ON THE FRONT COVER

THE HONOURABLE THOMAS R. BRAIDWOOD, Q.C.

By Christopher Harvey, Q.C.

No one will ever challenge the right of Tom Braidwood to be ranked among the great advocates of our time. Called to the bar in 1957, he spent his first years in practice with Angelo Branca, Q.C. By the time Branca was appointed to the bench in 1963, Braidwood had gained notice in the profession which he dominated through the late 1970s and '80s. Now, after 15 years on the bench, he is back in practice and shows no signs of slowing down.

Tom Braidwood grew up on the slopes of Burnaby Mountain and went to Britannia High School. From grade 8 until he started articles, he worked part-time in his father's butcher shop on Commercial Drive. His east-end experience gave him an understanding of life that served him well in the law. He had an instinctive grasp of the motivating forces of human conduct. One of the hallmarks of his career at the bar and on the bench was his understanding of human nature, with all its foibles and failings. He first put this to work in the Main and Hastings office of Angelo Branca, Q.C., who was B.C.'s leading criminal counsel when Tom joined him as an articled student in 1956. Tom covered many miles travelling around the province in his MGB, doing preliminary inquiries in all Branca's cases. Branca had an overflowing practice, and Tom often heard as he arrived at the office in the morning, "Tony [Branca always called him "Tony"], I'm double-booked. Take this case—it starts in half an hour." For self-preservation, Tom took to examining Branca's appointment book before he left office in the evening and then preparing the cases he thought he would have to pick up.

Tom describes Branca as a wonderful mentor. One day the roles were reversed. Tom was booked to be in New Westminster for a discovery, a regis-

trar's hearing and an undefended divorce on the same day. Branca heard him lamenting that he would be put to the bottom of the divorce list (in those days the list was always arranged in order of seniority at the bar). "Don't worry," Branca said, "I'll take the divorce case." They collected the nervous client from the waiting room and drove to New Westminster. Branca talked all the way, but without a word to the client about the case. J.O. Wilson was presiding. Angelo stood up first, being the most senior, causing some confusion as the judge searched for the file. The disadvantage of going first was that neither the judge nor counsel had got accustomed to the routine of the standard questions and orders by which the regular divorce counsel disposed of the "undefendeds" at a rate of about one every four minutes. When Angelo got to the first of the usual trilogy of questions about collusion, condonation or connivance, the client answered "Yes." Angelo went over to her, took her hand and said, "Madam, the answer to that question is 'No,' and there will be two more of the same coming." After the detective had given evidence (to prove adultery), there was a long silence as both Angelo and the judge wondered what came next—decree nisi, custody, access, maintenance, costs? Then Angelo asked for the "usual order". The judge immediately agreed: "Yes, the usual order." Fortunately the court clerk knew what the "usual order" was.

When Angelo was appointed to the bench in 1963, Tom inherited all of Angelo's unfinished cases, including several murder trials. Thrown in at the deep end, Tom had no choice but to swim. One case in this period was for London Drugs, charged by the College of Pharmacists with advertising contrary to the Act and bylaws. Tom had suggested to his skeptical leader that the bylaws were outside the authority of the Act. Later, abandoned by Angelo, he turned up alone at the old courthouse to argue the point, expecting to see Ted Hinkson (the father of the current Hinkson J.A.) acting for the college. However, Hinkson introduced him to C.H. Locke, recently retired from the Supreme Court of Canada, who would be taking the case.

The college's three lawyers had about 20 case books lined up on counsel's table. Tom, at seven years of call, had a single case, but he sensed that something could be made of the unusual—probably unprecedented—practice of a retired Supreme Court of Canada judge appearing as counsel in a trial court. At lunchtime he went to the library to see if he could find a case on point decided by Locke. When he couldn't, he went to the judge's chambers, recently taken up by Branca J. Branca remembered a case and found it, and Tom cited it after lunch. In reply, Locke made the tactical error of saying about his own judgment, "What I meant was..."

The trial judge found for London Drugs. The Court of Appeal upheld the judgment, and the college applied to the Supreme Court of Canada for leave.

Tom's plane was grounded by snow, so his first submission to the Supreme Court was a telegram from Toronto asking for the application to be set over to 2 p.m. When he arrived, the court registrar, knowing that Tom wouldn't know the way, led him to the robing room. C.H. Locke was there and had kindly arranged all of Tom's law books for him in the library. As they were walking down the corridor the panel hearing leave applications came by and stopped to chat with Locke, asking after his wife and family. In court a few minutes later, Locke made his application to the same three judges. Tom, despite his discomfiture, again succeeded—and his career was well under way.

As Tom's practice flourished, so the firm grew. The original office at Main and Hastings had become cramped. Farris & Co. then occupied the most splendid set of offices in the city—in the Standard Building, at Hastings and Richards, in what was formerly a penthouse apartment. It had high ceilings, a fireplace big enough to walk into, wainscoting everywhere and a law library with a spiral stairway and balcony. Tom suggested to Senator Farris that since the firm's good client, the Toronto Dominion Bank, was moving into its new skyscraper at Georgia and Granville, Farris & Co. should be thinking of moving there too. Soon afterwards, they struck a deal. Farris & Co. moved out and Tom's firm moved in. The firm was then known as Braidwood, Nuttal, Mackenzie, Brewer, Greyell and Stephenson.

Tom is immensely proud of the succession of wonderful juniors he had over the years, many of whom are now Queen's Counsel or judges: the late Richard Sugden, Robin McFee, David Crossin and Bill Knutson, and judges David Masuhara, Catherine Bruce, John Harvey and Bruce Greyell. His former associates are equally appreciative of their mentoring experience with Tom. Tom's style was to involve a junior in the case at the first client meeting. His practice involved every conceivable area of the law. The only areas he says he did not touch are tax and shipping, but this disclaimer is suspect because the law reports show him appearing on a succession tax case and a leading sales tax case.[1]

The broad range of Tom's practice accounts for the fact that his former juniors rose to prominence in completely unconnected fields: family law (John Harvey), criminal law (David Crossin), labour law (Catharine Bruce and Bruce Greyell), insurance law (Bill Knutson) and corporate/commercial law (Rick Sugden—although Sugden's practice, like that of McFee and Crossin, also covered a wide area).

Before the advent of *R. v. Stinchcomb*, the Crown disclosed nothing in advance of the trial other than the report to Crown counsel. Even the police officer's notebook was not disclosed until the officer testified. That is where Tom's instinct served him best. He would sense the weakness in the Crown's

case and send his juniors off to gather evidence and round up witnesses. Subpoenas *duces tecum* were routinely served on Crown witnesses to compel them to bring relevant documents to court. Tom would get into the case himself a day or two before the trial and would then thoroughly master the facts.

In trial after trial, Tom subjected witnesses to a withering cross-examination. His style was courteous but determined. He played on his upbringing, coming across as the unsophisticated East Ender having trouble understanding what the witness was saying. He understood perfectly, of course, and led the witness step by step into a trap that would expose the truth or at least discredit the witness. In one case, *R. v. Babb*, he defended a lawyer accused of multiple fraud and dipping into a trust account. His cross-examination of the key witness resulted in the judge directing the jury to enter an acquittal on a number of charges. The witness was charged with four counts of perjury soon afterwards.

In the Stephen Owen Discretion to Prosecute Inquiry, Tom represented the provincial Attorney General, Bud Smith. The NDP opposition had accused Smith of influencing the decision not to prosecute his Cabinet colleague, William Reid, for misuse of public funds. The events leading to the inquiry were a media sensation. They included a tape recording, disclosed to the press by the Opposition, of intercepted private cellphone calls by Smith to his deputy concerning the Reid case. Moe Sihota, the Opposition justice critic, initiated a private prosecution of Reid after the Crown declined to prosecute. Then, a short time later, the private prosecution was dropped. Braidwood's cross-examination of Moe Sihota was devastating. The commissioner's report criticized Sihota's actions and exonerated the Attorney General. The unauthorized interception and disclosure of private communications was found to be unlawful and repugnant to personal privacy. The special prosecutor process arose out of this inquiry.[2]

Tom was the epitome of general counsel, able to master any field. In his last year of practice he found himself in the unaccustomed role of federal Crown counsel in the famous aboriginal rights case of *R. v. Sparrow*. At one point during the hearing in the Supreme Court of Canada, Sopinka J. said, "Mr. Braidwood, you say that Parliament's power is limited—but why can't we regulate the fishery like we always did?" There was a momentary hesitation. Then Tom replied, "My instructions are..." A sense hung over the courtroom that the seasoned gladiator was not entirely comfortable with the shackles imposed upon him by his client.

Having turned down the offer once before, Tom accepted an appointment to the bench in 1990 as he approached his 60th birthday. Characteristically, when asked of the case he is most proud of in his time as a trial judge, he names an obscure matrimonial case. The wife had made the most horrible

allegations against the husband involving the children and had obtained an *ex parte* order excluding him from the home. On the fifth and final day of the trial, having concluded that the wife was lying and had brainwashed the children, Tom granted an order putting the children in the care of the husband and barring the wife from any access for six months. After delivering judgment, he asked the husband's sister to come forward. Saying he had absolutely no jurisdiction to do so, he asked if she would consider living with her brother for the first month to help look after the children. Years later, after retiring from the Court of Appeal, Tom received a letter from the sister saying what a benefit his order had been to the children, and updating him on how well they turned out.

In 1996 Tom was appointed to the Court of Appeal. He thought he would miss the juries and witnesses, but he thoroughly enjoyed it. His judgments were shorter than those of his colleagues but went directly to the point. His longest judgment was in the *Malmo-Levine* case—163 paragraphs.[3] It was a majority decision with Rowles J.A. concurring, and it was later upheld by the Supreme Court of Canada. The issue was whether the legal prohibition of possession of marijuana was contrary to s. 7 of the *Charter*. The judgment reflects Tom's unique combination of high intellectual skills, understanding of the Canadian constitutional balance and sound, down-to-earth common sense. His analysis draws upon the writings of John Stuart Mill and James Fitzjames Stephen and concludes with an application of modern conditions and experience. The following is typical of his style of expression:

> I conclude that on the basis of all these sources—common law, Law Reform Commissions, the federalism cases, *Charter* litigation—that the "harm principle" is indeed a principle of fundamental justice within the meaning of s. 7. It is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed I think that it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others.[4]

At his retirement ceremony at the end of 2005, as he was about to turn 75, Tom spoke of how much he had enjoyed his time on the bench. Then he paid tribute to the bar. He said that lawyers have the honour of acting for clients caught up in the most difficult of circumstances and that they enjoy the most challenging, stimulating and rewarding profession in the world.

Tom returned to his former firm, now MacKenzie Fujisawa LLP, and entered the third phase of a long and varied career. He has had no shortage of interesting appointments. One involved him in an arbitration appeal concerning the ownership of 133 paintings in the Beaverbrook Art Gallery in Fredericton (the collection included a Turner said to be worth $25 million). Before retaining him as a member of the appeal panel the Beaverbrook Foun-

dation asked Tom whether he would have any qualms about reversing a former Supreme Court of Canada judge (Peter Cory—the arbitrator appealed from). The enthusiasm of his response is thought to have clinched the retainer.

Tom's recent Taser Inquiry Report is his latest remarkable achievement. After his final report is submitted, he plans to spend the summer exploring the coast in his yacht. In the fall he expects to commence sitting as a sole arbitrator in a six-week arbitration involving some $32 million. Then he and his wife will enjoy the fall colours from Montreal to New York on a cruise, before holidaying at their place in Palm Desert.

Tom is the proud father of three. His daughter, Kim Grove, has had a women's fashion business in White Rock. His two sons have followed him to the bar. Tom Jr. is a sole practitioner in Squamish and the most recent recipient of the Access Justice Dugald Christie Award, in recognition of his pro bono work. Tom's other son, Mark, is a partner with Shapiro Hankinson in Vancouver. Tom lost his wife, Ann, to cancer in 2001 after a long and wonderful marriage, and he subsequently married Phyllis, with whom he shares his present nautical and other adventures. May they meet with favourable winds and gentle tides.

ENDNOTES

1. *Shepard v. British Columbia (Minister of Finance)* (1980), 20 B.C.L.R. 336; *Army & Navy Department Store Ltd. v. British Columbia (Commissioner, Social Services Tax)* (1965), 53 W.W.R. 285.
2. Discretion to Prosecute Inquiry, *Commissioner's Report*, Vol. I, *Report and Recommendations*, November 1990. Ironically (in view of recent events) the expectation was that the use of a special prosecutor would avoid future partisan accusations of favouritism in decisions not to prosecute.
3. *R. v. Malmo-Levine*, 2000 BCCA 335.
4. *Ibid.* at para. 134.

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