

**Edited Remarks by Chief Justice J. Derek Green
On the occasion of the Swearing-In of
The Honourable Raymond P. Whalen
As Chief Justice of the Supreme Court of
Newfoundland and Labrador, Trial Division
The Courthouse
Courtroom #1
St. John's, NL
January 16, 2015**

Welcome to this special sitting of the Supreme Court of Newfoundland and Labrador. My name is Derek Green. I am the Chief Justice of Newfoundland and Labrador. This joint sitting of all divisions of the Court has been called for the purpose of administering the oath of allegiance and the oath of office to the Honourable Raymond Patrick Whalen on the occasion of his appointment as Chief Justice of the Trial Division of the Supreme Court.

I acknowledge the presence of and extend a special welcome to Their Honours, the Honourable Frank Fagan, Lieutenant Governor of the Newfoundland and Labrador and Mrs. Patricia Fagan. I also extend a special welcome to the Honourable Judy Manning, Minister of Justice and Public Safety and Attorney General for the province. This is the first opportunity the Attorney General has had since assuming office to attend the swearing-in ceremony for a Supreme Court judge, let alone a Chief Justice. In fact, I suspect it may be the first time, Madam Attorney, that you have had to don the barrister's gown and appear in court for any purpose other than swearing- in Queen's Counsel since taking on the onerous responsibilities of Minister and Attorney General. Welcome, Madam Attorney.

I also pleased to welcome Ms. Amy Kendall who is here representing the Honourable Peter McKay, Minister of Justice for Canada, as well as Mr. Ken Baggs, Q.C., president of the Law Society of Newfoundland and Labrador, and Ms. Beth McGrath, president of the Canadian Bar Association, Newfoundland and Labrador Branch. Ms. McGrath, I am sure, is especially pleased to be here today as she also happens to be Justice Whalen's daughter. All of these individuals will be addressing the Court a little later in the ceremony.

I must also take the opportunity to recognize two former Chief Justices: the Hon. Clyde Wells, former Chief Justice of Newfoundland and Labrador, and the Hon. T. Alex Hickman who, despite having relinquished his hold on the chief

justiceship of the Trial Division nearly fifteen years ago, still maintains an engaged interest in the events of the Court. No doubt this ceremony, which will install a successor to the office he once held with distinction for twenty-one years, is of particular interest. I am also pleased that retired Justices William Marshall, formerly of the Court of Appeal, and Justices David Riche and Gerald Lang, both formerly of the Trial Division, are able to be present this morning. Furthermore, I am pleased to recognize the Honourable Mark Pike, Chief Judge of the Provincial Court, and a number of the judges of his court. I also notice that Senator, the Honourable George Furey, is here. Welcome, Senator.

Finally – and perhaps most importantly (with all due respect to those I have already mentioned) – I wish to welcome members of Justice Whalen’s family: his wife Maureen; his son, Michael; his sisters Agnes and Alice and brother Bill, and their significant others. I have already mentioned his daughter, Beth, who is wearing two hats here this morning. I must caution the members of Chief Justice Whalen’s family, however, that the fact that they are sitting in the jury box does not mean on this occasion that they can pass judgment (and perhaps even express a dissenting view) on the appropriateness of the appointment of Justice Whalen as Chief Justice. That judgment has already been made by the Prime Minister.

We will now proceed to the administration of the oaths to Chief Justice Whalen. I will first ask the Senior Deputy Registrar to read the Minute of the Committee of the Privy Council appointing Justice Whalen as Chief Justice. Thereafter, I will administer the oaths to him.

Madam Senior Deputy Registrar, please read the Minute.

[The Senior Deputy Registrar reads the Minute of Council appointing Chief Justice Whalen]

I will now administer the oaths.

[The Chief Justice administers the oath of allegiance and oath of office].

Your Honours, Madam Attorney General, Ms. Kendall (representing the federal Minister), Chief Judge Pike, Mr. President, Madam President, Senator Furey, judicial colleagues past and present, members of the Bar, family and friends of Chief Justice Whalen, it gives me great pleasure to be in a position to be able to administer the oaths on this special occasion of Justice Whalen’s appointment as

Chief Justice of the Trial Division. In fact, it is an extra special pleasure for me because of Ray's and my former association as law partners in the firm then known variously as Marshall, White Ottenheimer and Green and later White Ottenheimer and Baker.

I had many enjoyable years, first in the practice of law with Ray, then as his chief justice (the position he now holds) in the Trial Division and latterly (the most fun of all) as an appellate judge picking over the bones of his trial judgments. I am very much looking forward to our new association with Chief Justice Whalen in his new role as we work together on matters of judicial administration and justice issues generally both with respect to our dealings with the other branches of government and participation in the Canadian Judicial Council.

Chief Justice Whalen's appointment was necessitated by the resignation of the Honourable David Orsborn, who stepped down as Chief Justice earlier this year after five years in the position. Although Justice Orsborn is not able to be present today (he is taking a well-earned vacation), I know he would want me to express to Chief Justice Whalen his congratulations on his appointment. This occasion also gives me the opportunity to express publicly the thanks to which former Chief Justice Orsborn is due for his stewardship of the Trial Division in his role as chief justice. His dedication to ensuring the efficient running of the court and, more importantly, his commitment to the rule of law and the preservation of judicial independence are his trademarks.

By accepting his current office, Chief Justice Whalen becomes a representative of a justice system dedicated to the rule of law in Newfoundland and Labrador that has its roots four hundred years ago in 1615 when Sir Richard Whitbourne held the first court of Vice-Admiralty in Trinity just five years after Guy planted the first colony at Cupids. He is one of a long line of Chief Justices who have presided over the superior court, starting with John Reeves, the first chief justice who was appointed to that position in 1792, 223 years ago. The "fountain"¹ of the constitution of the current Supreme Court stems from the Royal Charter of 1825 and has been brought forward in successive judicature acts up to the present day. It is still the basis of the operation of the Court today. Finally, I should mention that this very courtroom, which was opened in 1904, has seen the swearing in of Chief Justices² for the past 110 years. The Court operates in the shadow of a great deal of history.

¹ *Bursey v. Bursey* (1966), 51 M.P.R. 256, per Furlong C.J. at p. 258.

² Every Chief Justice, with the exception of only one: Chief Justice Clyde K. Wells was sworn in as Chief Justice of the Court of Appeal in the Court of Appeal building on Duckworth Street, St. John's.

I mention these bits of historical trivia because it is important to remember that the office of judge, including that of chief justice, is more than the person occupying it at any point in time. What we as judges do today involves the continuation of a solid, time-tested process that is part of our democratic system based on the rule of law. This ceremony stands not only for the recognition and celebration of the appointment of a new chief justice but is symbolic of the fact that our judicial processes are solidly grounded and that we can have confidence that the courts operate not in an arbitrary and capricious manner according to the “flavor of the month” but according to well-accepted conventions, processes and principles. The specific rules may change over time but the fundamentals of the system continue.

However, not only is the ceremony of installation of a new chief justice grounded in respect for and confidence in the strengths of the past but it is also an opportunity to look to the future, specifically to the challenges that face the courts and the ability of the public to access them in the twenty-first century. A new chief justice may signal new ideas, new approaches and re-invigorated efforts to meet the existing challenges. It is therefore a time for optimism and expectation.

Chief Justice Whalen brings to the position much that can give hope for the future direction of the Court. As an experienced criminal and civil litigator during his years in the practice of law, he has a wealth of trial experience that gives him a good appreciation of what the users of the court system, both clients and lawyers, need to be able to make the system work on the ground. He has been a trial judge since 2008, serving primarily in the Judicial Centre of Gander and latterly in St. John’s. He knows how the court should operate in the rural parts of the province. In addition to being looked to for guidance in other cases by his colleagues in the Trial Division and the Provincial Court, his written judgments over the past seven years have also been cited and referred to by courts in Nova Scotia³, New Brunswick⁴, Ontario⁵, Manitoba⁶ and in the Federal Court of Canada⁷ as well as by *Halsbury’s Laws of Canada*⁸. For approximately five years prior to his appointment to the Bench, he worked in private industry in a senior corporate position, so he knows the needs of the commercial bar, something that is very important in view of the flight of much commercial litigation into the private

³ *R. v. Blundon*, 2011 NSSC 249

⁴ 2014 NBQB 79

⁵ *R. v. Arguela*, 2011 ONCJ 578

⁶ *R. v. Kennedy*, 2012 MBPC 60; *R. v. Desender*, 2011 MBQB 235

⁷ 2014 FCA 76

⁸ *Halsbury’s Laws of Canada on Real Property*, 1st ed (Markham:LexisNexis Canada Inc., 2012), pp. 186 and 188.

arbitration system and away from the courts. In addition his experience with senior corporate management will no doubt stand him in good stead with respect to understanding the need for management and administrative policies relating to court functioning.

On the subject of administration, I have watched with interest the degree of engagement shown by Chief Justice Whalen in the affairs of the Court since he received his appointment. He has thrown himself into a whirlwind of meetings with staff and judges getting briefed on various aspects of the administrative side of the Court. I have been impressed with the degree of interest shown. However, it can be overdone. Over Christmas he took a vacation with his wife in Florida. Although it had been planned long before he was appointed Chief Justice, I suspect he nevertheless felt a little bit awkward about the timing. Here he was, the new chief, wanting to demonstrate he was on the ground bringing himself up to speed and in the middle is seen to be leaving everything behind and going down south. Just before he left, Pamela Ryder Lahey, the chief executive officer of the Court, reminded him that this was in the middle of winter and that the court storm protocol required the three chiefs and senior staff to meet by conference call early in the morning of any day where a storm was predicted to decide whether the courts would open or not. She asked him who he was going to nominate to participate in this process while he was away. Chief Justice Whalen, perhaps feeling, as I said, a little awkward about being away said “oh no, that’s Ok I will participate myself. Just get me on the line.” I am not sure that was the right call. I could just envisage him receiving the call on his beach condo, looking out the window at the pelicans gliding gracefully over the sun-kissed crystalline sand and saying, “Look’s OK to me!” If you ever wondered, when hearing Nancy Walsh on the CBC Morning Show reading out the list of cancellations on snow days, how these decisions are made, now you know.

I think it is also worth mentioning that among his other talents, Chief Justice Whalen is a wine enthusiast and connoisseur. In fact, I note that the Chief Judge of the Provincial Court, Chief Judge Pike, is also a wine connoisseur. They both regularly attend wine tastings and have even competed against each other. It is interesting that two of the three chief justices in this province have this fascination with wine. I hasten to add I am not in their league. While they debate the qualities of *Chateau Margeaux 1982*, I am left with extolling the virtues of *Chateau Upper Island Cove 2014* (and the late harvest, at that). That said, wine tasting can be a useful metaphor for judging for our new chief justice. Competitive wine tasting is done blind. That can remind him that *Justicia*, the symbol of justice, is also blind, in the sense that a judge must be uninfluenced by any considerations extraneous to

the facts and the law of the particular case. Likewise, good wine should be decanted and aerated before drinking to bring out its subtleties and true flavor. In similar manner he may be reminded that he should not keep the multi-talented judges of his court too bottled up lest the court be deprived of the full range of their true creative talents.

Indeed, while on the subject of judges of the Court, I will give Chief Justice Whalen this piece of advice. Judicial independence applies as much to independence of judges from influence from their chief justice in judicial (as opposed to administrative) matters as it does to independence of judges from influence from the other branches of government. The direction given by a chief justice, in my opinion, cannot be from the top down. The story is told about a judge in the United States who had been appointed chief justice of his court. Several months later, he received a phone call from a friend who said: “how are you enjoying holding the reins of power?” To which the chief justice replied: “At first, I thought it was great – until I learned that the reins aren’t attached to anything.”

The reality is that Chief Justices have surprisingly little formal legal authority over the judges of the court. I suppose the chief could threaten to send a troublesome judge on circuit to northern Labrador in the dead of winter if he did not do what was asked but short of such blatant abuses of power there is little legally that he can do. Yet, the Chief is expected to provide leadership to the Court and to guide it through the various challenges it faces administratively from time to time, and to do so without holding the purse strings (which, of course, are held by the executive branch of government). Since the reins of power are not attached to anything, he can only do so by trying to lead by example, by dedication to the office and by creating an atmosphere of respect and cooperation among the judges and staff so that all will want to move together in the same direction to ensure that the institution functions efficiently as a coordinated whole.

There is no pat formula for doing that. Each chief has to find his or her own solution, drawing on the specific abilities he or she possesses. No doubt, Chief Justice Whalen will bring his own style to the office. As to how that plays out, we will all have to wait to see. But I can say this: when I swore him in as a judge of the Trial Division in 2008, I referred at that time to something Walter Lippman wrote. He said that the answer to criticism and distrust of the courts and the remedy for “sterile legalism” is to appoint judges “who know the law and know life and know human motives.” Judged by that standard, I said, I had little doubt that (then) Justice Whalen’s training, success at the bar and life experience made him eminently suitable to performing the role of judge. Those characteristics will

stand him in good stead as he faces this new challenge which, I am sure, he will face admirably.

In conclusion, let me say once again, Chief Justice Whalen, how pleased I am to welcome you to the office of chief justice. On behalf of the judges and staff of the Court, I congratulate you and wish you well.