

## MR. JUSTICE DOUGLAS LAMBERT: 25 YEARS ON THE COURT OF APPEAL\*

*By the Honourable Martin R. Taylor, Q.C.*

Speaking through Horace Rumpole, his custom-designed spokesperson, John Mortimer refuses to believe that “those who are entirely sane would undertake the thankless task of judging their fellow human beings”.

Under the Rumpole rule, none of us can be regarded as entirely ordered. But that being said, it must be acknowledged that our guest of honour, in 25 years of disciplined judgment writing, has brought as much order to the jurisprudence as anyone who ever undertook the thankless task. Some say that reported judgments would be improved by candid snapshots of the author during argument. Perhaps they would better come with a free CD of appropriate background music. Some of Lord Denning’s ruminations—such as “old farmer Bundy”, for instance—might be accompanied by a Percy Grainger theme. The music for split-decisions of the Supreme Court of Canada could be by Bela Bartok. Judgments of the Privy Council would be accompanied by the music of Sir Edward Elgar. For Douglas Lambert J.A., the score would be Handel’s Largo in G—each set of balanced cadences preceded by a Roman numeral.

I remember once suggesting to Douglas that a certain point did not call for a fully reasoned judgment. He said, “What do you mean by ‘fully reasoned?’” I said, “With Roman numerals.” Our friend made one of those tuning sounds that the Scots make before speaking, a sound rather like the bagpipe being warmed up—my father used to call them “Scottish noises”. But all that followed was a Caledonian gale of laughter. To be frank, I don’t remember whether there were any Roman numerals.

By the time he arrived on the bench, in 1978, the bagpipe warm-up had already long been a preliminary to the delivery of judgment in the British Columbia Court of Appeal. By my calculation, more than half of the 40 who preceded Douglas on this court were demonstrably Scotch. There were undoubtedly others, too, who had become so by assimilation or absorption. By the time he completes his statutory term there will, I believe, be only two judges that served here longer—James Alexander Macdonald, the first chief justice, a Scot who held that office for 28 years, and the Irish eccentric Archer Martin of Ballinahish, a Celt but not a Scot, appointed to the trial court at 33, elevated at 44, who served on this court for a probably unmatched 31 years. But they belong, of course, to the first half of the last century. The only other judicial terms that come close are

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\* This is the text of a speech given by the author at a recent celebration of Mr. Justice Lambert’s long years of service and many accomplishments as a member of the B.C. Court of Appeal.

those of Jack Taggart, who served on the court for 26 years, and Messrs. Justice McPhillips, O'Halloran and Carrothers, who each served for 25 years.

It seems unlikely that any of his predecessors will have written as many judgments—and certainly none with greater lucidity or effect.

Our guest of honour comes from the little town of Ardrossan, a rain-swept summer resort in the Burns country on the Firth of Clyde, whence the ferry plies to the Isle of Arran. In more meaningful terms, in the context of the law, he comes from 25 miles southwest of Paisley and was born in 2 A.D. (Anno Donoghue)—two years after May Donoghue's visit there. He is believed to have graduated from that famous Scottish boot camp later to be attended by Prince Charles—his foot locker and tucker box fated to be inherited, perhaps, by the heir to the throne. He is said then to have gone on to St. Andrews University, also now patronized by royalty. There he studied chemistry, physics and mathematics before moving to Quebec to work on the development of explosives. No doubt in pursuit of a quieter life, he thereafter enrolled at Queen's University and went on to law at UBC with the class of 1958. He articulated in the old firm of Robson, Macdonald and Guest, was "called" in 1959, then did five years with Department of Justice in Ottawa, in civil litigation and the drafting of financial legislation. There is a wonderful line in *Yes, Minister* in which the minister accuses his deputy, Sir Humphrey Appleby, of "stirring up apathy in the department". That is *not*, of course, what Douglas Lambert was doing. There is a story that demonstrates the extent of his dedication as a parliamentary draftsman. It relates to the federal student loan Act, of which he is thought to have been the author. In order to get royal assent—or was it proclamation?—for this important measure, during the absence of both the Governor General and the chief justice of Canada, it is said that he called at home one evening on the senior judge of the Supreme Court, who happened at the time to be washing dishes. Only after this important manual task had been completed, with the help of his visitor, it is said, was it possible for the vice-regal sign manual to be applied.

He returned to British Columbia in 1964, to join the legal department of the nascent hydro authority. Three years later he was off again, this time to Barbados, to introduce income tax to a theretofore-unspoiled paradise.

But all this is in the nature of "oral history", which, as we know, goes to its weight. The reason I believe that I was invited by Chief Justice Finch to speak is that in 1969 Douglas Lambert joined the venerable firm of Davis & Company. He and I were thus co-workers in practice at least 20 years before we were destined to labour together at the appellate level. During that earlier intersection of our coordinates of time and space, his disciplines were banking, corporate and securities law—matters as far from my ken today as then. His speciality was the "floating charge", something that might cause border problems today for a person trained in the manufacture of explosives.

In the course of this work he delivered a well-remembered opinion on s. 125 of the then *Companies Act*, of which this is but a very small part.

Why should there be a difference if it is done in two separate transactions, one between the buyer and one seller and the other between the buyer and the other seller? Why should there be a difference if these two transactions are separated in time by 24 hours?

If a time separation of 24 hours is permitted, why not any longer time separation? If such separate transactions can be done for two 50% shareholders, why not for several shareholders spaced over a long period of time? The grammatical structure of subsection 125(c) just does not justify any of those distinctions. The key, in our view, is that the financial assistance must relate to the specific purchase which puts the shareholder over the 90% level and not to the prior purchases which do not.

These words, dictated into a belt-drive Dictaphone in September 1976, seemed to those present as if falling *extempore* from Lord Morris of Borth-y-Gest. His co-workers, quietly rocking wide-eyed from heel to toe, recognized that here, indeed, was a consummate legal craftsman deserving of a larger bench.

And so it came to pass.

But not until he had wound up two celebrated financial empires and served for two years on the Law Reform Commission, the last five months as chairman. During his time the commission produced at least eight reports, including masterly analyses of the *Statute of Frauds* and the rule in *Hollington v. Hewthorn*.

The contribution of Mr. Justice Lambert to the jurisprudence of British Columbia over the last quarter of a century has amply demonstrated that those who rocked silently while he dissected s. 125(c), 27 years ago, were of course absolutely right. A search for his judgments on Quicklaw produces no less than 2,048 hits. Forty-nine of his decisions appear to have been reviewed by the Supreme Court of Canada. The box score is remarkable. It shows that with respect to 19 decisions in which he was in dissent, the Supreme Court allowed appeals in 13 and dismissed six. In respect of the 30 in which he was for the majority, the Supreme Court allowed appeals in 15 and dismissed the remaining 15. If these figures are correct, it seems obvious that Lambert J.A. does at least twice as well on his own as when the majority are with him.

Douglas Lambert has not spent *every* waking hour with the jurisprudence.

He is well remembered as tour organizer, or chaperone, for a 1978 visit to China of a group of local legal luminaries. During this very early post-Cultural Revolution expedition, certain un-named members of his group are said to have discovered a Beijing cocktail bar, fortified themselves with fierce fluids and managed on their return to the hotel to create a disturbance which attracted the attention of the Red Guards. This *contretemps* is said to have generated a degree of tension which might have resulted in the miscreants being marched off for denunciation had their leader not skilfully intervened and brought about a timely confession and apology by those responsible—a diplomatic exercise that is said to have swiftly restored, and perhaps improved, the harmony of Sino-Canadian cultural relations.

Douglas is remembered for many other contributions to the legal community. He chaired the *Canadian Bar Review* editorial committee during the reign of the redoubtable Professor Castel. He served for many years on the CBA council and executive and on important CBA committees. He is well remembered for his participation in public events, including his tribute to John J. Robinette, Q.C., and

his remarks at the opening of the Vancouver Law Courts, during which he applauded Arthur Erickson, its creator, for providing so many courthouse steps on which litigants might settle.

I remember, too, his service on the law clerk selection committee of this court. We had only one choice that seemed easy. Asked what he intended to do during the vacation, the particular candidate said he had felt he worked hard enough at law school and intended to draw unemployment insurance and spend the summer on the beach! Our guest has written memorable papers for the judges' dinners. It has been said that one of these dealt in a somewhat dismissive manner with the suggestion of Mr. Justice Chouinard that Supreme Court of Canada *obiter dicta*—the casual observations of the court—are entitled to the same respect as statements made in actually deciding the cases. Douglas is thought to have characterized Mr. Justice Chouinard's utterance as itself *obiter dicta*, and therefore deserving of no more force than such remarks had traditionally enjoyed. This is not quite what happened. What he in fact said was that Mr. Justice Chouinard, writing in French, had decreed only that *dicta* of the court *should* be followed—not that they *must* be followed—meaning that they should be followed *unless there were sound reason for not so doing*, a phrase worthy of Lord Denning. Only an accomplished legal francophone could have uncovered this important distinction—the English headnote was based on an erroneous translation.

It was in a similarly emendatory cause that Madam Justice Southin more recently sought to correct a reference by the Supreme Court of Canada to the term *contra proferentem*. Mr. Justice Esson, in citing the passage, dutifully reproduced the expression with the spelling there used, ending with the letters “um” rather than “em”. Mr. Justice Donald was reluctant to agree to any correction, on the ground that a spelling adopted by the court of last resort is probably binding. It was in the closing round of this exchange of memoranda that our guest of honour declared it to be the role of the English courts to be wrong in law but right in Latin, of his court to be right in law and wrong in Latin, and of the Supreme Court of Canada to be wrong in *both*.

There is indeed *much* more to be said. About his life as a cherry farmer on that other bench above Penticton, where he is known to stride the windy hillside in the capacity of “Laird of Munsen Mountain”. About his experience as a labour lawyer during the wildcat strike at the Mica dam site. About his analysis of the rights of the First Nations and his contribution to the development of Canadian aboriginal law. About his continuing association with an ever-growing company of former law clerks. About his Friday noontime retreats—once to the On-On Gardens, at Keefer and Main, more recently to the nearby Gain Wah tea rooms. About his appreciation of good literature and wines. About his abilities as a skier, which are said to be limited. And particularly of Barbara, to whom high tribute is due, his equally accomplished but definitely more charming better half, and of their three highly talented children.

But I know that everyone would like to hear from the Laird, so let me conclude with some of the things others have said of his work during the last quarter of a century.

A distinguished British Columbia legal scholar and long-time local judge-watcher says this: although trained in Canada, Mr. Justice Lambert takes a “Scottish” approach to justiciable issues; he moves from general principle to the particular problem, hurdling any intervening thickets of precedent; he is one of the few who properly understand the decision of the Supreme Court of Canada in *Rivtow v. Washington Iron Works*; he “sees the big picture”; Mr. Justice Lambert is neither formalistically bound nor persuaded by non-functional rules; he “confronts the intellect”.

To all of which everyone would join in timely concurrence, excepting only the matter of the decision in *Rivtow*. To agree that Douglas understands it, one must understand it oneself, and in this some of us are of the majority.

There are other qualities spoken of, too, with which we would all agree. His honesty and frankness, his brilliance in expressing himself, his invariable courtesy to counsel, litigants and those whose decisions he has to review. He is known for all of these. And also for the Roman numerals, and for the elegance of his many compositions, written to the music of George Frederic Handel.




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