

Remarks by Hon. J. Derek Green
Chief Justice of Newfoundland and Labrador
At a Special Sitting of the NL Court of Appeal
To recognize the passing of the late P. Derek Lewis, Q.C
and his contribution to the legal community of Canada
Court of Appeal
St. John's, NL
March 14, 2017

Welcome to this special sitting of the Newfoundland and Labrador Court of Appeal, called to reflect on the life and career of the Hon. P. Derek Lewis, Q.C. who passed away on January 19, 2017 at the age of 92 years.

I am pleased to extend a special welcome to Mrs. Grace Lewis, Derek's wife of 55 years. Mrs. Lewis, on behalf of the judges and staff of the Court of Appeal, indeed on behalf of all of the courts of the province, for whom the Chief Justice of Newfoundland and Labrador speaks on occasions such as these, I extend sincere sympathies to you on the loss of your husband.

I am also pleased to welcome the Hon. Andrew Parsons, Q.C., Minister of Justice and Public Safety. We are grateful indeed, Minister, that you have been able to find the time to be here this morning and to express your thoughts on the life of Mr. Lewis.

I also recognize other speakers, this morning: David C. Day, Q.C. , Derek's long-time friend and law partner, Mr. Ian Wallace, representing the President of the Law Society of NL, Mr. Michael Ladha, president of the CBA, NL Branch and Mr. Daniel Boone, Q.C. Chair of the Board of Governors of the Law Foundation of NL.

Let me also acknowledge the presence, in addition to Justices Welsh. White, Harrington and Hoegg of the Court of Appeal, of Justice Elizabeth Heneghan of the Federal Court of Canada, current sitting justices of the Trial Division, Justices Robert Hall and James Adams, as well as former justices Douglas Cook and Gerald Lang, former colleagues of Lewis Q.C.

I am also pleased to recognize the presence of the Hon. Nick Whalen, Member of Parliament for St. John's East.

There is much to be said about the rich and varied career of the Honourable P. Derek Lewis Q.C. On similar occasions to this in the past, I have exercised my prerogative as Chief

Justice to speak first and have always called upon the Minister to speak immediately thereafter. On this occasion, however, I am proposing a different order of events. Shortly after Derek's passing, I spoke with Day Q.C. to express my condolences. After we reminisced a bit, Mr. Day specifically requested an opportunity to address the Court on the subject of Derek Lewis' life. Of course, anything Day Q.C. undertakes is always thorough and comprehensive, so it also did not take me long to realize that there was no one better than Mr. Day, Lewis' colleague of nearly 50 years, to speak of the details of his life and career and of its significance in the wider community of NL and Canada as a whole. So, on this occasion, I am first going to call on Day Q.C. to deliver the main oration, so to speak, and thereby sketch out the major milestones of Derek Lewis' life. Thereafter, the Minister and I will add some extra thoughts and then call on the other speakers.

Mr. Day

[Mr. David C. Day, Q.C. speaks]

Thank you, Mr. Day. It is obvious from that oration why I am not going to try to compete with your remarks ! Just let me add a few further comments.

We have learned from Mr. Day's remarks that Lewis Q.C. was a learned, dedicated, quiet, self-effacing, wryly-humoured individual who was always committed to whatever he put his mind to.

It is evident from the sketch of his life that although Derek Lewis' career was a multi-faceted one, it did not in the end stray far from, and always came back to, the calling to which he was obviously devoted – the law and how it could be employed to advance the interests of those he respectfully called his clients.

In his legal practice he had the utmost respect of all with whom and against whom he practiced. He was a formidable opponent, known for his mastery of court procedure which he always employed to great effect when conducting litigation. Mr. Day used the words "tactical" and "shrewd" when describing Lewis Q.C.'s approach to the law. I learned this first hand in the cases I, as a young lawyer had opposite Lewis.¹ I learned never to take him for granted and even if I was lucky enough to avoid the consequences of some procedural move he made, he always had a "Plan B" in the wings which usually derailed you if you weren't waiting for it. Even though he was a great tactician, however, he never sought to take unfair advantage of opposite lawyers. That innate sense of fairness as an officer of the court is what contributed greatly to the esteem in which he was held by his colleagues.

¹ See, e.g. *Chaulk v. Fairview Construction Ltd.* 91977), 14 Nfld. & P.E.I.R. 13 (NFCA)

Lewis Q.C.'s litigation activities took him to all levels of court in Canada, including the Supreme Court of Canada.² In the *Great Eastern Oil* case, a case regarded significant enough that it found its way into Dean Wright's casebook on the Law of Torts,³ Lewis convinced the SCC to reverse the NFCA and hold that a gasoline retailer whose building was burnt to the ground as a result of negligence by a gasoline distributor in the manner in which he pumped the gas into the building was entitled to recover in tort for the damages suffered. The NFCA had apportioned responsibility between the retailer and distributor but Lewis Q.C. was able to persuade the SCC that the complex and convoluted analysis of the local Court was inappropriate.

The other thing I would note about this case is that the factum that Lewis Q.C. filed in the Supreme Court consisted of a total of six pages, a model of brevity that many counsel today could emulate to advantage.

Lewis Q.C. appeared, of course, in the Court of Appeal on many occasions. In one case that I am especially familiar with, he successfully resisted an attempt (by me on behalf of a contractor client using a convoluted argument based on the doctrine of condition precedent) to resile from a contract for the sale of land and thereby prevented the developer from avoiding a bad deal that he had made.⁴ In the well-known case of *Seabord Construction Ltd. v. Central Realties Limited*, a 40 year old mechanics lien case that has been consistently cited in other cases, most recently in a decision of this Court in 2013⁵, Lewis Q.C. managed to have a default judgment in a mechanics lien action set aside – nothing remarkable in that, perhaps – but Lewis Q.C.'s submissions led to the Court enunciating a different approach to the interpretation and application of mechanics lien legislation on procedural matters that is still relevant to this day and which still differentiates mechanics lien procedure from procedure in other civil cases.

Lewis Q.C.'s well-known involvement in the political sphere, as referred to by Day Q.C., inevitably led to him being engaged with respect to some of the most prominent legal cases involving political figures and political events. For example, he represented the Newfoundland Broadcasting Company in a defamation suit brought by Premier Frank Moores⁶ and in the course demonstrated again his mastery of court procedure, especially as it applied to the unique requirements of defamation litigation, by successfully resisting discovery, by way of particulars, of the details of the defence which his client proposed to make to the suit.

Of more significance, from an historical point of view, was his involvement in the Sally's Cove "burned ballot" judicial recount case following the 1971 provincial election. On this occasion, however, his legal acumen was not able to allow the defeated Liberal candidate to prevail. (I note as well that Thomas O'Reilly, Q.C., one of the counsel on the opposing – and

² *Great Eastern Oil and Import Company Limited and Angus Oakley v. F.E. Best Motor Accessories Motor Company Limited* [1962] S.C.R. 118; *Adelaide Motors Ltd. v. Byrne* [1966] S.C.R. 158

³ Cecil A. Wright, *Cases on the Law of Torts*, 4th ed.(Toronto: Butterworths, 1967), p. 433, 613.

⁴ *Chaulk*, fn 1

⁵ *Pennecon Energy Ltd. Metal World Inc.*, 2013 NLCA 67

⁶ *Moores v. Neary* [1979] N.J. No. 25 (NFCA)

ultimately winning – side is also present in Court this morning, as is my colleague Justice White who was there as an articled clerk assisting James J. Greene, Q.C., the successful lead counsel). It will be recalled that after the counting of the ballots on election night, the Conservative candidate, Ed Maynard, had received eight more votes than his Liberal opponent, Trevor Bennett. Bennett sought a judicial recount but when the ballot box for the polling station in Sally's Cove was opened, it was empty, The returning officer had mistakenly burned the ballots following the original count. The recount could not be completed. Bennett, represented by Lewis Q.C. amongst others, then petitioned the Court to have the election declared void.⁷ Unlike previous elections in the province's short history, the 1971 election was tight and every seat counted. The result in the case was critical to which party would form the government.

This was a case in which Lewis Q.C. would have reveled. It turned on issues of technical non-compliance with the election rules and was a matter of first impression. No other case like it had occurred before, anywhere. Despite the obvious difficulty of not having any evidence on which to base a recount, and despite the no doubt carefully-crafted and novel arguments advanced by Lewis Q.C. and his colleagues, they were unable to persuade the Court on this occasion to support their client's petition to have the election set aside. The Court concluded that the original vote count should be certified as the official result of the election and confirmed the election of Mr. Maynard. No doubt this was a frustrating result for Lewis Q.C. The result had momentous political implications. The government changed hands. And within a year another election had been called and the Progressive Conservatives formed a solid majority government, the first for that party in the province's history.⁸

On a lighter note, Lewis Q.C. was also involved in litigation of a significantly lesser legal import. It seems he had a bit of an obsession with parking regulations – as they affected him personally. He had received tickets on thirteen occasions for parking his vehicle on Duckworth Street in a zone marked “No Parking except under Permit.” He took umbrage with the fact that there was restricted parking along the street outside his law office. He persisted in parking there regardless of the offensive signage. He challenged the parking convictions in the District Court. Disregarding the maxim that a lawyer who acts for himself has a fool for a client, he appeared on his own behalf and made an argument that the convictions should be quashed because the Highway Traffic Act regulation in question was *ultra vires*. I cannot do justice to the ingenuity and complexity of the argument here (it took the appeal court 65 paragraphs to describe it, when the case reached that level) but it had something to do with the distinction between having power to pass regulations to prohibit parking and the supposed lack of power to grant permits nevertheless to park in a prohibited zone. Be that as it may, to the consternation of the authorities, Lewis Q.C. won, and all his convictions were quashed. The case apparently sent shockwaves throughout the driving community and the government appealed, sending no less

⁷ *Re Bennett* (1971), 2 Nfld. & P.E.I.R. 543 (Nfld. S.C.)

⁸ Jenny Higgins, “Changing Government 1971-72”, Newfoundland Heritage \Website, http://www.heritage.nf.ca/law/changing_gov.html

than the Director of Public Prosecutions himself to argue the appeal. The Supreme Court, sitting *en banc* on appeal, were not so easily persuaded by Lewis Q.C.'s arguments, no doubt presented somewhat tongue-in-cheek, when he submitted that the legislature could not possibly have intended to confer on the Minister the unfettered power to allow whomever he chose to park outside Lewis' office because it would be open to abuse and that a democratic country like Canada should not countenance unfettered power to give preferential parking to persons other than ordinary citizens who had as much right to park as anybody else. In the end, Lewis Q. C. had to concede that he could not point to any abusive action on the part of the Minister in this case and the appeal was allowed.⁹

As a concession to Lewis' spirited arguments, however, Justice Winter did opine in *obiter* that if the power to issue permits were ever abused, although the regulation itself would still be *intra vires*, the action of the Minister would be "plainly improper."

Lewis Q.C. continued his unsuccessful war against traffic laws in subsequent litigation on behalf of real litigants. In another case¹⁰, he unsuccessfully sued the City for setting up a bus stop outside his client's business on Water Street.

There is a sequel to Lewis Q.C.'s fight against parking regulations that I am sure he felt vindicated him. In a case twenty three years later¹¹ a challenge to the legality of parking regulations at Memorial University resulted in those regulations being declared *ultra vires* and the persons whose vehicles had been towed away and impounded being entitled to damages for loss of use of their vehicles. In giving judgment, Chief Justice Hickman stated:

[29] Counsel for the university cited the decision of the Court of Appeal of Newfoundland in *a case of great public import*, namely, *King v. Lewis* ... as authority for his submission that the regulations before me are *intra vires* the Act. [Giving the back of the hand to that argument, Chief Justice Hickman authoritatively stated:] *King v. Lewis* is clearly distinguishable ...

(Emphasis added.)

It may interest you to know that counsel for the successful plaintiff in that case was none other than Lewis's partner, Day Q.C. who no doubt reported back to his colleague that his once discredited theory had finally been resurrected.

In closing my remarks, let me say that I am glad to have had the opportunity to have known P. Derek Lewis, to have learned from him as a superb legal tactician and to have worked with him on matters pertaining to the legal profession. I had the privilege of serving as a member

⁹ *King v. Lewis* (1957), 120 C.C.C. 49 (Nfld. S.C. On Appeal)

¹⁰ *Bartlett. v. St. John's* (1959), 17 D.L.R. (2d) 593 (Nfld. S.C.)

¹¹ *Keough et al v. Memorial University of Newfoundland* (1980), 26 Nfld. & P.E.I.R. 386 (Nfld. S.C., T.D.)

of the Board of Governors of the Law Foundation under Derek Lewis' chairmanship. It was a very rewarding experience. When he was appointed as the first chair of the Foundation, members of the Bar remarked that they could think of no one better to provide the guidance with respect to and the stewardship of the administration of the money that was to be distributed in the community for law-related activities. He proved them correct. His quiet steady manner coupled with his wry sense of humour as well as steely resolve to account for and maximize the use of every dollar of the money entrusted to the Board was just what was needed. I looked forward to the Board meetings simply because it always was a pleasure to observe Chairman Lewis in operation.

P. Derek Lewis Q.C.'s contribution to the legal profession and to the justice system generally over his near record-setting career of nearly 70 years at the bar – not to mention his contribution to the public life of Canada through service in the Senate of Canada and in many other ways – should not be forgotten. It is right that we gather here today to pay tribute to his memory.

It is now time for others to speak.

Mr. Minister

[Hon. Andrew Parsons, Minister of Justice and Public Safety, speaks]

Mr. Wallace ...

[Mr. Ian Wallace speaks]

Mr. Ladha ...

[Mr. Michael Ladha speaks]

Mr. Boone ...

[Mr. Daniel Boone, Q.C. speaks]

This brings this Special Sitting of the NLCA to a close. To Mrs. Lewis, let me say it must be obvious from what has been said here this morning that your husband has certainly made an important and lasting contribution to the public life of this country and has achieved a reputation and respect that will keep his memory alive for a long time to come. Once again, we express our condolences on his passing.

The Court will now rise. The regular business of the Court will commence in a few minutes.