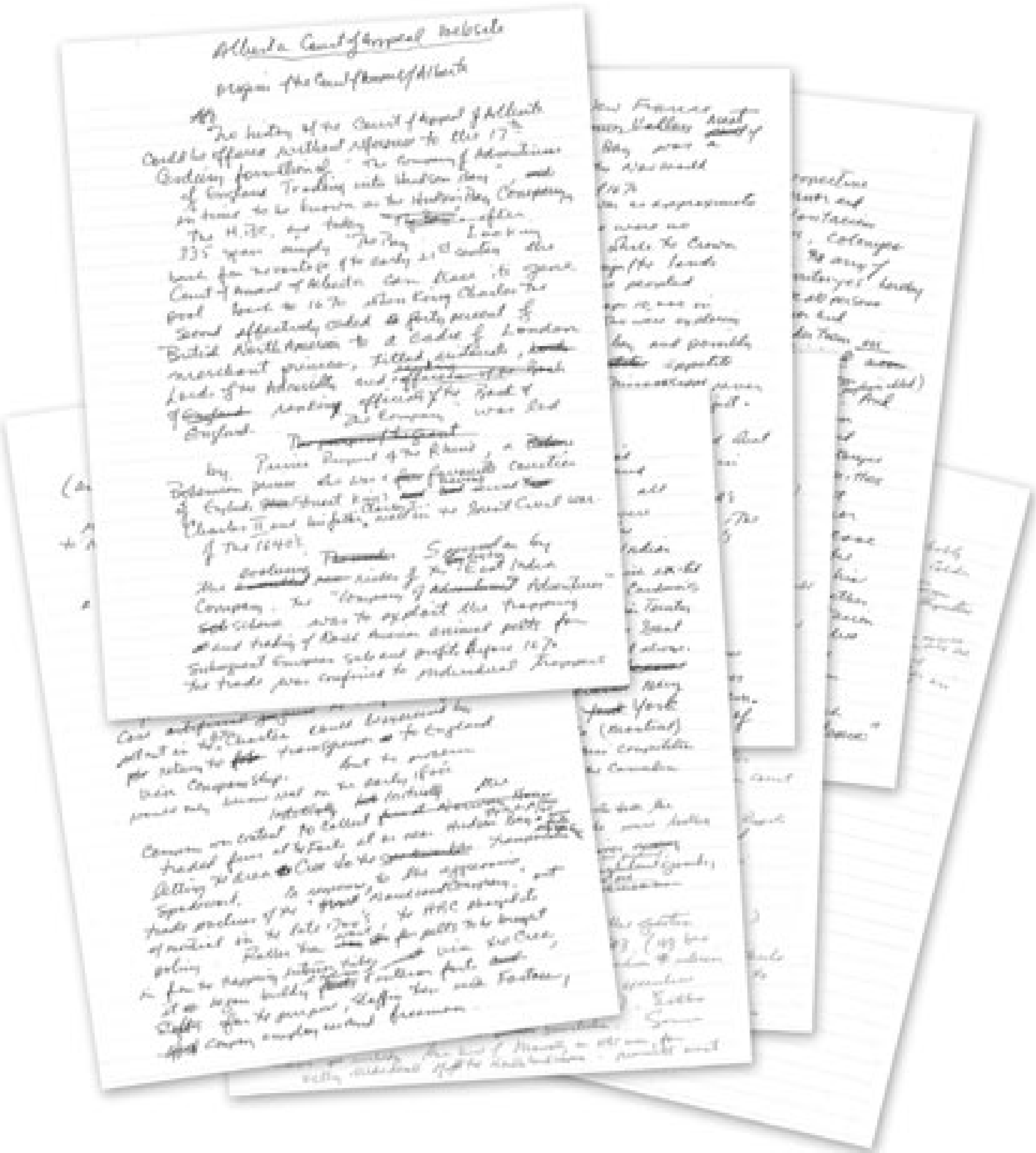
History of the Alberta Court of Appeal

by the late J.W. (Buzz) McClung, Justice of Appeal



John Wesley (Buzz) McClung's original notes for this document.

Dedication

This work is more than an interesting and accessible history of the Alberta Court of Appeal. It is also the last work by the late Mr. Justice John Wesley McClung. Therefore, the judges of the Court wish to publish it and dedicate the book to his memory.

This is not the place to discuss the brilliant legal career of Buzz McClung, as counsel, and then as a judge on Alberta's District Court, the Supreme Court Trial Division, the Court of Queen's Bench, and the Court of Appeal.

Instead, we now recognize the service of our departed comrade as a Western Canadian historian. He had a memory unsurpassed by anyone we can name, an immense love of reading, strong Western Canadian roots, and a fascination with old papers and photographs. He combed various archives, and read published works incessantly. Combining those soon produced a critical mass of historical knowledge and interest.

If there was anything significant which the Hudson's Bay Company or the North West Mounted Police did, Buzz McClung knew all about it, and could show you the precise riverbank where they did it. He was jovial and encouraging, but faintly disappointed that others did not recall the original names of all Edmonton law firms, and whether their offices had been above the Bank of Hochelaga, or in the Dominion Bank building. To him, all the judges, counsel, and notable criminals of Alberta's past were real people with whom he seemed so well acquainted that Buzz seemed to have met all of them, however chronologically impossible that was. Buzz knew where most Edmonton lawyers lived before 1940, and the precise location of every important crime in Edmonton after that date.

It was therefore easy for Buzz to compose this history of the Court of Appeal. But he still devoted himself to it with care, and took it through many drafts and fact-checks. He had it virtually complete and polished when he suddenly died and became part of this history.

The Court's history makes clear that we are not isolated explorers. As members of an institution with its own character, principles and traditions, we are part of a procession on a path. Here is Buzz McClung's torch, highlighting the footsteps and the very travellers who preceded us.

The Judges of the Court of Appeal of Alberta

An Unprofound History of the Appellate Process in Alberta

Origins of the Court of Appeal of Alberta

Before the middle of the 19th Century, appeals from the imposition by a judge of criminal or civil sanctions were foreign to the law systems of Great Britain as well as its Empire. It was only under the emergence of the Writ of Error that appellate review of criminal convictions become possible. This was delayed until the 1800's. Only in 1848 did judicial review of serious convictions by the Court for Crown Cases Reserved become a form of appeal. Appeals in civil matters were equally rare, mostly unsuccessful and prohibitively expensive. Yet it may be argued that on May 2nd, 1670 at Windsor Castle, the Court of Appeal of Alberta was conceived. To milk the metaphor further, it was delivered in 1921 - a period of gestation lasting a mere 251 years.

The Hudson's Bay Company Influence; Rupert's Land

No history of the Court of Appeal of Alberta could be offered without reference to the 17th Century formation of "The Company of Adventurers of England Trading into Hudson's Bay", in time to be known as the Hudson's Bay Company, the Company, the HBC and, today, after 335 years have passed, as simply "The Bay".

Looking back over 335 years of incremental political, trade and population growth in the Canadian Northwest, the Court of Appeal of Alberta is able to trace its gene pool back to 1670 when King Charles II effectively ceded forty percent of British North America to his cousin Prince Rupert and a cadre of London merchant princes, titled aristocrats, Lords of the Admiralty and ranking officials of the Bank of England. The risk-takers were led by Prince Rupert of the Rhine, a Bohemian prince who enjoyed status as a favored courtier of England's Stuart kings. Prince Rupert had loyally served his cousin, Charles II, and Charles I in the Great Civil War of the 1640's. In appreciation, the Stuarts made him

Warden and Constable of Windsor Palace, then the principal royal residence. He also received free lodging, i.e., his own apartments in the palace, as well as the North American grant – which comprised a mere ten million square kilometers.

Prince Rupert of the Rhine

Seduced by the lavish trade profits of the English East India Company, the scheme of "The Company of Adventurers" was to pursue the trapping and trading of North American animal pelts for European sale and profit. Before 1670, exercise of the trade was confined to individual trappers, voyageurs and *coureurs de bois*, largely French, rooted to the St. Lawrence Valley. Most of them believed that Hudson's Bay was a large body of water separating the New World from the Orient and simply another surmountable obstacle to the pursuit of profit.

The land grant of 1670 was as approximate as it was staggering in size. There were no maps of any precision, and the grant was simply defined as the lands that were drained by the rivers emptying into Hudson's Bay. The Crown of

England was the *de facto* sovereign of the lands, which were inhabited solely by aboriginals, perhaps 10,000 in number. Only the French, who in small numbers were then exploring the bays and rivers of Hudson's Bay, and possibly the Spanish, whose territorial appetites extended north from Louisiana along the Mississippi River and its tributaries, were expected to object. The French alone would take up arms against the British undertaking but the conflict was sporadic and largely limited to skirmishes at sea.

Edmonton Courthouse Interior

Ancestral Footprints; Other Recombinants

The grant included those lands which became the Province of Alberta over two hundred years later. How could today's Alberta Court of Appeal trace its DNA to the events of May 2nd, 1670? The claim is tied to the Charter provision setting out a primal justice system for Rupert's Land. It provided:

> . . . the said Governor and Company shall have liberty full Power and authority to appoint and establish Governors and all other Officers to governe them And that the Governor and his Councill of the severall and respective places where the said Company shall have Plantacions Fortes Factoryes Colonyes or Places of Trade within any the Countryes Landes or Territoryes hereby granted may have power to judge all persons belonging to the said Governor and Company or that shall live under them in all

> Causes whether civil or Criminall according to the Lawes of this Kingdome and to execute Justice accordingly And in case any crime or misdemeanor shall bee committed in any of the said Companyes Plantacions Fortes Factoryes or Places of Trade within the Lymittes aforesaid where Judicature cannot bee executed for want of a Governor and Councill there then in such case itt shall and may bee lawfull for the chiefe Factor of that place and his Councill to transmitt the party together with the offence to such other Plantacion Factory or Fort where there shall bee a Governor and Councill where Justice may bee executed or into this Kingdome of England as shall bee thought most convenient there to receive such punishment as the nature of his offence shall deserve ...

So, stripped of imperial argot, this meant that the Chief Factors of the HBC (and, in time, the Chief Traders as well) became the unbridled judges of the territorial areas in which the HBC would trade. Their authority was as absolute as that

enjoyed by any ship captain of the Royal Navy. The Factors assumed the power to resolve civil or criminal disputes literally on the spot. This made sense; the Company's business was trade, neither war nor the discipline of its underlings. War was incompatible with profit; so was the formal sanction of employees. Expelling a felon to another location for trial or punishment was troublesome, time-consuming and inimical to business. Yet the power was there. As an alternative to on-site discipline, felons or debtors could be removed to one of the Company's "Factoryes", such as Norway House or York Factory, for "justice". In an extreme case, the artificial jurisdiction set out in the 1670 Charter could be exercised by returning the transgressor via Company ship to England for trial. Hence, on May 2nd, 1670, after the Royal scriveners had done their work, and under the brocade, tapestries and ponderous oak decor of Prince Rupert's Windsor Castle apartments, the Great Charter was signed. It contained the first smack of a justice system for British North America.

How the System Worked

Initially, the Company was content to collect traded furs at its forts near Hudson's Bay. They included Fort Albany, Moose Factory, and inland Norway House. For the first 100 years, the Company left the gathering and transport of furs to the area Cree. The Cree and their allies, the Assiniboine, were astute traders and happily dealt with the other tribes as middlemen. They did not mind canoe travel and were generally reliable. So, few interior fur trading forts were needed. But in response to the aggressive trade practices of "The Northwest Company" (then dismissively known as "The Canadians") in Montreal in the late 1700's, the HBC was forced to change its policy. Rather than wait for the Cree to annually deliver pelts and skins from the trapping tribes of the interior, the HBC began building a network of interior forts in which to trade, staffing them with Factors, Traders, Company employees and freemen. In doing so, the HBC would go to the source of pelts. But, beginning in the 1780's and for 35 years thereafter, what once

Fort Albany, 1886

was orderly and quiet trade with the Indians slowly morphed into bloody trade wars with "The Canadians".

Coupled with the rise of the fractious "Canadians" or "The Northwest Company" and other smaller trading groups, incidents (all of them criminal in nature) would arise where offenders were shipped out for trial and punishment. Of significance was the Treaty of Paris in 1763, which had brought recognition of "The Indian Territory", a body of land in the Northwest which existed separately from Rupert's Land but generally to its south and east. "The Canadians" of The Northwest Company chose "The Indian Territory" to trade in, returning their furs to Montreal for disposition. Initially, the "Nor'westers" would outreach and outbid the HBC for marketable furs. They, contrary to the HBC, would ply trade with alcohol. But, as time passed, competition without clash would end as trade wars between the two companies flared over turf. Many men were detained by their rivals; several were killed. Some, who were accused of serious crime, stood trial in York (Toronto) or in Lower Canada (Montreal). As distasteful as it was, this competition would hasten the exploration and eventual peopling of the Canadian West.

But the glory days of the fur trade were ending. Only in 1821 when the HBC swallowed its pride and amalgamated with "The Northwest Company" would peace follow along the rivers of the Northwest.

Hudson's Bay House, Fort Albany

Trying Felons

"The King's writ does not outrun the King's musket."

This held true in the Canadian Northwest. The fabled British Grenadier was nowhere to be found. So justice and its initial execution lay completely in the hands and authority of the trading companies. The Courts of Eastern Canada tried to help out. Scores of arrest warrants, in blank but signed by judicial officials, issued from the Court of King's Bench in Montreal or the High Court of Justice in York and were sent west. Arresting and locking up your competitor became a popular and effective trade practice, especially if you could wave an official document justifying it.

By 1821, however, the rudimentary justice system had broken down. Many judges of the High Courts of Upper and Lower Canada, doubting their jurisdiction to try crimes arising more than 2000 miles away, declined on constitutional grounds to convict. In such cases, the accused was simply freed. Some cases did result in trials, convictions and punishments, but not many. In truth, the Northwest remained uninhibited by law or its sanctions until the 19th Century.

Attempts to Legislate Jurisdiction

Before 1803, apart from on-site adjustment, felons could be tried in the major "Factoryes" of Eastern Manitoba, London, England (before the Court of King's Bench or the Company's Courts), in Lower Canada (Montreal) or in Upper Canada (York, later Toronto). Felons shipped to Montreal for trial could be transferred to York on the order of the Lower Canada Courts where it was convenient to do so. But the Courts of The Canadas were inconsistent in their assumption of jurisdiction. Many demonstrable murderers escaped.

Attempts to resolve the question of jurisdiction were addressed by Imperial Statutes. In 1803 (43 Geo. III c. 138), the *Canada Jurisdiction Act* provided that crimes in the Canadian interior could be tried in Lower Canada with executive power to change the venue to Upper Canada. Either jurisdiction would be legally recognized. Some Rupert's Land cases, including that of Mowatt, an HBC man, for killing Macdonnell, a Nor'wester, proceeded smoothly. Mowatt went to trial in Montreal where he was convicted by a jury and branded. But what of crimes committed in "The Indian

Territory" – wherever its borders began and ended? There, the system broke down.

In 1816 a group of Nor'westers killed Robert Semple, the HBC governor at Selkirk. Eighteen others died too. It would be remembered as The Seven Oaks Massacre. The accused were rounded up and sent east for trial. Lower Canada changed the venue of the case to York, where the prisoners were tried but acquitted. Once again, there were vocal doubts within the Canadas as to whether the judges could lawfully try cases originating in "The Indian Territory" – wherever that was.

In 1821 another Act of the Imperial Parliament (1 and 2 Geo. IV c. 66) affirmed the jurisdiction of Upper Canada to try all cases from the Canadian West, whether they originated in Rupert's Land, "The Indian Territory" or elsewhere. Having brought clarity to the situation, the Act surprisingly went on to confirm that the rights of the Hudson's Bay Company (whatever they were) were to continue in full force. This inconsistent declaration sowed even more confusion and undid many of the statutory reforms.

Something good, however, came from the 1821 Act. Under it, the Hudson's Bay Company created a legislative council at Fort Garry to administer HBC justice as well as Company affairs. This was the first Western Court. It had the unwieldy title of "The Court of Governor and Council, District of Assiniboia, Rupert's Land" but became known as the General Sessions Court of Assiniboia. But then, as now, curial reform moved incrementally. The Court did not sit until 1835 and was not given its own judge (Recorder) until Adam Thom was hired in 1839. Only then did it begin to process cases. Justice in the Canadian West, with a possible appeal process, would move slowly simply because the population (now about 5,000 Europeans overall) really had no voice as well as little interest. The aboriginals wanted no part of it at all. (They would complain, "With our customs we do well, laws undo us.") To be sure, Rupert's Land institutions and the declining fur trade itself were low priority issues at Westminster.

What Did Future Alberta contribute?

Only two cases from Alberta, it seems, would play out in the artificial venue process of the early HBC period. The first involved François Gardepuy at Fort Assiniboia in 1834 on the Athabasca River, about 130 miles from Fort Edmonton. The other case was that of James Calder who was charged with murder "on the Peace River" (probably near the trading outpost of Fort Dunvegan) in 1846.

Hudson's Bay Company Post, Fort Edmonton

Gardepuy, a freeman, had committed a "series of misdemeanors at and around Fort Assiniboia". He was taken into custody, held at Fort Edmonton until the spring of 1835, and then taken to Toronto in irons, where he was tried and acquitted. Why? We don't know if it was a jurisdictional debate or lack of evidence. Gardepuy promptly returned west but lost his life while trapping in Montana in 1841.

Calder's prosecution was important at the time because Adam Thom, Recorder of Rupert's Land, in order to grant Calder bail, took the occasion to declare, with tortured

reasoning, that The Indian Territory, where the offence took place, was under HBC jurisdiction in any event. Thereby, he gave himself jurisdiction in the case while incidentally doubling the size of the HBC's North American holdings. However, not much would turn upon this as the HBC sold those holdings (whatever they included) to newly-minted Canada in 1867.

Adam Thom, Esq., Recorder of Rupert's Land (1839-1851)

Of all the conspicuous figures in the developing Canadian Northwest, Adam Thom remains the most controversial. He was a graduate Montreal lawyer who worked with Lord Durham in the compilation of Durham's famous 1838 Parliamentary report on relations between Upper and Lower Canada, which he called, "Two nations warring in the bosom of a single state ..."

Adam Thom, Esq.

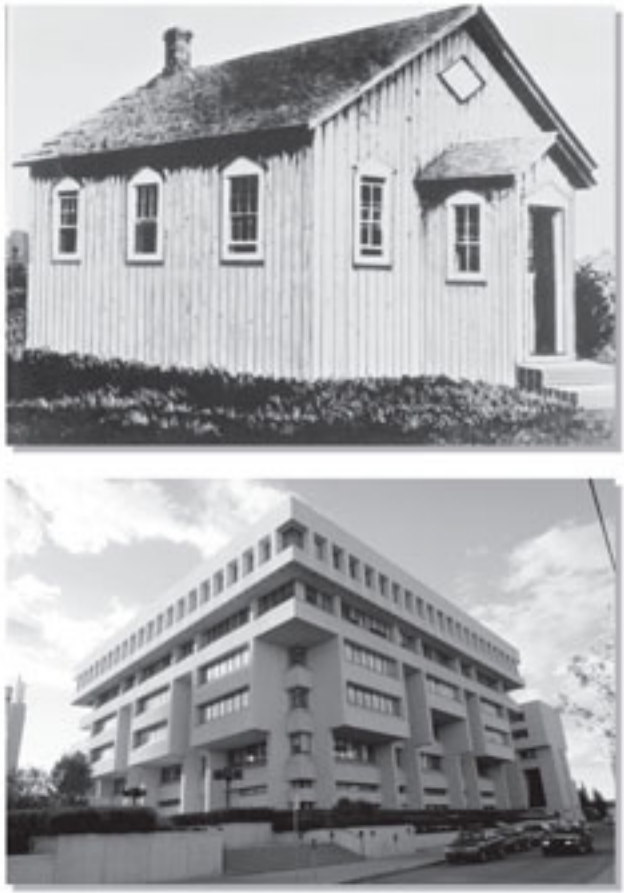
Thom once owned a small Montreal newspaper known as "The Settler" but when the work of the Durham Commission ended, he accepted an offer from the HBC to become its resident judge (Recorder) at Fort Garry to oversee its legal affairs. As Recorder of Rupert's Land, he headed up the General Sessions Court of Assiniboia, trying trade disputes and transgressors. But his biases were soon on display. He was the HBC's man and never tried to hide it. When his contributions to the heritage of the Canadian Northwest are examined, he is better remembered for his antics than his accomplishments.

Thom distrusted French-Canadians, aboriginals and Americans. He fought with his own sheriff. He fought with the local Fort Garry tradesmen who built his house. If he thought that you were opposed to the monolithic Hudson's Bay Company, you got, at best, a truncated hearing in his court. He never travelled to the outer trading forts, insisting that disputes come to him at Fort Garry for resolution. He railed against the existing trial system, especially his obligation to export serious cases along with their evidence out to Upper Canada for trial. But his unruly behavior aside, Thom remains first judicial officer to exercise jurisdiction within the land mass would become the provinces of Manitoba, Saskatchewan and Alberta. As such he was, literally, Alberta's first judge. His General Sessions Court of Assiniboia was the first court of record in the Canadian Northwest.

Upper Fort Garry, Early 1870's

Thom was removed from his employment in 1851 under persistent complaints about his conduct. The office of the Recorder of Rupert's Land was then filled by a succession

of administrators until 1870. Then the Hudson's Bay lands in North America, including the District of Assiniboia, were transferred to the fledgling Government of Canada.



Then and Now
The first courthouse in the Canadian Northwest (top) and the current Edmonton Law Courts (bottom).

The Era between the HBC and the Stipendiary Magistrates

Why the HBC sold out in 1867 (the effective sale date being deferred to 1870) is not germane to this history, but it is sufficient to say that beaver skins were no longer uppermost in European fashion and the post-civil war United States was casting covetous eyes on the Canadian Northwest ("Manifest Destiny et al ..."). Great Britain and Ottawa did not regard the self-occupied and waning Hudson's Bay Company as any real impediment to U.S. muscle-flexing. The HBC, having lost its monopoly in furs in 1849, cared little about U.S. expansion or Canadian demographics. It was only concerned with the value of its lands. The HBC well knew that, "... the sound of the settlers' axe is the death knell of the fur trade". And serious settlement of the Northwest above the 49th parallel had to be faced.

The year 1858 had seen the vanguard of U.S. gold miners arrive in Alberta. The 1860's witnessed the debauchery by wolfers, rustlers and bootleggers north of Montana. The 1870's saw the stirrings of the great cattle ranches of southern

Alberta. All played their part in the final and complete demise of the fur trade.

It was clear to Imperial Britain that a police presence in the great Northwest, not the diminishing interests of the Hudson's Bay Company, was the only practical buffer to U.S. expansionism. In 1867, Canada bought the HBC interest in Rupert's Land, taking possession of it in 1870. At this time the Province of Manitoba was carved out. The HBC legal system was left in place (discretionary sanctions exercised by the factors or, in serious cases, resort to the Court of Queen's Bench of Manitoba sitting in Winnipeg). The year 1872 saw the arrival of Captain William Francis Butler. A career British soldier, Captain Butler was hired by the new Manitoba government to personally survey the violent and lawless Canadian Northwest and make recommendations for the installation of some workable law-and-order machinery to combat it. The result of Captain Butler's insightful report was the passage in 1874 of "An Act Respecting the Administration of Justice and for the Establishment of a Police Force in the North-West Territories".

Captain William Francis Butler

The new Act addressed several needs. First, it provided for the appointment and maintenance of salaried Stipendiary Magistrates. Initially, there were four of them, all trained lawyers. In addition, the Superintendent of the new North West Mounted Police became a Stipendiary Magistrate, but he sat only at Fort Walsh. The rest were judges and were regarded as such. They would try cases in areas where the offences took place but where juries were not necessary, as it was difficult to assemble even six men from the area for the purpose. The Act established a body of Justices of the Peace (frequently senior HBC employees who would sit with and assist the Stipendiary Magistrates) to flesh out the new judicial system. Meaningfully, legislation was passed confirming the Court of Queen's Bench of Manitoba as the highest court of the Northwest Territories as well as the first Territories Appeal Court. So, after 200 years had passed in the history of the Canadian Northwest, an appellate legal structure was now in place.

The Act also created the North West Mounted Police (NWMP) and gave it sweeping powers to enforce the law and any challenges to its processes. Indeed the Act, by s. 19,

imposed a legal duty upon the police to assist the judges. The NWMP became a quasi-military force with power to try the offenders they had earlier arrested. Bootleggers, wolfers, rustlers and poachers could be arrested, prosecuted, convicted, sentenced and detained with the speed needed for the realities of a harsh new land. However, the success of the system was often marked by its excesses. The first criminal case processed under the new regime in future Alberta showed that expedited justice on the prairie plain could be little better than approximate.

NWMP Lancer

The case was that of William Bond. Bond was a hapless hireling in a bootlegging operation working out of Fort Benton in the Montana Territories. The operation was run by a crook named Jim Weatherwax (Waxy). He saw profit over the 49th parallel and went after it. In late October 1874, Bond and his fellows were all apprehended by Inspector Crozier of the NWMP and his men. The catch was three wagons full of contraband whiskey, illegal firearms and animal skins. This was near Pine Coulee, about 45 miles from Fort Macleod on the Oldman River. Bond and two others were forthwith tried

by Col. J.F. Macleod, J.P., who then convicted and fined them, forfeiting their horses, wagons, cash, guns and furs to Her Majesty. All were able to pay their fines in short order and were promptly released. That is, except Bond who couldn't pay his $200.00 fine and got no credit while he waited. He was detained in the Fort Macleod lock-up until he produced the cash. But nobody came to help him, including Waxy. After about five weeks, Bond broke out of custody, escaping into the chill prairie night. He suffered from a bullet wound to his shoulder, a bon voyage gift from his jail guards. However, his escape had not been well thought out. Bond forgot that he had no place to go. Doomed, he bled to death. His frozen body was found the following Spring.

Another case, five years later, displayed to a fault the dilemma posed by the statutory duty of the police to attend the judges and the Court in the execution of their duties. The marriage of convenience of their respective offices was easily recognized in future Alberta's first capital case, *Regina v. Ka-kisi Ku-chin (Swift Runner)* which was tried at Fort Saskatchewan in August 1879.

The facts of his case were horrific. By them Swift Runner was dubbed the Egg Lake Cannibal. Members of Swift Runner's family had been killed and, it was alleged, he cannibalized their remains. All of this happened near the settlement of Tawatina, north of Fort Edmonton. Inspector William Drummer Jarvis headed the NWMP Fort Saskatchewan detachment which was charged with the investigation. There Swift Runner was arrested, tried, convicted, held in custody and finally hanged.

Ka-kisi Ku-chin (Swift Runner)

Awaiting the arrival from Battleford of Stipendiary Magistrate Hugh Richardson to try the accused, Inspector Jarvis, himself a Justice of the Peace, conducted a preliminary inquiry into Swift Runner's murder charge. As Justice of the Peace, he duly committed Swift Runner for trial. That night, Swift Runner sent him a message. He had something to say. Jarvis had the prisoner brought to his quarters but did not reconvene his court. He heard Swift Runner's statement but dismissed it out of hand "...because he knew it to be untrue". Swift Runner's trial would begin when the judge arrived. Then, Jarvis gave evidence that

the accused had told him the next day that he had killed his three sons, his wife, her mother and his three daughters. To this, Inspector Jarvis was more receptive and so was the jury. The document containing the confession had been taken and retained by him to be tendered at trial. At the trial, Jarvis put on his prosecutor's hat and entered the confession document into evidence, as part of his other prosecutorial duties.

Not surprisingly, Swift Runner was convicted and sentenced to death. Stipendiary Magistrate Richardson, his duties completed, took the paddlewheel steamer back to Battleford. Inspector Jarvis cleaned up his remaining paperwork and kept Swift Runner in the Fort lock-up to await his upcoming hanging. That took place on December 20, 1879. It was 42° F below and again Inspector Jarvis presided. Swift Runner was despised throughout the community and his hanging was the social event of the 1879 Christmas season, attracting many onlookers, both native and European. Yet some thought that the appearance of it all was wanting, especially because Swift Runner never had a lawyer and neither spoke nor understood English. By any standard, legal or medical, he was also mentally unfit. Nonetheless, he had

Inspector Jarvis alongside to "help" him. So did Richardson, S.M.

Successive changes to the 1873 Administration of Justice Act were made by way of Territorial Ordinance. The Ordinances sorted out some practical problems in the new system, and obliged the Stipendiary Magistrates to travel to the populated areas in what would become Saskatchewan and Alberta, to sit when full dockets awaited them. The overlapping of the statutory functions of the police and judicial officers were continued with the appointment of Col. James F. Macleod as Stipendiary Magistrate in 1876. This was concurrent to his duties as Commissioner of the Mounted Police, an office which he held for four years before giving it up to attend his judicial duties full time. Macleod would later become Calgary's first resident judge.

Colonel James F. Macleod

The Demise of the Stipendiary Magistrates (1876-1887)

They were appointed by order-in council in Regina and paid the sum of $3,000.00 annually. The legal background of each of these men was of use to government in the drafting of Ordinances to police the land. Col. Macleod, Hugh Richardson and Matthew Ryan, followed by Charles Borimee Rouleau (who replaced Ryan) and Jeremiah Travis were the Stipendiary Magistrates who carried out their judicial duties throughout Saskatchewan and Alberta between 1876 and the erection of the new Supreme Court of the Northwest Territories in 1887. Each of the five men was a trained lawyer. Richardson and Rouleau habitually attended the Battleford and (after 1882) the Regina meetings of the North West Territorial Council.

The professional life of a Stipendiary Magistrate was taxing in all its aspects. Presiding in Court in the small population centres was a marked challenge. Few lawyers were available to help them, only police. Rarely did they have prosecutors. Interpreted evidence was commonplace and there being no court reporters, the judge was expected to maintain

complete notes of the evidence that he was hearing as he heard it. Travelling to their judicial tasks was always daunting. Fort Calgary (initially Fort Brisebois) was five days' hard ride from Fort Edmonton, six from Fort Saskatchewan. Before the railroad arrived in 1884, Medicine Hat was no closer. Travel from Battleford to Edmonton was by paddlewheel steamer when the ice was off the North Saskatchewan River, and by sleigh and sled dogs when it wasn't. Travel to and from the judicial centres in Saskatchewan was no easier. Much of the judges' summer travel was by buckboard, stagecoach or wagon. Later, Col. Macleod spoke proudly of how he had frequently held court on the bald prairie and adjudged disputes while sitting in his open wagon. Accommodation for the judges was usually found at the NWMP detachment or unused facilities of the local churches or their seminaries.

The length of the Court dockets can be studied by reading the annual reports of the various NWMP Division Superintendents to the Commissioner of the NWMP. They illustrate the public and demanding duties of the Stipendiary Magistrates and the Justices of the Peace, when they were not travelling.

The Trial of Louis David Riel

Many court watchers believed that the Stipendiary Magistrate system could handle all challenges, including the 1885 treason trial of Louis David Riel. It was a particularly awkward trial, steeped in politics, religion and race. It was held in Regina over many days. Col. Hugh Richardson presided; he had a jury and the assistance of Justice of the Peace Henry LeJeune. Richardson was confronted by a battery of Canada's best lawyers of the day, all of whom were seeking to foment and stake out legal errors in order to appeal any unfavourable result. But those present lauded Col. Richardson for his firm guidance of the case. In his hands, trial by Stipendiary Magistrate seemed swift, open and dispassionate.

Courtroom where Louis Riel was tried. Supreme Court of the Northwest Territories, 1901.

Yet in the face of his jury's recommendation for mercy, the hanging of Louis David Riel created a legal and political legacy that remains under debate today. While Col. Richardson emerged unsullied, the High Court of Justice of

the Northwest Territories (i.e., the Stipendiary Magistrate System) did not. Quebec, seemingly adoptive of Riel, resented his case being determined by a lowly Magistrate, however experienced he might have been. Col. Richardson's early legal career in the employ of the Federal and Territorial governments was thrown at him as conclusive evidence of bias. Moreover, treason was clearly a capital case which ought to have been tried by a s. 96 (Federal) Judge sitting in Winnipeg. Then there was the Caron telegram. Upon Riel's arrest, Sir John A. Macdonald's Militia Minister Joseph Caron telegraphed the triumphant General Middleton that Riel was to be taken to Winnipeg for trial. This did not happen and Regina was fixed, properly, as the venue of the case. Quebec's argument was that Winnipeg was closer to the concerns of the Métis and the ignoring of Caron's telegram (which arose from a misunderstanding) was held up as proof of the government's determination to have Riel tried by a sweetheart Regina jury from a constituency where little pro-Métis sentiment would be found. So the whole trial and the guilty verdict were wired. That was the argument.

Colonel Hugh Richardson

But heading the provocation list was Sir John A. Macdonald's very public promise that, despite the jury's recommendation for mercy, "...Riel would hang though every dog in Quebec bark in his favour". That promise he kept. Worse, the statement was made before Riel's final appeals were exhausted.

Within a year, Macdonald, Sir Alexander Campbell and Sir John Thompson, his Justice Ministers, decided on some damage control. They approved a new s. 96 justice system. It would separate the NWMP from the judges. The old system had become too clubby. There would be a new court, one of station equal to the Supreme Court of British Columbia and the Court of Queen's Bench of Manitoba. No companion assistance from local Justices of the Peace would be available to the sitting judges even in serious prosecutions. They would not have the sitting responsibilities earlier designed to palliate local concerns in serious jury cases. The new court would sit in specified judicial districts and on specified dates. Col. Richardson would sit in Regina, Rouleau would sit in the Judicial District of Northern Alberta (including Calgary and Edmonton),

The Honourable Charles Rouleau

Edward L. Wetmore, a new addition to the court, would sit in Saskatoon, Col. Macleod would sit in the Judicial District of Southern Alberta, which included Lethbridge, Medicine Hat and Fort Macleod. Another addition to the court was Thomas McGuire. His bailiwick would be the judicial centre of Moosomin.

The new system contemplated appeals. They would be heard in Regina twice yearly and later in Calgary. The judges of the court would form an appellate tribunal by sitting en banc. The judge whose decision or verdict was under appeal was initially allowed to sit on the appeal itself. This was changed after 1894 because of the bad optics of the process. Thereafter, the judge could sit on the appeal in his own case only where a quorum (three judges) could not otherwise be assembled. This was the planned framework of the incoming court.

The Honourable Thomas McGuire

Supreme Court of the Northwest Territories

The Supreme Court of the Northwest Territories arose from the ashes of the trials which ended the Riel insurrection. It was legislated into being on the 18th of February 1887 and replaced the Stipendiary Magistrate system.

Captain Butler had recommended the appointment of civil magistrates or commissioners from the model of similar judges in colonial Ireland and India. They would be required to "make semi-annual tours throughout the Saskatchewan for the purpose of holding courts". In many ways, the Stipendiary Magistrates would resemble the Itinerant Judges of the Assize. They filled the void left by the winding down of the HBC and its forts – an area of void existing between Manitoba Court of Queen's Bench and the Supreme Court of British Columbia.

In tandem with the NWMP, American hegemony in the west had been stayed, largely through exemplary treatment of the Plains Indians by the police and firm prosecution of the wolfers, whiskey merchants and rustlers at the hands of the Stipendiary Magistrates. Both had done their job – the 49th parallel border had held.

This was clear by 1885. But the old Stipendiary system had been further weakened by the personal foibles of two of its five members, Messrs. Ryan and Travis. And the whole Court would suffer from the political backlash from the trial and execution of Riel. The partnership, as it were, between the police and the judiciary had functioned well in its place and time, but the cross-pollination of their respective duties was viewed by purists as less than "British" in nature, emphasizing as it did order over law, or at least substance over process.

The Macdonald cabinet in Ottawa went to a sturdier s. 96 Court, one with less play in its joints. The new court would be given more to the traditional ermine and the immunities, not the navigation of dusty prairie trails, clouds of stinging insects, raging rivers and a shotgun marriage to the NWMP.

Richardson, Macleod and Rouleau became the inner core of the new court, joined by Edward L. Wetmore and Thomas McGuire, both former Assiniboia lawyers. Curiously, no Chief Justice of the new court was named. The office should have devolved upon Richardson, but speculation at the time was that Prime Minister Macdonald made no appointment at all in order to avoid any criticism that Richardson was being rewarded for the conviction of Riel some 18 months earlier. The insult must have pained Hugh Richardson deeply.

The new court was well received and it functioned well. Macleod died in 1894 and was replaced by David Lynch Scott, Q.C., one of Riel's prosecutors. He would become Edmonton's first resident Judge. Rouleau would die in 1901. He was succeeded by James Prendergast, who had practiced law in St. Boniface. Richardson completed his proud history of service in the new west and retired in 1903. Arthur Sifton of Calgary would become Chief Justice of the new court in 1903, replacing Thomas H. McGuire, who had assumed the office in 1902.

The Supreme Court of the Northwest Territories had to face all the old challenges and many new ones. A Torrens land registry system was instituted in 1886. It was followed by a registry of personal property. Practising lawyers had become regulated by the Territorial government by 1886. School boards, hospitals, health units and irrigation districts began to spring up. They and the recovery of hydrocarbons, logging disputes and farming challenges all represented expanded litigation before the new court. Dockets would soon fill. There were, of course, huge advances in transportation, communication (telephones) and immigration as well as rising commerce. All demanded judicial services.

The Honourable Arthur Sifton

The landscape was changing as well as immigration patterns (although they would not peak until the new Century). The buffalo were effectively gone, obliterated by the efficiency of the repeating rifle. Trapping and trading of furs for export died with them, but day-to-day trading, whether in food, clothing, horses or labour, began to swell. Soon, the eastern lawyers perked up. They sniffed profit in the

West and the C.P.R. was waiting at the station. The eastern banks came too. They also shared the bounty.

A new legal system had been called for. The Supreme Court of the Northwest Territories exceeded the limitations of the itinerant Stipendiary Magistrate system. It was staffed by experienced judges, equipped with essential textbooks, resident clerks, sheriffs, court reporters and pre-published dates of sittings, as well as lawyers who were professionally and ethically restrained in its service.

Edmonton Oldtimers Banquet, 1894

The Supreme Court of the Northwest Territories had existed for only twenty years. It disbanded in 1907 in order to accommodate the political creation of the eighth and ninth provinces of Confederation, Saskatchewan and Alberta. The incoming provincial governments could no longer share the administration of justice or use a common court. Each formed its own.

The Supreme Court of Alberta, Trial and Appellate Divisions

After twenty-five years of function, the territorial government in Regina was abolished in 1905. Two new provinces, Saskatchewan and Alberta, would be carved out of the Northwest Territories to join the Canadian Confederation.

Littermates since The Big Bang, Saskatchewan and Alberta were still joined by Confederation, the common law and the C.P.R. and Lloydminster. (The City of Lloydminster has spent the last 100 years strabismically studying both provinces and their time zones. Despite choosing neither, Lloydminster has flourished.) The two emerging provinces became distinct legal and jurisdictional entities separated by the 4th Meridian. This necessitated new Courts. The Stipendiary Magistrate system had been overtaken by its own versatility. The Supreme Court of the Northwest Territories could not survive the loss of its political power base.

The last spike is driven on the C.P.R. line on November 7, 1885 at Craigellachie, British Columbia.

The old Supreme Court of the Northwest Territories was given until 1907 to conclude its existing processes. In almost silent transition, the new Supreme Court of Alberta, again a s. 96 Court, stepped up. At its outset, it adopted, where applicable, the laws of England as they stood on July 15, 1870. The rules of the old court were applicable. Five judges, including a Chief Justice of Alberta, were appointed. Three judges came from the defunct Supreme Court of the Northwest Territories, the Chief Justice, the Honourable Arthur L. Sifton, the Honourable David Lynch Scott and the Honourable Horace Harvey. Two fresh appointments to the new court included the Honourable Nicholas D.D. Beck and the Honourable Charles Stuart. The new court would sit at Edmonton, Calgary, Lethbridge, Medicine Hat, Red Deer and Fort MacLeod. Other judicial districts such as Blairmore, Hanna, Drumheller, Vegreville, Grande Prairie and Peace River would later be added to the new court's sittings.

The Supreme Court of the Northwest Territories, 1894

Once again, the old bugaboo, the new court's appellate function, was addressed. This was done by ss. 30-33 of the Act. Again, appeals would be taken to, and heard by, the Court en banc. Again, three judges would form a quorum of the Court for the purpose. Again, no judge could sit on the appeal of any of his own orders or decisions.

Appeal hearings would take place in Edmonton and Calgary and at regular sittings. Yet, in a jurisdictional sense no real change was contemplated by the statutory duties of the judges at trials or on appeals. This would finally end, but not pleasantly.

Alberta Appellate Division, 1936

Who is Alberta's Chief Justice?

The Honourable Horace Harvey became Chief Justice of Alberta in 1910. He had served some seven prior years on the Court. Harvey was an advocate of a separate and independent appeal court, not one to be serviced by en banc sittings of brother trial judges. Litigation had mushroomed in the early days of the 20th Century and by 1914, Harvey dismissed the existing appellate system as a clog on the rest of the Court. With the increased workload, stopping trial work to hear en banc appeals was, at least, impractical. What was needed was a new Appellate Division of four judges for appeal cases alone. In his view, the old en banc system had outlived its time.

The Honourable Horace Harvey

By 1913, draft legislation first appeared creating a distinct Appellate Division of the Supreme Court of Alberta. The new system would have four judges consigned to the hearing of appeals alone and leave five other judges to continue processing trials. But the passage of the new Act was delayed until 1919, partially due to World War I. Then,

by amendment to the Judicature Act, a separate appellate division and a separate trial division were created. By the statute, each division would be led by a Chief Justice. The Chief Justice of the new Appellate Division would be styled "Chief Justice of Alberta". The Trial Division would be led by a Chief Justice to be styled "Chief Justice of the Trial Division".

Not surprisingly, Harvey, already the Chief Justice of Alberta since 1910, assumed that the new office would be his and that he would continue as the Chief Justice of Alberta. But bad draftsmanship and the presence of the Conservative government in Ottawa, whose loyalties lay to David Lynch Scott, intervened. The new Act (s. 6 thereof) failed to provide for the abolition of the old Supreme Court of Alberta, a necessity within the process. Harvey therefore believed his status as Alberta's Chief Justice would be continued. But Horace Harvey, the leading advocate of a reformed appellate system, would become its first casualty.

On September 15, 1921 the new Judicature Act was proclaimed and to Horace Harvey's horror, the Honourable David Lynch Scott was named by federal letters patent to

The Honourable David Lynch Scott

be the new Chief Justice of Alberta. Harvey, also by federal patent on the same day, was named the new Chief Justice of the new Trial Division, to him a serious loss of prestige.

Here it must be conceded that Scott had ample credentials for his new job. He had been a s. 96 judge since 1894, ten years longer than Harvey. But Harvey could not be placated. His office since 1910, the Chief Justiceship of Alberta, had not been abolished because the original Supreme Court of Alberta was allowed to continue in law.

It has never been urged that there was animosity between the two men before the contretemps which followed, but an iciness, at least, would continue to mark the relationship between them.

Harvey went to law to reclaim his old job. He brought an application to the Supreme Court of Canada for a declaration that he, not Scott, was the Chief Justice of Alberta. There, he won. Scott had entered no appearance in the proceedings before the Supreme Court of Canada but now took counsel from Richard Bedford Bennett, Esq., K.C., a Conservative

wheel-horse, for a further appeal to the Judicial Committee of the Privy Council. Harvey was now represented by the estimable Eugene Lafleur, a noted constitutional expert from Montreal. Expedited to speedy resolution by all concerned, the Privy Council appeal resulted in a judgment delivered by Lord Atkinson on October 18, 1923. The Judicial Committee of the Privy Council held that Scott had been lawfully appointed and rightly held the office of Chief Justice of Alberta.

The legal profession snickered. These were not happy times in the court. It had divided internally. Harvey was bitterly disappointed and refused, for example, to attend the unveiling of the World War I Memorial Tablet on November 11, 1921 at the Edmonton Courthouse where Scott, as Chief Justice, presided. When the new appellate court (with Scott, C.J.A. presiding) first assembled following Scott's appointment, Scott, C.J.A. and Harvey, C.J.T.D. entered the courtroom together and ascended the bench. Harvey made a brief statement to those assembled reminding them that he was the true Chief Justice of Alberta. He then left the bench.

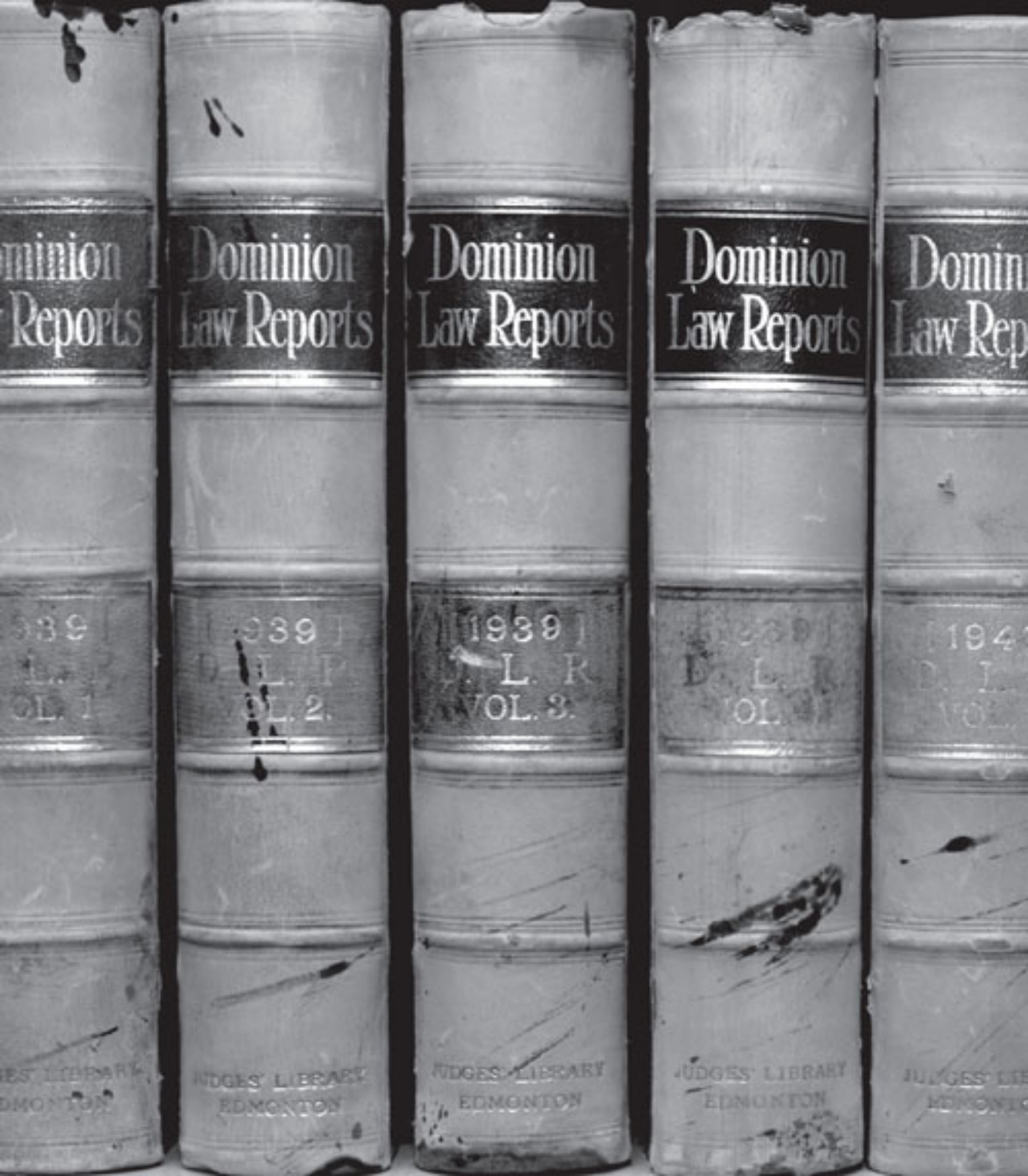
It had been two years after the proclamation of the disputed statute that the Judicial Committee of the Privy Council allowed Scott's appeal and declared him to be the officeholder. But any pleasure Chief Justice Scott took in the final outcome was fleeting. He would die on July 23 of 1924, less than a year later. Harvey was speedily confirmed as the new Chief Justice of Alberta and held the office for 25 years until his own death in 1949. So ended an embarrassing chapter in the Court's history.

Law Courts, Edmonton, Alberta, 1908 to 1972

Law Courts, Calgary, Alberta, 1888 to 1958

Appellate Courtroom in Edmonton (2005)

Appellate Courtroom in Calgary (2005)


Dominion Law Reports
[1939] D.L.R. VOL. 2.
Dominion Law Reports
[1939] D.L.R. VOL. 3.
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The Court of Appeal of Alberta

The Court of Appeal of Alberta finally derived from the old Appellate Division of the Supreme Court of Alberta created in 1921. In 1979, in conjunction with the formation of the Court of Queen's Bench of Alberta, (a fusion of the old Trial Division of the Supreme Court of Alberta and The District Court of Alberta), the new Court of Appeal came into being upon the proclamation of The Court of Appeal Act S.A. 1978, c. 50, proclaimed on June 30, 1979. As the successor to the old Appellate Division, the new Court would expand to fourteen judges and a Chief Justice, partially to service the workload needs of the Court of Appeal of the Northwest Territories and, later, the Court of Appeal of Nunavut. We are a far cry from the justice system of Rupert's Land as envisioned in 1670.

But here we are.

The Supreme Court of Alberta Appellate Division, 1962

What We Are; What We Do

The Court is known as a s. 96 intermediate appellate court. It is a federal court owing its existence to s. 96 of the Canadian Constitution Act, 1867 which confirms the federal power to create courts of this type. It is an intermediate appellate court because it hears appeals from lower Alberta tribunals including the Provincial Court of Alberta and the Court of Queen's Bench of Alberta. Likewise, appeals from the judgments of the Court of Appeal of Alberta lie to the Supreme Court of Canada. So displayed is the Canadian hierarchy of courts.

The Court sits in Calgary and Edmonton, eleven times a year in each City. The complement of the judges assigned to a given sitting may include judges of the Court of Queen's Bench of Alberta sitting "ex officio". When this takes place, the ex officio judges enjoy the same legal authority as the regular judges of the Court. Conversely, when judges of the Court of Appeal sit as trial judges, they do so "ex officio".

Generally, the Court has no jurisdiction to set aside or even review findings of fact made by trial judges or trial juries,

COURT OF APPEAL OF ALBERTA
2003

From Viewer's Left

Back Row
Neil C. Wittmann, J.A.; Keith G. Ritter, J.A.;
Ronald L. Berger, J.A.; Constance D. Hunt, J.A.; Ellen I. Picard, J.A.;
Adelle Fruman, J.A.; Willis E. O'Leary, J.A.; Jean E. L. Côté, J.A.

Front Row
Elizabeth A. McFadyen, J.A.; Peter T. Costigan, J.A.;
Carole M. Conrad, J.A.; Catherine A. Fraser, C.J.A.; John W. McClung, J.A.;
Marina S. Paperny, J.A.; Anne H. Russell, J.A.

unless permitted to do so by statute. Generally, the Court is only concerned with the question of whether the law has been properly determined and properly applied in the case before it.

The Court can hear other litigation, usually emanating from administrative boards or tribunals where the statute provides that any appeal therefrom goes directly to the Court of Appeal, bypassing the Court of Queen's Bench. Coming to mind are appeals of disciplinary orders under the Legal Professions Act, the Medical Profession Act and others. Appeals under the Planning Act in this form are prevalent as well.

Other matters can come before the Court of Appeal for review by way of reference. This includes references from the Minister of Justice of Canada under the Criminal Code. Constitutional questions can also be resolved in this way, that is without the necessity of bulky, extended and time-consuming pre-appeal proceedings.

Litigation before the Court is heard between 10:00 a.m. and 12:30 p.m., Monday through Friday. Appeals

resume at 1:30 p.m. and are continued until 3:30 p.m. These times are flexible, however, according to the needs of the case, the litigants or their counsel.

At this writing, the Court has expanded to 15 judges - a Chief Justice, twelve puisne (ranked after) judges and two supernumerary judges. The Court is equally divided between seven men and seven women and all serve under Chief Justice Catherine Anne Fraser. In all, the old Appellate Division of the Supreme Court of Alberta and its successor, the Court of Appeal of Alberta, have hosted 65 Justices of Appeal. By contrast, the Trial Division of the Supreme Court of Alberta and its successor, the Court of Queen's Bench of Alberta, have hosted 192 judges since its inception in 1907.

To be appointed a Justice of Appeal, any candidate must have been a member, in good standing, of a recognized Law Society for ten years and recommended by various selection committees, all community oriented. But it is not a process carried on beneath the public gaze. Appointments to the Court are made by the Federal cabinet on the recommendation of the Minister of Justice. Judges must

retire at age 75 but are allowed supernumerary (semi-retired) status, usually at the age of 65. Justices of Appeal must reside at or near a city where the Court sits. In Alberta that means Edmonton or Calgary. The judges are furnished extended research facilities, electronic and otherwise. They are assisted by legal counsel as well as students-at-law.

In criminal cases, the Court is generally occupied by appeals involving questions of law or mixed fact and law. The Court must hear applications for review of the propriety of criminal convictions at the request of the Federal Minister of Justice where the request is rooted to the application of the Royal prerogative of mercy.

The appeals of civil cases are substantially confined to consideration of alleged errors of law in the trial Courts. The Federal Minister of Justice can also refer any question to the Court of Appeal for its opinion on which the Minister wishes assistance. The Minister may also refer the matter to the Court of Appeal for hearing as if it were an appeal.

Provincially, similar although not identical jurisdiction exists. Her Majesty the Queen in Right of Alberta may ask

the Court of Appeal to answer specific questions posed by the Lieutenant Governor in Council. In these cases, interested parties including the Attorney General of Canada may receive standing before the Court to be heard on the question in dispute.

Unlike the Court of Queen's Bench, the Court of Appeal enjoys no inherent jurisdiction in the resolution of legal disputes. The Court's power to intercede must be set out by statute. Only then will a Court assemble, hear argument and then give judgment.

Chief Justices of Alberta

The Honourable
Arthur L. Sifton
(1907 - 1910)

The Honourable
Horace Harvey
(1910 - 1921, 1924 - 1949)

The Honourable
David Lynch Scott
(1921 - 1924)

The Honourable
George Bligh O'Connor
(1950 - 1957)

The Honourable
Clinton J. Ford
(1957 - 1961)

The Honourable
Sidney Bruce Smith
(1961 - 1974)

The Honourable
William A. McGillivray
(1974 - 1984)

The Honourable
James Herbert Laycraft
(1984 - 1991)

The Honourable
Catherine Anne Fraser
(1992 -)

Just off the Judges' library is this room, known as the Heritage Room, assembled under the direction of the Honourable Justice J.W. McClung, and where he often prepared for appeals and crafted judgments.

In his memory, this room has been renamed the J.W. (Buzz) McClung Heritage Room.