# William R. McIntyre: Paladin of the Common Law

*by W.H. McConnell,*
*Montreal: McGill-Queen's University Press, 2000. Pp. 248.*

IN *WILLIAM R. MCINTYRE: PALADIN OF THE COMMON LAW,*[1] Professor of Law Emeritus (University of Saskatchewan) W.H. McConnell has written one book with many pens. At different points he is Justice William McIntyre's ghost-writer, judgment-explicator, case-chronicler, biographer-cum-hagiographer, oral historian and cheerleader. Rarely is he a critic of the judge or of those around him, except by repeated comments chiding Pierre Elliott Trudeau, regarding his "patriation" strategy and the very existence of the *Charter.*[2] McConnell dispassionately narrates judicial views opposed to McIntyre's but still manages to write an apologia. This is a book, in other words, that is relatively easy to read and difficult to review.

It begins with a paean to University of Saskatchewan law faculty's past in the form of interviews, delightfully drawn from George Curtis, Sandy MacPherson, Otto Lang and Bud Estey.[3] The author has been commendably thorough in securing interviews with others concerning McIntyre's career and character: Bertha Wilson, Harry Rankin, Brian Dickson, Marc Lalonde,[4] and in-depth comments from his law partner and close friend, Lloyd McKenzie.

The first two chapters, "Early Influences: Education and Wartime" and "Practice in Victoria," give the biographical, educational, family and professional details about growing up in Moose Jaw during the inter-war years. There is a lot of nostalgia for the way law used to be taught in downtown Saskatoon, by three full-time professors (Moxon, Cronkite, Corry)[5] and two dozen sessional practitioners: Socratic method, jurisprudence, the English constitution, and the Harvard case law approach to torts, contracts and real property. Criminal law was best learned at the two annual assizes and in magistrate's court, where McIntyre and McKenzie would later routinely alternate as Crown or defence counsel.

After distinguished service as an artillery officer in World War II, he moved to Victoria to article and grow comfortably within the British Columbia bar. Never much of a social or political joiner, he networked naturally by impressing fellow professionals with the care and research that he applied to every case, whether corporate or *pro bono.* In 1967, after twenty years of practice, the Chief

1. Montreal: McGill-Queen's University Press, 2000.
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 [*Charter*].
3. George Curtis, Founding Dean of University of British Columbia Faculty of Law; Justice M.A. "Sandy" MacPherson, Saskatchewan Court of Queen's Bench; Honourable Otto Lang, Former Member of Parliament for Saskatchewan; The Honourable Mr. Justice Willard Zebedee Estey, Supreme Court Justice from 1978–1988.
4. Honourable Madam Justice Bertha Wilson, Supreme Court Justice from 1982–1991; Harry Rankin, Q.C., Former Vancouver Alderman and counsel; Rt. Hon. Robert George Brian Dickson, Chief Justice of Canada from 1984 to 1990; Honourable Marc Lalonde, Q.C., Former Minister of Justice and Attorney General of Canada.
5. Arthur Moxon, First Dean of College of Law, University of Saskatchewan (1914–1929); Frederick Cronkite, Dean of College of Law, University of Saskatchewan (1929–1961); Dr. James Alexander Corry, Professor of Law, University of Saskatchewan (1928–1936); 13th Principal of Queen's University (1961–1968).

Justice of British Columbia, Jack Wilson, "fixed it" for his federal appointment as a trial judge, ironically thanks to then Minister of Justice, Pierre Elliot Trudeau.[6]

Chapter Three repeatedly champions trial over appellate judging. That helps to explain why McIntyre consistently deferred to trial decisions, while on the British Columbia Court of Appeal (1973–1979) and the Supreme Court of Canada (1979–1989). McConnell covers the B.C. period with a random selection of trial and appellate judgments that might have offered more rhyme, reason, and "Denning-style" case colouring. We get little sense of the institutional context in which McIntyre worked: for example, of the scale and variety of the business of these courts, or of his colleagues and their competing jurisprudential views. What the author's potted summaries of select McIntyre judgments reveal, beyond life-long opposition to capital punishment, is his primary place for legislation and federalism, a distant second place for arguments based on equity, the need to "read down" rather than "read into" any statute, and an overall fondness for invoking more vaguely "the common law."

This gets everyone to the Supreme Court of Canada in 1979. Chapter Four gives a nicely written summary of McIntyre's colleagues and a survey of highlighted cases during his ten years there. McConnell notes that Brian Dickson "was mortified by Trudeau's comments"[7] at the Laskin Law Library in 1996, regarding the majority's *Patriation* judgment.[8] Dickson here defends himself vigorously, but no source is cited, so presumably it must be an author's interview with Dickson, and certainly not with Trudeau.

The book's next three chapters address separate areas of law at the Court during McIntyre's decade: constitutional law, criminal law, and *Charter* cases. Chapter Five covers a dozen of his judgments, including: *Patriation*, *Dolphin Delivery*,[9] *Vaillancourt*,[10] the second *Morgentaler*[11] and *Andrews*.[12] The author's method is to brief the judge's judgment, more or less in doctrinal isolation and in terms of reasons and authorities. McConnell avoids serious discussion of the judge's methods, such as his regular resort to statutory literalism for example, even when his own *Etobicoke*[13] test for discrimination produced conflicting results, as in *O'Malley*[14] and *Bhinder*.[15] Chapter Six rehearses eight criminal law judgments, from *Whitter*[16] to *Mercure*,[17] applying the same briefing of reports method.

Finally we see in Chapter Seven, what all the previous Trudeau-sniping was for: a blistering attack on the *Charter*. It is difficult to know how much of this stems from McConnell or and how much from McIntyre, although at various

6. McConnell, *supra* note 1 at 34.
7. *Ibid.* at 73.
8. *Reference Re Amendment of Canadian Constitution*, [1982] 2 S.C.R. 793; (*sub nom. Québec (A.G.) v. Canada (A.G.)*) 140 D.L.R. (3d) 385.
9. *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.
10. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399.
11. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.
12. *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.
13. *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14.
14. *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321.
15. *Bhinder v. Canadian National Railway Co.*, [1985] 2. S.C.R. 561, 23 D.L.R. (4th) 481.
16. *R. v. Whitter*, [1981] 2 S.C.R. 606, 129 D.L.R. (3d) 577.
17. *R. v. Mercure*, [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1.

points we are told that "McIntyre believes..." and "he can cite...". We are then told:

> Unlike most of his colleagues, he did not view the new Charter as a revolutionary departure in Canadian law. It did not create new rights; these existed already. What the Charter did was to guarantee them and place them beyond the reach of the legislature to change.[18]

This provocative assertion simply hangs at mid-page, undeveloped and undocumented. It cries out for an enumeration of whatever new versus old rights the author has in mind, for an elementary historical background to legal rights in "the common law" and in the pre-1982 Canadian legal system, for a careful explication of the *Charter*'s text, and for an analysis of pros and cons in the seismic shift to transcendency and away from positivism that the *Charter* has created. Placing rights "beyond the reach of the legislature" deserves more than passing reference, especially a century after legislatures in common law countries first grew heady with A.V. Dicey's arguments for parliamentary "supremacy."

In a closing Chapter Eight, "The Summing Up," we get Justice McIntyre's post-retirement reflections in McConnell's thinly disguised narrative. The focus on the Charter continues: "his deep attachment to common law principles leads him to view his influence over the Canadian body politic with some sadness."[19] Again he invokes "common law principles" as McIntyre's alternative authority, without ever once specifying which principles and how each developed historically for modern application; and that mantra is the core problem that McConnell creates for himself throughout this book. This failure to articulate is especially crucial if the author is to confront arguments that the *Charter* effectively restores the pre-Victorian balance between the Queen's Courts of common law and the Queen-in-Parliament.

Obviously there is food for constructive thought here, as there always is in McIntyre's judgments. McConnell reminds us that the Supreme Court of Canada and the Judicial Committee of the Privy Council, did not need a charter when they "eviscerated the Canadian New Deal in 1936-37."[20] McIntyre and McConnell offer provocative thoughts on "legislative confirmation for judges", on Quebec's constitutional position in 1980 and ever since, and a warning that "the Charter...could become a device for passing the buck" back and forth between judges and politicians.[21]

The text could have used a final editor, to eliminate over-use of commas, some annoying tense-jumping, inconsistent italicising of cited legislation and style of causes, as well as typing and indexing errors. Also, there are too many dubious assertions about English legal history. Identifying Holdsworth and Maitland as authoritative writers on the criminal laws remains a long stretch for each one's otherwise prolific scholarship.[22] Repeated reference to the British Columbia Supreme Court as "an historic descendent [*sic*] of the English Court of King's

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18. McConnell, *supra* note 1 at 186.
19. *Ibid.* at 234.
20. *Ibid.* at 191.
21. *Ibid.* at 210.
22. *Ibid.* at 23.

Bench",[23] without mention of Common Pleas, Exchequer and Chancery, suggests unfamiliarity with the actual workings of England's court system. And "the feudal notion that a husband had a 'property right' in his wife's person" is the longest, wrongest stretch of all.[24]

Professor McConnell has dubbed Justice McIntyre "paladin of the common law," by which he can mean two things: a knightly champion or someone who belongs to the palace, *i.e.*, the executive power. There are nuances here, about the Queen's judges in the Queen's court and judicial independence, which the author may not have intended. They deserve explanation; no doubt elsewhere. In the meantime we have a flawed but helpful record of one of Canada's more influential jurisprudents. And some legal historians may find encouraging the Canadian precedent set here for having retired judges see their post-retirement reflections, on legislation enacted and judgments written during their working careers, put into print.

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23. *Ibid.* at vii. See also *ibid* at 37, 46, 57.
24. *Ibid.* at 173.