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EMMETT M. HALL: A PROFILE OF THE JUDICIAL TEMPERAMENT

By FREDERICK VAUGHAN*

I suppose, too, it was partly the effect of sitting in court all day listening to cases. One gets what you might call the judicial temper of mind. Pepperleigh had it so strongly developed that I've seen him kick a hydrangea pot to pieces with his foot because the accursed thing wouldn't flower. He once threw the canary cage clear into the lilac bushes because the 'blasted bird wouldn't stop singing'. It was a straight case of judicial temper. Lots of judges have it, developed in just the same broad, all-round way as with Judge Pepperleigh.

Stephen Leacock,
Sunshine Sketches of a Little Town

A. INTRODUCTION

It is a commonplace observation to say that some men or women make better judges than others; everyone knows that some people display certain characteristics which, when put together, constitute the judicial temperament. And anyone who has spent anytime studying the work of judges knows that there is no such thing as *the* judicial temperament — there are numerous combinations of mind and disposition which conspire to make a 'good judge'. Despite the absence of a single standard against which one can measure a good judge, there are a number of characteristics which can be discerned in those men who have served society well as judges. Such Canadians as Ivan Cleveland Rand, Sir Lyman Poore Duff, John R. Cartwright, Chief Justice Samuel Freedman of Manitoba, and Chief Justice Jules Deschenes of Quebec, all qualify as men of outstanding judicial temperament. To this list must surely be added Emmett Matthew Hall.

What was the peculiar amalgam of characteristics which made Emmett Hall a good judge? However partial my judgment shall appear, it is the product of many hours of interviewing Emmett Hall and people who have known him — including men as divergent in their political views as John Diefenbaker and T. C. Douglas.

With no pretence to order, I answer: an intelligent but not a philosophic cast of mind. Despite his disposition to natural justice it carried no elaborately reasoned content in the manner of a Lord Denning. His is a practical wisdom anchored in a deeply held view of the human condition. He is also compassionate and generous. Emmett Hall lives a life of concern for other people — especially the poor, the ill and those caught in cultural destitution, such as Canadian native peoples. His compassion is not merely an official or public posture, for throughout his papers one finds letters addressed to "My

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Anonymous Benefactor," which reveal the personal generosity which he never discusses. His compassion has also made him a good listener — an indispensable quality for a good judge.

No one who saw Emmett Hall in court, either as a defence attorney or as a judge, could deny that Emmett Hall knew the law and continued to study it all his life. He was in every sense of the term a 'lawyer's judge' — one who understood the problems involved in litigation and respected the efforts put into arguing before court. In fact, even as a judge Emmett Hall continued to see himself as a defence counsel, in the sense that he always carefully scrutinized lower court proceedings to ensure that the accused had received a fair trial.

Hall's intelligence and strong social convictions gave him a degree of independence or open-mindedness which few men can claim. He demonstrated this in no uncertain terms soon after ascending to the Supreme Court of Canada. His first major judgment was a stinging dissent in *Truscott*. His strongly held views gave him the appearance on occasion of being 'tough' — as indeed he was.

If there is one attribute which Emmett Hall possesses beyond any other, it is his enormous energy or capacity for hard work. All his judgments reflect an intensity of concentration and perception. He has accustomed himself over many years to sustained hard work. Finally, a characteristic which has set Hall apart all his life is his impatience. But his impatience was ever on behalf of some social good and not for personal gain. Emmett Hall has never sought power for its own sake, but has worked to obtain a position from which he might influence the exercise of the power of others. This is, of course, a form of power, but he has never used it in the interest of self-aggrandizement. He sees public power as a trust which must be used as a means of assisting the needy or less fortunate. This does not mean that Hall spurned public acknowledgement of his virtues or that he eschewed money. Far from it; he enjoyed the perquisites which attend office or authority.

Despite his many virtues, Emmett Hall is not yet a fit subject for hagiography. One can do no better than to try to emulate James Boswell who wrote in the introduction of his famous *Life of Johnson* that Dr. Johnson

will be seen as he really was, for I profess to write not his panegyric, which must be all praise, but his life; which great and good as he was, must not be supposed to be entirely perfect. To be as he was, is indeed subject of panegyric enough to any man in this state of being; but in every picture, there should be shade as well as light, and when I delineate him without reserve, I do what he himself recommended, both by his precept and his example.¹

Emmett Hall will be portrayed as he really was, as far as that is possible for a biographer who, unlike Boswell, did not know his subject intimately.

B. EARLY LIFE

Emmett Hall was born into a large devout Irish Catholic family on November 9, 1898. Until he was twelve, the family lived on a dairy farm in

¹ J. Boswell, *The Life of Johnson* (London: Oxford University Press, 1964) at 22.

St. Columban, Quebec. During these early years, he became proficient in French and developed a lasting affection for Quebec. In 1910, he moved to Saskatoon and there advanced quickly through elementary and high school. He entered the newly established College of Law at the University of Saskatchewan in 1916 at the age of eighteen where he became known as the "boy" law student.

The fact that Emmett Hall became actively involved in litigation early in his career as a student under A. E. Bench was to have a profound impact on his temperament. It not only led him to prepare his cases with meticulous care, but also to be especially suspicious of police tactics and to be a stickler for legal procedures. It taught him, above all, that most cases had a 'villain' at their centre; before a case could be won it was essential to find the 'villain'. And Emmett Hall believed with a passion that the law says that an accused person cannot be convicted where there is reasonable doubt. He was especially concerned that the little people got the benefit of his enormous energies on their behalf and demanded as much from the state. Two cases in which Hall acted as defence counsel illustrate these views: the first was the case of John Petlock.²

John Petlock had been charged with the murder of his brother Mike on October 8, 1955. The details of the case were gruesome: someone had shot and killed Mike Petlock, his wife, their two young children, and Mike's elderly mother. All signs pointed to John Petlock who had been at odds with his brother Mike ever since the death of their father five years before.

At the trial Emmett Hall admitted that John shot his brother but argued that it had been in self-defence. He viewed the case as a large jigsaw puzzle which he and the jury had been called upon to assemble in the interest of justice. However, some of the pieces seemed to be missing or distorted. He began the defence by showing that the police, in constructing their theory, had excluded certain fine details and overlooked various points. These missing pieces were highly relevant because some of them confirmed Hall's premise that there had been a fight after Mike Petlock had pointed a loaded rifle at John. Hall focused his attention on the testimony of R.C.M.P. Sergeant Minor who led the investigation at the Petlock farm and who composed the main outlines of the prosecution theory implicating John Petlock. "What a wonderful thing it would have been," Hall said to the jury, "if a photograph had been taken before anything was moved. But no photograph was taken." Slowly but steadily Hall began to cast doubt upon the manner in which the police behaved in the course of collecting evidence against John Petlock. He pointedly invited the jury to scrutinize the evidence and theory of the prosecution.

Sergeant Minor formed a theory as to what had happened, and gentlemen, it is now of supreme importance that everything from here on — in terms of the police evidence — be judged in the light of the theory that was formed; because — is this not the fact that in our own [your own] ways of life we proceed at times from certain theories or standpoints? Is it not the way with us all as part

² This case was unreported. Quotes concerning this case have been taken from the Hall papers which are in the possession of the author.

of our human characteristics, that having formed an opinion, we release it very slowly and we will stick to it — sometimes through thick and thin — regardless of the fact that, to other people, it may sound silly.

Sergeant Minor had devised the theory that Mike had been killed in the kitchen. Emmett Hall attempted to prove that Mike had been shot outside and his body dragged into the kitchen after the fatal quarrel. "If Mike was not killed in the kitchen, then where does all this evidence lead you? The whole house of cards come crashing down, insofar as the police case is concerned."

Hall showed from the police photographs that Mike Petlock had been dragged: "The pattern of the blood which flowed from Mike's body on to the mat, on to the floor, fixes the pattern there; showing that that mat and Mike reached that location at the same time." He then submitted that the kitchen revealed no signs of struggle. Above all, Hall asked, if Mike had been shot in the kitchen where were the empty casings? The police admitted that they had looked for empty casings and had found none, but they had found three empty casings outside the house near another body.

Hall built upon these points step by step in his effort to cast reasonable doubt upon the police theory. He emphasized the fact that the police had failed to explore a part of the backyard where he maintained that John and Mike had struggled and that his assistant had been prevented from making a search. But, he reminded the jury, the police themselves still persisted in refusing to examine that part of the yard. "Why?" he asked repeatedly, and postulated that it was "because it did not fit the preconceived theory of the police and prosecution."

As the trial progressed and as Hall saw how loose the case against Petlock was, his anger and impatience increased. Towards the end of his lengthy address to the jury, Hall asked: "Does it not appear to you, gentlemen, that Sergeant Minor is just a little too anxious? I am not suggesting," he continued, "that he would wilfully do anything to bring about the unlawful conviction of a man, but don't some of us get a little too exuberant about our work, and feel that our reputation may be at stake and feel that we must fill up the gaps as we go along, lest it can be considered that the prosecution failed by reason of something that he did not do." The 'villain' was Sergeant Minor, or more precisely, the Sergeant's theory. Emmett Hall concluded his defence of John Petlock with the following words:

My suggestion to you, gentlemen of the jury, is that this prosecution must fail because the mistake that was made was the original mistake made by the prosecution of coming to a wrong theory and then closing the mind to anything else, and everything since that day has been done to support that theory and what does not fit in with that has to be discarded.

The jury deliberated for four hours and at length emerged with a verdict: John Petlock was guilty of the manslaughter of his brother Mike. Emmett Hall fumed with indignation as the judge sentenced Petlock to seventeen and a half years in the federal penitentiary at Prince Albert. He was so sure that he had won that he could not understand how the jury could have failed to see the grounds for doubt which he had cast on the police evidence. He has always retained that view, not because he had lost, but because he sin-

cerely believed that the case against John Petlock was not sufficiently solid, and that it was riddled with grounds for doubt.

If there is one thing that emerges from this case, it is Hall's unswerving determination to bring to bear all his energy and passion for justice on any case where he believed that there was a miscarriage of justice. He insisted that the duty of the prosecution is to *prove* beyond a reasonable doubt that an accused person is guilty; vague inference or circumstantial evidence is not sufficient. He demanded hard facts and sound procedures. These were attitudes or convictions which he took to the bench and which help to explain his belief in judicial activism to ensure a fair trial.

Hall was also concerned with protecting people from procedural abuses. If the prosecution made a mistake in procedure, Emmett Hall pounced upon it with tenacity. This is illustrated in the following case of *In re Beck*.³ Kaspar Beck, a Russian immigrant, had settled in Saskatoon in 1910. By 1951 he had acquired six and a quarter sections of prime Saskatchewan farmland. He had paid cash for each new quarter section and his seventeen sons and daughters worked on the farms for him. None of them was paid a salary but they were all provided with food, clothing, housing, and a little spending money. When one of the children married, the new bride or husband was brought into the family and he or she received the same benevolent treatment accorded to the sons and daughters. In short, Kaspar Beck ruled a small fiefdom in the heart of Saskatchewan. None of the family complained or resented the life style. Some of the local farmers complained about the "land hog" but most of them were clearly jealous of Beck's efficient farm operation. Beck lived easily with those complaints — if he even heard them. But in 1947, when the Department of National Revenue informed him that he had failed to file income tax for the years 1941-45, that was a different matter. He was assessed a fine of \$100 for not filing his 1945 returns. As was his custom with notices from governments, Kaspar Beck ignored it. This led the Department of National Revenue to probe more deeply into his past. The investigation resulted in the startling revelation that Kaspar Beck was delinquent in back taxes to the amount of \$28,623. The Department served notice on him and announced its intention to collect — even if this meant that Beck had to sell part or all of his land. This announcement stunned Beck. He simply could not understand how the government could take land away from a man who had paid for each parcel and held clear title to it. It reminded him of what had happened to his father's land in Russia in 1919 when the new Soviet government had confiscated his property without compensation. Beck was thrown into total confusion; he sought the aid of his eldest sons who advised him to retain a lawyer at once. But Beck didn't trust anyone outside of his family and as a result he went through several Saskatoon lawyers — all of whom gave up in exasperation. They could not make Beck understand that he was obliged to pay his back taxes. Beck turned a deaf ear to all suggestions and stubbornly refused to pay. When word reached him that the Department of National Revenue had secured a court order to auction off as much of his property as necessary to defray the cost of the back

³ *In re Beck* (1951), 3 W.W.R. (N.S.) 92 (Sask. K.B.).

taxes, Beck became hysterical and finally consented to accept his son's advice to retain Emmett Hall as his counsel.

Hall, like others in Saskatoon, had followed the newspaper accounts of the affair. He was particularly concerned by the angry letters to the editor in which people openly expressed their hostility to this German-speaking immigrant who had avoided service against Germany in World War I and World War II. The atmosphere was hostile and very bitter.

Emmett Hall gladly took the case and poured all his energy into it. He studied every facet of the government's case against Beck and was at length convinced that it was based on a valid legal argument. But to Hall, it did not seem right that Beck should run the risk of losing everything which he had worked so hard to obtain. He met with Beck and reassured him of his sympathy and determination to do his utmost on his behalf. But despite all his efforts, he could not discover anything irregular in the procedures followed by the Department.

The auction was held on October 24, 1950. Kaspar Beck attended but had to be removed as he tearfully attempted to prevent the piecemeal sale of his precious land. Shouting in German, he urged the auctioneer to stop and frantically pleaded with the bidders, several of whom were land speculators, but to no avail.

The land was sold for much less than its value and it soon became clear that not one parcel of Beck's land would remain at the end of the auction. That meant that the fifty-four members of Beck's family would be thrown off the land on which they had worked for over forty years. At the end of the auction all of Kaspar Beck's land was sold for a total of \$22,100 — more than \$6,300 less than the amount of delinquent taxes. Beck was almost mad with grief. But in the meantime Hall had continued to work on the case. He discovered that the Department had not strictly complied with the procedures set out by the Saskatchewan *Executions Act*.⁴ He informed Beck that there was a good chance that the court might nullify the sales. Beck, barely acknowledging him, consented through his son to authorize Hall to go to court.

Hall argued three points before Justice Smith of the Court of Queen's Bench: first, that the Department of National Revenue had failed to advertise the property in accordance with the manner prescribed by *The Executions Act* of Saskatchewan; second, that the lands were sold at a grossly inadequate price; and third, that the southwest quarter of section 11 was not advertised for sale at all. Hall described the auction as "a farce under the guise of law." *The Executions Act* clearly required that the property be advertised in the newspaper "nearest to the site of the property." His investigation revealed that that had not been done.

Justice Smith accepted Hall's arguments and declared the sale of the Beck lands invalid. Beck could not comprehend the details of the matter; all he understood was that Emmett Hall had saved his lands. Armed with a

⁴ *The Executions Act*, R.S.S. 1930, c. 65, s. 20.

power of attorney, Hall returned to Saskatoon to oversee the return of Beck's lands and the payment of his back taxes.

A month after the trial, Kaspar Beck was at home looking over his land when he saw two well-dressed men approach the house. Thinking that they were another delegation from the Revenue Department, he ran to the cellar crying "they'll never leave me alone." Mrs. Beck admitted the two men and discovered that they were not from the Revenue Department but were representatives of an oil company offering to buy up drilling rights on farm land throughout Saskatchewan. Most farmers considered the terms of the agreement reasonable and the compensation generous. Mrs. Beck went to fetch her husband from the cellar and found him bathed in blood from self-inflicted wounds. Kaspar Beck had attempted suicide by striking himself on the head with an axe.

When Beck finally came upstairs, he explained that he had fallen and cut his head. He listened in a daze to the two men and, uncharacteristically, consented to sign the drilling agreement. After they had left Beck flew into a rage: "They tricked me into selling my land. They have tricked me," he fumed. Kaspar Beck was by this point totally exhausted and could not be calmed. He spent most of the night in a chair brooding over the loss of his lands. Katherine left him late in the night and went to bed. The next morning Kaspar was not there; she called to him but there was no answer. She went out into the garage, and found her husband — hanging by a rope from a rafter.

Kaspar Beck never knew that the Department of National Revenue had decided not to appeal the ruling of Justice Smith, nor did he ever know that Emmett Hall had managed to settle the intestacy by giving one third of the land to Katherine and two thirds to his children: thus the land which Kaspar Beck had worked so hard to acquire was passed on to his family. To this day, Hall counts this as one of his greatest achievements as a practising attorney.

C. CHIEF JUSTICE OF THE SASKATCHEWAN COURT OF QUEEN'S BENCH

Hall was appointed Chief Justice of the Court of Queen's Bench upon the retirement of Chief Justice J. T. Brown and took the Oath of Office and the Oath of Allegiance on October 5, 1957. He willingly relinquished his successful — and lucrative — law practice for a judicial appointment because it provided him with greater scope for public service. He never viewed appointment to the bench as a comfortable way to end a distinguished career. Instead, he saw it as a platform from which he could initiate needed reforms and serve the cause of justice more effectively.

The duties and responsibilities of the Chief Justice of the Saskatchewan Court of Queen's Bench are onerous. Not only is he charged with the responsibility of administering the rules relating to pleadings, practise, and procedures of the Court, but also, with superintending the district Courts of the province. He must see to it that the Queen's Bench sittings are properly scheduled — that judges are available and that there is no undue backlog of cases awaiting trial. In short, the position entails time-consuming administra-

tive responsibilities. Few men have put as much energy into the detailed aspects of their work as Hall did into his. Along with Mr. Justice McKercher and Harold Thompson, he set about revising the Rules of Court and finished this in December, 1960. He also undertook to revise the Crown Practice Rules. One of his first administrative decisions was to review the tariff of fees paid to lawyers appearing before the court. It had not been revised for years and was far below the fees in neighbouring provinces. Chief Justice Hall increased it by 30% and did away with the requirement that lawyers submit detailed bills of costs; in their stead, he adopted the Alberta practice of requiring a simple bill of a consolidated amount. But Hall's administrative duties did not prevent him from becoming deeply involved with court work, as the following review of some of his decisions reveals.

He was particularly sensitive to novel dimensions in criminal cases. In the fall of 1958 he was confronted with a *voir dire* which raised an important question concerning the admissibility of a confession.⁵ The police had arrested John Hnedish on suspicion of having committed a crime, claiming that when they entered his room at 6:00 a.m., he was fully awake. They then took him to an interrogation room where they questioned him at length and had him sign a statement. When the Crown Attorney introduced this confession, Hnedish's counsel, P. G. Makaroff — with whom the young Emmett Hall had defended the Regina rioters in 1935 — objected, claiming that Hnedish had been asleep at the time and remained under the influence of sleep during the interrogation. In other words, he was drowsy and had unknowingly signed an incriminating statement.

According to English jurisprudence, evidence may be admitted in court as long as it is judged to be true — even if it has been illegally obtained.⁶ The United States Supreme Court, on the other hand, has ruled that illegally obtained evidence is inadmissible.⁷ Hall personally felt that the American view should prevail but was bound by Anglo-Canadian precedents. He predicted that, “when the point comes squarely to be decided, another court will take a hard look at the whole question, including the implications above mentioned and others.”⁸ Little did he suspect that he would play a major role as a member of the Supreme Court of Canada in attempting to resolve the practise of admitting illegally obtained evidence.

However, even in *Hnedish*, Hall was able to avoid applying the major English precedent of *R. v. Hammond*.⁹ Since he felt that “much of Humphreys J.'s judgment in the *Hammond* case is *obiter dicta*,”¹⁰ he was able to conclude that “I am left with the conviction that because its foundation is on so inse-

⁵ *R. v. Hnedish* (1958), 26 W.W.R. 685; 29 C.R. 347 (Sask. Q.B.).

⁶ *R. v. Hammond*, [1941] 3 All E.R. 318; 28 Cr. App. R. 84 (C.C.A.).

⁷ *Chambers v. Florida*, 309 U.S. 227 (1940); *McNabb v. U.S.*, 318 U.S. 332 (1943); *Mallory v. U.S.*, 354 U.S. 449 (1957); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁸ *Hnedish*, *supra*, note 5 at 688 (W.W.R.).

⁹ *Hammond*, *supra*, note 6.

¹⁰ *Hnedish*, *supra*, note 5 at 688 (W.W.R.).

cure a footing as the *obiter dicta* of *Hammond's* case, I cannot follow it or accept it as good law in Saskatchewan."¹¹

As one might suspect, Emmett Hall was at his best in criminal cases in which he revealed his capacity for scrutinizing trial and police procedures. In *R. v. Phillips*,¹² the accused had been tried before a Justice of the Peace on a charge of impaired driving. Phillips was without a lawyer and refused to plead guilty. He was convicted of violating s. 223 of the *Criminal Code*, fined \$50 plus \$23.90 court costs, and was given until December 31 to pay. He paid the fine on December 30, 1957.

Two months later, Phillips retained counsel and appealed to the Court of Queen's Bench, claiming that the original conviction was invalid because the indictment had not disclosed the nature of the offence and the Justice of the Peace had lacked jurisdiction to try the case. Crown Counsel countered that s. 682 of the *Criminal Code* prevents an appeal by way of *certiorari* in such cases.

However, Chief Justice Hall noted that the *Criminal Code* required that the charge in the *Phillips* case be in writing and under oath and that, in the case of two or more charges, they be set out in separate counts and disposed of in turn. Phillips had been charged on two counts but was tried as if there was only one. Hall concluded that: "It follows therefore that the information was bad in law and also the conviction."¹³ As to whether the *Criminal Code* prevented him from reviewing the case, he asked: "Does it follow that by reason of section 682 of the *Criminal Code* this court is powerless to act? In my opinion, section 682 is not a bar where the proceedings are invalid *ab initio*."¹⁴ Hall had ordered the records from the court at Kerrobert prior to giving his judgment — and he found what he had suspected: a shoddy trial. That was all he needed; he had clear jurisdiction to scrutinize the validity of proceedings of the inferior court — and they were found wanting.

In hearing appeals from inferior courts, Emmett Hall treated lower court judges fairly but he demanded that they preside over a fair and impartial court. On one occasion in 1959, Chief Justice Hall was called upon to review the words of a Regina Police Magistrate who was accused of having uttered comments from the bench which were prejudicial to the accused. The Magistrate was also charged with bias because of having imposed an excessive amount as bail. Counsel for the accused appealed to the Court of Queen's Bench for a writ to prohibit the Magistrate from presiding over the case.¹⁵

When the case came before Chief Justice Hall, he reviewed the transcript and listened to the testimony of a newspaper reporter and of the Police Magistrate himself. It was confirmed that the Magistrate said that "while this

¹¹ *Id.*

¹² *R. v. Phillips* (1958), 26 W.W.R. 315; 122 C.C.C. 181 (Sask. Q.B.).

¹³ *Id.* at 318 (W.W.R.).

¹⁴ *Id.*

¹⁵ *Re Elliott; R. v. Jackson* (No. 2) (1959), 29 W.W.R. 579; 125 C.C.C. 354; 31 C.R. 368 (Sask. Q.B.).

accused may be as innocent as the driven snow, nevertheless I know from my own experience that some of this security salesman stuff has been a terrible racket in this province. This has been a serious problem and should be cleaned up.”¹⁶ It was further established that the Magistrate and counsel for the accused had exchanged words in anger. The Chief Justice summed up his views gently but firmly:

I have studied these transcripts and with regret I must say that they indicate a departure from that essential quality of impartial detachment which should be the hallmark of every judge or magistrate in respect of every cause that comes before a court. I do not suggest that the learned magistrate was being consciously biased or prejudiced but he permitted himself to be misled into fixing excessive bail by the representations made to him by counsel for the Crown and by linking Jackson's [the accused] arrest and the charges against him with the numerous arrests of stock salesmen a few days before and by his personal experience as to 'this security salesman stuff being a terrible racket in this province'.¹⁷

This case prompted Emmett Hall to state clearly his basic judicial credo — one which he himself followed faithfully: “Every accused has an inherent and constitutional right to a fair trial by an impartial court and that means a court without any preconceived notions or ideas respecting the necessity of suppressing certain types of offences as distinct from others. I do not think that this is a right which can be waived because it is one which goes to the root of the proper administration of justice”.¹⁸ Hall accordingly granted the application to prohibit the Police Magistrate from presiding at the preliminary hearings on the three remaining charges against Jackson.

Emmett Hall has always been known for protecting the rights of the accused and ensuring that police procedures were followed meticulously. This was no less true for accused persons who happened to be lawyers. On October 4, 1960, the Regina police obtained two warrants to search the office and residence of Morris C. Shumiatcher, a Regina lawyer, on suspicion of having committed an offence.¹⁹ Counsel for Shumiatcher, A. W. Embury and E. J. Moss, argued that the warrants were improperly granted and urged that they be quashed. Chief Justice Hall agreed that the Magistrate who issued the warrants did not have judicial cause to do so and that the warrants were too vague since they “left to the discretion of those executing the warrants as to what should be seized.”²⁰

It became evident to the police that the court was going to quash the search warrants so they applied to another Magistrate, L. F. Bence, for two more. Magistrate Bence issued the warrants and all the parties were back in court the next day!²¹ One can sense in his judgment Hall's anger at this second attempt to ransack Shumiatcher's office. He found even more cause

¹⁶ *Id.* at 582 (W.W.R.).

¹⁷ *Id.*

¹⁸ *Id.* at 583 (W.W.R.).

¹⁹ *Shumiatcher v. Attorney-General of Saskatchewan* (1960), 33 W.W.R. 132; 129 C.C.C. 267; 34 C.R. 152 (Sask. Q.B.).

²⁰ *Id.* at 133 (W.W.R.).

²¹ *Shumiatcher v. Attorney-General of Saskatchewan* (1960), 33 W.W.R. 134; 129 C.C.C. 270; 34 C.R. 154 (Sask. Q.B.).

to quash these warrants since the Magistrate could not possibly have had judicial reason to grant them since the first two warrants were technically in effect at the time the Magistrate granted the second pair. As Hall stated:

In my view the new warrants cover a broader field than the first warrants and are even more open to objection. . . . I can hardly conceive that in a law office such as that of Shumiatcher, Moss and Lavery, in which no suggestion of wrongdoing has been suggested against the partners Moss and Lavery or against Mr. Shumiatcher, it would be possible for a peace officer executing the warrant to know just what to seize. I do not think it was ever contemplated by parliament that under the search warrant authorized by section 429 of the *Criminal Code*, 1953-54, ch. 51, those executing the warrant would have *carte blanche* to open and to read the private papers of clients and of partners in the hope of finding something therein that might in the sole judgment of those searching have evidentiary value relevant to the charges made against Shumiatcher.²²

The second set of search warrants was accordingly quashed.

But that did not end the case of *Shumiatcher v. The Attorney General of Saskatchewan*. Nor was it the last time that Emmett Hall heard charges against Morris Shumiatcher. But unlike the two earlier cases involving Shumiatcher which came before Emmett Hall as Chief Justice of the Court of Queen's Bench, the third one came before him when he was Chief Justice of Saskatchewan, after his appointment to that position on March 3, 1961.²³ Morris C. Shumiatcher and two associates, Walter W. Luboff of Saskatoon and Thomas S. C. Fawcett of Ottawa, were charged under the *Criminal Code* with unlawfully conspiring to commit an indictable offence, namely: "unlawfully by deceit, falsehood or other fraudulent means, to defraud the public of property, money or valuable securities."²⁴ The Court scrutinized the indictment against Shumiatcher and found that it was not sufficiently detailed to comply with the *Criminal Code* which requires that:

A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information . . . and to identify the transaction referred to.²⁵

Chief Justice Hall, agreeing with Justice Culliton, stated:

No reason was given why the crown elected to convey as little detail in the information [indictment] as was done here. And when the information was challenged as being invalid, the crown could easily at that time have laid a new information giving the detail lacking in the first information, but instead it has chosen to stand firm and to insist on proceeding on an information that appears to have been studiously prepared to give, at best, the minimum of detail to the person accused.²⁶

This was unacceptable to Emmett Hall since "an accused person should be able to tell from the information or indictment the precise nature of the charge against him. That principle has been carried into the *Canadian Bill*

²² *Id.* at 137 (W.W.R.).

²³ *Shumiatcher v. Attorney-General of Saskatchewan* (1962), 39 W.W.R. 577; 133 C.C.C. 69 (Sask. C.A.).

²⁴ *Id.* at 579 (W.W.R.), paraphrasing R.S.C. 1953-54, c. 51, s. 323 (1).

²⁵ R.S.C. 1953-54, c. 51, s. 492(3).

²⁶ *Shumiatcher, supra*, note 23 at 578 (W.W.R.).

of Rights.”²⁷ Chief Justice Hall let it be known on that occasion that he considered the new *Canadian Bill of Rights* to place a special responsibility upon the police and the judiciary. “The prosecution, acting in the name of the sovereign, is, in my opinion, under a specific duty not to circumvent or negative this positive injunction of the parliament of Canada. The courts, too, must be vigilant in seeing that the provisions of the *Canadian Bill of Rights* are not breached, ignored or whittled away.”²⁸

As mentioned previously, Emmett Hall’s Saskatchewan court decisions reveal his independence of judgment. This was nowhere more readily apparent than in *Thomas v. Thomas*,²⁹ which Hall heard in September, 1961. That case was an appeal from a judgment of Mr. Justice McKercher of the Court of Queen’s Bench refusing the application of Mrs. Thomas to have the farm and chattel mortgages sold and the sum divided equally between the parties under *The Partnership Act*.³⁰

When the case came before Chief Justice Hall, he, along with Mr. Justice McNiven and Mr. Justice Culliton, ruled that since the beginning of the marriage on November 2, 1952 until its dissolution seven years later on October 2, 1959, both parties contributed equal amounts of money toward the purchase of seven quarters of land and the necessary farm equipment. Mr. Thomas argued that the relationship had not been a partnership and that his former wife had no claim to direct a sale and division of the assets. He had been successful with this line of argument before Justice McKercher.

After hearing the facts, the court concluded that Mrs. Thomas had established that the marriage included a *de facto* and *de jure* partnership arrangement and, therefore, fell under the provisions of the Saskatchewan *Partnership Act*. “In my view,” said the Chief Justice, “the learned trial judge should have allowed . . . that the joint undertaking constituted a partnership and that the plaintiff [Mrs. Thomas] was entitled to seek the relief provided by *The Partnership Act*.”³¹

Chief Justice Hall further reasoned that when Mrs. Thomas advised her husband that she did not intend to return, she served effective notice which dissolved the partnership — as required under the terms of *The Partnership Act*. The Chief Justice said in his conclusion:

As the plaintiff has established that the farming operations were a partnership and that this partnership has been dissolved, the appeal will be allowed. The matter will be referred back to the Court of Queen’s Bench for the necessary directions to wind up the partnership in accordance with the provisions of *The Partnership Act*. While I feel compelled to make this order, I strongly urge the plaintiff and defendant to use every effort to settle their business difficulties by agreement. It appears to me that in respect to their partnership undertaking, there is no real difference between the parties and there should be no obstacle to a mutually satisfactory settlement. If the parties fail to heed this suggestion, and the court is

²⁷ *Id.* (W.W.R.).

²⁸ *Id.* at 599 (W.W.R.).

²⁹ *Thomas v. Thomas* (1961), 29 D.L.R. (2d) 576; 36 W.W.R. 23 (Sask. C.A.).

³⁰ *The Partnership Act*, R.S.S., 1953, c. 352.

³¹ *Thomas, supra*, note 29 at 578 (D.L.R.); 26 (W.W.R.).

compelled to direct a sale of the assets, there is every likelihood that both parties will end up with little or nothing.³²

Emmett Hall was no longer on the Supreme Court of Canada when the celebrated *Murdoch*³³ case came before the Court. However, there is no doubt that he would have stood foresquare with Chief Justice Bora Laskin in affirming the need to revise the common law conception of the marriage contract in those circumstances where the wife has contributed manually and materially to the farming enterprise.

D. THE SUPREME COURT OF CANADA

Emmett Hall was sworn in as a puisne judge of the Supreme Court of Canada on January 10, 1963 — thirty-five years after he had first appeared before the Supreme Court as a young attorney. He manifested his customary intelligent independence and impatience soon after ascending to the bench in the celebrated *Truscott* case.³⁴ Hall was the lone dissenter in that reference and his judgment was a sharp rejection of the court majority decision. He did not mince words for he had studied the trial transcript meticulously and found two villains: the Crown Attorney and the trial judge. The proceedings amounted to an unfair trial in Hall's mind: "I take the view that the trial was not conducted according to law. Even the guiltiest criminal must be tried according to law."³⁵ Justice Hall found that there were grave errors in the trial primarily as a result of "Crown Counsel's method in trying to establish guilt and by the learned Trial Judge's failure to appreciate that the course being followed by the Crown would necessarily involve the jury being led away from the objective appraisal by the evidence for and against the prisoner."³⁶ The original conviction was the product of a bad trial and, as Hall insisted, "A bad trial remains a bad trial. The only remedy for a bad trial is a new trial."³⁷

The *Truscott* case is important for an understanding of Emmett Hall's judicial temperament because it contains a clear summary of how he saw his role as a Supreme Court Justice: he viewed himself as a defence counsel who was charged with the responsibility of bringing all his energies of mind and body to bear upon the case at bar to see whether the accused or convicted person had received a fair trial. Hall was most interested in criminal cases because that was the area of the law with which he was most familiar, and he showed little patience with his brother judges for not seeing the flaws in the *Truscott* case.

If one had to identify a Supreme Court case which caused as much internal discord among members of the Court as *Truscott*, it would be *R. v.*

³² *Id.* at 580 (D.L.R.); 28 (W.W.R.).

³³ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; 41 D.L.R. (3d) 367; 13 R.F.L. 185.

³⁴ *In the Matter of a Reference Re: Steven Murray Truscott*, [1967] S.C.R. 309; 62 D.L.R. (2d) 545; [1967] 2 C.C.C. 285; 1 C.R.N.S. 1.

³⁵ *Id.* at 383 (S.C.R.); 611 (D.L.R.).

³⁶ *Id.* at 384 (S.C.R.); 611-12 (D.L.R.).

³⁷ *Id.* at 390 (S.C.R.); 616 (D.L.R.).

Wray.³⁸ In that case Hall found himself in dissent along with Chief Justice Cartwright and Justice Spence. John Wray was tried on a charge of non-capital murder in 1968. The police had arrested him in the morning and prevented him from talking with his lawyer. They admitted that they had done so because they feared that the lawyer would instruct the accused not to tell them where he had put the murder weapon. After lengthy and continuous questioning, Wray signed a statement and told the police where he had thrown the rifle. When the Crown Attorney attempted to adduce evidence as to the part taken by Wray in the finding of the murder weapon, the trial judge refused to allow him to do so on the ground that since the testimony was not voluntary the evidence was inadmissible.

The case went to the Ontario Court of Appeal where a unanimous court upheld the right of the trial judge to exercise discretion in admitting evidence which he felt would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute. Mr. Justice Aylesworth said that the information was "procured by trickery, duress and improper inducements and [it was] clearly inadmissible."³⁹ The Crown appealed this judgment to the Supreme Court of Canada, arguing that the discretion of a trial judge did not extend that far.

A full Court heard the appeal on January 29 and 30, 1970, and handed down its judgment reversing the Ontario Court of Appeal on June 26, 1970. The majority judgment was written by Mr. Justice Martland, who stated that a trial judge has no general discretion to exclude admissible evidence because, in his opinion, its admission would be unjust or unfair to the accused. He reasoned that a trial judge's discretion to exclude admissible evidence does not extend beyond his duty to ensure that the minds of the jury will not be prejudiced by evidence of little probative value, but of greater prejudicial effect.

Mr. Justice Judson claimed in a separate judgment that in his mind, "there is no justification for recognizing the existence of this discretion in these circumstances. This type of evidence has been admissible for almost 200 years. There is no judicial discretion permitting the exclusion of relevant evidence, in this case highly relevant evidence, on the ground of unfairness to the accused. . . . If this law is to be changed, a simple amendment to the *Canada Evidence Act* would be sufficient. . . ."⁴⁰ It would be difficult to find views on the judicial function and the admissibility of evidence more at variance with those espoused by Emmett Hall.

Justice Hall accordingly dissented along with Chief Justice Cartwright, who wrote the major dissenting opinion. Cartwright C.J.C. claimed that the "great weight of authority indicates that the underlying reason for the rule that an involuntary confession shall not be admitted is the supposed danger

³⁸ *R. v. Wray*, [1971] S.C.R. 272; 11 D.L.R. (3d) 673; [1970] 4 C.C.C. 1; 11 C.R.N.S. 235.

³⁹ *R. v. Wray*, [1970] 2 O.R. 3 at 5; [1970] 3 C.C.C. 122 at 123; 9 C.R.N.S. 131 at 133 (Ont. C.A.).

⁴⁰ *Wray*, *supra*, note 38 at 299 (S.C.R.); 694 (D.L.R.).

that it may be untrue.”⁴¹ What made judicial activism in the exercise of discretion imperative in this case for both Hall J. and Cartwright C.J.C. was that the discretionary rule was not created by statute but by judges: Hall stated that “Surely the established rule is that if the discretion has been judicially exercised by the trial judge, it is not subject to review or to being weighed on appeal.”⁴²

There can be no doubt that many observers felt Hall bent over backwards to be fair to the accused. Some even thought that he occasionally went too far, as in *The Queen v. Whitfield*.⁴³ This case involved the definition of “lawful custody.” A Toronto police officer had recognized James Whitfield, who was wanted by the police, in a car at the intersection of St. Clair Avenue and Dufferin Street. The officer touched him on the shoulder and told him that he was under arrest — Whitfield responded by stepping on the accelerator. He was arrested some time later and eventually convicted of escaping lawful custody. The Ontario Court of Appeal quashed the conviction on the grounds that he had never been “custodially arrested.”

The Supreme Court of Canada, with Hall and Spence JJ. dissenting, restored the trial verdict. The majority argued that it has long been held sufficient for a police officer to touch an accused person and announce that he is under arrest. Hall J. disagreed with this reasoning, claiming that it was an outdated civil law rule. He dismissed the British precedents, upon which the majority rested its judgment, with the claim that “[t]he dead hand of the past cannot reach that far. These outdated procedures evolved before the organization of police forces as we now know them and had no relation to the arrest or taking into custody of a person charged with a criminal offence.”⁴⁴ However unpalatable this approach may be to some, it shows how Justice Hall viewed his role on the court. He was often heard to say, mainly in exasperation at the obstinacy of his brother judges, that the Supreme Court of Canada is “a Court of *justice* as well as law.”

As one who was eminently qualified in criminal practice, Emmett Hall held strong views on other areas of criminal procedure. As we saw earlier, he was convinced that the courts would soon have to tighten up the practice governing the admission of evidence. Small wonder that he relished the opportunity presented by *Piché v. The Queen*.⁴⁵ Writing for the Court, Hall stated that the time had come for the Supreme Court to clear up the confusion surrounding *exculpatory* and *inculpatory* statements in evidence; indeed, he claimed that the Court had an obligation to the lower courts to do so:

In my view the time is opportune for this Court to say that the admission in evidence of all Statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule and thus put to an end

⁴¹ *Id.* at 279 (S.C.R.); 679 (D.L.R.).

⁴² *Id.* at 303 (S.C.R.); 698 (D.L.R.).

⁴³ *R. v. Whitfield*, [1970] S.C.R. 46; 7 D.L.R. (3d) 97.

⁴⁴ *Id.* at 53 (S.C.R.); 102 (D.L.R.).

⁴⁵ *Piché v. The Queen*, [1971] S.C.R. 23; 11 D.L.R. (3d) 700; 74 W.W.R. 674; [1970] 4 C.C.C. 27; 12 C.R.N.S. 222.

the continuing controversy and necessary evaluation by trial judges of every such statement which the Crown proposes to use in chief or on cross-examination as either being inculpatory or exculpatory.⁴⁶

After reviewing the relevant precedents, Justice Hall concluded that there "is no distinction to be drawn between inculpatory and exculpatory statements as such in so far as their admissibility in evidence when tendered by the Crown."⁴⁷ If the statement was given voluntarily, it could be admitted in evidence; but if it was found to be involuntary, then it should not be admitted.

As one might expect in view of Hall's background in private practice, he was particularly sensitive to problems involving evidence in criminal cases. He felt obliged to solve evidentiary problems which had been created by prior cases. In *Ares v. Venner*,⁴⁸ Justice Hall wrote for a unanimous five-man court that the Court ought to restate the hearsay rule. After acknowledging that there were two schools of thought among judges — one which claimed that it was the proper duty of the legislature to make such a clarifying restatement and the other which said that it was the responsibility of the Court to do so — Justice Hall decided in favour of the latter school. He found support for this approach in the Privy Council decision of *Myers v. The Director of Public Prosecutions*.⁴⁹ "Although the views of Lords Donovan and Pearce are those of the minority in *Myers*, I am of the opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions but we must leave it to Parliament and the ten provincial legislatures to do the job.'"⁵⁰ In Hall's opinion, the inconsistencies of judge-made laws should be rectified by judges; otherwise they would be in default of their judicial responsibilities.

E. HALL AND NATIVE RIGHTS

Emmett Hall championed the cause of Canadian native peoples — on and off the bench — for many years and he welcomed the opportunity to do something about it when he became a judge. In the *Daniels*⁵¹ case, he wrote: "the lamentable history of Canada's dealings with Indians in disregard of treaties made with them as spelt out in the judgment of Johnson J.A. in *Regina v. Sikyea* . . . ought in justice to allow the Indians to get the benefit of an unambiguous law which for once appears to give them what the treaties and Commissioners who were sent to negotiate those treaties promised."⁵² He strongly believed that "we as a nation, have failed our Indians and Metis."⁵³

⁴⁶ *Id.* at 36 (S.C.R.); 709-10 (D.L.R.).

⁴⁷ *Id.* at 40 (S.C.R.); 712 (D.L.R.).

⁴⁸ *Ares v. Venner*, [1970] S.C.R. 608; 14 D.L.R. (3d) 4.

⁴⁹ *Myers v. The D.P.P.*, [1965] A.C. 1001; [1964] All E.R. 881.

⁵⁰ *Ares*, *supra*, note 48 at 625-26 (S.C.R.); 16 (D.L.R.).

⁵¹ *Daniels v. White and the Queen*, [1968] S.C.R. 517; 2 D.L.R. (3d) 1; 64 W.W.R. 385; 4 C.R.N.S. 176.

⁵² *Id.* at 531 (S.C.R.); 13-14 (D.L.R.).

⁵³ Dr. Donald Thomas Fraser Memorial Lecture, Edmonton, June 1, 1965 at 11.

This concern permeated his non-judicial writings as well, as one sees from a reading of the recommendations on health services⁵⁴ or the Hall-Dennis Report⁵⁵ on education.

Hall's angry impatience with the law and his concern for Canadian native rights converged in two major cases: *Calder v. Attorney-General of British Columbia*⁵⁶ and *Attorney-General of Canada v. Lavell*.⁵⁷ Frank Calder, along with other members of the Nishga Tribal Council and four Indian bands in British Columbia, brought an action against the Attorney-General of British Columbia, claiming that the aboriginal title to their tribal territory — consisting of 1,000 square miles in and around the Nasa River Valley in northwestern British Columbia — had never been lawfully extinguished.

The Indian claim was dismissed at trial and the British Columbia Court of Appeal rejected the appeal. The case came with leave to the Supreme Court of Canada in the fall of 1971 and the judgment was handed down on January 31, 1973, dismissing the appeal. The majority judgment was written by Mr. Justice Judson, and Hall, Spence and Laskin JJ. dissented.

The Nishga Indians argued that their claim to the property in question arose out of aboriginal occupation and that recognition of such a right is well established in English law. Furthermore, they contended that no treaty or contract with the Crown or the Hudson's Bay Company had ever been entered into with respect to the area by anyone on behalf of the Nishga Nation. Within the area there are a number of reserves but they comprise only a small part of the total band and the Nishga Nation had not agreed to or accepted the creation of these reserves. The Nishga Indians further argued that they held title to the lands under the Royal Proclamation of 1763 which extend protection to all Indians living under the sovereignty of the British Crown. The Proclamation stated:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.⁵⁸

Judson J. ruled on the basis of *St. Catharines Milling and Lumber Co. v. The Queen*⁵⁹ that "the Crown had at all times a present proprietary estate, which title, after confederation, was in the Province, by virtue of s. 109 of the

⁵⁴ (Can.) *Royal Commission on Health Services* (Ottawa: Queen's Printer, 1964-65, 2 vol.).

⁵⁵ (Ont.) Provincial Committee on Aims and Objectives of Education in the Schools of Ontario. *Living and Learning* (Toronto: Newton Pub., 1968).

⁵⁶ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; 34 D.L.R. (3d) 145. The text of the case in the D.L.R. differs slightly from that of the S.C.R.

⁵⁷ *Attorney-General of Canada v. Lavell; Isaac v. Bedard*, [1974] S.C.R. 1349; 38 D.L.R. (3d) 481.

⁵⁸ *Calder, supra*, note 56 at 323 (S.C.R.); paraphrased at 153 (D.L.R.).

⁵⁹ *St. Catharines Milling and Lumber Co. v. The Queen* (1885), 10 O.R. 196, *aff'd* (1887), 13 S.C.R. 577, *aff'd* (1888), 14 A.C. 46.

B.N.A. Act. The Indian title was a mere burden upon that title which, following the cession of the lands under the treaty, was extinguished."⁶⁰ Judson J. reasoned that "the Nishga bands represented by the appellants were not any of the several nations or tribes of Indians who lived under British protection and were outside the scope of the Proclamation."⁶¹ The territory now comprising British Columbia did not come under British Sovereignty until the *Treaty of Oregon* in 1846. When the Colony of British Columbia was established in 1858, the Nishga territory became part of it. It entered into confederation in 1871, bringing with it all the territory, including the Nishga lands. On the basis of the *St. Catharines Milling* judgment Judson J. ruled that the Proclamation of 1763 was no longer binding once British Columbia entered confederation in 1871.

Judson had more difficulty in disposing of the Indian claim to title by virtue of their having occupied the territory for centuries. He not only acknowledged the fact of occupancy but that it was the basis of their claim to ownership.⁶² The British Columbia courts ruled that this right or title had been lawfully extinguished when British Columbia set apart reserves for Indians upon entry into Confederation. Indeed, title was extinguished before Confederation. Judson J. showed that the Indian territories had been specifically dealt with and acquired by the Crown in 1858 and 1861. He concluded that "the sovereign authority elected to exercise complete dominion over the lands in question adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."⁶³

Justice Hall responded in a lengthy dissent, in which Spence and Laskin JJ. concurred, that the Nishga Indians did have title to the lands in question and that it had never been extinguished as the Court majority claimed. He began by carefully stating the main issues before the court and then showing how an error or oversight had led to the lower court judgment. That court had mistakenly assigned the burden of proof to the Nishga Indians. There was no doubt in Hall's mind that the evidence supported the claim that the Indians possessed the lands in question; it was thus the Crown's responsibility to show that this ownership had been validly extinguished. He then pointed out that, unlike most other Indian tribes throughout Canada, the Nishga Indians never entered into a treaty or deed of surrender with anyone; nor had they ever been conquered.

Hall J.'s judgment contains long citations from the trial court transcript; this was done to show that the trial judge's efforts to relate the Nishga concept of ownership of real property to the conventional common law elements of ownership were inhibited by "a preoccupation with the traditional *indicia* of ownership."⁶⁴ He noted that Lord Haldane had cautioned against just such a problem many years earlier.

⁶⁰ *Calder, supra*, note 56 at 320 (S.C.R.); 150-51 (D.L.R.).

⁶¹ *Id.* at 325 (S.C.R.); 153-54 (D.L.R.).

⁶² *Id.* at 328 (S.C.R.); 156 (D.L.R.).

⁶³ *Id.* at 344 (S.C.R.); 167 (D.L.R.).

⁶⁴ *Id.* at 372 (S.C.R.); 187 (D.L.R.).

Hall's careful analysis of the trial transcript is apparent; he was approaching the problem as a defence attorney would, probing for inconsistencies and oversights in the interest of ensuring that the Nishga Indians were treated fairly. He felt that the trial judge had "overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent."⁶⁵

Hall J. showed that treaties had been made with Indians in British Columbia and the Northwest Territories after Confederation. Treaty No. 8, for example, was made in 1889. From this he postulated: "Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve?"⁶⁶ He further claimed that the Proclamation of 1763 served as a *Magna Carta* for Indians. "The Proclamation, he said, "must be regarded as a fundamental document upon which any just determination of original rights rests."⁶⁷ That Proclamation was pertinent to the case and had never been directly dealt with by the Supreme Court of Canada.

The British Columbia Court of Appeal had been divided in its views on the matter. The main British Columbia precedent was *R. v. White and Bob*.⁶⁸ In that decision the majority stated that the Proclamation did not apply to Vancouver Island, while Mr. Justice Norris claimed that it did: "The Royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island."⁶⁹ The trial judge in the *Calder* case had adopted the majority view in *White and Bob*. However, Hall felt that this opinion "was based on incomplete research as to the state of knowledge of the existence of the land mass between the Rocky Mountains and the Pacific Ocean in 1763."⁷⁰ This led him to an extensive review of the history of that part of British Columbia as well as a close scrutiny of the Proclamation. He concluded at length that it "cannot be challenged that while the west coast lands were mostly unexplored as of 1763 they were certainly known to exist and that fact is borne out by the wording of the paragraph in the Proclamation previously quoted."⁷¹

These steps were merely a prelude to the next important question: "Were the rights either at common law or under the Proclamation extinguished?"⁷² Hall insisted that once aboriginal title was established, it must then be proved that it was lawfully extinguished. "It [Indian title] being a legal right, it could not thereafter be extinguished except by surrender to the

⁶⁵ *Id.* at 375 (S.C.R.) 197 (D.L.R.).

⁶⁶ *Id.* at 394 (S.C.R.); 202 (D.L.R.).

⁶⁷ *Id.* at 395 (S.C.R.); 203 (D.L.R.).

⁶⁸ *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613; 52 W.W.R. 193 (B.C.C.A.).

⁶⁹ *Id.* at 636 (D.L.R.); 218 (W.W.R.).

⁷⁰ *Calder, supra*, note 56 at 397 (S.C.R.); 205 (D.L.R.).

⁷¹ *Id.* at 400-01 (S.C.R.); 207-08 (D.L.R.).

⁷² *Id.* at 401 (S.C.R.); 208 (D.L.R.).

Crown or by competent legislative authority, and then only by specific legislation.”⁷³ Hall J. looked for clear and plain legislation confirming extinguishment and could find none. “There is no such proof in the case at bar; no legislation to that effect.”⁷⁴ More than inferences from past Acts were required to establish *de jure* extinguishment; the Privy Council precedents made that clear. In effect, the Attorney-General of British Columbia was asking the Court to demand that the Nishga Indians prove that their title was not extinguished by the Crown. In Hall J.’s view this was backwards: the “onus of proving” rested on the respondent.

The Attorney-General of British Columbia based his case on the actions of Governors Douglas and Seymour and the Council of British Columbia. Calder and his associates argued that neither Douglas, Seymour nor the Council of the Colony of British Columbia had had the authority to extinguish Indian title. After reviewing the relevant Commissions, enactments, and ordinances presented on behalf of the respondent, Hall agreed with Calder’s submission. He concluded:

If in any of the Proclamations or actions of Douglas, Seymour or of the Council of the Colony of British Columbia there are elements which the respondent says extinguish by implication the Indian title, then it is obvious from the Commission of the Governor and from the Instructions under which the Governor was required to observe and neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, then it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*.⁷⁵

Justice Hall’s dissenting judgment in the *Calder* case ranks higher than his dissent in *Truscott*. The historical details are meticulously researched and the argument is lucidly presented. This opinion was one of the last Hall wrote as a Justice of the Supreme Court. He deeply regretted that it was not a majority judgment, since he could think of no better way to end his career as a judge than to see a long-standing injustice to native peoples corrected.

F. CONCLUSION

Since March, 1973, Emmett Hall has been living in ‘retirement’ with his wife in Saskatoon. ‘Retirement’ is in quotation marks because, in the conventional understanding of the term, Emmett Hall is hardly in retirement. But then he never was a conventional man. Since leaving the Supreme Court of Canada, he has been busily engaged in studying the judicial structure of Saskatchewan and arbitrating labour disputes. In 1974, he prepared a report on railway arbitration and, in 1975, he submitted a proposal for restructuring the Saskatchewan family court system.

Hall has just completed a Royal Commission study on the network of railway lines in Saskatchewan. This study⁷⁶ surveyed the potential social and

⁷³ *Id.* at 402 (S.C.R.); 208 (D.L.R.).

⁷⁴ *Id.* at 404 (S.C.R.); 210 (D.L.R.).

⁷⁵ *Id.* at 413 (S.C.R.); 216-17 (D.L.R.).

⁷⁶ (Can.) Grain Handlings and Transportation Commission. *Grain and Rail in Western Canada*, Vol. 1 (Ottawa: Minister of Supply and Services, 1977).

economic impact which a reduction in the railway services to remote areas of Saskatchewan might have on the people and economy of the province. As one might expect, this was a highly contentious matter, and all the parties involved — the farmers, the railways, the municipalities, and the public at large — have been very much interested in it. In preparing the report, Hall travelled throughout the province conducting public hearings among a wide range of interested groups and individuals.

Emmett Hall concluded that 2,165 miles of grain-related prairie branch lines should be abandoned in stages between now and 1981. He also recommended that 1,813 miles of branch lines become part of the basic rail network which would be guaranteed to the year 2000. This was designed to ensure sufficient transportation for the increased grain, mineral, and timber production which the Commission foresaw. These proposals outline a practical solution to the problems facing the west, and reaction to them has been uniformly favourable.

Emmett Hall's friends and family hope that now that this Royal Commission study is completed, the indefatigable worker will finally retire and rest as he approaches his eightieth year. It is hard to imagine, however, that Emmett Hall will ever retire in that sense.