

# ON THE FRONT COVER



## THE HONOURABLE MARION J. ALLAN

By the Honourable Mary Ellen Boyd, the Honourable Bruce Preston and Mark Weintraub, Q.C.

### THE EARLY YEARS

Marion spent her first seven years in Mevagissey, then a quaint fishing village in Cornwall, England, now a tourist mecca where chip butties vie with clotted cream teas. She started school when she was five and skipped grade 2. When she was seven, her parents immigrated to Canada where she spent the next two years in Montreal, Regina and Winnipeg before landing in Vancouver. From mid-grade 10 to graduation, she attended St. Ann's Academy, a convent boarding school in New Westminster, where she received more demerits than any student in the history of the school.

She went to UBC where she earned a B.A. in 1967 and to the University of Alberta where she received an M.A. in international relations in 1970. After having two babies in 1970 and 1972, she recognized that full-time domesticity was not her calling and she arrived at UBC's law school at the "mature" age of 28.

On the first day, in her first class, her contracts professor, Ray Herbert (known as "the Bullet"), called the roll alphabetically—"Marion Allan, is it 'Mrs.' or 'Miss'?" She replied: "It's 'Ms.'" "Oh no it's not!" Herbert replied. "Mary Southin, who is the best woman lawyer in the province, says there is no such being as a 'Ms.' and that is the full answer. Is it 'Mrs.' or 'Miss'?" "Neither," Marion replied nervously, "It's 'Ms.'" In her second class, the professor began to call the roll: "Mr. Allan." Marion replied: "I'm Marion Allan." The professor snapped back: "Marion is a man's name." Marion: "Well, my name is Marion and I am not a man." So began law school for Marion.

## THE LAWYERING YEARS

Marion was surprised to discover that doing well in law school did not guarantee articles for a woman in the 1970s. Pressed repeatedly on whether she seriously intended to practise law and if she might have more children, she once retorted to the interrogator on an eight-man panel, "Do you have children?" "Of course." "Well, it hasn't slowed you down, has it?" End of interview. Finally, at her interview at Russell & DuMoulin (now Faskens), she asked, "What are you looking for in an articling student?" "Well, eighty-five per cent marks and fifteen per cent personality." At last! She replied, "Well, you have seen my marks, and I can promise you I have at least a fifteen per cent personality!" She got the position on the spot.

These are Bill Berardino, Q.C.'s recollections of Marion at Russell & DuMoulin:

Marion came to R & D as an articled student in 1977. She quickly gained the confidence of three of the most respected and capable barristers in the province: Allan McEachern, John Steeves and Michael Goldie. Despite the fact that each of her mentors had remarkably different styles and approaches to practice and advocacy, Marion had their absolute trust and confidence. She had a reputation for grabbing the nettle and coming through with flying colours in trials, appeals, arbitrations and criminal matters.

And Marion could think on her feet. On one occasion when cross-examining a key witness in a commercial trial, she placed a document before the witness, who broke into a smile. "Why are you smiling?" Marion asked. "Because you aren't going to like my answer," replied the witness. Without missing a beat, Marion retorted, "Well then, I'm not going to ask the question!"

Being a female litigator in the early 1980s had its own challenges. Junioring, and hoping to impress, a senior lawyer at one long commercial trial, Marion was given the task of cross-examining one of the two key defendants in the trial. Focusing intently on the task, she was interrupted by the defendant's lawyer who handed her a note: "You're cute when you cross-examine." Not to be deterred, she looked up at the bench and said: "My Lord, my learned friend has passed me a note and I would like to read it into the record." The only sound in the courtroom was a choking sound from her learned friend.

As one of the first female litigators at R & D, Marion took an interest in the careers of the younger women in the firm. She was a mentor to many, always ready to listen, quick to offer help when needed and to give credit where credit was due. When Marion was appointed to the bench she took with her an exceptional breadth of experience, understanding of the law and commitment to legal ethics that made her uniquely qualified to be an outstanding judge.

After Allan McEachern left R&D to become Chief Justice of the B.C. Supreme Court, Sherman Hood “took her on” and they developed a winning litigation ritual whereby he dealt exclusively with settling the case and, if it did not settle, Marion took it to trial.

Between 1985 and 1988 Marion also enjoyed three years as an adjunct professor of civil litigation at UBC. In 1985 Marion was counsel on a trial in Penticton and ran into Chief Justice McEachern who, later that afternoon, suggested to a local lawyer, Bruce Preston, that he invite her to the bar dinner that night. She was happy to attend, despite knowing none of the lawyers and being the only female lawyer, until the president of the Penticton bar asked her to make a short speech introducing the Chief Justice. Seated between two talkative tablemates at dinner—Bruce and Fred Messenger—she tried desperately to think of something remotely intelligent and amusing to say. Unfortunately, her decision to relate amusing anecdotes about articling for the Chief was perhaps ill advised as he and Fred were in Penticton for the purpose of telling the bar, earlier that day, that a resident judge would not be appointed to the Penticton County Court! Nevertheless, Bruce was struck by her oratory and, in the following year, began a (long) courtship that led to their wedding in Lamu, Kenya in 2001.

Bruce was appointed to the County Court of the Cariboo in 1987 and was resident in Dawson Creek. On his frequent visits to Vancouver, he and Marion began their hiking career that has taken them around B.C., to the Coast to Coast walk in England, Offa’s Dyke bordering Wales, the Isle of Arran, the Cornish Coastal Path, the levadas in Madeira, the coast of New Zealand, Mexico and the Camino in France and Spain.

In the summer of 1987 Bruce decided that he would enter the Three Flags Rally—a motorcycle odyssey from Tijuana, Mexico to Penticton. Marion decided that she must join him as the backseat passenger (no sissy bars) on his BMW K100 on a one-way trip to Mexico. Apart from a dismal night in Bakersfield at a “Bates” motel, it was a great trip although, when returning alone from Mexico, Marion faced a challenge at the Tijuana border trying to explain why she had a motorcycle helmet, cowboy boots and virtually no luggage—but no motorcycle.

Later that summer, in August, Marion received a phone call from the executive assistant to the Right Honorable Ray Hnatyshyn, then Minister of Justice, asking if she would accept an appointment to the County Court of Vancouver. At her public swearing in ceremony in September 1988, several of the speakers referred to her as “Easy Rider”, which horrified her daughter Michelle who was seated beside Marion’s mother and had been sworn to secrecy about the motorcycle trip.

## THE JUDICIAL YEARS

Marion always counted herself as one of the lucky judges to have enjoyed the special camaraderie of the County Court under the leadership of the late Chief Judge David Campbell. That court was a special place, not least because it was the starting ground for what became the second wave of female colleagues on that court—first Jane Godfrey, Mary Ellen Boyd, Jo-Ann Prowse, Cathie Ryan, and then Marion and Jan Sinclair Prowse.

Marion loved the County Court. She particularly loved the beautiful jury robes which featured striking deep blue panels on the robes and matching cuffs on the vest. When the County Court merged with the Supreme Court in July 1990, Marion was disappointed with the Supreme Court jury robes which featured red panels on the robes and vests with red cuffs—but she was particularly horrified by what she viewed as the most egregious fashion faux pas—the “red Smartie” buttons on the vest. (To be fair, many disliked them.) She announced to then Chief Justice Allan McEachern (her old and close mentor) that while others might tolerate the “Smarties”, she intended to replace her buttons with black buttons. Needless to say, the Chief Justice overruled that fashion choice. Her only variation of the uniform that was tolerated, or at least ignored, was her introduction of lacy white court tabs, which she wore with rebellious pride. (In her senior judicial years, she pushed the envelope somewhat further, wearing black leather slacks under her court gown, although sneaking in and out of her chambers to ensure a certain senior female judge, whose initials are M.S., would not see!)

Fashion rebellion aside, on the courts' merger, Marion found a much larger forum in which to spread her wings and demonstrate her many skills. That same year she became a deputy judge of the Supreme Court of Yukon. Although she sat primarily in Whitehorse, she had one memorable criminal jury trial in Watson Lake where court was held in the curling rink.<sup>1</sup>

Over the course of the next 22 years, Marion won the confidence and respect of five successive chief justices who appointed her as a member of almost every court committee, most notably the Criminal Committee, the Family Law Committee and as either the co-chair or chair of the Computer and Technology Committee. Most challenging was her appointment as the longstanding chair of the Attorney General's Supreme Court Rules Revision Committee from 1994 until 1999. This role went beyond working with fellow judges and required a strong hand and sensitive leadership, balancing the interests of the bench, the bar and the public. She served in this position with distinction.

As if her committee work were not enough, Marion excelled as a teacher and leader of judicial education. From 1994 to 1997 she served on the faculty

of the Canadian Institute for the Association of Judges' annual seminar for newly appointed judges (which the judges fondly call "Dumb Judges School"). She was also a judicial member of the B.C. Working Group of the Canadian Bar Association's Civil Justice Task Force and the judicial representative on the board of directors of CLEBC. In her later years, she used a judicial sabbatical to immerse herself in the newly emerging field of elder law and then contributed heavily to attempts to reform the *Patients Property Act* in British Columbia. She remains a leader in the field. She also taught courses for CLEBC, TLABC and the CBA in many fields. In these circumstances, it would be fair to ask exactly how Marion had time to judge, and if so, just how effectively?

But Marion exemplified the adage that if you want something done, you ask a busy person. She always managed a heavy judicial workload and her judgments, which were universally delivered in clear, concise language, were only rarely successfully appealed. Early in her Supreme Court tenure, she demonstrated her judicial chops presiding over the Dilcon Construction action (*Dilcon Constructors Inc. v. British Columbia Hydro & Power Authority*, 1992 CanLII 353), the last long construction trial in the province. Marion sat for 105 days between September 1990 and June 1992 on the liability issues, spent her entire summer vacation immersed in a room lined with binders of submissions and then delivered a 242-page judgment a few months later. Even today, trial counsel look back and say the trial was "fun" – in the broadest sense of the word. The trial was a tightly run affair, fools were not tolerated lightly and unlike the adit (the one-way tunnel which was the subject of the trial and an invigorating site visit), judgment was delivered on time and without deficiencies. There was no appeal because, after commencing the damages portion of the trial with an assessor, Marion suggested to counsel that rather than spending more months litigating (and appealing), perhaps their clients might like to adjourn to the basement of the courthouse. Counsel would make their best case before Marion and the assessor and then attempt to negotiate a settlement. If they could not, she would make the decision. There would be no appeal. To everyone's surprise, the clients agreed, and an agreement was signed. Marion nervously adjourned to the judges' coffee lounge and was reassured by then Chief Justice Williams: "Ah, good—med-arb."

Marion had a reputation for being a judge with a keen intellect, leavened by a wonderful sense of humour, perhaps the quality most appreciated in a courtroom where everyone is operating under various levels of stress. Whatever the misdemeanors or the challenging behaviour before her, she was unfailingly polite. She was entirely unfazed by the unrepresented liti-

gant who showed up in her crowded chambers courtroom wearing underwear over his head.<sup>2</sup> Nor was she bothered by counsel who appeared in chambers sporting a particularly dreadful tie (featuring pigs in various positions), who then lost his application. With some pique, he huffed to Marion that he would be off to the Court of Appeal. Marion's response: "May I offer some advice? Don't wear that tie."

Her judgments always featured clear findings of fact and thorough discussions of the law. She was particularly unambiguous when making findings of credibility and had a large supply of apt nouns and adjectives. In a case in which one of the witnesses offered to tear open his shirt and stab himself to prove he was telling the truth, she was apparently unimpressed, noting in her reasons for judgment: "Virtually all of the witnesses impeached themselves. Collectively, they shared an elastic concept of the truth." She referred to "greed and virulent animosity", "a multitude of brazen and deceitful acts by all parties", "greed and chicanery", and, perhaps most quoted, "a perjurer's paradise". An appeal to the Court of Appeal and a leave to appeal application to the Supreme Court of Canada were dismissed.

Marion is a talented raconteuse and all her colleagues enjoyed her visits in the judges' lounge, to retell the latest funny moments in a trial. More often than not, these tales were at her own expense. On one occasion, she told a poor father who was required to pay large amounts of support: "I do sympathize with you; you must feel as if you have two large concrete balls hanging from your legs." (Whoops!)

Or the occasion which led her to win the "Most Quotable Moment in Court Award" at one of the annual court conferences. The winning entry was her stellar performance in giving judgment one morning in an aggravated assault trial. She tried to say: "The accused bit the skin on the complainant's forearm", but said, almost inevitably, "The accused bit the complainant's foreskin". Ever the professional, she corrected herself and carried on. Later she asked her clerk, "Did you hear what I said? I don't think anyone noticed though." "Are you kidding?!" said the clerk. "Haven't you noticed people dropping into the courtroom all day? They just wanted to get a look at you!"

Marion loved being a judge but, after 24 years on the bench, she decided it was time to follow Bruce into retirement in April 2012. Alas, the unstructured nature of retirement did not suit either of them. Bruce was appointed the Commissioner for Teacher Regulation. Then, after she gave the lunchtime address at a TLABC estate litigation conference in early 2013, Mark Weintraub, Q.C., asked Marion if she would like to join Clark Wilson

LLP as associate counsel and do whatever suited her best. She had no hesitation in signing on to her next career—mediating. And, of course, she loves being a mediator. She continues to teach and write articles, primarily in the areas of elder law, mediation and estate litigation. She sits on the board of directors of the B.C. Law Institute and on the B.C. Advisory Committee of The Advocates' Society.

Mark Weintraub notes:

In her new home at Clark Wilson, Marion has returned full circle to life in a law firm. This time, however, it is as a mentor. One of the reasons Marion gave for wanting to abandon retirement was that she missed the camaraderie of fellow lawyers and the opportunity to share her hard-earned knowledge and experience with a new generation of advocates. Not surprisingly, she not only freely shares her good-humoured wisdom with the firm, but also has become a highly sought-after mediator in estate and virtually all manner of disputes.

The final chapter has yet to be written as all of her friends and colleagues take great pleasure in the *Advocate's* acknowledgment of this most accomplished and humane lawyer still dazzling us all at full speed.

#### ENDNOTES

1. See "Reflections of a Deputy Judge of the Yukon Sitting in Watson Lake, August 1994" (2014) 72 *Advocate* 31.
2. See "Ten Tactical Tips to Avoid Tripping Up in Chambers: Musings of a Retired Judge" (2016) 74 *Advocate* 39 at 42–43.

