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Article 1

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MR. JUSTICE EMMETT MATTHEW HALL

By W. KENNETH CAMPBELL*

I am deeply sensible of the honour done me by the editors of Volume 15 of the Osgoode Hall Law Journal when they invited me to write an article setting forth some of my recollections of the work of Mr. Justice Emmett M. Hall with the Supreme Court of Canada. This great jurist and distinguished gentleman was my mentor, guide and good friend for more than ten years when he laboured at the Court where I was engaged as Executive Secretary to the Court and Private Secretary to the Chief Justice.

I first met Mr. Justice Hall one morning in 1961 as I was leaving the office of Prime Minister Diefenbaker. Mr. Justice Hall was sitting in the anteroom waiting to be shown in to see the Prime Minister. The Appointment Clerk was a friend of mine and he said to me, "Of course you know Chief Justice Hall." (He was then Chief Justice of Saskatchewan.) I replied that I knew him by reputation as an outstanding lawyer and judge and also as Chairman of the Royal Commission on Health Services, but I had not had the pleasure of meeting him personally. The Chief Justice and I chatted for a few minutes, I apologized for keeping him from his appointment with the Prime Minister and took my leave.

For many years Mr. Justice Hall had been one of the finest counsel in Saskatchewan. He was constantly before the Courts in that Province and on numerous occasions he appeared before the Supreme Court of Canada, where he first appeared in February, 1928. He was appointed Chief Justice of the Court of Queen's Bench, Saskatchewan in October, 1957 and Chief Justice of Saskatchewan and of the Court of Appeal in February, 1961. When he was appointed to the Supreme Court in November, 1962, he had all the experience necessary to enable him to make a very substantial contribution to the work of the Court.

The Judge is our only jurist who has the distinction of having been Chief Justice of a trial division, Chief Justice of a Province and a Judge of the Supreme Court of Canada.

I next met Mr. Justice Hall when he was sworn in as a Judge of the Supreme Court of Canada in January, 1963, by Chief Justice Kerwin in the latter's Chambers. After the ceremony, I was invited to visit the Judge and his family in his Chambers, and met Mrs. Hall and their son Dr. John Hall, a renowned orthopaedic surgeon and Harvard graduate, and his wife. That happy gathering made a lasting impression on me. It was very apparent that there was a real bond of love, affection and respect in the family. I knew then that I was going to get along well with the new Judge.

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* Mr. Campbell served as Private Secretary to five successive Chief Justices of the Supreme Court of Canada, beginning with Chief Justice Sir Lyman Duff in 1940, and assumed the additional duties of Executive Secretary to the Court in 1965.

I hope that I can provide some useful insight into Mr. Justice Hall's work with the Court. I must say at once that he is a prodigious worker. His work habits are regular and when he seats himself behind his desk no time is lost in getting on with the business at hand. Everyone who has been associated with him is impressed with his capacity to get things done in a speedy and orderly manner.

Mr. Justice Hall carried his full workload at the Court. Born in Quebec, he is bilingual and therefore sat on many appeals from that Province and in several instances wrote his reasons for judgment in French. I do not think it is too much to say that during his service with the Court he acquired a very broad knowledge of the Civil Law of that Province.

Criminal appeals were of great interest to him and he was always seeking to have justice done. Unless for some special reasons — illness, for example — the full Court sits on constitutional cases and this branch of the law held a special attraction for him. Mastering patent law requires a superior knowledge of mathematics and intense concentration. Mr. Justice Hall sat on many patent, trademark and copyright appeals and wrote reasons for judgment on most of them.

Space will not permit me to comment on all the important appeals in which Mr. Justice Hall participated. I have selected five areas which, I trust, will provide some useful insight into Mr. Justice Hall's work with the Court. I will accordingly refer briefly to several cases which will illustrate the Judge's principal concerns.

First, he believed that the Court has a reform function. This was manifested particularly in two cases: *Ares* v. *Venner*[1] and *Piché* v. *The Queen*.[2] Prior to *Ares*, hospital patient's records were not received in evidence as such but only through the testimony of the nurse or person who had actually made them. The records were treated like any other out-of-court statements tendered to prove the truth of those statements. The House of Lords in *Myers* v. *Director of Public Prosecutions*[3] stated the common law position to be that no matter how reliable such documents might be, they would be inadmissible.

In *Ares*, Justice Hall wrote the judgment of the Court, stating in part:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should, in no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses' notes, the nurses were present in court and available to be called as witnesses if the respondent had so wished.

This demonstrated that the Supreme Court of Canada would not necessarily follow the House of Lords decision and was free to differ as it saw fit. Furthermore, it altered in a material way the law as it stood up until that

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[1] [1970] S.C.R. 608.

[2] [1971] S.C.R. 23; 11 D.L.R. (3d) 700.

[3] [1965] A.C. 1001.

time. Hospital records which contained both objective and subjective statements would now be admissible as evidence of the facts contained therein.

In *Piché*,[4] Mr. Justice Hall had to deal with the time-consuming argument over whether a statement made by an accused to a person in authority was inculpatory or exculpatory, and whether, therefore, it required a *voir dire*. Hall J. writing on behalf of the Court, settled the law in Canada as follows:

> 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 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. The rule respecting the admission of statements is a judge-made rule and does not depend upon any legislative foundation and I see no impediment to making the rule clear and beyond dispute.

Mr. Justice Hall was deeply concerned that the little man got a fair hearing, as the case of *Ives* v. *Manitoba*[5] illustrates. Mrs. Ives with some foresight had acquired 140 acres of land for $6,000.00. Within a year the Province of Manitoba decided it must have 80 acres of her land for Birds Hill Provincial Park. In the arbitration proceedings Mrs. Ives was awarded $20,500.00. The Court of Appeal reduced the amount to $12,320.00. Mrs. Ives appealed to the Supreme Court, and, being without funds to employ counsel, appeared in person.

I was in Court when she opened with what was a reasonably good appeal, and I noticed that she was nervous and not doing very well. Mr. Justice Hall interrupted her to say, "Mrs. Ives, if I understand you correctly you are putting your case on these grounds and if I am wrong don't hesitate to say so." He then proceeded to clarify her argument by outlining her strong points and presenting her case as it should have been done. When he finished, he asked her if he had properly stated her case. She replied, "Oh yes, Mr. Justice Hall. Thank you so much, everyone told me that you were a kind man." The appeal was allowed and the arbitrator's award of $20,500.00 restored with costs to the appellant.

As I stated earlier, Mr. Justice Hall had a great interest in the criminal appeals which came before the Court. The most famous of these was the *Truscott Reference*.[6] In 1959, the accused, a boy of fourteen and a half years, was found guilty by a jury of the murder of a girl of twelve years. Most of the evidence was circumstantial and the accused did not give evidence at his trial. The conviction was unanimously affirmed by the Court of Appeal of Ontario. An application for leave to appeal to the Supreme Court of Canada was refused in February, 1960. Six years later, the Governor General in Council referred the *Truscott* case to the Supreme Court of Canada for decision as if it had been appealed under a 1961 amendment to

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[4] *Supra*, note 2.

[5] [1970] S.C.R. 465.

[6] *In the Matter of a Reference re Steven Murray Truscott*, [1967] S.C.R. 309.

the *Criminal Code* that permitted an appeal as of right in such cases.[7] Nine judges heard that reference. Eight reported that they were satisfied that Truscott had been rightly convicted.

Hall J., the lone dissenter, in a lengthy judgment of 42 pages, analysed the evidence as well as the trial judge's charge to the jury and concluded that the trial had not been conducted according to law and that Truscott should be given a new trial. Hall's analysis of the record and his comments have been widely accepted in the legal profession and law schools as unanswerable and a broad opinion persists that Truscott was wrongly convicted.

R. v. *Wray*[8] is another case in which Hall J. dissented and where the majority judgment is held by legal scholars to be in error and one which may well call for legislative reform to deal with the problem of evidence illegally obtained and the power of trial judges to reject such evidence.

The case raised the issue, *inter alia,* of whether a trial judge has discretion to exclude evidence acquired by means oppressive to the accused. The majority relied on the decision in *Noor Mohamed* v. *The King*[9] and held that the trial judge could only use his discretion to exclude admissible evidence when it was of great prejudicial effect and of trifling probative value. Mr. Justice Hall, on the other hand, felt that the discretion in *Noor Mohamed* has been expanded in other cases, such as *Kuruma* v. *The Queen*[10] to include the right to exclude evidence which would operate unfairly against a defendant. He felt that this approach recognized a centuries-old general principle that an accused has a constitutional right to a fair trial. Furthermore, contrary to the decision of the majority, he stated that once it is established that the discretion has been judicially exercised by the trial judge, it is not subject to review or to being weighed on appeal. He held that this was a rule of general application which should not be breached merely because it might contribute to a result which an Appeal Court considered undesirable.

Justice Hall was an early judicial supporter of the Canadian Bill of Rights. While Chief Justice of Saskatchewan, he had said in *Shumiatcher* v. *Attorney General for Saskatchewan:*[11]

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[7] In 1960, the Court had jurisdiction to hear criminal appeals only where a judge of the Court of Appeal had dissented (which was not the case here) or on a question of law with the leave of the court. In 1961, s. 597A of the *Criminal Code* was enacted by S.C. 1960-61, c. 44, s. 11, to permit a person sentenced to death, whose conviction had been affirmed by the Court of Appeal, to appeal to the Supreme Court as of right on any question of law, fact, or mixed fact and law. In 1966, the Governor General in Council referred the following question to the Court pursuant to s. 55 of *The Supreme Court Act,* R.S.C. 1952, c. 259:

> Had an appeal by Steven Murray Truscott been made to the Supreme Court of Canada as is now permitted by Section 597A of the *Criminal Code* of Canada, what disposition would the Court have made of such an appeal on a consideration of the existing Record and such further evidence as the Court, in its discretion, may receive and consider?

[8] [1971] S.C.R. 272; 11 D.L.R. (3d) 673.

[9] [1949] A.C. 182.

[10] [1955] A.C. 197.

[11] (1962), 39 W.W.R. (N.S.) 577.

It is a fundamental principle of criminal law that 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 of Rights, 1960, ch. 44, by sec. 2(e), which reads:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
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> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

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.

He concurred with Ritchie J. in *R.* v. *Drybones*[12] and in a short judgment wrote:

> I agree with the reasons of my brother Ritchie and wish only to add some observations regarding the decision in *Regina* v. *Gonzales.*
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> The concept that the Canadian Bill of Rights is operative in the fact of a law of Canada only when that law does not give equality to all persons within the class to whom that particular law extends or relates, as it was expressed by Tysoe J.A. at p. 264.
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> > Coming now to sec. 1(b) of the Canadian Bill of Rights. The meaning of the word "equality" is well known. In my opinion, the word "before" in the expression "equality before the law," in the sense in which that expression is used in sec. 1(b) means "in the presence of." It seems to me this is the key to the correct interpretation of the expression and makes it clear that "equality before the law" has nothing to do with the application of the law equally to everyone and equal laws for everyone in the sense for which appellant's counsel contends, namely the same laws for all persons, but to the position occupied by persons to whom a law relates or extends. They shall be entitled to have the law as it exists applied equally and without fear or favour to all persons to whom it relates or extends.
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> is analogous to the position taken by the Supreme Court of the United States in *Plessy* v. *Ferguson* (1896, 163 U.S. 537), and which was wholly rejected by the same Court in its historic desegregation judgment *Brown* v. *Board of Education* (1953, 347 U.S. 483).
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> In *Plessy* v. *Ferguson,* the Court had held that under the "separate but equal" doctrine equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate. In *Brown* v. *Board of Education,* the Court held the "separate but equal" doctrine to be totally invalid.
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> The social situations in *Brown* v. *Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.

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[12] [1970] S.C.R. 282; 9 D.L.R. (3d) 473.

However, in *Attorney General of Canada* v. *Lavell*,[13] Ritchie J. again writing for the majority virtually negatived *Drybones*. Justice Hall considers *Lavell* to be a bad judgment and one which the Supreme Court must eventually so characterize.

Mr. Justice Hall believes that while the Courts have an important part and duty to perform in the field of law reform, Parliament is supreme in that field. He demonstrated this in his judgment in the *Breathalizer Reference*[14] when, in concurring with Laskin J., as he then was, he wrote:

> Notwithstanding that in my view the Order in Council proclaiming parts only of s. 16 of the Criminal Law Amendment Act, 1968-69 (Can.), c. 38, may indicate on the part of the executive a failure to live up to the spirit of what was intended by Parliament, I am nevertheless bound to hold that the remedy does not lie with the Court. Under our system of parliamentary responsible government, the executive is answerable to Parliament, and when Parliament, by enacting s. 120, gave the executive a free hand to proclaim "any" of the provisions of the Act as set out in the English version, 'ou l'une ou plusieurs de ses dispositions' as in the French version, the responsibility for the result rests with Parliament which has the power to remedy the situation if the executive has actually acted contrary to its intention.

Two other decisions, in both of which Hall J. was in the minority, are worthy of note in that the minority view which he put forward has been subsequently accepted by Parliament as the preferable one in each instance. In the *Kootenay and Elk Railway* case[15] he supported the Canadian Pacific Railway position that the U.S. Kaiser railway interests along with Burlington Northern Railway should not be allowed to build a branch line into the Kootenay coal area to syphon off the lucrative coal carrying business destined for Japan through Roberts Bank at Vancouver. Mr. Justice Hall had very strong views in this appeal and wrote a powerful judgment. He was in the minority in this opinion, but his views were subsequently vindicated when the Government of British Columbia killed the project.

In the celebrated Nishga Indians land claims case, *Calder* v. *British Columbia*,[16] Hall J. again in a minority position, reviewed aboriginal land claims in their historical setting in America, Africa and Australia and concluded that there was such a thing as aboriginal rights and that the Nishga Tribe had not surrendered title to their lands nor had title to these lands been extinguished in the only way that such extinguishment can be done, namely by positive legislative action. Prior to Hall's reasoned judgment the Government of Canada had given little credence to the Indians' claim. Following the judgment, steps have been taken to negotiate the aboriginal claims in the Yukon, British Columbia and other areas in Canada. Mr. Justice Hall toiled long and hard on his judgment because there was no doubt in his mind of the merit of the appeal. The media gave this appeal wide coverage. The

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[13] [1974] S.C.R. 1349; 38 D.L.R. (3d) 481.

[14] *In the Matter of a Reference by the Governor General in Council Concerning the Proclamation of Section 16 of the Criminal Law Amendment Act*, 1968-69, [1970] S.C.R. 777 at 778.

[15] *Kootenay and Elk Railway Co. et al.* v. *C.P.R.*, [1974] S.C.R. 955.

[16] [1973] S.C.R. 313.

Indians of Canada consider Hall's judgment a complete vindication of their position on aboriginal title.

These judgments will serve to indicate the character and judicial leanings of Mr. Justice Hall. He has a forceful approach to everything he does, and has no qualms about expressing his views on any subject which he has studied. On the Bench he was courteous and helpful to counsel. He disliked an appeal that was not properly prepared and presented. On occasions when counsel were unduly repetitious, he would say in a sharp voice, "Mr. ————, I understood you perfectly the first time you made that point." Counsel, if he knew Mr. Justice Hall, would then proceed to his next point. He sought perfection, because the litigant deserved nothing less. Mr. Justice Hall was prepared to differ with his colleagues on the Bench, in the Conference Room, and in their Chambers. But those differences were soon forgotten and he bore no malice at any time.

Mr. Justice Hall has stated publicly on more than one occasion that the law ought not to remain static, that it must breathe, live and continue to advance to meet the changing conditions of our present day society. His reasons for judgment reflect his thinking in this respect; he will be remembered as a libertarian judge. I think that Chief Justice Laskin would not take issue with my observation that he and Mr. Justice Hall approach legal and social problems in the same fashion. When they were assigned to sit on the same appeal they usually agreed in the conclusion.

I have already mentioned that Mr. Justice Hall was Chairman of the Royal Commission on Health Services. There is also the Hall-Dennis Commission on Aims and Objectives of Education in Ontario; his appointment as sole arbitrator following the railway strike in 1973; and his most recent appointment in 1975 as Chairman of the Commission on Grain Handling and Transportation. In addition to these onerous tasks, he has served as Chancellor of Guelph University for two three-year terms.

If I may be forgiven, I would like to note that Mr. Justice Hall invited me to come out of retirement to assist him with his work in the Railway Arbitration and the Commission on Grain Handling and Transportation. I am confident that these invitations were prompted by the fact that he had confidence in my ability to discharge my duties in a satisfactory manner. However, I am also persuaded that our friendship was a deciding factor in his decision.

I take much pride in the fact that I have been privileged to be associated with Mr. Justice Hall. I shall always remember him as a scholar, gentleman, brilliant jurist and unforgettable friend.