

THE BRITISH COLUMBIA COURT OF APPEAL

PATRONS OF THE OSGOODE SOCIETY

Blake, Cassels & Graydon LLP
Gowlings
McCarthy Tétrault LLP
Osler, Hoskin & Harcourt LLP
Paliare Roland Rosenberg Rothstein LLP
Torkin Manes Cohen Arbus LLP
Torys LLP
WeirFoulds LLP

The Osgoode Society is supported by a grant from
the Law Foundation of Ontario.



The Law Foundation of Ontario
Building a better foundation for justice in Ontario

The Society also thanks the Law Society of Upper Canada
for its continuing support.

THE
BRITISH COLUMBIA
COURT OF APPEAL

The First Hundred Years, 1910-2010

CHRISTOPHER MOORE

with research by

Andrew Crabtree, Tricia Daykin, Rae Franklin,
Eric Heath, Laura Hodgins, Bob Kucheran, Jennifer Lau,
Valerie Leblanc, Chris Macleod, Sean McGinty, Elizabeth Moore,
Sarvaz Mirbagheri, Paige Morrow, Stephanie Sim,
Jennifer Smith, Matt Watson, and Kirsten Wharton



UBCPress • Vancouver • Toronto

Published by UBC Press for the Osgoode Society for Canadian Legal History

© Christopher Moore Editorial Ltd. 2010

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright, www.accesscopyright.ca.

20 19 18 17 16 15 14 13 12 11 10 5 4 3 2 1

Printed in Canada on acid-free paper.

Library and Archives Canada Cataloguing in Publication

Moore, Christopher, 1950-

The British Columbia Court of Appeal : the first one hundred years /
Christopher Moore.

Includes bibliographical references and index.

ISBN 978-0-7748-1864-3

1. British Columbia. Court of Appeal – History. 2. British Columbia. Court of
Appeal – Biography. 3. Judges – British Columbia – Biography. I. Title.

KEB165.M66 2010

347.711'0309

C2009-907045-6

KF345.M66 2010

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

The research and writing of this history was made possible by a grant from the Law Foundation of British Columbia to the British Columbia Legal Historical Society.

Printed and bound in Canada by Friesens

Set in Bembo by Artegraphica Design Co. Ltd.

Copy editor: Deborah Kerr

Proofreader: Stacy Belden

Indexer: Patricia Buchanan

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpres.ca

CONTENTS

Foreword / vii

Preface and Acknowledgments / ix

1 The Origins of the Court / 1

2 The Founders' Court, 1910-40:

The Macdonald-Martin Courts / 21

One Case from the 1910s: *In Re Munshi Singh* / 52

One Case from the 1920s: *Attorney General of Canada v. Gonzalves* / 57

One Case from the 1930s: *R. v. Richards and Woolridge* / 61

3 Transition and Growth, 1940-57:

The Macdonald-McDonald-Sloan Courts / 67

One Case from the 1940s: *Ronan v. Hortin* / 91

One Case from the 1950s: *Guay v. Sun Publishing Company* / 95

4 A Growing Court in a Growing Province, 1958-78:

The DesBrisay-Lett-Bird-Davey-Farris Courts / 101

One Case from the 1960s: *R. v. White and Bob* / 136

One Case from the 1970s: *R. v. Miller and Cockriell* / 141

CONTENTS

5 Justice on a New Scale, 1979-2001:
 The Nemetz-McEachern Courts / 147
 One Case from the 1980s: *Rutherford v. Rutherford* / 202
 One Case from the 1990s: *Atley v. Popkum Water Slides Ltd.* / 205

6 Toward a Second Century, 2001-10: The Finch Court / 213
 One Case from the 2000s: *Barbeau v. British Columbia* / 231

APPENDIX A: Judges of the British Columbia Court of Appeal,
 1909-2009 / 241

APPENDIX B: Note on Methods / 245

Notes / 249

Index / 271

FOREWORD

The Osgoode Society for Canadian Legal History

THE BRITISH Columbia Court of Appeal first sat in 1910, and this engaging and lively book provides a timely centenary assessment of its history. In part it is a basic narrative of the institutional history of the court, looking at its founding, its modes of operation over time, and its caseload. To this is wedded a history of the court's judges, who are not only analyzed as a collective whole but also presented as individuals in a series of intriguing biographical sketches of major and minor figures in the court's history. Each section also offers close examination of a selection of principal cases, showing how the court has shaped provincial law over its first century of operation. Christopher Moore's account is based on research into all aspects of the court's operations, and the Osgoode Society is very pleased to include this among its growing number of studies of this country's courts.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, formerly attorney general for Ontario and chief justice of the province, and officials of the Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. It has published seventy-eight books on the courts, the judiciary, and the legal profession, as well as on the history of crime and punishment, women and law, law and economy, the legal treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

FOREWORD

Current directors of the Osgoode Society for Canadian Legal History are Robert Armstrong, Christopher Bentley, Kenneth Binks, Patrick Brode, Brian Bucknall, David Chernos, Kirby Chown, J. Douglas Ewart, Martin Friedland, John Honsberger, Horace Krever, C. Ian Kyer, Virginia MacLean, Patricia McMahon, Roy McMurtry, W.A. Derry Millar, Jim Phillips, Paul Reinhardt, Joel Richler, William Ross, Paul Schabas, Robert Sharpe, James Spence, Richard Tinsley, and Michael Tulloch.

The annual report and information about membership may be obtained by writing to the Osgoode Society for Canadian Legal History, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N6. Telephone: 416-947-3321. E-mail: mmacfarl@suc.on.ca. Website: <http://www.osgoodesociety.ca>.

R. Roy McMurtry
President

Jim Phillips
Editor-in-Chief

PREFACE AND ACKNOWLEDGMENTS

IN THE 2005 *Annual Report* of the Court of Appeal for British Columbia, the court's Planning Committee noted that, "in recognition of the hundred years the Court of Appeal will have existed in 2010, the committee is exploring different ways of celebrating the occasion. The Chief Justice met with the bar on September 20th, 2005."¹ Among the ideas raised in that meeting with the bar was a history of the court.

From that beginning, members and friends of the court, along with faculty from both of British Columbia's law schools and other friends of BC legal history, began to plan a history of the court. Perhaps most importantly, they secured the agreement of the Law Foundation of British Columbia to provide a grant to the Legal Historical Society of British Columbia to underwrite the project. This history could not have been written without the generous support of the law foundation.

When I was asked to advise the ad-hoc committee planning the history, I was given one assignment: to involve BC law students as much as possible, in order to help engage a new generation of the legal profession with the legal history of the province. To that end, we hired sixteen law students from the University of British Columbia and the University of Victoria in the fall of 2007, and their work during that academic year provided much of the research that underpins this book. I supervised and directed them only remotely, from Toronto, but I was delighted with the material they delivered and greatly impressed with the skill and enthusiasm with which they proceeded. I am sure that in the years to come they will make a great contribution to both law and legal history in British Columbia, and I am proud to see their names on the title page, for they have been vital contributors to this work.

Early in the process, we developed a three-part plan for this book. We agreed that the history of the Court of Appeal would be a biographical history, an institutional history, and a jurisprudential history.

“Lives of the Judges” — biographical history — is the most traditional form of legal history. But who the judges are remains vital, and since the oral tradition by which the bench and bar remember leaders and mentors quickly fades into obscurity, we have provided here a biographical sketch of every judge of the Court of Appeal, with particular attention to recovering and documenting earlier judges whose stories, in some cases, have been almost lost. In this regard, I am particularly grateful to law student Christopher Macleod, who, in the summer of 2008, took on the assignment of compiling a biographical database of the Court of Appeal judges. His online database, the source of all biographical data not specifically referenced in this book, will be deposited with the judges’ library at the superior courts in Vancouver, and I trust it will be available to lawyers and students of the law.

Courts are institutions as well as people. A key part of the law students’ research for this book focused on the changing procedures of the court: the size of appellate panels, how long the court took to deliver judgments, the frequency of dissenting opinions, the sources of legal citations, and so on. We have tried at least to sketch the administrative and procedural history of the Court of Appeal, from the unsophisticated managerial systems of the early decades through the revolution in judicial administration that took place in the 1970s, and from a courtroom process once largely based on oral arguments and decisions to one that depends on intensely researched written factums and judgments.

As a historian without legal training, working with a team of law students, I have been reluctant to impersonate a lawyer — that is, to attempt too much interpretation of the legal principles behind a hundred years of appellate jurisprudence. Nevertheless, what courts ultimately do is judge, and the principal task of the student researchers on this project was case analysis. The students divided among themselves almost a hundred years of Court of Appeal cases reported in the *British Columbia Reports* (1910–48), the *Western Weekly Reports* (1948–76), and the *British Columbia Law Reports* (1976–2005). The process they followed is outlined in Appendix B on page 245, but two things stand out. The students gathered a great deal of new information about the court and its cases. They also, from reading case law spanning the twentieth century, learned a lot about the law. I have tried to draw on both the data they provided

and the perceptive and enthusiastic commentary they offered. The law student researchers on this project were a pleasure to work with, and this book owes them a great deal.

Scholars in recent years have developed fruitful methods for the quantitative study of court decisions. I have followed some of their examples here: observing the speed with which cases were heard, who the leading appellate lawyers were, the frequency of unanimous decisions and of dissents, and other indicators. But this history has not entirely stayed away from the cases themselves. Where there is a developed line of study and interpretation of British Columbia appellate cases, I have followed those analyses of the court's jurisprudence — rather more cautiously for recent (and still debated) legal issues than for those that were salient in the earlier part of the twentieth century. For every decade of the court's existence, I also selected one case that seemed representative of British Columbia, of the issues facing judges, of the evolution of legal thinking, or simply of the variety of situations that come before an appellate court.

Students of jurisprudence should be advised, however, that a truly intensive interpretation of the judicial philosophies of this court and its judges was beyond the scope of this history, and perhaps of this historian. Fortunately, the centenary of the court has also inspired a special issue of the journal *BC Studies: The British Columbian Quarterly* devoted to the court. Guest edited by the lawyer-historians John McLaren, Hamar Foster, and Wes Pue, the issue includes focused studies of the court's history in such fields as sentencing law, labour law, civil liberties, corporate-commercial law, and Aboriginal rights. It will be of lasting value to all students of appellate court history, and I am grateful to the authors and editors for sharing their draft work with me in advance of its publication as the summer 2009 issue of *BC Studies*.

During this project, it has been a pleasure to work with Chief Justice Lance Finch and the members of his court, active and retired. They have been very generous with their time and thoughts. My only regret is that, working from Ontario most of the time, I spent less time with them than I would have wished. Sitting and retired judges spoke to me about any issue I raised and made no restrictions on my use of their comments. When several of the judges volunteered to make time from their busy schedules to read and critique a draft of this manuscript, I learned what formidable textual critics appellate judges can be and was also saved from countless errors in law, history, and usage. The court's law officer, Greg

Pun, was no less meticulous in suggesting, and often chasing down, scores of leads. I am also grateful to his predecessor, Meg Gaily, to Jennifer Joiner, and other members of the court staff for their assistance.

The Legal Historical Society of British Columbia is a remarkable institution that seems able to spring from quietude to effective action whenever a worthy project in West Coast legal history offers itself. In the case of this history, the springing into action was almost entirely undertaken by Geoffrey Cowper, QC, of Fasken Martineau DuMoulin in Vancouver, who, in the midst of a busy legal career and a thousand pro bono commitments, also directed this history project with tremendous energy and enthusiasm. The Legal Historical Society secured the generous grant from the Law Foundation of British Columbia that made this book possible. I was also fortunate to work with Rick Craig and the Justice Education Society of British Columbia and with writer-director Meghna Haldar as they developed *And Justice for All*, a documentary film about the Court of Appeal and its work. Finally, it has been a pleasure to be published by the press of the university where I was an undergraduate many years ago and, equally, to earn the imprint of the Osgoode Society for Canadian Legal History, of which I have long been a member. I am grateful to both organizations, their staffs, and to the scholars, both signed and anonymous, who reviewed the manuscript at their invitation.

I owe a special tribute to the late chief justice of British Columbia Allan McEachern. He had a deep and creative ambivalence about this history. I think it is fair to say he loved the Court of Appeal. He had a profound sense of its importance, and he had endless enthusiasm for its people, its traditions, and its lore. At the same time, he believed that a certain dignity and even majesty were essential to the courts. His determination while chief justice to make the courts accessible to British Columbians inspired an online “chief justice’s home page” filled with his own commentary, but he always knew that judging is not a popularity contest and that courts need to maintain a proper detachment to do their work.

McEachern wanted the history of the Court of Appeal preserved for future generations, and he did not want to control that history. At the same time, he could not bear the thought of exposing his court to ignorant scrutiny from insensitive outsiders, and he did not want to give his countenance to that kind of history. So, in the several conversations I had with him between the beginning of this project in 2006 and his death in January 2008, he was divided. But Allan McEachern was not

one to be paralyzed by mixed emotions. Whatever his doubts about the project, he plunged wholeheartedly into it. Of all the judges of the Court of Appeal from 1910 to 2001, there were only ten he never sat with or appeared before. From that unparalleled knowledge, he wrote a long and perceptive appreciation, “Appeal Judges I Have Known,” and made it available to me without conditions, even without the final polishing he intended to give it. On his own initiative, he made himself an oral historian and taped lengthy interviews with half a dozen retired judges of appeal, some now deceased. To round out that project, he consented to being interviewed himself by Geoffrey Cowper. The transcripts of these conversations have been of great value to this book and will continue to illuminate the legal history of British Columbia as long as they are preserved.

Readers will see that I have made extensive use of McEachern’s memoir and his interviews, and I have tried to let him speak for himself. Precisely because of his insider knowledge, enthusiasm for, and devotion to the Court of Appeal, his strongly committed perspective may balance my own more distanced point of view as a non-lawyer historian who grew up in British Columbia but worked on this project mostly remotely. The Court of Appeal of British Columbia would be different without Allan McEachern, and so would this history.

USAGE AND TERMINOLOGY

Courts form a hierarchy, in which higher courts can review and overrule lower courts. The Court of Appeal is the highest court of British Columbia, the province’s final court for appeals from the other courts. Some judges, like cases, also move “upward,” and many of the judges discussed in this book came to the Court of Appeal after service on the other provincial courts, particularly the Supreme Court of British Columbia. In general, however, this book, like many of today’s judges, avoids the use of “higher” and “lower” to describe the courts, or “promoted” or “raised” with respect to appointments to the Court of Appeal. Every court has its function and every judge his or her vital duties to perform.

Some versions of the much-amended British Columbia statute called the *Court of Appeal Act* used the word “puisne” (from French, later born) to describe any judge of the court other than the chief justice, but it is a word that has been losing currency. In this book, we write about four

kinds of Court of Appeal judges. First, there is the chief justice. Second, there are the regular judges, whose number is specified by BC's *Court of Appeal Act* (in 2009 there are fourteen) and who are full-time sitting judges of the court. Third, since the early 1970s, there have been supernumerary judges, who have yielded their places as regular judges but continue to sit as members of the court on a part-time basis until they retire. Fourth, there are retired judges, who have left the court entirely, either through voluntary retirement or upon reaching the mandatory retirement age of seventy-five, after which neither regular nor supernumerary judges can continue to sit.

Judges of the Court of Appeal are entitled to the honorific "The Honourable" and the title "Mr. (or Madam) Justice." In legal documents, they may be referred to as "Smith JA" (justice of appeal) or "Smith and Jones JJA." In this book, I treat the judges as historical subjects and mostly refer to them, without disrespect, as Smith or Jones. "Brother judge," a common form of address among judges in much of the twentieth century, is one more aspect of court practice that seems not to have survived the move to gender parity.

"Verdicts" come from juries and trial court judges. At the Court of Appeal, individual judges of appeal write "reasons for judgment," and the court gives "decisions" or "judgments," or else it "allows" or "dismisses" appeals.

THE BRITISH COLUMBIA COURT OF APPEAL



THE ORIGINS OF THE COURT

1

ON TUESDAY, 4 January 1910, at the courthouse in Victoria's Bastion Square, the judges of the new Court of Appeal of the province of British Columbia — Chief Justice James A. Macdonald and Judges Paulus Irving, Archer Martin, and William Galliher — assembled for the new court's first sitting as directed by an Order-in-Council under the recently proclaimed *Act Constituting a Court of Appeal and Declaring Its Jurisdiction (Court of Appeal Act)*.¹ The first case they heard was *R. v. Prasiloski*, which concerned a decision of County Court judge Frederick W. Howay in New Westminster.² In September 1909, one Prasiloski had accused some neighbours of stealing his red cow, and on his information they had been charged with theft. Prasiloski's subsequent accounts of the alleged theft were so inconsistent that the charge was dismissed at the preliminary hearing in Magistrates' Court. Prasiloski was then charged with perjury and convicted by Judge Howay.³ The appeal court hearing turned on a point of law: had Judge Howay acted correctly in admitting oral evidence from the magistrate about Prasiloski's testimony in Magistrates' Court, even though the oral testimony attributed statements to Prasiloski that were not in the original written deposition the magistrate had signed?

In a decision delivered on 11 February, Chief Justice Macdonald reviewed the precedents and ruled that, though written evidence was best in such matters, oral evidence was indeed admissible. The other three judges concurred. Judge Howay's decision was sustained. The British Columbia Court of Appeal had determined the law in the first case it had heard.

Perhaps there is no typical appeal court case. But the first case heard by the BC Court of Appeal effectively demonstrates one salient aspect of appeal court justice. In the Prasiloski appeal, the facts themselves were not at issue. Once the case reached the appeal stage, Prasiloski's cow and the question of who (if anyone) stole it were no longer significant. Nor was it the appeal court's task to decide if Prasiloski was a perjurer. Those were matters of fact to be determined by trial, and as such, they were the responsibility of the trial courts. What justified the attention of the appeal court was the possibility of an error of law. Had the appeal judges

◀ O V E R

Since 1910 the British Columbia Court of Appeal has sat in this courtroom, but the room itself has moved. Built for the Vancouver Court House of 1909, the "Heritage Court Room" was reconstructed in the new law courts building in 1979. | British Columbia Court of Appeal (BCCA) and Skunkworks Creative Group Inc.

determined that the trial judge misapplied the law, they could have overturned the conviction or ordered a new trial, but what was at stake at the Court of Appeal was the proper determination of the law of evidence.

Although perjury cases are uncommon, the first group of recorded cases of the BC Court of Appeal suggests many of the enduring concerns of the province's courts in 1910 and long afterward. Three of the first ten reported cases of January 1910 involved forestry. Two dealt with the mining industry. Six of the ten cases were civil disputes, three involved criminal charges, and one tested the authority of a city bylaw. Besides Prasiloski's perjury, there were appeals concerning a motor vehicle accident, a theft in the Chinese business district of downtown Vancouver, a murder involving two First Nations men, and the prohibition on Sunday shopping in Victoria. Just ten cases, yet they touched on the province's resource industries, motor vehicle litigation, minorities, and government regulation. These would all be fruitful sources for the province's appeal court throughout the next century. All of these cases, like Prasiloski's, came to the Court of Appeal to be decided on points of law.⁴

In 1910, as a century later, it was broadly settled that trial courts were the triers of fact. Witnesses, juries, direct and cross-examination, physical evidence, the testing of credibility, and the finding of facts were all in the realm of the trial courts; an appeal court has none of them. Appeal courts do not enable a disappointed prosecutor, a convicted defendant, or an unsuccessful litigant simply to have the whole case tried over again in hopes of a better outcome. An appeal is permitted only where reasons exist to argue that the trial court judge had made an error in law or in the supervision of the trial. Though appeal court hearings are always open to the public, the only participants are the lawyers who argue either side and the panel of judges who will rule on the appeal.

The judge who said that when he moved from the trial court to the appeal court, "I gave up the search for truth and set upon the search for error" expressed a fundamental fact about appellate jurisdiction. Appeal courts exist because it is accepted that errors can occur in the judicial process and because justice demands a process for identifying and remedying them. But the judge's quip omits the other vital function of appeal courts: not just identifying error but positively determining law. Because they deal in the interpretation of law rather than the finding of fact, appeal courts constantly establish what the law is and what it is not. They are not only seekers and redressers of judicial error but also deciders of what is law.

The function of appeal jurisdiction and the distinction between trial courts and appeal courts was not new to British Columbia when its Court of Appeal stated the law with regard to admissibility of evidence in *Prasiloski's* case in early January 1910. The new court marked an evolution in BC's judicial administration but not a startling innovation. Appeals had been heard and determined in the province for many years before the British Columbia Court of Appeal began sitting.

APPEALS BEFORE THE COURT OF APPEAL

Among the first requirements of any British colonial administration was a system of courts. Establishment of the colony of Vancouver Island in 1849 led to the creation of the Supreme Court of Civil Justice of the island colony in 1853, and when the colony of British Columbia was founded on the mainland in 1858, the Supreme Court of British Columbia came into being the same year. The two colonies merged as British Columbia in 1866, and after a squabble among the two chief justices as to who should have precedence, the two courts merged in 1870. The first mention of anything resembling an appeal jurisdiction came in 1873, when the full Supreme Court, recently expanded to three judges, declared it would sit *en banc* to review questions of law only in the judgments of its individual judges.⁵ In 1878 and subsequent years, acts of the BC legislature confirmed the jurisdiction of the full Supreme Court in appeals from all trial decisions, civil and criminal, made by individual Supreme Court judges (who in turn could hear appeals from the lower courts).⁶ The Supreme Court as appeal tribunal was no longer limited only to questions of law. Appeals to it could become rehearings, for the court *en banc* could receive and assess evidence if it chose. That process — the full Supreme Court bench sitting as an appeal tribunal upon decisions of individual Supreme Court judges, while still retaining some trial court authority — would be the way in which appeals were heard in British Columbia until the separate Court of Appeal began sitting in 1910.

There was an appeal beyond British Columbia as well. The Supreme Court of Canada, from its foundation in 1875, had jurisdiction to hear appeals from BC cases, and in some circumstances there had always been a right of appeal to the Judicial Committee of the Privy Council in Britain, either directly from BC or as an appeal from a decision of the Supreme Court of Canada.

British Columbia's progress — from virtually no appeals in the 1860s to a mixture of trial and appellate jurisdiction in the 1890s to the division of trial and appeal responsibilities in 1910 — roughly recapitulates the development of the appeal process within Canadian jurisprudence. At the start of the twentieth century, courts of appeal were still a rather new element in the legal system that Canada had inherited from Britain. Canada and British Columbia, in fact, were participating in significant innovations in appeal jurisdiction and (as we shall see) running ahead of British precedents in some ways.

APPEAL: THE CANADIAN LEGAL TRADITION

Appeal as a legal concept and courts of appeal as legal institutions hardly derive from the misty antiquity in which the entire English legal system is frequently believed to have taken shape. They are rather more modern than that. When justice was understood to be the king's gift to his subjects, and all judges were the king's judges, appeals were to the king, not to an appeal court. Such appeals were generally addressed to the king's executive council, so to appeal the king's justice to the king himself was not much different from petitioning for clemency. Even as the Crown began to delegate judicial authority to the courts and to develop the principle of judicial independence, there was no time-honoured tradition of a broad right to appeal, particularly against the judgments of the superior courts of England. High court judges and juries were not expected to be wrong.

Under certain conditions, the king's courts could assert their right to review and overturn decisions rendered by lower courts, but into the nineteenth century, it remained standard in England that the basis for an appeal (as opposed to a petition for clemency or pardon) was a "writ of error," the demonstration of an error made in the formal pleading of a case at trial. The idea of judicial error had not yet been fully accepted; miscarriages of justice could be corrected only if they could be linked to mistakes in the formal presentation of the case. As the historians of the English Court of Appeal put it, "If the official record disclosed no error on its face the decision stood." They report that, when the (English) *Judicature Acts* were enacted in 1873, "the creation of a court that could, without technicality, consider the legality of a decision of a lower court was entirely new."⁷ The long-standing requirement that decisions of county juries in civil law disputes had to be registered at the central

courts in London provided an opening for some judicial review, but only in civil cases.

In nineteenth-century criminal trials, particularly ones where juries gave the verdicts, English law generally did not allow for appeals, and in civil cases they were scarce. Only in 1848 did England create the Court of Crown Cases Reserved, a bench of judges to whom a trial judge could, if he chose, refer a criminal decision for review. The English *Judicature Acts* first began laying down broader principles of appeal in the 1870s, but not until 1907 was the Court of Criminal Appeal, with a defendant's *right* to appeal clearly spelled out, created for criminal cases in England. This innovation followed some notorious cases of apparent judicial injustice that were widely covered in the British press and discussed in Parliament. Even so, there was powerful and effective resistance to the idea that trial court judges should be accountable to higher courts that could find they had erred in law or procedure. Opposition was particularly fierce among lay justices of the peace, who as a group were largely drawn from the gentry and aristocracy of England and hence were well represented in the British Houses of Parliament.⁸ In sum, judicial appeals were hardly an unknown concept in nineteenth-century England, but a general right of appeal was far from being established.

Canadian colonies and provinces, less wrapped in legal tradition and social custom than was Britain, moved ahead of England in developing appellate jurisdictions. In colonial British North America, the first court structures had reflected old British practice. In the late-eighteenth- and early-nineteenth-century colonies, supreme judicial authority in each colony lay with the lieutenant governor in council — that is, with the unelected executive committee chosen by each governor (mostly from among non-lawyers) to advise him on matters of government. Until the early 1840s, there was no clear separation between executive and judicial functions in the British North American colonies: judges could sit on the governor's executive council along with non-judges, sharing judicial and political roles. In British Columbia as late as the 1860s, Matthew Baillie Begbie was simultaneously chief judge and a member of the governor's executive council.⁹ Appeals to the governor's council (or to the Privy Council far above it) were more theoretical than real in Canadian colonies in the early nineteenth century. After the treason trials of the War of 1812 and the 1837–38 rebellions in Upper and Lower Canada, for instance, convicts went to the gallows or into exile without any kind

of appeal being offered or expected, though some sought and received pardons.¹⁰

With the achievement of responsible government in Canada in 1847-48, however, separation of the judiciary from the executive moved rapidly to the fore. Louis-Hippolyte LaFontaine and Robert Baldwin, architects of responsible government, were both lawyers, and as co-premiers of the united Province of Canada from 1848 to 1851, they made reform of the judiciary a government priority. The governor's council, now a political cabinet drawn from and accountable to the elected legislature, was immediately deprived of its judicial functions, and the new courts that took on that role were explicitly appeal courts, with full appellate jurisdiction. This institutionalization of the appeal process was as much a part of the reform agenda as was the separation of government and the judiciary. In 1845 William Hume Blake, the Ontario lawyer and politician who as attorney general would spearhead the reforms to Canada West's courts, argued that "the position of our common law courts from which there is no appeal [he evidently dismissed the distant Privy Council as irrelevant] is truly alarming ... The danger to liberty from this despotic tribunal [the executive council acting as a court] is most imminent."¹¹

In 1849, just a year after the achievement of responsible government in the Province of Canada, a series of bills drafted by Blake established new courts with full appellate jurisdiction in civil and criminal matters for Canada West (the future Ontario). These reforms did away with the appeal court function of the lieutenant governor's executive council ("a political unprofessional body," as the *Toronto Globe* called it) in 1849.¹² The nine judges of the three superior courts in Canada West (Queen's Bench, Common Pleas, and Chancery) were constituted judges of a new court, the Court of Error and Appeal, which, sitting *en banc*, could hear appeals from any of the three courts. In 1874 the first appointments to the Court of Error and Appeal of judges who did not sit on any trial court began the separation of trial and appeal functions. This process was confirmed by the establishment of the Ontario Court of Appeal as an independent court, separate from the trial courts, in 1876. In 1881, however, Ontario continued its judicial experimentation by uniting all its superior courts, trial and appeal, as the Supreme Court of Judicature for Ontario, with the combined Courts of Queen's Bench, Chancery, and Common Pleas as one division, and the Court of Appeal as the other, administratively linked but operationally separate.¹³

Even before the democratic transformation of 1847–48, Quebec (known as Lower Canada from 1791 to 1841 and as Canada East from 1841 to 1867) had already begun to make itself the first Canadian province to provide something resembling a modern appeal process. Appeals to the lieutenant governor in council were ended there in 1840. Appeals from decisions of a lone judge of Queen’s Bench were thereafter heard by panels of Queen’s Bench judges, sitting as an appeal court to review questions of law. In 1849, soon after the achievement of responsible government, the LaFontaine administration changed the jurisdiction of the Court of Queen’s Bench of Canada East to make it principally an appeal court. Trials became the responsibility of the Quebec Superior Court, though Queen’s Bench judges could also in theory be trial judges. (Only in 1920 did King’s Bench judges in Quebec give up their concurrent trial court authority.) The Quebec Court of Queen’s Bench was renamed the Quebec Court of Appeal in 1974.¹⁴

These innovations presented a broad and generally accessible right of appeal, not merely as a restructuring of the judiciary but more as a significant new bulwark of Canadian democracy. The establishment of appeal courts in Canada went hand in hand with the achievement of responsible government. Both independent courts and accessible processes of appeal soon became accepted aspects of life in the Canadian provinces. Louis Riel faced a treason trial in 1885 as other Canadians had in 1812 and 1837, but because of these changes, Riel was able to appeal his conviction in the court of the North-West Territories to the nearest appeal tribunal (the Court of Queen’s Bench in the adjacent province of Manitoba) and from there to the Judicial Committee of the Privy Council. Both, in the event, swiftly dismissed his appeal, and his execution proceeded.¹⁵ (Some limits on the right of appeal did endure in Canada into the twentieth century. From 1892 to 1923, the *Criminal Code* required the attorney general’s consent for criminal appeals, at least in theory, and some appeals still required the trial judge’s consent.¹⁶ In its early years, the BC Court of Appeal heard a slowly declining number of “stated cases” — that is, cases referred to it by the trial judges rather than appealed directly by one of the parties. *R. v. Prasiloski* was a stated case.)

Other Canadian provinces broadly followed the post-responsible-government evolution of appellate jurisdiction as worked out in Quebec and Ontario during the 1840s. The smaller provinces, however, with smaller caseloads and fewer judges, often retained a single Supreme Court that exercised both trial functions (with individual judges) and appellate

functions (with panels of judges). Nova Scotia abolished the appeal function of the governor's executive council in 1847, as part of the same reform process operating in Canada East and West. Thereafter, Nova Scotia saw frequent campaigns by lawyers and politicians to separate trial from appeal jurisdiction, but the Nova Scotia Supreme Court, sitting *en banc*, remained the province's appeal court until 1966.¹⁷ Newfoundland's Supreme Court had both trial and appellate functions until 1975. Prince Edward Island's Supreme Court had a trial division and an appellate division until 2009.¹⁸

Early in the twentieth century, well ahead of their Atlantic Canadian counterparts, the rapidly growing western provinces began considering fully-fledged courts of appeal. Manitoba established its Court of Appeal in 1906.¹⁹ When courts for the new provinces of Saskatchewan and Alberta were founded in 1907, they combined appellate and trial responsibilities in their Supreme Courts, but Saskatchewan created a separate Court of Appeal in 1918, and Alberta established a separate appellate division in 1921. (It became the Alberta Court of Appeal in 1979.)²⁰ The emergence of a Court of Appeal in British Columbia, therefore, moved more or less in harmony with developments elsewhere in Canada and, particularly in Western Canada, quite independently and somewhat earlier than comparable developments in England.

The origins of British Columbia's Court of Appeal are further evidence that, by the beginning of the twentieth century, the province's models for legal institutions were becoming more Canadian than British. In BC's colonial days, its first judges and several of its early lawyers had come directly from Britain, and they had fought to install and preserve British models for West Coast jurisprudence. Matthew Baillie Begbie, first chief justice of British Columbia, looked with a baleful eye on Canadian interlopers, and he was reluctant to accept the idea of any appeal tribunal in the colony that might review his judgments.²¹ Confederation, however, consolidated the growing "Canadianness" of BC's legal institutions. The judicial hierarchy (magistrates' court, county court, supreme court), the role of the attorney general, the unified profession of barristers and solicitors governed by a law society; these all came to resemble Canadian practices and terminologies rather than British ones. Once British Columbia became a Canadian province in 1871, its high court judges were appointed by Ottawa. Soon many of the province's lawyers and judges were recent immigrants from Ontario, Quebec, and the Maritimes, often trained in the law there, who naturally looked to the

bar and the courts of the other provinces rather than to Britain for precedents and examples, and some BC-born members of the profession studied at Eastern Canada law schools. That the BC Court of Appeal broadly resembled those of the other provinces and came into being in the same period was not a coincidence. BC was participating in the same judicial evolution as the rest of the country.

Sir Matthew Begbie remains the only judge of a BC court to have received a knighthood. In the 1880s, Prime Minister Macdonald intended that all Canadian chief justices would receive knighthoods *ex officio*, but when Chief Justice Hagerty of Ontario declined the honour in 1887, the tradition lapsed before it had really started.²² Laurier's Liberals, much more skeptical of British honours, ensured that the idea faded away. In 1934, during a brief revival of the honours system, Chief Justice of Canada Lyman Duff was knighted, long after he left BC's Supreme Court, but no chief justice or other member of the British Columbia Court of Appeal ever received such an honour.

FOUNDING THE COURT OF APPEAL

British Columbia held its first provincial election contested on party lines in June 1903. Until then, the legislature had run on "personal government": the province's constituencies elected individual representatives without regard to party, and the members of the legislature then sorted themselves into leaders, cabinets, and caucuses through personal preference and persuasion. By 1903 that system had been destabilized by debt, economic uncertainty, and a growing conflict between anti-union employers and radical workers. It was swept away that summer by Richard McBride, a charismatic thirty-two-year-old who led a newly organized provincial Conservative Party slate to a slim majority.²³

McBride was the first premier born in British Columbia; he had earned a law degree at Dalhousie University in Halifax before launching practices in New Westminster and Atlin.²⁴ His glad-handing, optimistic style made him an effective party leader and campaigner, and he became premier at the right moment. The "Laurier boom" and the great surge of European immigration to Canada were building British Columbia's population and expanding the markets for its products on the prairies and in the east. At the same time, capital investment increased markedly in BC mining, forestry, salmon canning, fruit packing, and other export industries, leading to mechanization and rapid productivity increases.

With the help of generous provincial subsidies, new transcontinental and local railroads were opening up isolated areas of the province, and its cities and seaports thrived on imports, exports, and international trade. The return of prosperity and McBride's deft concessions to labour helped dampen down the industrial unrest that had plagued the mines and fisheries. Vancouver, with a population that passed 100,000 by 1910, eclipsed Winnipeg as Western Canada's largest city and established itself solidly as an international seaport and the province's commercial and financial capital.²⁵

Problems remained. There were scandals over McBride's openhanded attitude to grants and guarantees for railroads and other businesses. Anti-Asian agitators sometimes protested and rioted against immigration from Japan, China, and India, and McBride effectively sidetracked half-hearted federal initiatives to address the land claims and Aboriginal rights that First Nations organizations were beginning to advance. The West Coast economic boom carried all before it, and McBride rode the boom to ever larger majorities. His advocacy of provincial rights and his constitutional battles with Ottawa over "better terms" for British Columbia had made him the first BC premier of national stature and influence. He would remain as premier until 1915 and retire undefeated.

British Columbia's prosperity and McBride's characteristic enthusiasm for progress and development were prime underlying causes for the creation of the Court of Appeal in 1907. Throughout McBride's time in office, his government worked to strengthen the province's institutional structures and its place in Confederation. The McBride years saw the building of public infrastructure that ranged from public buildings such as the Vancouver courthouse to the endowment of a provincial university to the development of the city of Prince Rupert as a northern railroad terminal and seaport. The Court of Appeal became part of that trend. In 1907 Ontario had had its appeal court for thirty years, and Manitoba had just created one. Manitoba was one year senior to British Columbia as a province of Confederation, but BC was rapidly supplanting it in population and in ambition. A fully-fledged Court of Appeal would be another mark of dignity and progress for the province and another lasting achievement for its premier.

Certainly, the BC legal profession had been agitating for a Court of Appeal. In the years before 1907, the Law Society of British Columbia (founded in 1869 and given authority to govern the profession in 1884) had repeatedly called for separation of the trial and appeal functions of

the Supreme Court.²⁶ It complained of “the congested state of business” in the Supreme Court. The law society might have been moved by the self-interest of its members, of course: they could advocate efficiency, but they could also see career possibilities in the permanent addition of several new positions in the local judiciary.²⁷ In fact, the evidence that appeal responsibilities greatly burdened the Supreme Court in the early 1900s is slight. Chief Justice Gordon Hunter told the prime minister that a sixth judge for his Supreme Court would do more than an appeal court to relieve pressure on his judges, and the *Victoria Times* tallied the Supreme Court’s actual sitting schedule and concluded that it was not onerous.²⁸ The law society’s urgings might not have carried much weight with the provincial government had McBride and his ministers not already been taken with the idea.

McBride’s government introduced legislation to create a Court of Appeal for British Columbia in the legislative session that immediately followed the election of February 1907, which returned the Conservatives to power with an increased majority.²⁹ The *Court of Appeal Act* was introduced by the attorney general, the Kamloops lawyer Frederick Fulton.³⁰ The legislature handled the bill with characteristic dispatch. It received first reading on 15 April 1907 and second reading the next day. Referred to committee on 22 April, it was amended, returned, and debated that day, was given third reading on 24 April, and received royal assent from Lieutenant Governor Dunsmuir on the 25th. It would not come into force, however, “until a day to be fixed by the Lieutenant-Governor in Council” — that is, by the provincial Cabinet.³¹

The only debate in the legislature about the Court of Appeal bill was sparked by James Hurst Hawthornthwaite, a socialist MLA elected by the embattled coal miners of Nanaimo.³² Hawthornthwaite moved to delete the clause on precedence among the judges. He declared that, having done away with wigs in court, British Columbia should also abandon antiquated notions of social precedence: “What did it matter which judge should enter a ping pong fete or a pink tea first? The whole matter was of so petty a character that he thought his amendment should pass.” James A. Macdonald, leader of the Liberal opposition and a lawyer from Rossland, agreed that the House should have nothing to do with social status, but he observed that “the section provided for judicial precedence, which was necessary for fixing to some extent the duties of the judges. It was not a question of which official should walk first into

a drawing room or a social function.” On that reassurance, the amendment was defeated, and the bill passed. When the legislative session ended the next day, the Liberal-leaning *Victoria Times* noted the new court as one of the achievements of the session, though it declared that “the most important measure of the session was that relating to the endowing of the university. This is a great stride in the right direction.”³³

THE COURT AND ITS POWERS

The new court, as constituted by the thirty sections of the *Court of Appeal Act*, resembled appeal courts in Ontario and Manitoba broadly but not slavishly. As in Manitoba, the new court would consist of a chief justice and three judges of appeal, who would sit in panels of no less than three. As in Manitoba, the chief justice would be styled “the chief justice of the Court of Appeal” as long as the incumbent chief justice of the province (that is, the head of the existing trial court) held office, after which the head of the appeal court and his successors would take the title of chief justice of the province. British Columbia’s Court of Appeal would be entirely separate from the Supreme Court, with no overlapping functions, unlike Manitoba, where appeal court judges were also *ex officio* judges of the Court of King’s Bench.³⁴ (There is one known instance of a BC Supreme Court judge sitting on a Court of Appeal panel to provide a quorum, as authorized by a short-lived amendment made to the *Court of Appeal Act* in 1909.)³⁵

The Court of Appeal was given all of the appellate powers formerly exercised by the full court of the Supreme Court, with authority to review all judgments, orders, and decrees of the Supreme Court and the County Courts, and it acquired such original jurisdiction as was necessary to hear and determine appeals. (Supreme Court judges, sitting alone, could still hear appeals from County Court and the provincial Magistrates’ Court, but their decisions could now be appealed to the Court of Appeal.) In keeping with the traditional judicial schedule, the court would sit four times a year, twice in Victoria and twice in Vancouver. (Ontario’s Court of Appeal sat only in Toronto; Manitoba’s was authorized to travel to several courthouses across the province.) In both Vancouver and Victoria, the registrars of the Supreme Court would double as Court of Appeal registrars. The rules of procedure for the new court were laid out in some detail in the act, but in addition, the lieutenant

governor in council was authorized to make rules governing the sittings, procedures, and reporting of the Court of Appeal and its business in chambers.

The 1907 *Court of Appeal Act* would prove to have a long life. Though it was frequently amended, most of the changes made to it for many years were relatively small and cumulative — increasing the number of judges, revising the schedule of sittings, adjusting the court’s jurisdiction in response to new legislation, and generally shifting matters of detail from the act itself to the discretion of the lieutenant governor in council. As the number of judges grew, making it unnecessary for each judge to sit on almost every panel, the judges (or failing their agreement, the chief justice) were authorized to decide the assignment of judges to panels. In 1936 even-numbered panels of judges were prohibited, and in 1937 federal legislation empowered the court to hear appeals in divorce cases.³⁶ In 1955 the court was authorized to sit in separate divisions simultaneously. Truly substantial changes began to be made in the 1970s. As we shall see in Chapter 5, the 1907 act was finally laid to rest in September 1982, when it was repealed and replaced by an entirely new *Court of Appeal Act*, which continues to be amended periodically.³⁷

VICTORIA AND OTTAWA: THE FIRST APPOINTMENTS

Quickly passed, the *Court of Appeal Act* was not as swiftly acted on. When the new act would come into force was left to the government’s discretion, and it languished through 1908 and much of 1909. Further prodding by the law society was required before the act was proclaimed on 1 September 1909.³⁸ Apart from the administrative requirements of providing courtrooms, chambers, and staff for the new court, one cause of delay was the need for federal-provincial consultation. In accordance with the division of authority set out by sections 92 and 96 of the *British North America Act*, the new Court of Appeal was administered by the Province of British Columbia, but its judges, like those of the BC Supreme Court since 1871, were federal judges, to be appointed and paid by the government in Ottawa.³⁹ McBride’s Conservative government in Victoria had to seek judges for its new court from Wilfrid Laurier’s Liberal administration in Ottawa.

By 1909 Wilfrid Laurier had been prime minister for thirteen years, and his habits in judicial appointments were well established. The minister of justice, Allen Aylesworth, was a Toronto lawyer popular in British

Columbia for his advocacy for the Canadian interest as a member of the Alaska Boundary Commission of the early 1900s, but he was largely unfamiliar with the West Coast bar.⁴⁰ In any case, Laurier took a keen personal interest in all matters of patronage and appointments, including judicial appointments. He had come to power after a long period of Conservative rule, at a time when there was no embarrassment about political patronage in judicial appointments. John A. Macdonald had said that he followed “the true constitutional principle: whenever an office is vacant it belongs to the party supporting the government.”⁴¹ Though he often spoke of the need for legal ability as well as party loyalty, Macdonald gave nearly all his judicial appointments to Conservative Party supporters. During his long tenure in office, most of the superior court judges right across Canada came to be Macdonald’s own appointees. The prime minister gradually developed a custom of selecting new chief justices and judges for the higher courts from among incumbent judges.⁴²

When the Liberals replaced the Conservatives in power, Laurier sometimes followed this tradition of promotion from lower to higher courts, even though it meant that he rewarded incumbent Conservative appointees, particularly during his early years in office. Laurier also gave weight to regional balance and the interests of the francophone and Roman Catholic communities. In general, however, his appointments were as partisan as Macdonald’s had been. In British Columbia, he did not name a single Conservative to the bench between 1896 and 1911, even though that meant an unusual reliance on appointing judges directly from practice rather than from the lower courts.

Though BC elected mostly Liberals to Ottawa during Laurier’s years in office, only one British Columbian, William Templeman, sat in his Cabinet. Templeman, the founder of the *Victoria Daily Times*, handled West Coast patronage matters for Laurier and took an interest in legal appointments, but he was not a lawyer.⁴³ In Liberal circles, no BC lawyer seems to have enjoyed an influence rivalling that of the Vancouver lawyer and former federal Cabinet minister Charles Hibbert Tupper (son of the former prime minister Charles Tupper) on the Conservative side. But Laurier seems to have taken advice from Lyman Poore Duff, whom he named to the BC Supreme Court in 1904 and to the Supreme Court of Canada in 1906, and from the Victoria lawyer, judge, and Liberal partisan Archer Martin. As a young lawyer in 1896, Martin had urged the newly elected Laurier to appoint Liberals to vacancies on the

BC bench “to put an end to the judicial tyranny which has terrorized the bar and made it dangerous for a lawyer to be a Liberal.”⁴⁴ Laurier obliged; indeed, one of his first appointments was Martin himself, who was named to the Supreme Court of British Columbia in 1898 at the age of just thirty-three. Martin, an able lawyer and a productive scholar in both law and history, would continue to offer Laurier advice on legal appointments while on the bench.

In the early 1900s, Martin’s influence on Laurier served him well in the intense feud he began with his chief justice. In 1902 Laurier had named Gordon Hunter, a Victoria lawyer and the partner of Lyman Duff, as chief justice of British Columbia directly from practice.⁴⁵ This appointment had not been on Martin’s advice, and it made Chief Justice Hunter senior to Martin. Hunter and Martin had been estranged at least since Hunter, then still a lawyer, had challenged Martin’s eligibility for appointment to the bench in 1898. Hunter’s appointment as chief justice provoked Martin into an extraordinary campaign of disrespect and insubordination that became one of the legends of the BC bar. Martin appears to have been principally at fault, and his general behaviour so irritated the Vancouver bar that in 1908 leading members petitioned Ottawa to have him removed from the bench — something only a joint resolution of Parliament could have achieved.

Martin may have characterized the petition to the federal government as an attack by the old Conservative-dominated bar on a new Liberal appointee, for in the end no changes were made. Hunter, meanwhile, was becoming heavy-handed in asserting his authority as chief justice, and he was also drinking heavily during the conflict with Martin. When the attorney general complained of his conduct, Laurier pondered holding an inquiry into the BC judiciary, and in 1909, in a personal letter that today would surely be considered interference with the independence of the judiciary, he vigorously rebuked Hunter and came close to threatening him with removal: “Had I been in charge of the matter, the petition brought against you would have been dealt with differently, but the Minister of Justice thought otherwise and I felt bound to defer my judgment to his own.”⁴⁶ In the end, Hunter abjectly promised to mend his ways, and he remained at the head of the Supreme Court. Martin would soon be named to the new Court of Appeal.

Historians David R. Verchere and David R. Williams, who knew much of the lore of the BC courts, both suggest that the Court of Appeal may have been created principally as a means by which to separate

Hunter and Martin.⁴⁷ It was Premier McBride's government, however, that established the Court of Appeal, and McBride had no say in the naming of the judges and little incentive to want a Liberal judge promoted (or, for that matter, to end a fight among two federally appointed Liberal judges). There was scant collaboration between the Conservative McBride and the Liberal Laurier regarding either the founding of the court or the judges who would be named to it, and leading Liberals among the lawyers and judges of BC would have lobbied Laurier directly regarding appointments. In any case, putting Martin in a position to review and overrule Hunter's Supreme Court decisions was not likely to end feuding within the BC judiciary — as Martin's later career would demonstrate decisively. Separating Martin from Hunter may have carried some weight in Laurier's choices in 1909, but it seems unlikely that this motive would have prompted McBride to create the court in 1907.

Finally, Victoria's administrative preparations and Ottawa's appointment decisions were complete, and the first four judges of the British Columbia Court of Appeal were appointed on 30 November 1909. The new chief justice of the Court of Appeal was James A. Macdonald, and the three regular judges were William Galliher, Paulus Irving, and Archer Martin. Despite James Hawthornthwaite's unsuccessful interjection about precedence among the judges, the three regular judges were appointed simultaneously in a single order that did not, in fact, specify seniority among them.⁴⁸

All four judges had close ties to the Liberal Party. Macdonald was the leader of the provincial opposition; he resigned from the legislature to take the appointment. William Galliher, who had practised in Nelson and then briefly in Vancouver, had been a Liberal MP in Ottawa between 1900 and 1908 for the Yale and Kootenay ridings (the Kootenay constituency was split off from Yale in 1904), and he had corresponded directly with Laurier, soliciting a patronage appointment. Paulus Irving had not held elected office, but he was an active Liberal and the son of the prominent Ontario lawyer Aemilius Irving, a former MP and a long-time advisor to Ontario premier Oliver Mowat and Prime Minister Laurier. Martin and Irving were both moved from the BC Supreme Court (to which Laurier had named them). Galliher and Chief Justice Macdonald had no previous judicial experience. (For further biographical details and sources regarding each judge, see pages 39-45.)

Political qualifications aside, the judges of the new court had some notable legal credentials. Macdonald was considered a capable lawyer

and administrator, if somewhat self-effacing, and some thought him better suited to the bench than to politics. Paulus Irving had founded and largely run the *British Columbia Reports* for many years, and he had been a deputy attorney general and a commissioner for mining disputes. Archer Martin's legal publishing had abundantly demonstrated his knowledge of the law. Only Galliher had no evident legal credentials as a potential judge.

BC's *Court of Appeal Act* prevented one likely cause of friction and allowed one small source of confusion. It specified that, though the new court would be senior in judicial rank to the BC Supreme Court, the incumbent chief justice of the Supreme Court, Gordon Hunter, would retain the title chief justice of British Columbia as long as he remained on the bench. Only when Hunter left office would James Macdonald, chief justice of the appeal court, inherit the title of chief justice of British Columbia, which would thereafter remain the perquisite of the head of the appeal court. Manitoba and Ontario had earlier made the same specifications in creating their courts of appeal. Alberta's failure to do so in 1919-20 would drive its two rival chief justices to litigate all the way to the Privy Council the vexed question of who was the real chief justice of Alberta.⁴⁹

On the other hand, the BC act produced some enduring confusion in the names of the province's courts. The new British Columbia Court of Appeal was now the highest court in the province, but the name of the Supreme Court of British Columbia remained unchanged, creating the odd situation that the Supreme Court was not in fact supreme among the province's courts. Alberta and some of the Atlantic provinces followed the same practice, but when Saskatchewan established a Court of Appeal in 1918, its Supreme Court was renamed the Court of King's Bench to underline that it was no longer "supreme" in the province. In Quebec, the Court of King's Bench was the highest court until it was renamed the Court of Appeal in 1974. In Ontario, the Supreme Court was not a specific court but a title applied collectively to the superior trial courts and the Court of Appeal of the province.

The fact that the first Court of Appeal consisted of four judges produced neither comment nor complication. The act required a minimum of three to sit on appeal cases, but it was otherwise silent on the size of appeal court panels, and four-judge panels were common in the court's early decades. Since a majority was required for any judgment, a panel

of four set a high threshold. A two-to-two split would allow a trial court judgment to stand, so a four-judge panel needed at least a three-to-one majority (75 percent, in effect) in order to overturn a trial court decision. (In a panel of three, the threshold was 66 percent; in a panel of five, it was just 60 percent.) There seems to have been no particular intention to encourage four-judge panels, and a fifth, potentially tie-breaking, judge was appointed just three years after the court began sitting.

The expansion of the Court of Appeal, just a few years after its creation, may have been intended to provide five judges for capital cases, constitutional cases, and other matters of particular importance. It seems unlikely that pressure of work was the sole reason for this. Only a small portion of trial court cases ever come up to the appellate level, and in 1913 (until 1947, in fact), the Supreme Court of British Columbia got by with only six judges to the appeal court's five. (In the early twenty-first century, the Supreme Court had about five times as many judges as the Court of Appeal.)⁵⁰ Even after the fifth seat was established, four-member panels frequently sat in BC appeal cases until the statute was amended to require odd-numbered panels in 1936. Until then, appeals were often denied on a two-to-two split among the judges.

With all of the preliminaries in hand, the *Court of Appeal Act* directed that the court's first sitting each year would be in Victoria on the Tuesday after the third day of January. According to a front-page story in the *Victoria Daily Times*, that first sitting, on 4 January 1910, was "a notable day in the legal calendar of British Columbia," with a "gathering of members of the legal profession such as has never been seen here before."⁵¹ The rival *Victoria Daily Colonist* reported that the Supreme Court room at the Victoria courthouse was "crowded with members of the bar and interested citizens when their lordships entered."⁵² Chief Justice Macdonald sat with Paulus Irving in the next-in-seniority seat to his right, Archer Martin on his left, and William Galliher beyond Irving. At 10:00 A.M., Registrar Brian H. Tyrwhitt Drake declared the inaugural sitting of the Court of Appeal of British Columbia in session. Attorney General Bowser immediately arose with welcoming remarks. In response, Chief Justice Macdonald said "the establishment of this court marks a new development in our judicial system."⁵³

Macdonald also observed that the three regular judges had been appointed simultaneously, without precedence being established among them. He added that the judges had differed regarding the authority of

the court to respond to this situation. (A later chief justice, Allan McEachern, suspected the dissenter would have been the ambitious, self-important Martin, but the newspapers report that the disagreement was about the power of the court to act, not about which judge the court would declare senior if it had the power to decide.)⁵⁴ In the end, a majority of the court had decided that the court had the power to determine precedence for itself. Martin and Galliher, Chief Justice Macdonald declared, had then “happily” agreed that Paulus Irving, who had served on the Supreme Court longer than Martin, should be declared senior among the regular judges.⁵⁵

Then arose “the last of the old gladiators ... straight as an arrow and belying his white hair by his easy carriage.” This was the treasurer of the Law Society of British Columbia, Charles Edward Pooley, who had been practising in Victoria for forty-seven years. Pooley brought the congratulations of the bar and offered some reminiscences about courts and judges of the province’s frontier days. “His brother members,” he said, “looked forward to a transaction of court business without delay of justice.”⁵⁶

The chief justice then laid out a provisional list of cases to be heard in Victoria and Vancouver, with criminal matters to precede civil cases, and the court got down to business. For its first case, it heard arguments in *R. v. Prasiloski*. Deputy Attorney General Hugh Archibald Maclean led for the Crown, and E.B. Ross spoke on Prasiloski’s behalf. According to the *Colonist*, “their lordships created a very favourable impression indeed,” particularly the chief justice: “His keen logical mind, his finely-marked face, and the clearness and decision he evinced in getting at the meat of things all drew the attention of the visitors and the counsel he heard.” The court reserved judgment in *Prasiloski* and began hearing arguments from Maclean and counsel J.A. Harvey in *R. v. Stickler*, an appeal from Cranbrook, before adjourning. It was “a day notable in the legal history of the province,” said the *Times*.⁵⁷