time'. W. C. Ives was a clear headed judge with the knack of conveying his meaning with a paucity of words, and often hitting the legal point very clearly and accurately. McCarthy was the inheritor of a name famous in legal circles of Canada—a rather brilliant lawyer.

But I cannot pass over the earlier part of this century without mentioning Honourable Tom Tweedie, a man large in mind, heart and body, an able lawyer and a graduate of Harvard Law School. He was a colourful character. In the hungry thirties there occurred in Calgary a series of service station holdups. The story is told of a letter said to have been written by a resident of one of Alberta's penitentiaries in which a member of the criminal community in the United States was warned to stay out of Alberta because of the activities of a very stout Alberta judge, Judge Tweedie, (described in non-complimentary terms with reference to his parentage) who was said to be dispatching hold-up artists to long terms of imprisonment, sometimes with lashes. Hold-ups in Calgary became less frequent. Judge Tweedie was loved by the Bar. Towards the end of his life he was appointed Chief Justice of the Trial Division; he died in Lethbridge the night of a bar dinner honouring him on his appointment—unfortunately he lived only a short time to enjoy the office. As a young lawyer I appeared in a trial before him in which he continued to admit evidence I considered inadmissible. I continued to object: he finally roared at me "Don't buzz around me like a bee". I lost the case but on adjournment he called me to his chambers and in a kindly way told me not to be upset by the scolding he had given me.

And now I come to more recent times and the personalities of many men with whom or against whom I practised and with some of whom I was associated on the bench.

The first will be Honourable A. A. McGillivray with whom I was associated as junior counsel for three years. I was his junior counsel in the case of *The King v. Solloway and Mills*,⁶ a rather famous case tried by Ives, J. without a jury. And in the same period he defended several members of the Bronfman family in Saskatchewan. My recollection is that there were seven charges—and every one was dismissed. I cannot but

6. [1930] 2 W.W.R. 516.

describe him as a great counsel, one of the top two or three I have seen in action. I saw him in action as the nominator of R. B. Bennett Q.C. for the leadership of the Conservative party at the Winnipeg Conservative Convention in 1927. He would dictate a speech, revise it, put it away and without notes or reference to the draft deliver it fluently and word for word. He was a conscientious judge, thorough and careful in his writing and a model of what an appellate judge should be. He graced the Appellate Division.

It was a strong Appellate Division when McGillivray was a member of it with Harvey, C.J.A., Clarke, J. A., Frank Ford, J.A., Ewing, J.A., Lunney, J.A. There was sometimes, I think, a bit of tug-of-war with Ford and McGillivray holding out in favour of granting counsel every opportunity to present his case, for Harvey, C.J.A. thought like lightning.

With the group of distinguished judges mentioned in the preceding paragraph, I should include Harry H. Parlee, who was approximately in their age group but who joined the Appellate Division somewhat later than those persons, at the age of 67. I was his partner and junior for some 13 years and therefore knew him well. He was a brilliant lawyer, with a fast moving mind. He could absorb facts as fast as they could be thrown at him and the situation was much the same as far as law was concerned. He was a kind and generous man and a gentle and courteous judge. He taught me a great deal and I have happy recollections of my long association with him.

Hyndman, J.A., a Supreme Court judge from 1913 to 1931 when he moved to Ottawa as Chairman of the Pension Appeal Board is one of a family of distinguished lawyers, a son-in-law of Sir Louis Davies, one time Chief Justice of Canada. His son Lou is the well regarded Master in Chambers in Edmonton and his grandson Lou is Provincial Treasurer of Alberta. Hyndman, J.A. was a handsome man and an extremely gentlemanly person.

And I come to what is the most difficult phase of my article, that dealing with more or less current times and some of the men with whom I was associated as a brother judge. This was indeed a happy time for me and I must state that I consider myself to have been very lucky and blessed by Providence to have been associated with men of such a high degree of intelligence, lofty ideals of public service and the highest degree of intellectual honesty. Here I speak of Marshall M. Porter, Hugh John Macdonald, Horace G. Johnson, James M. Cairns, Edward W. S. Kane, N. D. McDermid, Gordon Allen, Carlton W. Clement, William G. Morrow, Valentine Milvain, C.J.T.D., William R. Sinclair, C.J.Q.B., William J. Haddad, Neil Primrose, Peter Greschuk and Arnold Moir.

I must devote a bit of time and space to Marshall M. Porter, a very successful lawyer and counsel before his appointment to the Appellate Division. He is a man of far ranging interests and broad intelligence with many contributions in the way of public service. I admired his historical references in the *Burns* case,⁷ in which he went outside the record for many factual historical references just as Duff, C.J.C. did in the *Eskimo* case.⁸ He was quick to come to the assistance of anyone whom he thought

7. (1960) 32 W.W.R. 689.

8. [1939] S.C.R. 104.

to have been oppressed or improperly used and he adorned the law reports with broadly painted judgments. In some ways he was a rather strict lawyer, yet mainly a very tolerant judge. He loved a good legal argument, in which he was usually pleased to participate. It was a pleasure to sit with him and to enjoy friendship with him. He stimulated counsel and his brother judges.

I cannot pass over the period from 1949 to 1957. That is the period of the chief justiceship of George B. O'Connor. He was a very able judge with long experience in practice. He had a delightful sense of humour and always appeared to be cheerful and pleasant with counsel. He ran the Appellate Division in an orderly fashion. His judgments were usually short and very clear.

Horace Johnson, I could describe as a lawyer's lawyer, a tremendous and thorough worker and a writer of artistic judgments, some of the better ones in modern Canadian reports, inclined to the legal rather than the factual aspects of judicial work. He has been a well educated man with a deep knowledge of and interest in history. He could untangle any complicated legal problem with ease.

It was indeed a privilege to have sat on the Appellate Division with Ted Kane, than whom we have never had a more conscientious judge, and a pleasant one with a kindly disposition and a tremendous sense of humour, which has often been of help in the serious atmosphere of the Appellate Division. He has always been a popular figure with the Bar, having in his last Benchers' election headed the poll. I cannot speak too highly of him. What a privilege it has been to have been a member of the Appellate Division with lawyers of the personal qualities and intelligence of men such as Ted Kane and Carl Clement. Clement ranks with the best lawyers in Alberta's history; his judgments which adorn the Law Reports were often worked out in the quietness of the Judges' Library between 8:00 a.m. and noon on Sunday mornings when one could really concentrate. The law has indeed been his mistress.

Bill Morrow followed well in the footsteps of Sissons, J., the first distinguished judge of the Northwest Territories who so ably administered the law in the extremely difficult circumstances often confronting him in this frontier area. Morrow indeed had a broadening experience as a foundation for his present work as a member of the Court of Appeal of Alberta and of the Court of Appeal for the Northwest Territories. He is undoubtedly a great humanitarian and a glutton for work.

Here I must refer to W. R. Howson, Chief Justice of the Trial Division for several years. He had practised largely on the criminal side, but he applied himself with diligence in civil cases. He dealt with numerous outstanding cases.

Val Milvain followed me as vice president of the Canadian Bar for Alberta and as president of the Law Society of Alberta. He has been a very able Chief Justice of the Trial Division. His ability to absorb and organize facts is nothing short of fantastic. In the case of *C.P.R. v. The City of Calgary*,⁹ after a trial of over a week, with evidence of a complicated nature, much of it very technical, he delivered immediately

9. (1971) 4 W.W.R. 241.

following the conclusion of the evidence an artistically expressed oral judgment found by the Appellate Division to be sound and correct in every detail. This was typical of his work as Chief Justice. As a judge he addressed with ability and clarity many juries. The Bar admires and likes him.

Doug McDermid, Clifford Prowse, Arnold Moir and Bill Haddad have been able and serious members of the Appellate Division, to the work of which they have contributed much.

J. M. Cairns came to the Appellate Division in the 1960's from a long period on the Trial Division. He was a very experienced and able trial judge and made a very valuable member of the Appellate Division. He had a bright and good sense of humour, which often lightened the hearing of appeals.

N. D. McDermid and Gordon H. Allen were each leading corporation lawyers at the Bar but with little court experience. But when they joined the Appellate Division, each of them voluntarily undertook a considerable amount of trial work to get the viewpoint of a trial judge and to have the experience of dealing with the admissibility of evidence. Both contributed very much to the work of the Appellate Division.

And I now proceed to deal with two Chief Justices, William A. McGillivray, Chief Justice of Alberta, and Chief Justice of the Court of Appeal for the Northwest Territories, and William R. Sinclair, now Chief Justice of the Court of Queen's Bench of Alberta. This is indeed a privilege for me, for each was articulated to me as a law student some years ago. The Chief Justice of Alberta is the son of former senior Honourable A. A. McGillivray. I was happy to have been asked by him to return to the bench for the swearing in of Bill Sinclair, with the ceremony presided over by Bill McGillivray. I think it has been the only occasion in Canadian judicial history when a former Chief Justice has sat on the Bench at the swearing in of a new chief justice with the ceremony presided over by a chief justice, when the latter two had been former law students of the retired chief justice.

Bill McGillivray had become a leading and distinguished counsel before his appointment from the Bar to the Chief Justiceship of the Province. He has demonstrated clearly since his appointment his qualifications for his judicial position. I do not think I can or need say any more. His genial disposition and quick intelligence are no handicaps to him. He is invariably polite and kind to counsel.

Bill Sinclair worked with me for some years as a junior after his admission to the Bar. It is difficult to weigh his qualities with impartiality. I know he has been an excellent trial judge and a fine member of the Appellate Division. He has contributed much in the way of public service as a member of the Commission dealing with the use of language in the guidance of aircraft over Quebec. He is highly regarded by the Bar and not without affection. I know he will have a great future as Chief Justice of the Court of Queen's Bench. I wish him well.

And then I refer to a very distinguished former member of the Supreme Court of Alberta, the Honourable C. C. McLaurin, Chief Justice of the Trial Division for a very long time. He was an able administrator who functioned well with the many members of his court, including myself for a comparatively short time. He dealt with dispatch and was

rarely reversed on appeal — indications of a good trial judge. There were practically never any delays in the delivery of his judgments, he wanted counsel to be clear and he liked it better if they were brief, and his memory is regarded with respect and affection by the Bar and the judges. He is one of my oldest friends. He was, I believe, largely responsible for the establishment of the Law School of the University of Calgary and has played an important part in the administration of the University.

I should have mentioned Chief Justice C. J. Ford, a former City Solicitor for Calgary. A studious, serious and conscientious judge. He was Chief Justice for only four years when he was retired upon reaching the age of 75.

Before closing I must refer to two of the most experienced trial judges in Alberta, Peter Greschuk and Neil Primrose. Both have given long and good service to the people of Alberta. Greschuk always carried a heavy load. Primrose practically lived in the Court House and was almost always available for judicial work. Since retirement he has done valuable work for the Federal Court. They both leave the Bench of Alberta with the respect of the people of Alberta and their gratitude.

Under the circumstances mentioned, I do not deal with most of the present members of the Court of Queen's Bench. I am familiar with the fine work of most of them through having, as one of the Appellate Division, sat on appeals from them. Those who have been appointed since my retirement I knew during their periods of practise. I read recently that the appointments made by the Honourable Otto Lang, Minister of Justice during one period of the last Liberal Government, are considered to have been of high order, made largely without undue regard to Party politics. And with this comment I am in agreement.

My view is that Alberta has been blessed with a high class of judicial performance and justice in its Superior Courts.