

A JUDICIAL LOUDMOUTH WITH A QUIET LEGACY: A REVIEW OF *EMMETT HALL: ESTABLISHMENT RADICAL*

D A R C Y L . M A C P H E R S O N *

In the revised and updated version of *Emmett Hall: Establishment Radical*,¹ journalist Dennis Gruending paints a compelling portrait of a man whose life's work may not be directly known by today's younger generation. But Gruending makes the point quite convincingly that, without Emmett Hall, some of the most basic rights many of us cherish might very well not exist, or would exist in a form quite different from that on which Canadians have come to rely.

The original version of the book was published in 1985, that is, just after the patriation of the Canadian Constitution, and the entrenchment of the *Canadian Charter of Rights and Freedoms*,² only three years earlier. By 1985, cases under the *Charter* had just begun to percolate up to the Supreme Court of Canada, a court on which Justice Hall served for over a decade, beginning with his appointment in late 1962. The later edition was published two decades later (and ten years after the death of its subject), ostensibly because events in which Justice Hall had a significant role (including the Canadian medicare system, the Supreme Court's decision in the case of Stephen Truscott, and claims of Aboriginal title to land in British Columbia) still had currency and relevance in contemporary Canadian society.

Despite some areas where the new edition may be considered to fall short which I will mention in due course, this book was a tremendous read, both for those with legal training, and, I suspect, for those without such training as well. For those (like me) who were legally trained in the post-*Charter* era, the book is a

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¹ D. Gruending, *Emmett Hall: Establishment Radical - Revised and Updated* (Markham, ON: Fitzhenry & Whiteside, 2005).

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

tremendous insight into the activities that shaped the thinking of a man who foresaw the day when judges would be called upon not only to apply the law as written by the legislature (or to apply the precedents set out by their judicial forbearers), but also to keep one eye on the social realities of both the past and present to arrive at a just result.

Names like Chief Justice Brian Dickson, Justice Bertha Wilson, Justice Gérard LaForest, Justice Claire L'Heureux-Dubé, and Chief Justice Beverley McLachlin are likely to ring in the memories of law students for at least a generation or two to come (if not longer), given their indelible impact on early *Charter* jurisprudence (whether one considers their respective contributions to be for the better, or not). Absent Gruending's biography, and perhaps even in spite of it, I doubt that the same can be said of Emmett Hall. Justice Hall – the last man to serve on the Supreme Court of Canada from the Saskatchewan Court of Appeal³ – is about one generation removed from service on the Court, and less than a generation removed from his last foray into post-retirement service to the Canadian public. Yet I suspect that many law students today could not even tell anyone anything about Emmett Hall. He did not have the grand stage of the *Charter* on which to make his imprint on Canada. As Gruending's book recounts though, Justice Hall did leave a mark on this country. This book is a way to point to that mark, and associate it with the man, the institutions which he served, and the values he embodied. It is said that those who do not know history are doomed to repeat it. In reading this book, major portions of Canadian history were brought to light through the prism of one man's exploits. For that, any reader owes the author, as well as his subject, a debt of gratitude.

Structurally, the book is not entirely a chronological recounting of the exploits of a man of remarkable talent. While some sections (such as the opening chapter on Hall's childhood) tended to be organized chronologically, others were more thematic in their orientation. For example, Chief Justice Hall⁴ maintained a

³ At least three subsequent members of the country's highest court did have Saskatchewan connections. Chief Justice Brian Dickson (who served on the Court from 1973 to 1990, and as Chief Justice from 1984 to 1990) was born in Yorkton, Saskatchewan. See the Supreme Court of Canada's website: <http://www.scc-csc.gc.ca/AboutCourt/judges/dickson/index_e.asp>. However, all of Chief Justice Dickson's legal and judicial experience was gained in Manitoba. Justice Willard Estey (who served from 1977 to 1988) was born and received his law degree in Saskatoon, Saskatchewan. Shortly after his return from World War II, Justice Estey would be called to the Ontario bar. All of Justice Estey's judicial experience prior to joining the Court was gained in Ontario. See the Supreme Court of Canada's website: <http://www.scc-csc.gc.ca/aboutcourt/judges/estey2/index_e.asp>. Finally, Justice John Sopinka (who served on the Court from 1988 to his untimely death in 1997) was born in Broderick Saskatchewan. But again, the majority of his legal experience was gained in Ontario. See the Supreme Court of Canada's website: <http://www.scc-csc.gc.ca/aboutcourt/judges/sopinka/index_e.asp>

⁴ While Emmett Hall never served as Chief Justice of Canada (The Right Honourable Chief Justices Robert Taschereau, John Robert Cartwright and Joseph Honoré Gérard Fauteux served

position in the Saskatchewan courts while leading a royal commission on the future of health services in Canada. Yet, each topic is treated separately. While this topical approach is a perfectly valid one, some readers may find that some areas of Hall's life are presented in a somewhat disjointed way, because large portions of a given time period are dealt with in different locations of the book.

Conversely and perhaps somewhat oddly, the relationship between Hall and John Diefenbaker is not treated thematically in the book. Diefenbaker was both Hall's Saskatchewan student and legal contemporary, as well as the Prime Minister who appointed him to all three of the judicial posts he would hold during his time on the bench. Despite knowing each other for well over half a century, and being what Gruending describes as "friendly rivals"⁵ from the beginning of that relationship, the two men did not merit a chapter to themselves. Yet, one is left with the impression that the fortunes of the two men (and perhaps their legacies as well) were inextricably linked one to the other. Emmett Hall's hopes for judicial appointment were clearly in the hands of his "rival". Similarly, Diefenbaker (a Conservative) lit what could have been considered political dynamite in using a Royal Commission on Health Services to study medical services – a subject on which Diefenbaker's own party appears, on Gruending's account at least, not to have at that point reached consensus⁶ – and then appointing his "rival" to chair it. So it seems that the author is not wedded to a single approach. This may be a bit confusing at times for some readers, but Gruending is nonetheless successful in his attempt to mold the two approaches together in his work. Lastly, on the subject of structure, one is left to wonder whether the book is set up in the way it is as a reflection of the subject himself. Emmett Hall was both a judge and one of the architects of the modern provision of medical services in Canada. The book leaves the impression that while he did both, and each was exceptionally important to him, he felt that each role was separate from the other, and each, when he was doing the work associated with it, deserved his full energy and attention.

The book's first and second chapters also delve into Hall's early years, including his student days, as well as his use of his bilingualism – Hall was born in Quebec, and attended school in French there – to find jobs both in the private sector (for example, teaching French in Prince Albert) and in government. Diefenbaker's relationship with Hall – begun during their law studies and continued at the bar – is also introduced here. Some of their correspondence also

successively in that position during Hall's tenure at the Supreme Court of Canada), Hall did serve as Chief Justice of both the Court of Queen's Bench and the Court of Appeal, in Saskatchewan. See the Supreme Court of Canada's website: <http://www.scc-csc.gc.ca/AboutCourt/judges/curformchief/index_e.asp>

⁵ Gruending, *supra* note 1 at 71.

⁶ *Ibid.*, at 119.

showed some money lending occurring between the two as Depression-era lawyers in Saskatchewan. While the two may well have been “friendly rivals” as described in the book, respect and a desire for mutual success also seemed to be part of their early relationship.

His apprenticeships and early legal career showed Hall to have a certain wanderlust, moving about small towns in Saskatchewan, both to find work as an apprentice, and then as a lawyer. Similar themes of a love for travel would animate Emmett Hall’s later work as a commissioner, which included both the committee that produced the 1968 Hall-Dennis Report on education reform in Ontario, as well as the federal commission on health services, where Hall would travel extensively as part of his research. But perhaps the most important contribution of this chapter was to show the beginnings of Hall’s relationship with Isabel Parker (called “Belle” by those who knew her), who would soon become his wife. They would be married for almost 60 years, until her death in 1981.

The third through fifth chapters continue the examination of Emmett Hall’s life as a member of the bar. Hall’s office demeanour and courtroom prowess are described in glowing terms by those who saw them first-hand. Specific cases were referred to in detail, including successfully defending two men from rioting charges arising out of the 1935 Regina Riot.⁷ But the accounts were not one-sided. Gruending is quite willing to point to those cases that his subject lost. Hall was not above opening his mouth to suggest that courts had made mistakes, including with respect to cases on which he was counsel. In fact, as the title of this review suggests, Hall’s outspoken nature was not necessarily silenced by judicial robes, nor did his positions necessarily soften in retirement. This is a theme to which we will return later in this review.

The other element that receives extensive mention is Hall’s legal work with prairie farmers, which introduced Hall to populist politics in the West. Over the course of his life (and the book), Hall would be described as coming from a Liberal family, then as a Progressive, next a Liberal (the party that made him a King’s Counsel), and finally a Conservative. Finally, in his post-judicial career in public service, Hall would also take on projects for the provincial government of Saskatchewan. This was so even though the government of the day was under the banner of the New Democratic Party. Hall himself became an active politician for the Conservatives, although a relatively unsuccessful one, both federally and provincially.

A recurring theme in the book was Hall’s giving of time and resources to various causes, to extended family, and to those in need. From taking care of children when their parents (members of Hall’s extended family, and those of his

⁷ *Ibid.*, at 32-40.

wife) became ill, to paying for university for their grandchildren, Hall and his wife seemed to show generosity whenever circumstances allowed. Perhaps even more impressive, though, was the litany of public service endeavours into which Hall threw himself over the course of his life. Some were a product of his faith (Hall's Catholicism was described as the product of a devout mother who valued the church), such as serving on the Catholic school board in Saskatoon, and on the board of a hospital which was Catholic, at least in orientation. Others were unrelated to Hall's faith, but were even more numerous, including service as chancellor of the University of Saskatchewan in his retirement. A list seems unnecessary here, but it is clear that, in addition to all of Hall's more famous public service commitments - the medicare and education reports to be discussed below are but two examples - Hall took the concept of giving back to the community to heart, in ways both great and small. Though Gruending does not frame it in these terms, his account seems to suggest that Emmett Hall was the personification of the old adage "Of a person to whom much is given, much is expected." Hall clearly believed that he was fortunate to have the opportunities that came his way throughout his life,⁸ and gave back as much as he could.

Gruending spends little ink to describe Hall's career as a judge in Saskatchewan. By Gruending's account, there were few cases of genuine import during Hall's tenure as Chief Justice.⁹ Instead, three main points appear. The first point brought out in this, the book's sixth chapter, was that Hall did not believe that his work as a Royal Commissioner (consuming though it was), had any impact on his work as a judge. Gruending is clearly skeptical of this claim, showing how much time Hall missed on the bench during his Saskatchewan judicial tenure, owing to his commitments on the Royal Commission.¹⁰ Second, while other cases also received minor attention in the chapter, a pair of cases that Hall decided as Chief Justice (one in the criminal law, the other in family law) were also used to point out his ability to foresee future trends in the law, and shape the law in cases before him. A third case, decided in the Court of Appeal, showed Hall's protectiveness for the *Canadian Bill of Rights*, passed by the Diefenbaker government in 1960.¹¹

The third point of relevance from this chapter is the author's claim that Hall adjusted his personality to the judicial role. In fact, as Gruending would have us believe, the change would seem to have occurred almost in a single stroke. Where he was previously depicted as a forceful personality, the bench seems to have made him more humane. While this may well have had an impact on Hall,

⁸ *Ibid.*, at 155.

⁹ *Ibid.*, at 85.

¹⁰ *Ibid.*, at 94-95.

¹¹ *Canadian Bill of Rights*, S.C. 1960, c. 44.

Gruending's description of the pre-bench and post-bench Emmett Hall is at odds with his own description of Hall later in the book and with two of its basic themes. Let us deal with each of these in turn.

First, with respect to what Gruending himself had written, he reports that an important research analyst nearly quit working with the Royal Commission because he did not think that he and Justice Hall were getting along, and he could not tolerate Hall's personal style. Hall told the research analyst not to worry. He is reported to have said "Don't pay any attention to that. It's my manner."¹² This occurred after Hall's appointment to the bench. This is an inconsistency between the author's descriptions of Hall in two different areas of the book.

Let me turn to the more fundamental problem. I call it "fundamental" because Gruending's description of Hall at this juncture of the book could actually be said to undercut one of the points that the author makes later that are key to the overall assessment of Justice Hall. The first incongruity arises out of the fact that Hall was described as a populist libertarian in his political leanings, even as a lawyer. In fact, later in the book, Gruending goes out of his way to point to some of Hall's earlier cases as counsel to show that the libertarian instincts that would be on display in some of his more famous Supreme Court judgments were a long-standing commitment of Hall's, and *not* merely something that he developed on the bench. So, for Gruending to describe a fundamental personality shift in Justice Hall upon arrival at the bench seems somewhat incongruous with his basic thrust.

The second incongruity seems to present itself later still in the book. Hall would be described as a "rebel". His judicial colleagues were frequently uncomfortable with his penchant for using public speaking engagements to defend the report of the Royal Commission of which he was the chair. The very fact of his persistence in this course of action could be taken as showing that Hall had not mellowed on the bench. Rather, perhaps, age provided a degree of perspective that might have been lacking earlier in his life, giving the impression that Chief Justice Hall was different (and more mellow) than in his younger days at the bar. The weight of evidence in the book would suggest that whatever changes the judiciary made to Emmett Hall, he was, regardless of anything else, a passionate defender of the things he believed in. He would speak about them, forsaking conventional wisdom as to the proper judicial role of informed detachment from issues that might be before the courts, be it in the past, present or the future. Speaking out on issues of importance was a habit that would continue to the end of Justice Hall's life.

Personally, I tend to resolve these ambiguities through a simple device. Rather than allow a single claim of the author - namely, that Chief Justice Hall

¹² Gruending, *supra* note 1 at 101.

mellowed substantially on the bench – to undercut the “radical” label that runs throughout the book, I choose to say that out of respect for the litigants and counsel before him, Chief Justice Hall did not allow his more aggressive personality traits to be on display on the bench. However, these more forceful aspects of his character were more evident when he was personally invested in a cause. The report on medical services was one example of this.

Medicare is probably Emmett Hall’s single greatest public service contribution to the country. Yet, after explaining how Hall became involved in the Royal Commission – again appointed by his friend, Prime Minister Diefenbaker – the author is careful to point out that Emmett Hall did not design medicare. Saskatchewan had begun with medicare at the provincial level in 1947, long before Diefenbaker was the Prime Minister. Ten years later, a federal cost-sharing arrangement was set up. The author is careful to place Emmett Hall’s work in the medicare field in a historical context that would neither oversell nor undervalue his contribution.

It is interesting that the politics of the Royal Commission were so prominent in the book. Representatives from a variety of groups (insurance companies, public servants, doctors, dentists and nurses) sat on the commission. As Gruending explains in his book, getting everyone representing such diverse constituencies to speak with one voice would have been a challenge. According to Gruending, Hall was a dominant personality who wanted consensus. The departure of the insurance industry representative a year after the formation of the Royal Commission made that consensus much easier to get. Hall was considered thorough and demanding of those involved in the process, himself included, as he held down an appointment of the Supreme Court of Canada during a majority of the Commission’s mandate. In the end, the recommendations of the Commission were sweeping, and in some ways far broader than the version of medicare that would ultimately be accepted, including recommendations of both dental and vision care for children.¹³

But whatever the distinctions between the principles espoused by the Commission and the health-care system on which Canadians have come to rely, several points can be underscored. First, Emmett Hall was the chair of the commission that managed to make a simple point. Basic medical care should be a right of everyone, no less so for a resident of Nova Scotia than for a resident of Saskatchewan. Second, the other simple principle was the idea that there should be a single payer for medical services, that is, the government.

The other thing that is evident from Gruending’s account is that Emmett Hall had worked hard on this Royal Commission, and he was unwilling to let unwarranted criticism of its report derail the potential implementation of its

¹³ *Ibid.* at 111.

recommendations. So, Justice Hall spoke out. Some people had questioned the wisdom of a judge leading a Royal Commission on such a politically charged subject. But later and much to the chagrin of both politicians and judicial colleagues, Hall was open and public in dismissing the claims of critics that (i) this would be too expensive for government to pay for, and that (ii) this would be unfair to doctors, who, it was argued, should be allowed to charge more than the government was willing to pay.

The loudmouth had been through the public hearings. He understood the arguments better than most, and also understood that the majority of the briefs that had been heard were prepared by groups with money, not the common folk with whom Emmett Hall so easily identified himself. He had commissioned the research studies – 26 in all – to back up the recommendations. He had been part of the debates in the Commission's deliberations. The loudmouth was unprepared to let those groups with vested interests go unchallenged in trying to present only the views that would support their own positions. Judicial robes were not to be a barrier. And, as the author points out in his Note opening the book, many of the economic forecasts as to medicare spending were remarkably accurate, that is, until the 1990s when, in the name of deficit reduction, health budgets were cut.

In 1979, when Hall would be asked by the then-Conservative federal government to review the implementation of the Royal Commission's report, the loudmouth was politically savvy enough to recognize that with the minority government situation of the day, and the Liberals trying to claim health care as one of their priorities, there was a chance to actually keep medicare current in Canadian politics, without appearing to favour either side. The doctors were again demanding the right to set their own fees. Salaries were another hot issue. Hall made several aggressive recommendations, including mandatory arbitration procedures for disputes between provinces and their doctors. Some of these favoured the opposition Liberals, while others seemed to take some sting out of the criticisms being leveled at the governing Conservatives. Hall was still making sure that his voice could be heard. He also recommended that binding arbitration of the fee schedule would be a good idea, so that one side in the payment negotiations – the government – could not simply impose a fee schedule on the other side – the doctors. The idea of binding arbitration would be something to which Emmett Hall would return in his later public service.

Although Gruending does not say so explicitly, it seems as though Hall did not have to shill for his second health-care report quite so much this time, because the report was framed in such a way that everyone got something they wanted out of it, without Hall compromising any of his principles to get there. Therefore, by staying above the political fray (or at least not making political enemies) and making everyone a winner in the process, Hall was able to be the

man who influenced the future of the provision of medical services in Canada – again.

His third impact on health care in this country was more indirect than either the Royal Commission or his review fifteen years later, but still significant. Roy Romanow, in his Foreword to the book, was quite candid about the impact that Emmett Hall had on Romanow's report on the future of health care in Canada.¹⁴ Hall's Royal Commission report was an essential resource to Romanow in his task.¹⁵ More to the point, though, was that Romanow was influenced by his many conversations with Justice Hall, by then in retirement.¹⁶ For the third time, Hall would leave his fingerprints on Canada's medicare system. Even from the grave by the time the Romanow report was issued, the loudmouth was not to be entirely silenced on this issue.

What is really interesting is that the debate in which Emmett Hall was a central player in the 1960s through the 1980s remains in the public arena for consideration today. The argument has moved away from the question of *whether* publicly-funded health care was a good idea, either in the abstract, or in practice; the need for public funding of health care is widely accepted. But whether private health care should exist *alongside* the publicly funded system remains a hot topic currently. Some citizens argue for the right to access health-care service providers paid for by private insurers, and others argue that the introduction of patient-pay, private-insurance health care threatens the viability of the public health care system.¹⁷

It would be very informative to know what the Chair of the Royal Commission on Medical Services would have thought of using the courts to attack legislative provisions preventing private health care insurance. On the one hand, in favour of court action, Justice Hall clearly believed that the courts were a branch of government that could – and should – be a catalyst for achieving the public good, and spent more than a decade and a half proving exactly that as a judge. Also, the Royal Commission report did not prohibit medical practice outside medicare. It simply held that there could no reimbursement if the doctor charged more than the fee schedule.¹⁸ On the other hand, the Royal Commission's proposals were to provide basic medical services through a *public* program, without allowing doctors to bill the patient on top of the amounts paid by the provincial health plans.

¹⁴ *Building on Values: The Future of Health Care in Canada: Final Report* (Ottawa: The Commission on the Future of Health Care in Canada, 2002).

¹⁵ Greunding, *supra* note 1 at x.

¹⁶ *Ibid.*, at ix-x.

¹⁷ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791.

¹⁸ Greunding, *supra* note 1 at 118.

Also, one factor must be thrown into the mix. Could Justice Hall have foreseen the massive wait times for basic services that accompanied government cutbacks in the 1990s? These wait times continue into the 21st century. Gruending does not deal specifically with this issue. However, based on his overall portrait of the man, there can be little doubt that if he had foreseen this de-funding of health care, Justice Hall would have been singularly unimpressed with government spending priorities. So, being a political populist, it is difficult to know whether Justice Hall would have been more supportive of either (i) the system of payment for medical services that he helped to both create and sell to the Canadian public in the early- to mid-1960s, or of (ii) the sentiment (popular among wealthier Canadians) that while publicly-funded health care is good, there should be no reason that they should not be allowed to receive the “best care money can buy”, even if it were outside the public system. This is eerily reminiscent of the situation when Hall began his review of the system in the late 1970s. As Gruending explains:

To avoid the image of themselves as grasping moneygrubbers, the medical associations explained that extra billing was a method of improving Canadian health care. Medical care, the doctors said, was deteriorating. There were frequent stories in the press about people who needed surgery having to wait months for a hospital bed. Nurses and hospital workers complained about onerous workloads and a decline in the quality of service. The doctors said that governments were either unable or unwilling to pay doctors an adequate salary. The system needed more money and it must come from patients because government refused to provide it. The medical associations also argued that people would make less frivolous use of their access to health care if they had to pay at least part of the bill themselves. The politics of health care was heating up.¹⁹

Hall was opposed to extra-billing, and said as much in his review report,²⁰ as he had in the original Royal Commission report.²¹ Yet, private health care was specifically permitted by the Royal Commission, as long as the government did not foot any part of the bill. Perhaps we cannot predict what Justice Hall would have said or done about the current health-care debates. Perhaps the divide in Hall himself – private health care is okay, but extra-billing is not – shows at least the potential validity of each side of the debate in the 21st century. On the one hand, the Royal Commission has made statements that would support those who claim that private health care is permissible for those who can afford it without government reimbursement. Yet, on the other hand, the Royal Commission’s opposition to extra-billing could also be used to point out that if private health care generates better incomes for doctors, it may deplete the stock of top-quality doctors for the public system. If this is the case, then those who *cannot* afford to

¹⁹ *Ibid.*, at 253.

²⁰ *Ibid.*, at 259.

²¹ *Ibid.*, at 111.

pay for health care will not be able to get it. Just as extra-billing was thought to be undesirable by the Royal Commission, a two-tiered health care system could be opposed on similar grounds.

The book also considers (in Chapter 8) Hall's role on an Ontario ministerial committee studying education in Ontario in the 1960s. Ultimately, recommendations of the committee included calls for a massive overhaul of the educational system, eliminating the concept of year progression – and thus, of failure of a year – and to focus instead on the accumulation of skills. The report – described in detail in the book – is portrayed as something which was seen by many as going too far in its push for student-centered learning, and embraced a very liberal vision of education. The author is careful in this chapter neither to discount the report, nor to deny or underplay the negative reasons of some. In fact, the chapter begins with a 1983 quote from the *Globe & Mail*,²² critically denouncing the work of Hall, his co-chair Dr. Lloyd Dennis,²³ and the other committee members.

However, several points are worthy of notice here. First, according to Gruending, there was significant friction between some members of the committee and the Ontario Department of Education. Second, it appears that there was strong opposition to his leading another extra-judicial panel amongst some of his judicial colleagues. After all, he had made waves with his foray into this type of commitment. Hall was again undeterred.²⁴ Third, as he had with the Royal Commission on Health Services, Hall sought to achieve unanimity within the committee. On this point, he was largely, but not entirely, successful. Fourth, much to Hall's chagrin, the point that had to be given up to achieve unanimity within the group was the idea of funding for Catholic school throughout Grades 1 to 12. This was something that mattered deeply to Justice Hall, having grown up Catholic in Saskatchewan. As Gruending points out, Hall believed that he could succeed where others had not. He felt strongly about the issue, but his strength of conviction could not sway enough of the committee to push the issue past the tipping point. Hall had to give in on the issue, and little reference would be made to it in the committee's report.²⁵ Hall did not champion this report in touring the country, as he had for health care reform, leaving this to his co-chair.²⁶

²² *Ibid.*, at 123.

²³ Dennis took over, first as secretary to the committee when the original secretary, as Gruending depicts it, "found Hall's bluntness and impatience too much to bear" (*ibid.*, at 127). Once again, the mellower side that Justice Hall was said to have developed on the bench was not in evidence. Later, when Hall became ill, Dennis was appointed as a co-chair of the committee.

²⁴ *Ibid.*, at 124.

²⁵ *Ibid.*, at 132.

²⁶ *Ibid.*, at 137.

Chapter 9 begins a string of chapters focused on Emmett Hall's work on the Supreme Court of Canada. The major points of the first of these chapters are three in number. First, Emmett Hall did not come from the same past family experiences as did his judicial colleagues. While Hall became a member of the elite purely through his own exploits, many of his colleagues came from families with historical connections to the elite in politics, law, or the judiciary. Others had schooling at elite institutions. Despite these differences in background, Hall was accepted into the inner circle of the Court.

The second point was that Hall was one of the Court's workhorses, although not its most productive member, a fact that the author attributes to Hall's contributions outside the Court at the same time. Third, there was some interaction amongst members of the Court, and some members of the Court (notably Chief Justice Cartwright and Justice Spence) were close to Justice Hall. But, the Court was described as a somewhat less than collegial place.²⁷

The next chapter puts Justice Hall's libertarian instincts in full view. Along with Chief Justice Cartwright and Justice Spence, Hall was seen as being liberal in criminal-law matters,²⁸ the author points to two specific cases as examples, and a quantitative study to support his claim.²⁹ But Justice Hall's liberal leanings were not limited to the criminal law. Justice Hall believed that women's contributions to their partner's business interests should be recognized by the law. This belief was at the heart of Justice Hall's public defence of the thrust of Justice Bora Laskin's dissenting judgment (as he then was) in *Murdoch v. Murdoch*.³⁰ Even though Hall did not sit on the panel that decided this case, the loudmouth was not about to let his voice be silenced.³¹

The libertarian theme continues later in the book, discussing the *Canadian Bill of Rights*. The government of Justice Hall's old "friendly rival", Prime Minister Diefenbaker, had created something which would allow Justice Hall to partially implement his own unique view of the judicial role. The author is again careful to provide a historical context of civil rights in Canada, in the form of a short summary of a group of earlier cases – in which Justice Hall was not involved as a jurist – where the Supreme Court protected the civil rights of its citizens, by using interpretive techniques then in its arsenal.³² But, using interpretation to protect

²⁷ *Ibid.*, at 153.

²⁸ *Ibid.*, at 159-161.

²⁹ *Ibid.*, at 159, 161-164.

³⁰ 1975] 1 S.C.R. 423.

³¹ Greunding, *supra* note 1 at 165.

³² *Ibid.*, at 186. See *R. v. Boucher*, [1951] S.C.R. 265; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 and *Roncarelli v. Duplessis*, [1959] S.C.R. 121; Of course, the facts of all these cases predated the passage of both the *Bill of Rights* and the *Charter*.

civil rights was extended by the introduction of the *Canadian Bill of Rights*. Justice Hall was more prepared than some of his colleagues to accept the new power to declare laws be inoperative. For example, he was part of the group willing to use the *Canadian Bill of Rights* to declare part of the *Indian Act* (as it then read)³³ inoperative in the *Drybones* decision.³⁴ Conversely, he was in the dissent in the *Lavell* case,³⁵ in which the majority refused to declare inoperative another provision of the *Indian Act*. Emmett Hall's reaction to the decision of the majority was negative, and he clearly was not shy about sharing it, both privately and publicly.³⁶ The judicial loudmouth was still a force, even after leaving the bench.

The case of Stephen Truscott is the subject of a unique chapter (Chapter 11) in the book. It is clearly one of the areas that received attention during the period between the publication of the first and revised editions of *Emmett Hall*. Truscott was originally sentenced to hang in 1959, even though he was not yet an adult. The death sentence was later commuted to life imprisonment, and leave to appeal to the Supreme Court of Canada was originally denied.³⁷ However, the Supreme Court's involvement in the case was not at an end. By government reference, the Court was ordered to hear witnesses in 1966.³⁸ After hearing witnesses, the majority of the Court said that Stephen Truscott was guilty of murder. Justice Hall wrote a stinging dissent, pointing out all the problems with the original trial, with little interest in the new evidence, saying that a new trial was the only remedy. Hall was the only member of the Supreme Court to find this to be the appropriate resolution of the issue before the Court.

Greunding points out the public attention that the case foisted upon the Court made many of the judges uncomfortable.³⁹ For those of us educated in the law in the *Charter* era, the issue of public scrutiny of the Court is simply a fact of life. One is forced to wonder whether this discomfort (and the fact that the Court had turned a deaf ear to Stephen Truscott's plaintive cries for help six years earlier by denying his request for leave to appeal) had any impact on the majority's position.

³³ *Indian Act*, R.S.C. 1952, c. 149, s. 94.

³⁴ *R. v. Drybones*, [1970] S.C.R. 282.

³⁵ *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349.

³⁶ Greunding, *supra* note 1 at 192-193.

³⁷ *Ibid.*, at 172; [1960] S.C.R. xi.

³⁸ Greunding, *supra* note 1 at 174.

³⁹ *Ibid.*, at 176.

Four points are worthy of notice here. First, Justice Hall was not a member of the Court in 1960,⁴⁰ when the original application for leave to appeal was dismissed. Second, Justice Hall was accustomed to public scrutiny of his activities, perhaps far more than some of his judicial colleagues, having served as the Chair of the Royal Commission on Medical Services. Gruending had already pointed out that in his interviews for the Hall biography, comments had made to show that Hall enjoyed action and the spotlight that often accompanied it.⁴¹ Third, Hall's populist and libertarian leanings were right in line with the public pressure that had caused the government of the day to throw the case back to the Supreme Court in the first place. A unanimous confirmation of the conviction would have done little to encourage popular consideration of legal issues. Fourth, Justice Hall's concern in the case was *not* whether in fact Truscott had committed the crime with which he was charged. The issue, in Justice Hall's view, was one of process.⁴² Regardless of his personal beliefs with respect to the evidence – or anyone else's, for that matter – everyone deserved a fair trial. The witnesses before the Supreme Court did not, in Justice Hall's view, make right any procedural wrong that had occurred earlier in the process.

Since 1959, Stephen Truscott has never left the Canadian national consciousness, at least not permanently. In 2002, the federal government again appointed a judge to look into the Truscott case. Justice Fred Kaufman, formerly of the Quebec Court of Appeal, examined new evidence in the case, even though Truscott had been paroled in 1969. Justice Kaufman's report to the federal government prompted another reference, this time to the Ontario Court of Appeal, to review the Truscott affair. As pointed out at the end of the chapter, the federal justice minister seemed to be validating Justice Hall's dissent when, in sending the matter back to the Ontario Court of Appeal, he said that there was a reasonable basis for believing that a miscarriage of justice likely occurred in the case of Stephen Truscott.⁴³ The appeal court delivered its judgment on August 28th, 2007.⁴⁴ The Ontario Court of Appeal was dutifully careful not lay blame on

⁴⁰ In the book, the author indicates that the application for leave to appeal was dismissed in 1961 (*ibid.*, at 173). However, the official Supreme Court Reports notation shows that the application for leave to appeal was dismissed on February 24, 1960. Also, on a very minor point, Gruending says that Justice Hall's dissent was 42 pages in length (*ibid.*, at 176). However, in the Supreme Court Reports – the official reporter series of the Supreme Court of Canada – Hall's dissent occupies only 31 pages (pages 382-412).

⁴¹ Gruending, *supra* note 1 at 101.

⁴² *Ibid.*, at 173. See also Justice Hall's dissenting judgment in *Reference Re: Steven Murray Truscott*, [1967] S.C.R. 309, at 383.

⁴³ Gruending, *supra* note 1 at 183.

⁴⁴ *R. v. Truscott*, 2007 ONCA 575, 226 O.A.C. 200.

any of the previous judicial determinations with respect to the death of Lynne Harper, the young girl of whose murder Truscott had been convicted. The Court wrote:⁴⁵

Based on evidence that qualifies as fresh evidence in these proceedings, we are satisfied that Mr. Truscott's conviction was a miscarriage of justice and must be quashed. We are further satisfied upon a review of the entirety of the evidentiary record and the additional material available to this court and not previously judicially considered, that if a new trial were possible, an acquittal would clearly be the likely result. The interests of justice dictate that we make that order. Mr. Truscott should stand acquitted of the murder of Lynne Harper.

Thus, the Ontario Court of Appeal held that fresh evidence justified an acquittal, because that would be the likely result of a new trial. But, unlike Justice Hall four decades earlier, the Court based its decision on their view of new evidence, and did not comment on the process at the original trial.

Emmett Hall's dissent was undoubtedly one factor in keeping the Truscott controversy in the public arena.⁴⁶ But, it seems incongruous not to make more of the popular and political pressure that allowed Justice Hall to take his stand in this critical story of the Canadian justice system. After all, the Supreme Court had denied leave to appeal prior to Justice Hall's arrival. Ordinarily, this would end any litigation. The government of the day opened the door for Emmett Hall to take a role in all of this through its decision to send it back to the Court. Without that, the case never would have been heard by Justice Hall and his colleagues.

The other person on whose courage this story hinges is Stephen Truscott himself. Paroled in 1969, it takes tremendous fortitude to say that one's freedom is not enough, and demand that the record be set right. It is this courage and personal fortitude that allowed Emmett Hall's dissent in the 1966 case before the Supreme Court to be more than a historical footnote on his judicial career, more than a powerful disagreement with his colleagues. While I have no desire to underplay Justice Hall's impact on this series of events, Emmett Hall's contribution to this saga might never have happened - or had the historical significance that it did - without the actions of others.

The same might be said of Gruending's treatment of the *Calder* case in 1973, the subject of Chapter 13. Four points are again relevant here. First, Gruending is correct that in this Aboriginal rights case, the Supreme Court wrote a decision that said very little.⁴⁷ Of those who wrote about the substantive issue in the case,

⁴⁵ See *ibid.*, at para. 3. The panel that heard this reference to the Court of Appeal included Chief Justice McMurtry, and Justices Doherty, Weiler, Rosenberg and Moldaver.

⁴⁶ Gruending, *supra* note 1 at 178.

⁴⁷ Gruending actually begins the chapter by saying the judgment of the Court decided nothing. However, technically, the Court decided to dismiss the appeal. Therefore, the Court decided not to disturb the judgment of the British Columbia Court of Appeal. Furthermore, as

the Court split evenly.⁴⁸ Interestingly, although the chapter acknowledges that Justice Hall's judgment did not carry the day in court, it seems that Gruending treats it almost as if it were so. Perhaps a more accurate way to describe the case is that it was essential that there was a dissent in the case. Just as Justice Hall's dissent kept the Truscott situation in the public consciousness in 1966, the matter of Aboriginal rights – and in particular its legal ambiguity – was kept front and centre by the court's division in the *Calder* case. In fact, one could make an argument that the judgment of Justice Pigeon on the procedural issue – even though it went against the Aboriginal claim in the case – was important in forcing the question of Aboriginal rights into the forefront of public debate in Canada. It could be considered just as important as Justice Hall's substantive argument in favour of the Aboriginal claim. It was Justice Pigeon's decision to essentially *not* decide the substance of the claim that returned the political hot potato back to a government that could no longer be confident of the outcome, if its battle were to return to the judicial branch. Put another way, uncertainty leads to negotiation, as opposed to either the imposition of a solution, or the desire to litigate. Even assuming, for the sake of argument, that Justice Hall was absolutely legally "right" in *Calder* – various aspects of the case have the subject of scholarly comment⁴⁹ – Justice Pigeon's judgment was equally important to the impact of the *Calder* decision. This is so, even if Justice Hall did not agree with his colleague's decision not to address the substance of the case before the Court.⁵⁰

discussed below, the majority of the Court (Justice Hall included) did decide that Aboriginal rights *could* be extinguished. The disagreement between Justice Hall's trio of dissenters (Justices Spence and Laskin, concurring), on the one hand, and the three judges who dismissed the substantive claim, on the other, centered around whether in fact the rights at issue in the case *had* been extinguished. Thus, it would be more accurate to say that *no majority* of the Supreme Court of Canada decided the substantive issue presented by the Aboriginal claim raised. However, to non-lawyers, there is little distinction between what Gruending said and the reality. For lawyers, though, a judgment must always decide something, even if it is only to begin the case again (such as, for example, in the case of ordering a new trial in a criminal matter).

⁴⁸ Justice Pigeon, the seventh member of the panel, decided that Frank Calder – the appellant Aboriginal chief in whose name the case had been started – should lose on a procedural point, that is, that the lawsuit had been begun improperly. Technically, Justice Judson (Justices Martland and Ritchie, concurring), wrote that Justice Pigeon was correct on this point (see *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313, [*Calder*] at 345). However, Justice Judson is quite clear that the technicality is *not* the fundamental basis of his decision in the case. Therefore, Justice Judson's comments on the procedural issue are merely *obiter dicta*.

⁴⁹ See for example, K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*" (1973), 51 *Can. Bar Rev.* 450; P.A. Cumming, "Native Land Rights and Northern Development" (1974), 12 *Alberta L. Rev.* 57; W.H. McConnell, "The *Calder* Case in Historical Perspective", (1973-74) 38 *Sask. L. Rev.* 88.

⁵⁰ Gruending, *supra* note 1 at 206.

Second, on a related point, when the highest court in the land is evenly split on an issue of public importance,⁵¹ the public will generally demand resolution from another forum, usually the overt political arena. The popular political uprising on the issue of Aboriginal rights following the *Calder* case was no doubt due in part to the Supreme Court's inability to definitively resolve the substantive issues presented to it. However, other events, such as Prime Minister Trudeau's 1969 White Paper on Aboriginal Peoples – which is mentioned by Gruending, mainly to make the point that Justice Hall's dissent led to a change in government policy in this regard⁵² – and the popular firestorm it created also conspired to alter the political reality of subjugation and devaluation that had previously been the norm in the area of Aboriginal rights.

Third, Justice Hall agreed that Aboriginal rights to and in a piece of territory could be extinguished, but argued that in this case, extinguishment had simply not occurred.⁵³ It could be argued that Justice Hall's *agreement* with the majority of his judicial colleagues on that point created the conditions for Aboriginal groups to demand constitutional recognition of their rights, protection that was achieved by virtue of the entrenchment of s. 35 of the *Constitution Act, 1982*.⁵⁴ The entrenchment of this provision removed the possibility of the extinguishment of Aboriginal rights by legislative fiat.

Interestingly, it was Brian Dickson, Emmett Hall's immediate successor at the Supreme Court, who as Chief Justice, co-authored, along with Justice LaForest (for the Court), the judgment in the *Sparrow* case in 1990.⁵⁵ This case would set the stage (and the basic legal parameters) for the constitutionally-based Aboriginal-rights jurisprudence that would be written in the two decades following its release.⁵⁶

Fourth, just as Justice Hall had been a passionate champion of health care in the past (and would be again), he would be unafraid of speaking publicly about the *Calder* case, both in public speeches and privately. Hall would strike up a personal friendship with Tom Berger, one of the counsel who appeared to argue in favour of the Aboriginal claim put forward in the case. Berger was later a made

⁵¹ "Public importance" of the issues presented by the case is one of the key ingredients to resolving applications for leave to appeal. See *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

⁵² Gruending, *supra* note 1 at 208.

⁵³ *Calder*, *supra* note 48, at 402.

⁵⁴ *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

⁵⁶ See for example, *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Vanderpeet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388. All of these cases refer to the framework set out in *Sparrow*.

judge of the Supreme Court of British Columbia. While still on the bench, Berger commented critically on certain proposals of the government of the day. Berger eventually resigned over those comments. In his resignation, Justice Berger clearly looked with favour on Hall's rebellious image.⁵⁷ Justice Hall, by then retired from the bench, defended Justice Berger's actions, albeit in somewhat softer tones than might otherwise have been the case, because Justice Berger had declined an offer of Hall's help.⁵⁸ The judicial loudmouth was back, and he was ready to fight the good fight, at least as he perceived it, yet again.

The remainder of the book goes on to describe Emmett Hall's post-judicial activity, most of it in public service. Hall would accept an appointment to review the Saskatchewan courts; he would be a labour arbitrator (helping to solve a national railway strike begun in 1973 and averted further labour unrest by reprising his role); he would report to the Saskatchewan government on university governance issues surrounding the potential creation of a separate university in Regina. Hall would be tapped by the federal government again to study the Canadian rail transportation system. As mentioned earlier, Hall also became the chancellor of the University of Saskatchewan.

Hall would also speak publicly about the free trade agreement which was a key issue in the 1988 federal election, dismissing claims that free trade could damage the Canadian medicare system. Interestingly, Hall's public comments favoured the Conservatives and were against the opposition Liberals. Although Gruending does not mention it specifically, one is forced to wonder whether Hall's comments would have been as forceful if the party affiliations in the debate had been reversed. On the other hand, by this point in his life, Hall had already shown that he was willing to defend medicare from unwarranted attack from any side, regardless of the political situation at the time of his comments.

On the subject of overall impressions of Gruending's work, I appreciate that the book is devoid of the hyperbole which can sometimes accompany a biography where the author has avowedly had substantial contact with the person who is the subject of the book. While there is clearly a degree of respect and admiration between author and subject, Gruending does not whitewash or gloss over areas where Justice Hall may not have been at his best. For example, Gruending does not pretend that Justice Hall's public speeches were always well-received. Yet, even in pointing out what could be perceived by many as flaws in Hall's work, Gruending allows the reader to make his or her decision about the potential error, but does not shy away from describing the reaction of those involved, regardless of whether they would support Justice Hall or not. At the same time,

⁵⁷ Gruending, *supra* note 1 at 214.

⁵⁸ *Ibid.*, at 212-213.

Gruending shows a degree of compassion for Justice Hall, similar to the humanity that was in evidence throughout the life of his subject.

For the lawyers who will read this review, some may find the dearth of sophisticated legal analysis troubling. I think that this is to be expected. Gruending's avowed background is as a journalist. There is no indication on the face of the book that the author is legally trained. To demand a legal approach to the book would be to ask something quite difficult, if not impossible. What is more, I believe that the analysis provided of legal cases in the book is accurate. While any lawyer can usually parse a condensed case description, I was certainly left with the impression that the abbreviated versions would not mislead anyone. In a book meant to appeal to lawyers and non-lawyers alike, I believe that this is all that one could reasonably ask. Finally, I think that by eschewing a strictly legal analysis of the cases, the author actually does readers (lawyers included) a service. The importance of Emmett Hall should not be said to rest solely in the cases that he won – or lost – as an advocate, nor in the judgments that he rendered on the bench. Rather, without legal analysis to anchor the book, the author finds the book's recurring theme in Emmett's Hall's ability to do two interrelated things. First, Hall would use whatever position he had at any given moment – as a lawyer, Supreme Court judge, Royal Commissioner, or political observer – to influence the events and institutions that he felt were most in need. Second, Hall was, by any measure, a person of extraordinary talent and success. Yet, as Gruending makes clear throughout the book, Hall would always view himself as supporting "ordinary people", again, regardless of the position in which he found himself.

One of my genuine disappointments with this book is its lack of a substantive conclusion. Gruending's summary of his oeuvre would cover less than a full page in a work of almost 300 pages. Gruending portrays a man whose interests and influence were as vast as the prairie landscape he seemingly loved so much. Transportation, farming, universities, public primary and secondary education, Aboriginal rights, criminal law and philanthropy were all passions of the man known as "the father of Medicare". How did all of these diverse areas fit together? How did each impact the others? It is clear that Hall did not view any of these areas or pursuits as inconsistent with any of the others. Does the author agree? The book is laid out with much research, and having read the book, I have no reason whatsoever to doubt the thoroughness of the author's endeavour. That said, I do not have access to all of the research to help me bring all of the diverse facets of this man together. I would have appreciated the perspective of the person who has read all the documents – the author – on some of these questions. While some of the individual areas in which Emmett Hall was involved during his life do receive perspective and comment from the author (most of which is quite helpful), Emmett Hall's life as a whole receives much less of a meaningful summary and synthesis.

Some readers might think, based on some of my earlier comments, that I have been very critical of Gruending's work in *Emmett Hall*, demonstrating that I found little of value in it. In fact, the opposite is true. I enjoyed the book immensely. At the same time, just as Gruending is not uncritical of his subject, Justice Hall, I believe that I owe the author – and the readers of this review – the same courtesy. If I were to do otherwise, it might be said either that: (i) I did not read the book (or at least did not do so with sufficient care); or that (ii) I was not thinking very hard about the book I was reading. Each could be considered an insult to both the author and Emmett Hall. Well done, Mr. Gruending. Justice Hall deserves a biography, and Gruending writes an admittedly laudatory but fair account of a man whose contributions to our country are both massive and varied. Canada would still be Canada without Emmett Hall, but it would also be very different than it is today, and not for the better. Whether or not you agree with the loudmouth approach that Justice Hall would take with respect to certain issues, this biography lays out a convincing case that Emmett Hall was one of the giants of Canadian history. His legacy deserves to be proclaimed by many and remembered by all. Dennis Gruending compellingly does the former in *Emmett Hall: Establishment Radical*. It is up to the rest of us to do the remembering. Perhaps then the legacy of the judicial loudmouth will not remain quite so quiet. Thanks to reading this book, I, for one, hope that Justice Hall's legacy will be trumpeted well into the future.