FOR THE BETTER ADMINISTRATION OF JUSTICE:

The Court of Appeal for British Columbia, 1910–2010

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In the Anglo-Canadian legal system, trials are proceedings in which the disputing parties, or litigants, each put evidence, usually through the oral testimony of witnesses, before a court and make legal arguments based upon it. Then the judge – or the jury, if there is one – decides the case. Most disputes never go to trial, and the vast majority of those that do are not appealed.

If the unsuccessful litigant does appeal, the process is markedly different. There are no witnesses and there is no jury, even if there was a jury at trial.[1] So there is no examination or cross-examination and no flights of rhetoric addressed to jurors. Appeals are generally confined to legal argument based on the record – that is, a transcript of everything that happened at trial – and are nearly always heard by more than one judge. In the British Columbia Court of Appeal three judges (and sometimes five) sit on appeals.

Although infrequently exercised, the right to appeal a judicial decision that has gone against you is fundamental to our legal system. But it is a right that is of relatively recent origin. Because trial outcomes were seen, for centuries, as revealing the judgment of God, one could hardly appeal them; and this attitude persisted even after the obviously supernatural modes of trial, such as battle, ordeal, and wager of law, were replaced by trials in which mere mortals – juries – rendered judgment.[2] At common law, judges presided and juries decided, and that was that. When the verdict of a jury was entered on the record before all the judges of one of

[1] Exceptionally, new evidence may be led on appeal if the party proposing to do so can persuade the court that it is not only important but was unavailable at time of trial.

[2] Trial by battle was more or less what it sounds like. It had a short life but was not formally abolished until 1818. Trial by ordeal also resembled its description, but when, in 1216, Pope Innocent III forbade priests from taking part it lost its legitimacy. Wager of law, which involved having a set number of "oath helpers" swear that your oath denying liability should be believed, lasted until the early seventeenth century. But it was not formally abolished until the nineteenth century.

the central superior courts at Westminster, it was intended to be final.[3] There was no right of appeal at common law. Such a right, as lawyers say, is a "creature of statute" – which means that it must be conferred by legislation.[4]

Still, something like a modern appeal did develop in the medieval period because the verdict of a jury in a civil case did not become a binding decision until it was entered before the central superior court in which the case had begun. The interval between taking the verdict in the country and entering it before the Full Court provided the party that lost with an opportunity to move to have the jury's verdict set aside. In other words, the losing party could "appeal" the verdict before the trial was formally over. It was an adapted version of this system – referred to as the *nisi prius* system – as it existed in England on 19 November 1858 that was formally "received" in British Columbia.[5] Fittingly for present purposes, more than half a century ago Justice C.H. O'Halloran, a judge of the British Columbia Court of Appeal who appears more than once in this special issue of *BC Studies*, described the *nisi prius* system in the *Canadian Bar Review*.[6] In criminal cases, however, the jury's verdict was final and did not need to be entered at Westminster, so there was no opportunity for the sort of "internal" review available in civil cases – a matter that Justice O'Halloran also addressed at length.[7]

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[3] For more detail, see J.H. Baker, *An Introduction to English Legal History* 4th ed. (London: Butterworths, 2002) chap. 9, upon which much of the material in these opening paragraphs is based. Such decisions could of course be reviewed by Parliament, the highest court; but this jurisdiction was soon confined to the House of Lords.

[4] It is true that there was a process of sorts for reviewing and correcting legal mistakes, but the "writ of error" was a narrow and discretionary remedy that did not reach the merits of the case. It was therefore nothing like a modern appeal, where a litigant has a right to go to a higher court to have the record of the trial court, including the transcript of all the evidence and the judge's reasons for judgment, reviewed for errors of law and, less often, errors of fact or mixed law and fact.

[5] *The English Law Ordinance*, 1858. Now see the *Law and Equity Act*, RSBC 1996, c. 253, s.2. *Nisi prius* is Latin for "unless before," and it refers to the wording of the writ sent to the sheriff in the county in which the lawsuit arose. This document ordered the sheriff to send a jury to Westminster to try the case "unless before" the time stated in the writ the king's justices arrived in his county to try the case there – which they invariably did. The first legislation regulating all this is the *Statute of Westminster II*, c. 30 (1285).

[6] See C.H. O'Halloran, "Right of Review and Appeal in Civil Cases before the Judicature Acts, 1875," *Canadian Bar Review* 27 (1949): 46-66. See also his "Problems in the Modern Appeal in Civil Cases" in the same volume at 259-82.

[7] See C.H. O'Halloran, "Development of the Right of Appeal in England in Criminal Cases," *Canadian Bar Review* 27 (1949): 153-72. The difference is that a commissioner of assize who presided over criminal trials in the counties had full authority to hear and determine such cases, whereas his authority to hear civil cases was only as a delegate of the central superior courts. For more detail see Hamar Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth Century British Columbia," in D. Flaherty, ed., *Essays in the History of Canadian Law,* vol. 2 (Toronto: Osgoode Society for Canadian Legal History, 1983) 308 at

Apart from motions to set aside civil jury verdicts at *nisi prius*, the modern civil appeal to a separate Court of Appeal did not arrive in England until the nineteenth century. It developed first in the Court of Chancery and, significantly for our purposes, in the Judicial Committee of the Privy Council, which heard appeals from the colonies.[8] It was then extended to all civil matters, a process that culminated in the *Judicature Acts* of 1873 and 1875.[9] But in criminal cases this sort of appeal was not available as of right in England until the Court of Criminal Appeal was established in 1907.

BRITISH COLUMBIA IN THE NINETEENTH CENTURY

So: how did all this reforming zeal affect nineteenth-century British Columbia?

At first, not very much. The colonies of Vancouver Island (1849) and British Columbia (1858) were established two decades before the English *Judicature Acts*, so these statutes were not part of the package received as law. The legal system in the colony of Vancouver Island, moreover, was originally an entirely amateur one: neither the magistrates nor the only judge – who was the chief justice of the Supreme Court – were lawyers. A professional judge, Matthew Baillie Begbie, was sent out when the second colony was established on the mainland, but he too was on his own: there was no full court to review jury verdicts or Begbie's rulings at trial. And although the law guaranteed the right of colonists to appeal civil cases to the Judicial Committee of the Privy Council in England, this was about as practical in the colonial period as appealing to the pope.[10] As a result, Begbie would be in his third decade as a judge

315-17. Although punishments might be mitigated through devices such as pardons and benefit of clergy, reviewing the conviction upon which a punishment was based was discretionary and exceedingly rare. On pardons and benefit of clergy see *An Introduction to English Legal History* at 515-17. Note also that, although there was no right of appeal from a jury verdict in a serious criminal case, the Court of King's Bench could review convictions entered by justices of the peace for lesser offences.

[8] One effect of the seventeenth-century civil war in England was to deprive the king's council of its domestic judicial authority, and courts that were really emanations of the council – such as the Star Chamber – were abolished. But the council retained its authority to hear appeals from the Crown's overseas dominions, and the formal Judicial Committee of the Privy Council (JCPC) was established for this purpose by statute in 1832-33. (In the older British colonies in what is now eastern Canada the colonial governor and council heard appeals that could, in turn, be appealed to the JCPC; but this was never the case in British Columbia.)

[9] 36 & 37 Vict. (1873), c. 66 and 38 & 39 Vict. (1875), c. 77.

[10] Which had been illegal since the fourteenth century anyway. For the right to appeal civil cases to the JCPC, see *An Act to Provide for the Administration of Justice on Vancouver's Island*, 12 & 13 Vict., c. 48, s. 3 (1849) and *An Act to Provide for the Government of British Columbia*, 21 & 22 Vict., c. 99, s. 5 (1858).

before he had one of his decisions reviewed – a circumstance that may help to explain some of the heated courtroom exchanges that punctuated his judicial career.[11]

The Supreme Court of British Columbia expanded to two judges in 1870, then to three on Confederation with Canada in 1871, and all three occasionally sat on important cases.[12] But it was not until 1879 that the legislature formally provided for a Full Court that could review jury verdicts and rulings at trial.[13] By 1897 the legislature was referring to this court as "the Court of Appeal," but it was still simply the judges of the Supreme Court, sitting – as the old Law French phrase would have it – *en banc*.[14]

The years immediately following the formal establishment of the Full Court were rancorous. It was not clear after Confederation which level of government had jurisdiction over Supreme Court judges in British Columbia, and the Full Court became an arena in which the judges and the provincial government fought about whether the latter could make rules of court, order the judges to reside in a particular district, and order regular court sittings called "assizes" without issuing ancient

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[11] On Begbie, see David R. Williams, *"…The Man For A New Country." Sir Matthew Baillie Begbie* (Sidney: Grays Publishing, 1977). On the legal history of the colonial period generally, see Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821–1871* (Toronto: University of Toronto Press, 1994); Hamar Foster, "Law Enforcement in Nineteenth Century British Columbia: A Brief and Comparative Overview," *BC Studies* 63 (1984): 3-28, and "British Columbia: Legal Institutions in the Far West, from Contact to 1871," in DeLloyd Guth and W. Wesley Pue, eds., *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001) chap. 10; and David M.L. Farr, "The Organization of the Judicial System of the Colonies of Vancouver Island and British Columbia" (BA essay, University of British Columbia, 1944). An abridged version of Farr's essay may be found in *UBC Law Review* 3 (1976-68): 1.

[12] For example, in 1877 they decided 2:1 that the English *Divorce and Matrimonial Causes Act* of 1857 applied in British Columbia, notwithstanding that the divorce courts provided for in the Act did not exist here: see *M. falsely called S. v. S.* (1877), 1 B.C.R. 25 (1) (S.C.). On the history of the BC Supreme Court see the Hon. David Verchere, *A Progression of Judges: A History of the Supreme Court of British Columbia* (Vancouver: UBC Press, 1988).

[13] See the *Better Administration of Justice Act*, SBC 1878, c. 20 (providing in s.1 for Ottawa to appoint two more judges) and the *Judicature Act*, SBC 1879, c. 12 (providing in s. 5 for a Full Court). The latter was an attempt to introduce some of the reforms of the English *Judicature Acts*. From 1885 to 1896 the judges could also sit as a divisional court to hear interlocutory appeals, the details of which need not detain us here. See SBC 1885, c. 5, ss. 1-6 (establishing the Divisional Court) and SBC 1896, c. 14, s.12 (abolishing the Divisional Court and transferring its jurisdiction to the Full Court).

[14] Latin was originally used for formal written records. French was the language of oral proceedings in court and for written reports of legal argument, but it degenerated into an Anglo-French dialect that came to be referred to as "Law French." Long before the common law arrived in British Columbia, English had replaced both as the language of the law, but some Law French phrases survived. See SBC 1897, c. 8, s. 16. *En banc* sittings for "appeals" were also the norm elsewhere in Canada before separate appeal courts were established.

"commissions of assize."[15] These debates may seem esoteric today, but they represented a very real political struggle between the court, which preferred to be regulated by the Dominion government, and the province. For several years this struggle, which the judges lost, generated a great deal of heat.

British Columbia's adapted *nisi prius* system, which had been replaced even in England by a separate court of appeal for civil cases, must have seemed somewhat archaic by the end of the century. Under it a trial judge could participate in the review of a trial over which he had himself presided, a situation that would not be tolerated today. In the *Kamloops Outlaws* case, for example, Justice Crease was the trial judge yet took part in the review of the convictions made by the jury.[16] And in the equally notorious *Thrasher* case, Chief Justice Begbie sat on the Full Court that reviewed his decision at trial.[17] Not surprisingly, he was of the view that his earlier decision should be confirmed as correct. Begbie's biographer states that he could find only one case in which a judge agreed with his colleagues on the Full Court that his own decision at trial should be reversed.[18]

THE ESTABLISHMENT OF THE BRITISH COLUMBIA COURT OF APPEAL

This all changed early in the new century. In 1907, the provincial legislature authorized the creation of a separate Court of Appeal, with both civil and criminal jurisdiction, and in 1909 this legislation was

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[15] The question of commissions of assize is documented in Foster, "The Kamloops Outlaws." The other two issues are canvassed in Hamar Foster, "The Struggle for the Supreme Court: Law and Politics in British Columbia, 1871-1885," in Louis Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Calgary: Carswell, 1986) at 167-213.

[16] By 1893, when Canada's first Criminal Code was enacted, an accused person could appeal a conviction to the Supreme Court of Canada if one of the judges of the Full Court had dissented, but not otherwise. And if the trial judge refused to reserve a point of law for consideration, the accused could ask the Full Court to consider it anyway – but only if the attorney general consented. Crease had been firmly of the view from the outset that he did not have jurisdiction to preside over this trial – a view his brother judges confirmed – and encouraged defence counsel to challenge the validity of the conviction in the *MacLean* case by way of *habeas corpus*. The legal reasons for the lack of jurisdiction are explained in Foster, "The Kamloops Outlaws."

[17] The *Thrasher* case is discussed in "The Struggle for the Supreme Court."

[18] "*…The Man For A New Country*" at 180, referring to Justice Walkem in *Malott v. The Queen* (1886), 1 B.C.R. 212 (II) (S.C.).

proclaimed in force.[19] On 4 January 1910, the Court of Appeal sat for the first time, in Victoria.[20]

In England, as we have seen, a Court of Appeal with civil jurisdiction had been created as part of a larger reform of court structures and was firmly established by the 1870s.[21] Then, in 1907, a Court of Criminal Appeal was created, largely as a result of parliamentary inquiries into two cases involving wrongful convictions based on mistaken identity.[22] Moreover, three other Canadian provinces had legislated separate appellate courts by this time, a reflection in part of increasing concern about the *en banc* system and possible perceptions of partiality in fellow judges sitting on appeals from colleagues.[23] By the time British Columbia acted, therefore, a statutory Court of Appeal separate from the Supreme Court was clearly an idea that was gaining support.

There is evidence, too, that by 1907 the Law Society of British Columbia had been maintaining for some time that this reform was necessary for the more effective and ready disposal of appeals, citing the congested state of business in the Supreme Court.[24] Still, the decision to establish a Court of Appeal was not merely the product of seamless legal evolution or imperial imitation. There were those, notably Chief Justice Gordon Hunter and members of the press, who opposed the move, arguing that there was no justification for the expense involved in setting up a new

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[19] *An Act Constituting a Court of Appeal and Declaring its Jurisdiction*, SBC 1907, c. 10. The Act contemplated a chief justice and three justices of appeal (s. 2) and was declared not to come into force until a day was fixed by the lieutenant governor in council (s. 30).

[20] See *R. v. Prasiloski* (1910), 15 BCR 29, a perjury case arising out of a prosecution for the theft of cows that was dismissed.

[21] 36 & 37 Vict. (1873), c. 66.

[22] *Criminal Appeal Act*, 1907, 7 Edw. VII, c. 17. On the background to this legislation, see W.R. Cornish and G. de N Clarke, *Law and Society in England* 1750-1970 (London: Sweet and Maxwell, 1989) 619, and R. Pattenden, *English Criminal Appeals* 1844-1994 (Oxford: Clarendon Press, 1996) chap. 1. See also Benjamin L. Berger, "Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals," *Canadian Criminal Law Review* 10, 1 (2005): 1-41.

[23] Before 1906 two provinces – Ontario and Quebec – had established separate courts of appeal. As Dale Brawn has noted, that year the Province of Manitoba had introduced a Court of Appeal – *The Court of Queen's Bench of Manitoba: A Biographical History* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2006) 19-20, joining its eastern neighbours in that regard. Moreover, although the attempts did not bear fruit, plans to organize a separate appellate court in Nova Scotia were being discussed during this period. See Philip Girard, "The Supreme Court of Nova Scotia: Confederation to the Twenty-First Century," in Philip Girard, Jim Phillips, and Barry Cahill, *The Supreme Court of Nova Scotia: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2004) 140-205 at 159-61. Girard specifically refers to concerns about an appearance of partiality in the old system.

[24] Verchere, *A Progression of Judges* at 141.

court.[25] According to Hunter, the delays and bottlenecks in the existing system could be resolved simply, and significantly more cheaply, by appointing a sixth judge to his court.

What, therefore, finally moved the province to action? Part of the explanation would seem to be the ongoing and vindictive squabble between Hunter and one of the other judges, Justice Archer Martin. When the legislation creating the new court was drafted in 1907, this visceral spat was not only interfering with the administration of justice in the province; it was having an adverse psychological effect on the chief justice. Because it was also bringing the law into positive disrepute, it deserves some space here.[26]

Both men were highly talented jurists; but the personalities and lifestyles of the two judges could not have been more different. In the judgment of BC lawyer and legal historian David Williams, Hunter was "a companionable bon-vivant" who, alas, "depreciated his talents when at the bar by hard drinking and heavy gambling." By contrast, Archer Martin was a loner, "ascetic, irascible [and] humourless."[27] Hunter's nose had been put out of joint when Martin was appointed to the Supreme Court before him in 1898,[28] as was Martin's when Hunter was appointed chief justice in 1902.[29]

The main irritant between the two antagonists was Martin's prickliness about judicial assignments, especially those that took him away from his

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[25] See *Victoria Times*, 17 July 1909, mentioned in Verchere, *A Progression of Judges* at 142n, and Library and Archives of Canada (LAC), Laurier Papers, series A, 159801, letter 15 September 1909 from Chief Justice Hunter to Prime Minister Laurier.

[26] For detailed accounts of this remarkable judicial conflict, see David Ricardo Williams, "Judges at War: Mr. Justice Martin vs. Chief Justice Hunter," *Law Society of Upper Canada Gazette* 16 (1982): 292-333; and Verchere, *A Progression of Judges* at 127-40.

[27] Williams, "Judges at War" at 297. Both men were Liberals and Laurier appointments (although Martin suspected Hunter of "only posing as a Liberal"). See Philip Girard, "Politics, Promotion, and Professionalism: Sir Wilfrid Laurier's Judicial Appointments," in Jim Phillips, R. Roy McMurtry, and John T. Saywell, eds., *Essays in the History of Canadian Law,* vol. 10: *A Tribute to Peter N. Oliver* (Toronto: The Osgoode Society, 2008) at 169-99. Girard argues that, although Laurier generally followed Macdonald's policy of patronage appointments where trial judges were concerned, he preferred to promote senior incumbent judges, "regardless of past party affiliation," to appeal courts. The exception was British Columbia, where "not a single one" of the judicial vacancies that occurred between 1896 and 1911 was filled by promoting a judge who had been appointed by the Conservatives.

[28] Verchere, *A Progression of Judges* at 127. In a contested election suit shortly after Archer Martin became a judge, Hunter, one of the lawyers in the case, had raised the issue of the validity of his appointment. Martin, not one to forget a slight, never forgave Hunter. See ibid. at 127-28; Williams, "Judges at War" at 297-99.

[29] The prime minister did entertain reservations about Hunter's alleged dipsomania. See LAC, Laurier Papers, series A, 154955-154956, letter, 6 April 1909, Laurier to Hunter, in which the prime minister reminded the chief justice of the undertaking he made, when appointed, to "never touch a drop of liquor."

home town and interfered, as he saw it, with his duties as the admiralty judge for British Columbia. Miffed by his colleague's churlish behaviour, the chief justice successfully pressed the government of Richard McBride to amend the Supreme Court Rules by putting all decisions regarding the assignment of judicial duties exclusively in the hands of the chief justice.[30] The new rule did away with consultative decisions by the judges, and Martin regarded this "usurpation" of authority as intolerable.

Early in 1907, the animus between the two men erupted in public. When the chief justice remonstrated with his colleague for seeking to delay judgment in a case heard by the Full Court, Martin left the Bench in a huff, drawing a sarcastic and audible rejoinder from Hunter.[31] Martin complained to the provincial attorney general about his mistreatment and the dictatorial power the new rule bestowed on Hunter, claiming that the subservience it demanded was "unworthy of Siberia". When it became clear that the government was not about to repeal the rule, Martin began a childish and bitter campaign against Hunter and his other colleagues.[32]

He began by announcing that he would ignore any directions from Hunter about assignments unless they were in writing or delivered personally.[33] He added that it followed from this policy that assignments could not be altered verbally, even in an emergency. Martin also maintained that once the chief justice had assigned judges to a case he had exhausted his powers and could not countermand or change the assignment. Hunter reacted unfavourably to these strictures and advised his intransigent colleague accordingly.[34] When, in the summer of 1907, Martin refused to sit on assignments made verbally by underlings, frustrated counsel complained both to the minister of justice in Ottawa and to the provincial attorney general. But Ottawa was not willing to be drawn into the controversy, and Victoria declined to act.[35] Martin's refusal to hear an urgent injunction application later that summer prompted the Vancouver Bar Association to write to both the minister

30 See Rule 1043 in Williams, "Judges at War" at 299-300.

31 As he left the courtroom Martin complained that his services had been dispensed with, drawing from Hunter the comment that those services "could be dispensed with alright." Martin described this language as "coarse and insulting" and complained that he had been "publicly humiliated and treated with open contempt." See ibid. at 295. The exchange was duly recorded in the columns of the *Victoria Times*, 15 January 1907.

32 Williams, "Judges at War" at 301-03.

33 Ibid., reference to letter of 10 July 1907, which is in British Columbia Archives (BCA), Archer Martin Papers, *Correspondence (1907-1909) re Dispute over Rule* 1043, MSS 1000, box 1, file 8.

34 Ibid.

35 Williams, "Judges at War" at 304-05. For the sentiments expressed by the Vancouver Bar Association, see its letter to Hunter, 31 July 1907, BCA, Martin Papers.

of justice and the attorney general, demanding that the recalcitrant judge be "impeached."[36] This entreaty also fell on deaf ears.

Things came to a head when Martin, who had expected to participate in a series of appeals before the Full Court, learned that he had been reassigned to other court business. Angered by this, he turned up for *Hunting v. Macadam*, the first of the appeals to come before the Full Court, which meant that there was now an extra judge.[37] The four judges then engaged in an embarrassing public debate as to which three lawfully constituted the court.[38] It was only after Justice Morrison, Martin's substitute, dug in his heels that Martin reluctantly withdrew, allowing the appeal to proceed before the other three.

In the wake of this hearing, the Vancouver Bar wrote to the federal minister of justice to start removal proceedings against Martin.[39] Again the result was a rebuff, the minister arguing that they should first lay their grievance before the provincial government.[40] The latter remained unwilling to act. Although Martin ceased his public attacks on Hunter, his vitriolic correspondence with the chief justice continued in private.[41] The associate justice thus emerged from this unseemly conflict with his tenure unscathed, despite his thoroughly injudicious and subversive conduct. Benefiting from the jurisdictional dithering of the federal and provincial justice authorities, and protected by the bedrock constitutional principle of judicial independence, he remained immune from discipline.

By early 1908, the effect that this dispute was having on Hunter's conduct of his judicial duties was painfully apparent. The chief justice was the subject of adverse comment in the press and among the litigation bar for his intoxication on the bench and his failure, in some instances,

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[36] Ibid. at 306-08; and BCA, *Department of the Attorney General*, GR 429, BO 9322, box 14, file 2. The word "impeached," which was used in this missive, was not technically correct in terms of describing the process of removing a federally appointed judge under the *British North America Act* of 1867. That process requires a joint address of both houses of Parliament.

[37] Williams, "Judges at War" at 309-11. See also BCA, Martin Papers, letter, 27 November 1907, Hunter to Martin reassigning him to the Kootenays, that of 21 January 1908, directing him to hold further sittings in that region, and a memorandum of 17 February 1908, directing that the panel hearing *Hunting v. Macadam* on the nineteenth would be comprised of Justices Irving, Clement, and Morrison.

[38] All this caused frustration to counsel waiting to proceed and fascination to the press. For a copy of the transcript of the debate, see BCA, Martin Papers, 19 February 1908.

[39] BCA, GR 429, BO 9328, box 15, file 1, letter from Justices Irving, Morrison, and Clement to the Minister of Justice, 22 February 1908.

[40] For the letter from Minister of Justice Aylesworth to the Governor General in Council responding to the petition of the VBA, see BCA, Martin Papers, 21 April 1908.

[41] Williams, "Judges at War" at 326.

to appear at all.[42] It was Hunter's peculiar behaviour towards a juvenile witness in a murder case that ultimately prompted Attorney General William Bowser to report him to the minister of justice. The latter initiated an investigation and the chief justice's conduct promised to become the locus of a public inquiry initiated during discussion in the Senate.[43] Prime Minister Laurier was already aware of Hunter's problems and asked Supreme Court of Canada justice Lyman Poore Duff, a friend and former colleague of the troubled jurist, to bring him to his senses.[44] When Hunter demonstrated contrition and undertook to deal decisively with his drinking problem, the prime minister accepted the advice of his minister of justice not to launch formal disciplinary action against him.[45] Like his cantankerous colleague, Hunter avoided impeachment or removal from office, but in his case, perhaps only just.

By 1909, the running feud between Hunter and Martin seems to have persuaded both the provincial and federal governments that establishing a Court of Appeal provided an effective way of separating the combatants.[46] Accordingly, on 30 September 1909, the *Court of Appeal Act* was proclaimed in force, and in November the minister of justice announced the membership of the court, including Justice Archer Martin as a justice of appeal.[47] While this stratagem did nothing to heal the personal wounds felt by the two antagonists, it did provide a way of preventing the administration of justice from falling further into disrepute. The Supreme Court of British Columbia and the Court of Appeal for British Columbia were now entirely separate bodies, each with its own contingent of judges.

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[42] Hunter's failure to appear at a hearing involving witnesses from Washington State resulted in a broadside over his "blowout" from the *Bellingham Herald* in October 1908. See ibid. at 326-29.

[43] Ibid. at 328-29.

[44] Ibid. See also David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: UBC Press for the Osgoode Society for Canadian Legal History, 1984) 81-82.

[45] Ibid. at 329-30. Formal action would have involved the removal of Hunter from office by a joint address of both houses of Parliament. Laurier, however, was quick to deliver a rebuke when Hunter addressed a craven letter to him in which he attempted to find excuses for his slide into excessive drinking. See LAC, Laurier Papers, 154198-154200, letter, 31 March 1909, Hunter to Laurier; 154955-154956, letter, 6 April 1909, Laurier to Hunter; 154950-154951, letter, 19 April 1909, Hunter to Laurier.

[46] In "Judges at War" at 330, Williams says that "[i]t is difficult not to believe that Martin's appointment reflected a desire by government to separate the two judges by ensuring that they would no longer sit on the same court."

[47] Verchere, *A Progression of Judges*, 141-42. The Act also provided that the title of chief justice of British Columbia would not migrate to the chief justice of the new Court of Appeal until Hunter retired. See SBC 1907, s. 2.

THE JURISPRUDENCE OF THE COURT OF APPEAL IN CONTEXT

The articles in this issue of *BC Studies* provide helpful insights into how the Court of Appeal approached its role during its one-hundred-year existence. Although it has been impossible to cover all or even most areas of the court's case load during its first century, the authors have painted a series of revealing landscapes, especially, although not exclusively, in the area of public law. Together they provide us with some idea of how the members of the court saw their role as interpreters of the law; some sense of the degree to which the court's decisions reflected changing social, political, economic, and more broadly cultural values in the province; and the extent to which the decisions they made coincided with or diverged from the conclusions of appellate courts in other Canadian jurisdictions.[48]

How did the court's members conceive of their place within the constitutional order during these years, and to what extent was both their vision and their practice constrained by institutional factors?

In the first place, Canadian judges have traditionally seen themselves as engaged in resolving disputes, not in making law or rendering political decisions. The latter have been considered the preserve of the legislative and executive branches of government, although this is less true since the enactment of the Charter of Rights and Freedoms in 1982, which authorizes and indeed requires the courts to pronounce on many issues that did not come before them in the past. Before 1982 the ability of courts to strike down laws was confined to those few cases where they concluded that Parliament or a provincial legislature had enacted a statute that was within the other legislative body's exclusive jurisdiction. And although, of course, there is a sense in which law is made every time a case is decided – witness the picketing decisions chronicled by Eric Tucker and Judy Fudge – the binding nature of precedent had a tighter hold on judges in 1910 than it does today. They were perhaps even more anxious than their modern counterparts about deciding no more than they had to in order to resolve the specific issue before them.

Second, apart from reference cases, litigation is party-driven: parties choose whether to sue or to appeal, not courts, which means that courts

[48] Quantitatively, Peter McCormick has calculated that, between 1949 and 1990, 42.0 percent of the appeals of BC Court of Appeal decisions to the Supreme Court of Canada were successful. The percentage of successful appeals for the whole country was 43.0 percent. The New Brunswick Court of Appeal had the worst record (59.8 percent) and Prince Edward Island had the best (36.4 percent). See "The Supervisory Role of the Supreme Court of Canada: Analysis of Appeals from Provincial Courts of Appeal, 1949-1990" (1992), 3 S.C.L.R. (2d) 1 at 13.

do not set their own agendas.[49] Because most trial verdicts and judgments are not appealed, the vast bulk of the legal business that occupies the lower courts never gets to the Court of Appeal.

Third, in British Columbia the Court of Appeal is subject to the Supreme Court of Canada and, until 1949, it was also subject to the Judicial Committee of the Privy Council. Although it is the court of last resort in most cases, the possibility of a further appeal remains.[50] This not only means that the Court of Appeal's view of the law can be reversed. Even when the Supreme Court of Canada upholds the Court of Appeal, the latter's role can be diminished if its decision and reasoning is supplanted by that of the former, thus relegating – unless one is a legal historian – the Court of Appeal's labour to mere footnote status.[51]

Despite these limitations on the decision-making functions of the judges during most of the Court of Appeal's history and the judges' apparent assumption of a non-activist role, the law and its application by the court did not exist in a vacuum: both were influenced by the judges' own values and by those of the society in which the law evolved. In the first place, judges are not automatons. They came and still come from an elite, professional group with its own notion of tradition, propriety, and a strong sense that judges must commit themselves to the preservation of "peace, order, and good government" in Canadian society. For much of the court's history, its corporate mindset was that of a small group of economically successful, middle-class white men whose politics were acceptable to the federal government of the day. And although many lawyers acted *pro bono* in the days before Legal Aid, the practice of most of those who were elevated to the Court of Appeal involved primarily the legal needs of institutions, corporations, and individuals with the

[49] Reference cases are cases where the government has submitted a question or set of questions to the court for its opinion. In British Columbia, see the *Constitutional Question Determination Act*, RSBC 1996, c.68. A relic of the monarch's prerogative of referring questions to the Judicial Committee of the Privy Council, references no longer exist in the UK and the US, where it is thought inappropriate for the government to use a court as its law firm, so to speak.

[50] In most cases, leave to appeal to the Supreme Court of Canada must be sought, but in criminal cases where the Court of Appeal has set aside an acquittal, or where it has upheld a conviction and there is a dissent, there is an automatic right of appeal on a question of law to Ottawa. See *Criminal Code*, RSC 1985, c. C-46, ss. 691(1) (a) and 691(2) (b).

[51] This statement, appropriately, requires a footnote. Sometimes the Supreme Court of Canada simply affirms the Court of Appeal's judgment without elaborating, which means that the Court of Appeal's decision and reasons are the relevant precedent. For an example, see *Regina v. White and Bob* (1964), 50 DLR (2d) 613 (B.C.C.A.), discussed by Doug Harris in this issue, and compare it to the court's decision in *Regina v. Sparrow* (1986), 32 CCC (3d) 65 (B.C.C.A.). As Harris points out, although the latter is historically important, legally it "sits in the shadow" of the Supreme Court of Canada's decision in *Sparrow* and, although significant at the time, is "hardly remembered."

resources to retain them.[52] In the last four decades, however, changes in the composition of the court have made it decidedly more diverse, and not only in terms of gender. Appointments draw less clearly than in the past from the mainstream practice of law, and judges from other ethnic backgrounds than the old Anglo-Saxon or Anglo-Celtic pool now sit on the bench. The court remains an elite institution but, increasingly, one that demonstrates some sensitivity to changes in the composition of Canadian and BC society, and to the changing social values and mores that mark the more liberal attitudes of the population of British Columbia since the nineteen-sixties.

For a significant portion of the century, both the judges and those they served were committed to stability in social and economic relations and to using the law to achieve that end. As Janis Sarra shows in her chapter on the court's handling of corporate and commercial law, for years it responded readily, if conservatively, to the demands of business for legal certainty – a very strong impulse in a market economy. Responding to changing market conditions and the needs of certain players for effective protection from manipulation by others, the court has more recently shown both a more purposive and a more supervisory approach in its decisions. On the other hand, as Judy Fudge and Eric Tucker so amply show, the court has exhibited antipathy towards the strategies of organized labour in its struggles with employers, even though it had some interpretive room to do otherwise. This was clearly evident in its treatment of strikes and picketing, where the judges seem to have sensed that their position reflected a more broadly held middle-class belief in the virtues of social peace and the ability to move around in public places free of menace.[53] As Justice O'Halloran noted, "in a unionized city like Vancouver everybody knows what a picket line means." And in this field of law judicial attitudes have, perhaps, changed the least. As late as 1970, a lawyer who would one day become a judge of the court lamented the lack of understanding revealed by the court's picketing decisions.[54] Even

[52] Considerations of space in this special issue have required the authors to pass over, for the most part, judicial biographies and anecdotes. However, a special issue of *The Advocate*, which is published by the Vancouver Bar Association, will be devoted to these aspects of the court's history. See also "The Court of Appeal for British Columbia: Appeal Judges I Have Known, 1951-2006" (unpublished) by the late Allan MacEachern, who was chief justice of British Columbia from 1988 to 2001. It includes an appendix on the judges he did not know because they served between 1910 and his call to the bar in 1951.

[53] O'Halloran J.A. in *Aristocratic Restaurants (1947) Ltd. v. Williams et al.* [1951] 1 D.L.R. 360, (B.C.C.A.) at 368. Earlier he had referred to "peaceful picketing" as a contradiction in terms. See *Hollywood Theatres v. Tenney*, [1940) 1 D.L.R. 452 at 459.

[54] Mary F. Southin, Q.C., "The Courts and Labour Injunctions," *The Advocate* 28 (1970): 74-84. Madam Justice Southin served as a judge of the Court of Appeal from 1988 to 2006.

with the advent of the Charter and a more diverse judiciary, the twin objectives of propriety and social peace continue to dominate in judicial thinking on industrial relations litigation.

Until the 1960s, judges were also strong believers in the superiority of the institutions of British governance and of English law, and in the need to secure these in the province. In his intriguing historical and cultural analysis of the court's performance in the *Martin* case and the decision of the Benchers of the Law Society of British Columbia to bar entry to the profession to an avowed Communist, Wes Pue reminds us of the dangers in rushing to presentist judgments when we recoil from what may appear to us as antediluvian attitudes on the part of the judiciary during earlier periods. In other words, chronology and political and cultural context must be borne in mind when assessing such decisions – although even then there were usually other voices that spoke in favour of a somewhat different world in which tolerance was accorded greater weight.

Among earlier generations of judges the fundamental rights protected by English law were freedom of contract and those attached to ownership of property.[55] Indeed, it is perhaps ironic that this emphasis on British justice and the importance of property was taken up by Aboriginal organizations in the early years of the last century, and again in the 1950s and 1960s, to justify their land claims. Both Peter Kelly, the Haida chairman of the Allied Indian Tribes of British Columbia (1916-27), and Frank Calder, president of the Nisga'a Tribal Council from 1955 to 1974, repeatedly invoked the principles of British justice, only to be rebuffed by government. The Allied Tribes were not able to get their case before the courts and, as Doug Harris points out, when the Nisga'a finally did so, in 1970 the Court of Appeal's decision was a disappointing reflection of government policy and public perceptions.[56] Thus, in its first opportunity to consider whether the rights of ownership extended to First Nations in the province, the Court found no difficulty in concluding that they did not. But Harris also notes that, in the 1980s, this would change, and in

[55] See, for example, *Rogers v. Clarence Hotel* [1940] 3 D.L.R. 583 (B.C.C.A.), following *Christie v. York Corporation Ltd,* [1940] S.C.R. 139, on appeal from Quebec.

[56] *Calder v. British Columbia (Attorney General)* (1970), 13 D.L.R (3d) 64 (B.C.C.A.). The main legal obstacle was Crown immunity: the Crown had to consent to be sued, and this was true in British Columbia until 1974. Indeed, the Nisga'a technically lost even in the Supreme Court of Canada because they did not have British Columbia's permission to sue. For an account of the earlier attempts to get into court, see Hamar Foster, "We Are Not O'Meara's Children: Law, Lawyers and the first Campaign for Aboriginal Title in British Columbia, 1908-1928," in Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 61-84.

a "remarkable series of decisions … the Court put itself at the forefront of an extraordinary transformation of Canadian law."

As Ross Lambertson demonstrates in another context, the belief in freedom of contract and the rights of property could easily be translated into discriminatory decision making when it came to dealing with the place and conduct of those who stood outside the charmed majority and its values and preoccupations – most especially non-white or unconventional immigrants and political radicals. We incline to the view that most judges of the court before the end of the Second World War shared what James St. J. Walker has described as the "common sense" attitude of the dominant society that loyalty to the system and things British validated discrimination against those whose inferiority somehow disqualified them for equal treatment.[57] However, in assessing cases in which the court denied would-be Asian immigrants rights of entry, it is important to discern whether, legally, the court had a choice.

British Columbia was the primary site of restrictions on immigration and discrimination against Asians seeking to enter or who were resident in the province, a position that reflected general and apocalyptic anxieties among the European population about the erosion of British values and institutions, and about the influx of "undesirable aliens," especially those from China, Japan, and India.[58] After the province's Supreme Court had found procedural and interpretative problems with the passage of orders-in-council by Ottawa designed to bar immigrants from the Indian subcontinent, the Dominion government went out if its way to close any loopholes that might be left.[59] When the issue came again before the Court of Appeal in the *Munshi Singh* case, brought as a result of the notorious *Komagata Maru* incident in Vancouver harbour in 1914, the court concluded that the *Immigration Act* and the amended orders-in-council had effectively insulated administrative decisions to

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[57] James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Toronto: Wilfrid Laurier University Press for the Osgoode Society for Canadian Legal History, 1997) at 12-23. Rulings by Chief Justice Matthew Baillie Begbie's Supreme Court in the nineteenth century that struck down anti-Chinese legislation constitute something of an exception. See John McLaren, "The Early British Columbia Judges, the Rule of Law, and the 'Chinese Question': The California and Oregon Connection," in John McLaren, Hamar Foster, and Chet Orloff, eds., *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Pasadena and Regina: Ninth Judicial Circuit Historical Society and Canadian Plains Research Centre, 1992) 233-69.

[58] See, for example, Tom MacInnes, *Oriental Occupation of British Columbia* (Vancouver: Sun Publishing, 1927). The author's father was T.R. MacInnes, who was lieutenant-governor of British Columbia from 1897 to 1900.

[59] See *Re Bahari Lal* (1908), 8 W.L.R. 129 (B.C.S.C.), and *Re Narain Singh* (1913), 18 B.C.R. 506 (S.C.).

bar immigrants from any form of judicial review.[60] One of the judges, Justice McPhillips, used the occasion to describe such immigrants as "undesirables" and a potential menace. Such statements were not only derogatory but gratuitous, given that the court ruled that it was no part of the judicial function to consider the policy of the laws in question.[61] Accordingly, although the other judges may well have shared his views, none of them made similar remarks, and the grim reality was that Canadian law at the time held out little or no hope to litigants such as Mr. Singh. With very few exceptions, it was not until Canadian public policy moved towards outlawing active racial and ethnic discrimination after the Second World War, and equality rights began their journey towards entrenchment in a new Constitution, that judicial attitudes began to change.[62] Even where there was some interpretative space, as in *Rogers v. Clarence Hotel*, to protect civil liberties in a broader sense, most judges were not willing to protect minorities against unequal treatment. It is perhaps in cases such as these that one discerns most clearly the majority espousal of "common sense" discrimination.

Even in the 1950s, when sensitivity to civil and religious rights seemed to be developing in the Supreme Court of Canada, the Court of Appeal's performance in the Doukhobor cases suggests that BC judges were slow to yield to the developing recalibration of constitutional rights and values.[63] Moreover, the deeply engrained sense of the bar as a league of Christian gentlemen dedicated to preserving British values was, as Wes

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[60] *R. V. Munshi Singh* (1914), 20 B.C.R. 243 (B.C.C.A.), in which Martin, J.A., perhaps not surprisingly, disagrees with Chief Justice Hunter's decision in *Re Narain Singh*, above. Section 23 of the *Immigration Act* at that time provided that no court or judge had "jurisdiction to review, quash, reverse, restrain or otherwise interfere with any … decision or order of the Minister or of any Board of inquiry … upon any ground whatsoever…" For the details of this litigation and its place in the broader story of the *Komagatu Maru*, see Hugh Johnston, *The Voyage of the Komagatu Maru: The Sikh Challenge to Canada's Colour Bar*, 2d ed. (Vancouver: UBC Press, 1989) at 54-64.

[61] Interestingly, McPhillips, JA, was also one of the judges in *Canada (Attorney General) v. Gonzalves* [1925] 1 D.L.R. 605 who found in favour of aboriginal squatters in Stanley Park, based on their oral history testimony - only to be reversed by the Supreme Court of Canada. See Jean Barman, *Stanley Park's Secret* (Madeira Park: Harbour Publishing 2005), chaps. 8 and 9.

[62] For two exceptions, see the dissent of O'Halloran J.A. in *Rogers v. Clarence Hotel* [1940] 3 D.L.R. 583, 585-593 (B.C.C.A.) and – although he never sat on the Court of Appeal – the decision of Chief Justice Hunter in *In the Matter of the Land Registry Act* (1911) as described in H.S. Robinson, "Limited Restraints on Alienation," *The Advocate* 8 (1950): 250.

[63] See in particular the judgment of Sidney Smith, J.A., in *Perepelkin v. Superintendent of Child Welfare (No. 2)* (1957), 23 W.W.R. 592 (B.C.C.A.) at 597-600, and John Mclaren, "The State, Child Snatching and the Law: The Seizure and Indoctrination of Sons of Freedom Children in British Columbia, 1950-60," in John McLaren, Robert Menzies, and Dorothy E. Chunn, eds., *Regulating Lives: Historical Essays on the State, Society, the Individual and the Law* (Vancouver: UBC Press, 2002) 259 at 273-78.

Pue asserts, strong enough to induce the court to uphold the right of the Law Society to exclude a professed Communist from practice.[64]

The question of how well the jurisprudence of the court jibed with or diverged from that of the appellate courts in other provinces receives various answers. As Gerry Ferguson and Ben Berger suggest, the court's values and preoccupations in the realm of sentencing and penal policy seem to have largely coincided with trends elsewhere in Canada for much of the court's history. However, in more recent decades, it has shown itself more progressive than other appellate courts in questioning retributive and elevating reformative objectives of punishment.[65]

In the realm of corporate and commercial jurisprudence, as Janis Sarra's article indicates, the attitude of the BC Court of Appeal for the majority of its history was to favour the strict as opposed to the purposive interpretation of rights and obligations within corporations, reflecting the view that the court was bound to follow the contract or incorporation document to the letter. In this it diverged from the more creative positions taken by other provincial appellate courts. In more recent times, however, the court has shown some leadership by adopting a more flexible pattern of interpretation, allowing it to respond sensitively to changing conditions in the marketplace. It has also been more assertive in protecting the more vulnerable elements in the corporate structure.

The clearest example of a distinctive jurisprudence emerging from the court, however, has been the consistently hard-nosed attitude towards organized labour described by Judy Fudge and Eric Tucker. Whether interpreting common law or statute, when it comes to workers' rights, the court has tended to read the law relating to strikes and picketing narrowly. (Indeed, this was an important factor in the legislative limits imposed on the court's jurisdiction in labour disputes in the 1970s.) The distinctive tension between businesses all too eager to exploit labour and the vigorous resistance of organized labour in response, which was rife in the period between 1900 and the end of the Second World War, seems to

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[64] *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173 (B.C.C.A.).

[65] That it is not to say, however, that there were no differences in judicial attitudes to the use of criminal law in more precise contexts at earlier points in time, reflecting both geographic and demographic realities as well as enhanced fears about "the other." There is evidence, for example, that after 1920 the BC judges began taking a hard line on "oriental" crime, most especially drug offences, as Parliament increased the powers of the police and the penalties. See John McLaren, "Race and the Criminal Justice System in British Columbia, 1892-1920: Constructing Chinese Crimes," in G. Blaine Baker and Jim Phillips, eds., *Essays in the History of Canadian Law*, vol. 8: *In Honour of Dick Risk* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 199) 398-442 at 428-30.

have left an enduring imprint on the judicial psyche.[66] This reflects the judges' more abstract concern about social peace mentioned earlier, but it is probably due as well to the continuing adherence of many of them to a set of values that elevates capital and entrepreneurship over labour in terms of the province's economic welfare. And yet, as Doug Harris points out in another context, it was the Court of Appeal that halted the logging of Meares Island in 1985 so that the issue of Aboriginal title could be tried, and it was the Court of Appeal that stopped a marina development in its tracks in 1989 in order to preserve an Aboriginal treaty right to fish. In rejecting arguments in the Meares Island case that the province's economy would be at risk if an injunction were issued against logging, Justice Peter Seaton made the point eloquently. He said that claims of Aboriginal title had not been addressed and found wanting; rather, they had not been addressed at all: "We are being asked to ignore the problem as others have ignored it. I am not willing to do that."[67]

In the field of civil liberties, although the court was not alone in Canada in dealing with issues of discrimination, it had more than its share of cases involving the "race issue," a reflection of the fact that the vast majority of non-European immigrants came through BC ports. Moreover, for a long time British Columbia had the largest concentration of residents of Asian origin. As a consequence, the court was more preoccupied with these matters and, thus, more open to scrutiny as to where it stood on civil liberties than were its counterparts elsewhere in Canada. In its first fifty years, it clearly stood alongside other Canadian appellate courts in championing contractual and property rights to the detriment of a broader, less economic conception of human rights and, if anything, showed a distinctive edge (and edginess) born of a belief that British Columbia carried the burden of absorbing these "undesirable" immigrants.[68]

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[66] On the hard edges of labour relations in Canada's most westerly province, see, inter alia, Jean Barman, *The West beyond the West: A History of British Columbia*, 3rd ed. (Toronto: University of Toronto Press, 2007) 216-51; Robert A.J. McDonald, *Making Vancouver,* 1863-1913 (Vancouver: UBC Press, 1996) at 90-119; and Mark Leir, *Where the Fraser River Flows: The Industrial Workers of the World in British Columbia* (Vancouver: New Star Books, 1990).

[67] *MacMillan Bloedel Ltd. v. Mullin* [1985] BCJ No. 2355 at para. 78, *per* Seaton, J.A. (B.C.C.A.).

[68] We have referred elsewhere to the hard edge of politics, and, in some instances, law in the history of the province. See Hamar Foster and John McLaren, "Hard Choices and Sharp Edges," in Foster and McLaren, eds., *Essays in the History of Canadian Law,* vol. 6: *British Columbia and the Yukon* (Toronto: Osgoode Society for Canadian Legal History, 1995) 3 at 9.

THE LEGAL CULTURE OF BRITISH COLUMBIA

Is there a distinctive BC legal culture? And, if there is, is it revealed in the jurisprudence of the Court of Appeal? The articles that follow appear to give somewhat different responses to this difficult and perhaps unanswerable question. The answer, if there is one, is that it depends both upon the area of law and the period.

Ben Berger and Gerry Ferguson conclude that the court's sentencing decisions more or less tracked trends elsewhere but began to diverge later in the century, when several members of the court demonstrated a clear desire to rethink the purposes of punishment. This is a pattern that Janis Sarra also notes in her study of the court's corporate and commercial decisions. The judges in the last thirty or forty years or so broke away from their earlier strict interpretation of corporate documents and contracts to embrace both a more purposive interpretation of rights and obligations within the corporate structure and a clearer supervisory role over corporate relationships and those with the public. Movement from a narrow conception of civil liberties to a much more expansive and assertive view is also apparent in Ross Lambertson's study as the court and its members began to respond to and reflect a more general trend towards the elevation of equality rights and the protection of individuals from discrimination in Canadian society, a process assisted greatly by the Charter of Rights and Freedoms. In this context, the court may be said to have tracked both the traditional conservatism and latter day liberalism of appeal courts in other provinces, although perhaps with a higher profile in both periods – a profile born of demographics in the pre-Second World War period and the vigorous activities of advocacy groups, especially those pressing for the recognition of gay, lesbian, and transgendered rights, in the later period.

There are two areas in which the pattern described above of a movement from a decidedly conservative to a much more progressive, even reformative, stance does not jibe with the court's evolving jurisprudence. Doug Harris finds the court to have made a unique, albeit uneven, contribution to the law of Aboriginal rights and title. In this field, all of the action has occurred since the legal barriers against such lawsuits were removed, and even now the cost of litigation is a significant obstacle. For their part, Eric Tucker and Judy Fudge view the court's decisions on picketing as icily predictable and, when compared to court decisions elsewhere in Canada, increasingly idiosyncratic, hinting at this being consistent with a more general antagonistic attitude on the part of the court towards the labour side in industrial relations disputes.

In all of this one must be careful to remember that, in historical terms, the more liberal mindset through which many now view socio-legal issues is not, on its own, an appropriate yardstick for assessing the court's performance. Nor should it be forgotten that unanimity of opinion was no more characteristic of the past than the present, even in vexed areas such as industrial relations and civil liberties law. What might be hazarded as a tentative and only partial answer to the question about legal culture is this. In its first half century the Court of Appeal, inhibited by the sort of structural and professional considerations mentioned earlier, hewed to a conservative view of its functions and predilections. In this it tracked the performance of its counterparts elsewhere in Canada. If there was any difference, it may have been an even more cautious approach to some of the issues discussed in this issue, reflecting an edginess about race and labour relations on the west coast. By contrast, in its second half century, in most of the fields examined the court has broken free from the shackles of the past, whether structural or self-imposed, and embraced a much more liberal view of its function as an appellate tribunal. In some areas of the law, it has gone further and exercised a degree of creative leadership in Canada. The notable exception is industrial relations law, which seems to be caught in an ideological time warp in which a conservative view of social peace and propriety and a narrow conception of economic stability seem to continue to reign supreme among our appellate judiciary. Perhaps it is in this field that the edge and edginess of BC politics and law continue.

The legal culture question is, of course, a large one and cannot be answered here. Instead we must content ourselves with the usual academic excuse that further research is needed – and in this case it is clearly true. This issue of *BC Studies* is, as we have already conceded, an incomplete view of the record of the British Columbia Court of Appeal, its jurisprudence, and the social and political impact of that jurisprudence. Significant areas of private law – torts, contract, insurance, consumer and property law – have not, and could not, be addressed given space limitations. The same is true of family law. On the public law side, social legislation, federalism, and the constitution go largely undiscussed. So does the important modern field of environmental law.

But this collection is a start, and all those interested in the legal history of British Columbia and its Court of Appeal look forward to the publication of the first history of the court in 2010.[69] And may both publications provoke more scholars to turn their attention to the history of an institution most worthy of it.

[69] Currently being researched and written by noted historian Christopher Moore.