PEOPLE PRINCIPLES PROGRESS: THE ALBERTA COURT OF APPEAL'S FIRST CENTURY 1914 TO 2014, DAVID MITTELSTADT (CALGARY: LEGAL ARCHIVES SOCIETY OF ALBERTA, 2014)

All Alberta lawyers should read David Mittelstadt's *People Principles Progress*.[1] It is informative, accessible, and entertaining, and provides a useful foundation for understanding and appreciating the work of our highest Court over the last 100 years.

People Principles Progress is an impressive document, with high production values — it is not simply a book, but a visual design artefact, by designer Mieka West.[2] At 488 pages (including introductory material and index), it measures 31 by 24 by 4 cm and weighs in at 3 kg, a result of its high-quality, heavy paper. It includes many photographs stretching back to 1871,[3] which not only illuminate text but provide important visual history on their own. Photo contributors include the Glenbow Museum Archives, the Public Archives of Alberta, the Legal Archives of Alberta, and the Court of Appeal collection. Noel Zinger contributed excellent photo portraits of recent Court of Appeal Justices.[4]

People Principles Progress is a popular history of the Court of Appeal, from its origins in the Northwest Territories Courts to today. It fixes the birth of the Court in 1914, with the establishment of the Appellate Division of the Supreme Court of Alberta,[5] rather than in 1907 (when the Supreme Court of Alberta was established),[6] in 1921 (when the Trial Division and the positions of Chief Justice of the Trial Division and of the Court of Appeal and Chief Justice of Alberta were recognized),[7] or 1979 (when the Appellate Division was continued as the Court of Appeal).[8] In terms of currency, it falls just short of the appointments of Justices Brown and Wakeling in June 2014.[9] Although important cases are discussed, it is expressly not a comprehensive, technical jurisprudential history.[10] Such a task could not be accomplished in short compass, given 100 years of decisions across the legal spectrum.[11] Neither is it a work of academic history, providing detailed argument linking large scale or "micro" scale social developments (obvious or not-so-obvious) to developments in judicial decision-making and institutional evolution across the Court's 100 years. That too would be an excessive task for one volume — although the Justices and their Court are linked (as they

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1 David Mittelstadt, *People Principles Progress: The Alberta Court of Appeal's First Century 1914 to 2014* (Calgary: The Legal Archives Society of Alberta, 2014).

2 See "People, Principles, Progress" (24 February 2014), online: Mieka West <http://jumpci.com/wordpress/httpjumpci-comwordpressportfolio/book-design-legal-history/>.

3 *Supra* note 1 at xxiv.

4 *Ibid* at 407-39.

5 *Ibid* at xvi, 45; *The Statute Law Amendment Act of 1913*, SA 1913, c 9, s 38.

6 *The Supreme Court Act*, SA 1907, c 3.

7 *The Judicature Act*, SA 1919, c 3, s 6; SA 1920 c 3, s 2(a); SA 1920, c 4, s. 43; Mittelstadt, *supra* note 1 at 87-8.

8 *The Court of Appeal Act*, SA 1978, c 50.

9 Chief Justice Fraser has assured them that they will figure in the next centennial edition: Swearing in Ceremony for Justice Brown, Law Courts, Edmonton, 6 June 2014.

10 Mittelstadt, *supra* note 1 at xvii.

11 Some tantalizing hints for profitable lines of further historical research are provided, including the evolution of criminal sentencing practices and principles (e.g. respecting drug offences or sexual offences): *ibid* at 207, 215, 221, 264, 359; developments in the Court's implicit understanding of legal rules (whether statutory, common law, or contractual) and the practice of interpretation; or the jurisprudence of Justice Roger Kerans: *ibid* at 256, 282, n 95.

must be) to events and changes which have overtaken Alberta, such as the First World War, the Great Depression, the Second World War, the ascension of the automobile, energy booms and busts, the proliferation of regulation and regulatory tribunals, advances in the understanding of equality rights, and technological change.[12]

With a few exceptions, each chapter covers a period defined by the tenure of a Chief Justice. This is a common approach,[13] but no doubt raises sociological or organizational dynamics issues about the imprint that one (Chief) Justice may have on talented and independent fellow jurists. If the focus were only on decisions over some measured interval, legal trends in majorities, minorities, and dissents would probably be as much the function of the particular constellation and interactions of Justices deciding particular appeals as of the influence of a Chief (although a natural name for this conjuncture would be that of the Chief Justice). Indeed, a Chief may not take a leadership role in developing jurisprudence.[14] Yet the Chief is, after all, the Chief — which in any organization carries some weight.[15] Further, the Chief Justice's responsibilities extend beyond analysis and decision-making to the collegial and administrative processes in which appellate judging is embedded. As will be elaborated below, a Chief Justice can significantly influence the form or mechanisms of appellate work, which in turn conditions the "output" of the appellate process.[16]

Most chapters have four main elements — a set of vignettes or short biographies of the Chief Justice and other Justices, a description of major contemporary events, an assessment of trends or patterns in decisions over the relevant period, and a discussion of a few emblematic decisions. The judicial biographies will be useful, especially those concerning members of older Courts, and for students and members of the Bar who may not be familiar with Justices of more recent Courts. Some "life and times" details and sketches of jurisprudential output provide context for appreciating decisions, and transform mere text into the product of judicial personalities.

Throughout the accounts of the people and events, a twinned theme is pursued. It emerges from the comments of two Chief Justices, separated by some 96 years. The first, which opens *People Principles Progress*, is a passage from Chief Justice Harvey's reasons in *Re Norton*:

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12 On the Court's progressive approach to integrating information technology, see *ibid* at 297-98. The Ontario Court of Appeal turned to our Court for guidance respecting the introduction of computers to the appellate court room: *ibid*.

13 Works have been written about, for example, the "Burger Court" and the "Rehnquist Court," see the Chief Justice-named chapters in Christopher Tomlins, ed, *The United States Supreme Court: The Pursuit of Justice,* (New York: Houghton Mifflin, 2005); Tinsley E Yarbrough, *The Burger Court: Justices, Rulings, and Legacy* (Santa-Barbara: ABC-CLIO, 2000); Thomas R Hensley, *The Rehnquist Court: Justices, Rulings, and Legacy* (Santa-Barbara, ABC-CLIO, 2006).

14 Mittelstadt, *supra* note 1 at 94, 163, 205.

15 As a Dean's views carry weight even among fractious and fiercely independent Faculty members.

16 Mittelstadt, *supra* note 1 at 352 captures the dynamics of the Chief's position well: "Chiefs have the responsibility for the administration of the court, but in regard to other judges, they are caught in a paradox: wielding considerable power, but also having none at all. Their authority is based on a complex interplay of tradition, moral suasion, and the fact that most judges are happy to let someone else take care of court administration."

> This Court is the highest Court of this province. It is duly and legally constituted for the purposes of protecting the legal rights of all persons who may come before it. It has all the powers substantive and incidental of all the common-law Courts of England.
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> …
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> Upon this situation two courses are open to this Court. It can either abdicate its authority and functions and advise applicants to it for a redress of their wrongs and the protection of their legal rights that it is powerless, which, of course, means there is no power except that of force which can protect their rights, the consequence of which could scarcely mean anything less than anarchy or it may decide to continue to perform the duties with which it is entrusted for the purpose of guarding the rights of the subjects and not prove false to the oath of office which each member of it took when he "solemnly and sincerely promised and swore that he would duly and faithfully and to the best of his skill and knowledge exercise the powers and trusts reposed in him as a Judge of the said Court."
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> There can be only one answer to the question which way will this Court act? It will continue to perform its duties as it sees them, and will endeavour in so far as lies in its power to furnish protection to persons who apply to it to be permitted to exercise their legal rights.[17]

The context of Chief Justice Harvey's comments was indeed, as Mittelstadt puts it, "astonishing."[18] In the midst of the conscription crisis in the Prairies during the Great War, the Sheriff, an officer of the Court duly executing an order of that court, met the threat of armed resistance from the military — which refused to deliver up conscripts in answer to a writ of *habeas corpus*. This point of rupture rudely exposed the distinction between the powerless authority of law and the power of physical violence.[19] The Chief Justice founded his response not on any institutional capacity for physical force, but on the rule of law and on his position as the representative of the province's highest court.

The second passage — fortunately lodged in less traumatic circumstances — is from Chief Justice Fraser's afterword, which closes the book:

> Nothing can be built, maintained, improved, used, saved or even spoken about without the shield and voice of the rule of law. It makes everything else possible. However, the rule of law is itself contingent on an independent judiciary able to fulfill its constitutional duty as the third branch of government.
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> …

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17 *Re Norton* (1918), 13 Alta LR 456 at 458-61 (SC AD), reprinted in Mittelstadt, *supra* note 1 at xv.

18 Mittelstadt, *ibid*; see also *ibid* at 69; Wilbur Bowker, "The Honourable Horace Harvey, Chief Justice of Alberta" (1954) 32:9 Can Bar Rev 933 & 32:10 Can Bar Rev 1118; Dale Gibson, "The Supreme Court of Alberta Meets the Supreme Law of Canada" in Jonathan Swainger, ed, *The Alberta Supreme Court at 100: History & Authority* (Edmonton: University of Alberta Press, Osgoode Society for Canadian Legal History, 2007) at 99; Wayne N Renke, "The Power of Law: Judicial Independence and the Supreme Court of Alberta, 1918" in Swainger, *ibid* at 69.

19 See Hannah Arendt, *On Violence* (San Diego: Harcourt Brace Jovanovich, 1970) at 43-46. As Simone Weil has observed, the good has no force ("force is a stranger to and indifferent to the good"): Simone Weil, *Gateway to God*, ed by David Raper (Glasgow: Collins, 1974) at 37.

> Defending the rule of law is a duty and challenge for the judiciary. We cannot fail…. If the judiciary is to maintain its integral role in the delivery of justice, we ourselves must meet justice's highest standard. That means an impartial, informed, open-minded judiciary, respectful of change when warranted and resistant to change when capricious. Our citizens expect and deserve no less.[20]

The two linked themes emerge — the rule of law and the Court of Appeal. Clearly, a history of the Court of Appeal must be a history of the expression of the rule of law. But more precisely, this history is of one set of voices in the larger polyphony of the expression of the rule of law. What is the role proper to the Court of Appeal in the promotion of the rule of law? What is its special contribution? And how can the Court best pursue its particular role? *People Principles Progress* does not provide explicit argument concerning these issues, but its narrative illustrates the growth of the Court of Appeal from undifferentiated union with the trial court to its distinct status as an independent institution with processes and mechanisms supporting its role in promoting the rule of law.

To better perceive the relationship between the rule of law and the Court of Appeal, it may be helpful to understand the administration of justice through civil and criminal courts not so much as a system, but as a system of systems. The relationships between the courts are not simply linear, unidirectional, and "vertical" or hierarchical. The trial courts, provincial appellate courts, and the Supreme Court of Canada[21] are relatively autonomous: each has its own procedures, personnel, functions, and effects — although each meshes with other courts. Within this system of systems, cases make their way to the Supreme Court or they do not.

Facts are found and legal argument is first deployed at trial. With the trial judge's findings in hand, argument is refined by counsel and perhaps supplemented by interveners in the appeal courts.[22] The appellate panel assesses argument and reasons through the issues. These courts play an important role in the refining of appeals bound for the Supreme Court, recognized (at least formally) in the "judicial history" section of many Supreme Court judgments. The Supreme Court has the advantage of working with legal products distilled through two levels of judicial scrutiny and analysis.

In many instances, appeals go no further than the provincial Court of Appeal. For most litigants, it is the final Court of Appeal.[23] Courts of Appeal ensure that trial (or tribunal) dispositions were not founded on error. They also stabilize and clarify the law for the province. They promote the rule of law by promoting the uniformity of interpretation of law

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20 Chief Justice Catherine A Fraser, "Thoughts for the Future," Mittelstadt, *supra* note 1 at 443-44, also reproduced in Watson, "Introduction" (2014) 52:1 Alta L Rev 1 at 4-5 [Fraser, "Thoughts"]; see also Mittelstadt, *ibid* at 430-32.

21 Not to mention administrative tribunals.

22 *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 49, McLachlin CJ:

> The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact.

23 Mittelstadt, *supra* note 1 at 258, quoting Chief Justice Laycraft. In 2013, the Supreme Court granted leave to appeal for only 9 percent of applications for leave: *Statistics 2003 to 2013*, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/case-dossier/stat/index-eng.aspx> at 4.

in the province — uniformity of result (if like facts fall under the same application of a law) or uniformity in approach (recognizing that while like cases should be treated alike, materially different cases should be treated differently).[24] The Justices of the Court of Appeal have the job of explaining the law to their province — within that province, they are the voice of the rule of law.[25] The notion of "voice" is important. A Court of Appeal speaks to multiple audiences — litigants, the Supreme Court and other provincial appellate courts, current and future members of the bench, counsel, potential litigants, and the general public. Given multiple audiences, the prospects of misinterpretation, and the consequences of misinterpretation, Justices must work hard to get to correct (by their lights) conclusions and to explain their reasoning clearly. The level of hard work demanded is well-illustrated by Justice Fruman:

> Fruman once said: "There is no great writing, just great rewriting." Colleagues mentioned how she rewrote and rewrote: thirty-five drafts for a judgment was not unusual.[26]

At the root of the difficulty of articulating the law is its linguistic nature. Fortunately, we often say what we mean, and mean what we say, and others have no difficulty understanding us. Unfortunately, complex or necessarily general linguistic constructions like legal rules may support different interpretations, or may not have an indisputable application to some particular set of facts (and talk of "facts" should not disguise the further contribution of language to establishing what, for us, count as "the facts"). Non-controversial interpretations and applications are not litigated. Controversial interpretations and applications of legal rules may find their way to Courts of Appeal. Appellate courts have the job of authoritatively settling such issues of interpretation and application.

One of the subthemes of *People Principles Progress* is the evolution of approaches to interpretation. Given uncertain meaning or uncertain application — whether of a statute, common law (judge-made law), or contractual rules, how is the job of interpretation or application to be approached? Mittelstadt contrasts early Courts' "formalism" or "legal positivism" with modern contextual approaches to interpretation.[27] The problem is not metaphysical but practical. What potential interpretations or applications may be entertained, and against what factors or criteria is meaning or use to be judged? What constitutes a good argument for favouring one interpretation or application over a rival? These questions do not presuppose that there is a single right answer which awaits being unearthed; but there can be better and worse arguments, judged by (for example) coherence with permissibly considered factors or criteria.

The difficulty with older approaches to interpretation was twofold. First, potential interpretations were excluded, and second — consistently — factors relevant to determining meaning and use were excluded. The approach was not so much "positivist" as constrained — and arbitrarily constrained, one might argue today. The interpretive focus was on disputed texts themselves and on other judicial decisions (which similarly focused on texts

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24 See e.g. the approach to "starting point" sentencing guidelines: Mittelstadt, *ibid* at 263.

25 See Fraser, "Thoughts," *supra* note 20.

26 Mittestadt, *supra* note 1 at 335. On the heavy workload an appellate job demands, see e.g. *ibid* at 356, 386, 391.

27 *Ibid* at 54, 125, 129; with respect to more modern approaches, see *ibid* at 255-56.

themselves) and not on purpose, effects, and context. It is not that modern interpretation is "creative," in the sense of being free from the anchor of the text; rather, earlier interpretation was working within artificially limited frameworks. Earlier interpretation too was creative — it selected and certified meaning while excluding interpretive possibilities. It did so, however, without expressly acknowledging its active impositions of limitation. Modern interpretations are text-based (or they would not be legal interpretations), but meaning is assessed in broader contexts — "context is everything."[28] These reflections support the accuracy of Chief Justice Fraser's "assessment that common law judges, despite protestations to the contrary, always had a significant law-making role, one where considerations of public policy played a part."[29]

If a key job of appellate courts is to articulate the law, what material conditions had to be satisfied for the Court of Appeal to play its proper role in the promotion of the rule of law in Alberta? This question goes to the evolution of the Court as a distinct organization or institution — a slow work of decades. The Court's institutional evolution runs in three channels.

First, the Court had to develop into a distinct entity. It began as part of a single court. The early approach, which appears odd to modern sensibilities, was not to have a separate appeal court. Instead, the Court sat *en banc* to hear appeals.[30] Further compounding the oddity was that a judge whose decision was appealed might form part of the *en banc* panel.[31] In 1914, the Appellate Division of the Supreme Court was established, with a rotating appellate bench, but the two courts shared personnel. A Court of Appeal, with its own set of Justices, did not emerge until 1921.[32]

Second, the Court had to achieve at least relative budgetary and administrative independence from the provincial government and the trial court.[33] Without control in these

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28 *Ibid* at 408.

29 Catherine Fraser, "Fairness to the Judiciary," (Speech delivered on 17 June 1992) at 4 [unpublished] cited in *ibid* at 356; see also 371, 408. A practical corollary of contextualized assessments of meaning is that Justices should have a sufficient understanding of context. Justices will have gained much of what they need to know through their pre-appointment formation. Yet we are all exposed, through life and literature, only to a select set of experiences. Some supplementation would be in order. Hence we can see the usefulness of judicial education programs dealing with social context, equity, and equality issues that may not have formed part of a particular Justice's experience: *ibid* at 351.

30 *Ibid* at 19, 31.

31 *Ibid* at 19, 49.

32 *Ibid* at 88.

33 At this point in our jurisprudence, this set of issues is framed in terms of good governance or good business practice, rather than constitutional necessity. "Administrative independence," as an aspect of constitutionally-protected judicial independence, has so far been described narrowly. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 117, Lamer CJ:

> Finally, the Court defined the administrative independence of the provincial court, as control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function"…. These were defined … in narrow terms as "assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions."

And see *ibid* at para 253: "It is clear from *Valente* that while it may be desirable for the judiciary to have control over the various aspects of financial administration, such as 'budgetary preparation and presentation and allocation of expenditure'… these matters do not fall within the scope of administrative

areas, the Court would not have the capacity to manage its processes and to improve delivery of its contributions to justice in the province.[34] Innovation would be stifled in governmental bureaucracy and would be subordinated to governmental budgetary priorities. Remarkably, for budgetary purposes, the Court remained coupled with the Court of Queen's Bench until 1995.[35] At this point, the effect of a Chief Justice on the Court becomes clear.[36] Through the work of Chief Justice Fraser, her judicial colleagues, and the Court's Registrar, Lynn Varty, the Court achieved a preferable (if not ideal) level of fiscal and administrative independence.[37] The Court, for example, was able to bring the position of Registrar (as a CEO for administrative staff and operations) under the control of the Court, with accountability to the Chief Justice.[38] The Court was also able to hire legal counsel to assist the Justices with the legal side of their work. This has been described as a "game changer."[39]

Third, the Court has had to develop "business processes" that permit it to carry on its role more effectively. Once again, the role of the Chief Justice is critical in identifying problems that need fixing, showing leadership in innovation, and facilitating sufficient agreement and cooperation to make change happen. The Court begins with appeal "inputs"; its products or outputs are decisions. The challenge is to maximize the reliability and quality of the outputs, while expending appropriate (not excessive or insufficient) resources — whether human (the time and effort of Justices), financial, or physical (infrastructure). Process and its modifications, however economically desirable, must not violate the independence of Justices or the requirements of fundamental justice owed to litigants. A complication for any process design is that it must be fair not only to particular litigants, but to the array of litigants coming before the Court. The Court's procedural innovation began early and is ongoing. *People Principles Progress* marks stages in the Court's rationalization of its processes. For example:

- With an eye to the practice of using briefs in United States appeals courts, the Alberta Supreme Court adopted the use of factums, pointing the way towards a greater reliance on written rather than predominantly oral submissions.[40]

- Until relatively recently, setting matters on the appeal list was an inefficient process, consuming excessive amounts of counsel time.[41] Once Case Management Officers could be hired in 2007, an efficient list management system was devised, and operated under their delegated authority.[42]

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independence, because they do not bear directly and immediately on the exercise of the judicial function."

34 Mittelstadt, *supra* note 1 at 345.

35 *Ibid* at 345, 348.

36 Keeping in mind that administration and change management must be a team effort: *ibid* at 352.

37 *Ibid* at 347. The Court has not achieved complete fiscal and administrative independence from the province. The made-in-Alberta solution is a collaborative model: *ibid* at 348.

38 *Ibid* at 346-47.

39 *Ibid* at 352.

40 *Ibid* at 3.

41 *Ibid* at 202; see 251.

42 *Ibid* at 397-98.

- Appeals have been streamed into different categories, such as sentence appeals and "Part J" appeals.[43] Some experiments, such as the use of sentencing panels involving Queen's Bench Justices, have run their course and are no longer pursued.[44]

- The Court has instituted a Judicial Dispute Resolution Program to move cases that may be settled out of the hearing process.[45]

- The number of judges assigned to hear appeals has moved from an early preference for four, to a usual three.[46]

- Judicial preparation has evolved from a (relatively) "cold" system, in which Justices read little before hearing oral argument (to avoid pre-judgment of the issues)[47] to a "hot" system under Chief Justices McGillivray and Laycraft,[48] to a "very hot" system under Chief Justice Fraser, whereby significant preparation is done, with the assistance (as needed) of legal counsel, before oral hearing.[49]

- After 100 years of oral arguments, the Court has finally instituted time limits on argument — which has been referred to as a "revolutionary" development.[50]

- The format of judgements themselves has changed, from early *seriatim* judgments, in which each judge would contribute his or her views, whether or not serving any objectively compelling purpose,[51] to collaboratively written judgments, which reduce the number of sets of reasons produced by an appeal.[52]

Overall, the appeal process itself, and not simply elements of that process, has been recognized as an "object" that may be managed.

Through all of these changes, for 100 years and counting, our Court of Appeal has stood at the shoulder of Chief Justice Harvey and made its contribution to the rule of law in Alberta. *People Principles Progress* is an excellent account of the Court's journey. We can only wonder what challenges and solutions the next 100 years will bring.

Wayne Renke
Professor
Faculty of Law
University of Alberta

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43 *Ibid* at 392, 398.
44 *Ibid* at 296-97.
45 *Ibid* at 398-99.
46 *Ibid* at 46, 202, 294-95.
47 *Ibid* at 51.
48 *Ibid* at 251, 295.
49 *Ibid* at 352, 396.
50 *Ibid* at 392, 399, 400.
51 *Ibid* at 51.
52 *Ibid* at 294.