

JOHN McLAREN

Dewigged, Bothered, & Bewildered

British Colonial Judges
on Trial, 1800–1900



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University of Toronto Press acknowledges the financial support of the
Government of Canada through the Canada Book Fund for its
publishing activities.

This volume is dedicated to the late A.W.B. 'Brian' Simpson (1931–2011) who epitomized the very best legal historical research and writing, was an inspiration to legal historians of the Common Law world, and was a most amusing lecturer and raconteur. He is sorely missed.

Foreword

THE OSGOOD SOCIETY FOR CANADIAN LEGAL HISTORY

Canada was but one part of a large and complex empire, and this book is a reminder of that fact and a fascinating exploration of one important aspect of the legal history of the empire – the role of superior court judges. Professor John McLaren gives us a series of case studies of nineteenth-century judges from across the empire, including, of course, the Canadian colonies, who found themselves the centre of political controversy and were either suspended or removed from office. Frequently they landed in another colony, despite their chequered pasts. The book also provides a very useful and informative survey of the process of judicial appointments and the developing rules on judicial independence within the empire.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry, formerly attorney general for Ontario and chief justice of the province, and officials of the Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. It has published eighty-four books on the courts, the judiciary, and the legal profession, as well as on the history of crime and punishment, women and law, law and economy, the

legal treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

Current directors of the Osgoode Society for Canadian Legal History are Robert Armstrong, Christopher Bentley, Kenneth Binks, David Chernos, Kirby Chown, J. Douglas Ewart, Violet French, Martin Friedland, Philip Girard, John Honsberger, Horace Krever, C. Ian Kyer, Virginia MacLean, Patricia McMahon, R. Roy McMurtry, Laurie Pawlitza, Paul Perell, Jim Phillips, Paul Reinhardt, Joel Richler, William Ross, Paul Schabas, Robert Sharpe, Mary Stokes, and Michael Tulloch.

The annual report and information about membership may be obtained by writing to the Osgoode Society for Canadian Legal History, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N6. Telephone: 416-947-3321. E-mail: mmacfarl@lsuc.on.ca. Website: www.osgoodesociety.ca

R. Roy McMurtry
President

Jim Phillips
Editor-in-Chief

Foreword

THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

John McLaren is an important figure in the study of Australian legal history. He visits Australia frequently and has delivered a number of public lectures and conference papers there. His significance lies in his comparative approach to the history of the British legal empire. He has published influential books and was the primary compiler of a brilliant comparative legal history course, which was taught simultaneously in Canadian and Australian law schools. Students in both countries studied the same materials in the same week.

Dewigged, Bothered, and Bewildered is the culmination of Professor McLaren's comparative approach. It shows how colonial judges were appointed, how they were disciplined, and how they took legal ideas from one colony to the next, developing colonial law that was sometimes as much influenced by other colonies as it was by the law of England.

The Francis Forbes Society for Australian Legal History (ABN 55 099 158 620) was established in 2002. Inspired by and partly modelled on the Osgoode Society, its principal object is to encourage the study of the history of Australian law and, to that end, to publish books and other publications and to promote continuing education and the compilation of records of Australian and Indigenous law. It has already published several books, and it cooperates with journals in the publication of articles and lectures. It conducts an annual Forbes lecture and an essay competition for students, and it publishes research papers on its website at www.forbessociety.org.au.

The current members of its Council are Bruce Kercher, The Hon. Keith Mason AC, QC, Wendy Robinson QC, Geoff Lindsay SC, Carol Webster, Michael Tidball, Laurie Glanfield AM, Michael Pelly, and Stephen Toomey. Its Honorary Executive Director is Philip Selth OAM, Executive Director of the New South Wales Bar Association. The Society's membership, which is open to the public, includes senior lawyers drawn from the ranks of the judiciary, barristers, solicitors, and academics.

Membership information may be obtained by writing to the Secretary, Geoff Lindsay SC, at secretary@forbessociety.org.au or at Francis Forbes Society for Australian Legal History, Basement, Selborne Chambers, 174 Phillip Street, Sydney, NSW 2000.

Bruce Kercher
President

Philip Selth
Honorary Executive Director

Preface

This book is the product of a developing interest in teaching and researching comparative British colonial history. Much of the inspiration came from a joint teaching learning venture (OZCAN) involving faculty and students at four Australian and Canadian law schools between 1997 and 2005. Tribute is due to both groups for exciting this interest and piquing my curiosity in colonial judicial cultures. The faculty included Simon Bronitt, Ian Holloway, and John Williams at ANU; Andrew Buck at Macquarie; and Lyndsay Campbell, Doug Harris, and Wes Pue at UBC.

The research for the book would not have been possible without the important financial support of the Social Sciences and Humanities Research Council of Canada, directly through a three-year research grant (2006–9), and indirectly, through an internal seed grant from my own university. My deep appreciation goes out to that body.

I was assisted in my research by Emily Boyle, Stefan Jensen, and Nicole O'Brien, each of whom did important archival work on segments of the book. Special plaudits are due to John McCurdy, who served as my overall research associate for the years of the grant and who embodies that combination of skills, enthusiasm, initiative, and insight that constitutes the inspired researcher. The output and quality of his research were phenomenal, and I appreciated his running commentary on what he was finding and enjoyed the conversations to which they gave rise.

The scope of the book involved travel and consultation with historians in several regions of the former British Empire. I owe them a deep debt of gratitude for their guidance and enthusiasm for the project, and, in several cases, for outstanding hospitality. Bruce Kercher in Sydney went way beyond the call of duty by reviewing an earlier version of the manuscript and lending both great encouragement and helpful commentary to my work. Stefan Petrow in Hobart and John Williams in Adelaide reviewed chapters and provided guidance with access to archival material in Tasmania and South Australia respectively, as well as acting as delightful hosts. Peter Moore of Crossing Press in Sydney helped me with editing the chapter on Judge Boothby and opened up for me a new dimension to this turbulent judge's career – his financial difficulties. Andrew Buck and Nancy Wright offered elegant shelter in both Sydney and the Blue Mountains, during which we spent many hours indulging our mutual interests in legal history, popular culture, jazz, and much more. Elizabeth Olsson in Adelaide was generous in making available her collection of research materials on Justice Boothby. Justice Paul Mullaly, Janine Rizzetti and Chris O'Brien in Melbourne and Ned Fletcher in Auckland helped me hone my insights on John Walpole Willis, whom they too have researched. Through the good offices of David Williams in Auckland I was able to share work in progress with New Zealand colleagues. In the Caribbean I was similarly welcomed and encouraged. Bridget Brereton was a great source of insights into the political and social, as well as the legal, history of Trinidad and Tobago, shared her extensive knowledge of the life and times of Sir John Gorrie, and assisted me in navigating the archives in Port-of-Spain. In Barbados, Anthony Phillips gave me the benefit of his broad grasp of the legal history of that island and the British West Indies more generally. Nathan Brun at the Hebrew University and Maria del Pilar Kaladeen at Royal Holloway College of the University of London shared important information on Chief Justice McDonnell's quarrel with the high commissioner of the Palestinian Mandated Territory, and on the trials and tribulations of Chief Justice Beaumont in British Guiana, respectively. Keith Smith and his family were excellent hosts at the British end of my research, and I benefited from Keith's expansive knowledge of nineteenth-century English legal history.

Jim Phillips, editor-in-chief of the Osgoode Society for Canadian Legal History book series, has been the consummate guide and counsellor, combining enthusiasm for my work and inspired suggestions for substantive enrichment, with a welcome firmness in reining in a

propensity for verbosity on my part. Marilyn MacFarlane, the society's administrator, has, as always, provided helpful and genial guidance on the publication process. Michel Morin helped me with important leads on judicial accountability in Lower Canada (Quebec). I am also grateful to John Weaver and Barry Wright, who reviewed the manuscript anonymously for the Osgoode Society and who were both positive in their comments and had valuable suggestions for improving the quality of the text. The editorial staff at the University of Toronto Press, especially Len Husband and Wayne Herrington, have been a pleasure to work with. Closer to home I feel fortunate to have had the constant support of two colleagues and friends in this venture, Hamar Foster and Ben Berger, both of whom not only talk the talk but walk the walk in recognizing the value of history and historical research in understanding legal cultures. Rosemary Garton of the Faculty of Law was generous with her time and enormously efficient in helping with the administrative and secretarial dimensions of the project.

Given the geographic scope of this book, it is very gratifying that the Francis Forbes Society for Australian Legal History has agreed that it should be published under its banner as well as that of the Osgoode Society. My thanks to the Forbes Society's president, Bruce Kercher, and secretary, Geoff Lindsay, SC, for making this fruitful example of scholarly collaboration possible.

Last but not least, I appreciate the support and encouragement of Ann and our children, who have been so willing to indulge my flights into nineteenth-century colonial culture and the lives and times of some of the judges who served the empire in the colonies, and who were patient with me in the sometimes difficult process of my returning to the twenty-first century and the realities of this world.

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Colonial Judges in Trouble: Setting the Scene

A Man of Law's Tale

Lieutenant Governor Peregrine Maitland of Upper Canada ordered Justice John Walpole Willis, puisne judge of the province's Court of King's Bench, removed from office in June 1828. By challenging the legality of the actions of the conservative law officers of the Crown, by consorting with reformist politicians and questioning the constitutionality of the Court sitting with less than a full bench, this judge had driven the colonial executive to the point of exasperation.¹ But this was not to be the end of Willis's troubles as a colonial judge. Having persuaded the Colonial Office that he had been unjustly treated in Upper Canada, if not on the merits of his case then by virtue of faulty process in not allowing him to respond to the charges against him, London appointed him to the British Guiana bench. There he served by and large without legal complication, although he developed a chronic liver complaint associated with dysentery or malaria. In 1836 he accepted an invitation from the Colonial Office to transfer to the Australian colony of New South Wales as an associate justice of its Supreme Court. Six years later, in June 1843, Governor George Gipps removed Willis from office in that colony. As a judge in Sydney, Willis had by his actions and incautious comments antagonized his judicial colleagues and the Roman Catholic population of the colony. In 1839 Gipps sent him to become the new resident judge in Port Phillip (now Melbourne) to avoid

the ongoing bad blood with his judicial brethren. In the new location, Willis's increasingly choleric disposition, his antipathy to those in authority in and the gentlemanly elite of the district, his perceived partiality in cases argued before him, and continued sniping at his colleagues in Sydney so severely tried the governor's patience that he gave the judge his marching orders in June 1843. Although Willis succeeded in an appeal to the Judicial Committee of the Privy Council over the failure of the governor to accord him a hearing, this proved a pyrrhic victory. In their terse advice to the monarch, their lordships added the gratuitous opinion that on the basis of what they had heard and read, Gipps had adequate substantive grounds for removing the judge in this instance. No further judicial preferment was forthcoming and Willis faded from history.²

The Tale and Its Relevance to the Tenure and Accountability of Colonial Judges

Although the disciplining of Willis not once but twice in different colonies provides a particularly dramatic tale of a colonial judge in trouble, that story, along with those of other judges who suffered or were threatened with discipline during the nineteenth century, have a deeper significance. These narratives provide intriguing insights into the administration of justice in the higher courts of the colonies; imperial and local colonial expectations about judicial loyalty to the mission of colonial governance and the role of the judge within the colonial system; the systems for disciplining recalcitrant colonial judges; and the perils associated with a colonial judge speaking out in opposition to a colonial executive or legislature on a matter of law or politics or both. More broadly, these tales speak to competing interpretations of the rule of law in imperial, colonial, and judicial circles in the British Empire during that century.

The Scope of the Study and Its Place in Judicial Historiography

In the core of this book I examine these issues of judicial tenure, accountability, and independence, or lack of it, through a set of histories of colonial judges disciplined for 'misbehaviour' or threatened with discipline.

The major focus, the nineteenth century, reflects my sense that it is in that time span that one sees most clearly both the mechanics and the