**Address[1] to Rotary Club of St. John's**
**By**
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**Chief Justice of Newfoundland and Labrador**
**January 22, 2015**

***Justice in Newfoundland and Labrador: Past, Present and Future***

Madam President, members of Rotary and guests …

Thank you for inviting me, once again, to address your Club on matters pertaining to the administration of justice in Newfoundland and Labrador. I have given my remarks the innocuous title, "Justice in Newfoundland and Labrador: Past, Present and Future".

In line with that tripartite title description, my talk will be broken into three segments (though not in chronological order):

i. A report on recent developments relating to the administration of justice generally (the present);
ii. An update on access to justice initiatives (the future); and
iii. A short presentation on an aspect of Newfoundland and Labrador legal History, celebrating 400 Years of justice (the past).

## The Present: Administration of Justice

As you know, the court system in the province consists of three levels of courts: (i) provincial court, which tries probably 90 % of all criminal cases and small civil claims up to $25,000; (ii) Supreme Court Trial Division which hears trials of the remaining 10% of criminal cases (mostly the most serious, such as murder and sexual assault), as well as most civil claims and all matters of bankruptcy and challenges to government authority and decisions made by administrative tribunals (it has two divisions, a Family Division and a General Division which hears all non-family matters); and (iii) the Court of Appeal, which hears most appeals in civil and criminal matters from the Provincial Court and the Trial Division. It is the final court of appeal for the province. Only about 2 or 3 % of cases get appealed further to the Supreme Court of Canada.

[1] Edited and amplified.

Each court is headed by a chief justice or chief judge. I am the chief of the Court of Appeal and also hold the title of CJ of the province of Newfoundland and Labrador. The judges of the Trial Division and Court of Appeal are appointed by the federal government and the judges of the Provincial Court are appointed by the provincial government. All courts are funded by the provincial government (except the salaries of the TD and CA judges are paid by the federal government). Sound confusing? It is.

(For the sake of completeness, the Federal Court of Canada and the Federal Court of Appeal, as well as the Tax Court of Canada, also operate in the province. They are all federally constituted and appointed courts with specialized jurisdictions primarily in admiralty, intellectual property, immigration, taxation and claims against the federal government. What I say today does not relate to them.)

The power to legislate in relation to administration of justice in the province is vested constitutionally in the provincial government. Thus, effectively, the operation, administration and funding of the Provincial Court, Trial Division and Court of Appeal are dependent on the provincial government.

That is why in the past I have dwelt on the difficulties the courts have been having in getting sufficient resources to perform their functions effectively. Major changes in the structure and management of the courts and funding for new initiatives require the cooperation of the provincial government. That means that there must be a degree of interaction between the chief justices representing the courts and the minister of justice (and, now, public safety). This is a delicate issue because the provincial government is the single biggest litigator before the court (the Crown in all criminal prosecutions and as defendant or respondent in civil suits or challenges to administrative decision-making and occasionally as claimants against private citizens). The courts must be impartial not only as between private citizens who are disputing something in the court but also as between the private citizen and the state. Whenever therefore the court has to “negotiate” with the government to persuade them that something (money or other resources) should be provided to the court, there is always the possibility of there being a resulting appearance that perhaps the court, out of gratitude for the provision of the requested resource, might feel beholden to the government and be more inclined to look with favour on the government’s cases. The existence and appearance of impartiality is fundamental to maintaining the public’s confidence in the fairness of the judicial system.

That is why we have been advocating for some time that there should be a greater degree of separation between the courts and the other branches of government and that that should be reflected in a more independent administration that can make administrative decisions – within the confines of the courts' allocated budget – that do not require regular interaction with the Department of Justice, along the lines of court administrative structures adopted in other jurisdictions, like Australia, Ireland, United Kingdom and in the federal court system in Canada. To put it another way, the courts should have the same degree of independence with respect to management and financial decision-making as presently exist in hospital administrations, Memorial University and the Liquor Corporation. It is a little known fact that the Courts have less autonomy in such matters than these other bodies I have mentioned. If the model is regarded as acceptable in such contexts, why not in the courts?

We have been advocating for some time that a new model of court administration be adopted for all the courts in the province. I continue to be hopeful that the merits of this idea will be recognized by the government and that legislation implementing it can be presented to the House sooner rather than later. A joint court administration service will likely save money in the long run, something that the government in the current fiscal climate should find attractive.

Turning now to specific developments in court administration over the past year, I can say that the year has been a busy one. Perhaps the most important development has been in connection with my annual call for a new courthouse in St. John's. I have sounded like a broken record in my annual remarks to you, constantly bemoaning the fact that the current court facilities housing the CA, TD and PC are completely inadequate. I have also stressed the importance of adequate facilities not only for the convenience and safety of the users of the system but also because of the symbolic nature of court facilities as important public buildings standing for the stability of the rule of law in our community. In 1904, when the current courthouse on Duckworth Street was opened, Chief Justice Horwood remarked that buildings housing courts of justice are often amongst the most prominent and important public buildings in a community. He said:

> They stand as witnesses for law and order, and are a tribute which the citizens pay to those principles of justice in which lie the chief security of all social and communal life.

Interestingly, at the time that the existing courthouse was contemplated – at the turn of the 20th century – there had been concerns expressed about the adequacy of the previous building that are similar to those that are being expressed today. The previous courthouse had been destroyed in the great Fire of 1892. Its loss, however, was not lamented. The state of the building was so bad that the Benchers of the Law Society actually seemed glad that it had been consumed in the fire. The minutes of the annual meeting of the Law Society held on January 30, 1893 record the following observation with respect to the "total destruction of the courthouse":

> Fortunately, if indeed we may not say happily, the difficulties which were occasioned by the insufficiency of the building have been removed by its destruction.
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> (Emphasis added.)

Fortunately, we did not have to see the current courthouse burned to the ground to get action on the building of a new one for the 21st century. Late last year, the current Premier and the Minister of Justice and Public Safety announced that government was proceeding with the planning of a new court complex to house all of the courts and related justice services in St. John's. Money in an existing infrastructure fund could be accessed before fiscal year end to commence the planning process.

This is extremely good news. Since the announcement, the government has moved forward expeditiously with the development and publication of a Request for Proposals for the provision of planning services, the first stage to any construction. Proposals have been received and are in the process of being evaluated.

Now, I am realistic enough to know that we are not out of the woods yet. There will no doubt be many more hurdles to get over before a new courthouse opens for business. Clearly, the current fiscal situation may have an effect on willingness to move forward to the construction phase. However, I take some comfort in the fact that we are talking about capital expenditure here, not the annual operating budget. And that capital expenditure will not have to be incurred for some time yet, when the fiscal situation may have improved. In the meantime, the basic planning will have been done. Also, the operating costs of the new facility will not be a factor until after the new building is finished and by all accounts, there will be considerable efficiencies and savings by consolidating all courts in one complex rather than maintaining the many old and inefficient buildings scattered throughout the downtown.

At the moment, I am prepared to take one day at a time. I am certainly pleased that the government has recognized publicly that there is a need for a new facility and that they can see their way open at least to commence the preliminary planning process.

I have already alluded to the province's fiscal situation. It is, of course, the elephant in the room in any discussion of provision of government services, including judicial services. We know that discretionary spending has been curtailed and that efforts are being made to find savings in existing programs. Although the courts are in a slightly different position than government departments, boards, agencies and commissions (because the courts are a separate branch (not simply a department) of government and are not part of the executive branch), the reality is that the courts receive their funding from the executive as a result of legislative appropriation. Consequently, on a practical level, we have to be cognizant of the fiscal realities and try to do our bit in difficult financial times. The reality, of course, is that the courts have generally made modest budget requests in the past and have been cut close to the bone in previous budget-cutting exercises. There comes a point where to cut further the provision of proper adjudicative services to the public may be jeopardized. I am not saying we are necessarily there yet, but it is an important factor to keep in mind. The courts are constitutionally required to operate. The provision of fair and impartial judicial services is a fundamental of our democratic society, just as having a legislature and a cabinet system of government are.

We are seeing the efforts of the current fiscal restraint already. One major initiative was the development of a new case management system that will modernize and manage electronically all information in the Trial Division and the Court of Appeal relating to the documents that are filed and the scheduling of matters in court. The current system has passed its useful life and, in any event, is not comprehensive enough. But, to replace it is expensive. We have now been told that the Office of the Chief Information Commissioner will not be putting forward our budget request for this item because the current financial situation is too unstable. This is disappointing but it does reflect how efforts to modernize the system for the benefit of the public can be affected by external events. I am pleased however that they have not scrapped the idea altogether but have merely deferred it for the present fiscal year.

On the more positive side, I can highlight the following as some things that have been accomplished this past year:

- Both the Court of Appeal and the Trial Division have undertaken a major revision of the rules of civil procedure with a view to making the courts more accessible to both represented and self-represented litigants through simplifying them and rewriting them in plain and non-technical language, allowing for greater use of technology with respect to accessing the court and conducting proceedings and allowing for more alternative dispute resolution methods. This is a long and expensive project but it has to be done. The last major revision was done 28 years ago before the internet was part of our lives and before computers were in every home. We are very pleased that the Minister of Justice is supportive of this initiative.
- The Court of Appeal is in the process of adopting an Action Plan to promote access to justice, particularly for unrepresented parties. In addition to the rules revision project, it will involve establishment of policies on wireless communications in the courtroom, the posting of court judgments online in an accessible, indexed format and the operation of our own Twitter feed.
- The development of a long term IT strategy in the Court of Appeal and Trial Division.
- Development of materials for self-represented litigants, both written and using online videos.
- Encouragement of the use of video and teleconferencing as a means of conducting hearings remotely.
- Development of website information in the Family Division for the benefit of children who are affected by separation and divorce.
- Development of a case tracking system in the Provincial Court to monitor the progress of cases in the system and to measure the work of the various participants in the system to ensure that work in being done efficiently.

I could itemize a lot more, but I hope you will get the message that the courts are not standing still.

**The Future: Access to Justice**

Last year, I spoke about “Access to Civil Justice: Why it is important to all of us”. Since that time, a number of events have occurred relating to that theme.

In an important decision released just a week after I spoke to you last year, Justice Karakatsanis of the Supreme Court of Canada made the following observation:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened.[2]
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> (Emphasis added.)

You may recall that in last year's talk, I asserted that having effective access to justice was important to each one of us because legal problems affect us all. Fifty percent of people will experience a legal problem over any three year period, and the number of persons who try to resolve their legal problems without assistance of a lawyer (often because they cannot afford one) is increasing.

The consequences of poor access to justice include a loss of confidence in governmental systems, greater feelings of helplessness and a sense of unfairness, leading to a breakdown in social order, with more people trying to take the law into their own hands.

The concerns about this issue have resulted in increasing attention and study of the problem. You will recall I referred to the **Action Committee on Access to Justice in Civil and Family Matters** headed by Justice Thomas Cromwell of the Supreme Court of Canada and the Canadian Bar Association Report on Equal Justice, both of which called for a concerted effort by all stakeholders in the system (including members of the public) to address the issues in a coordinated way. Justice Cromwell asserted, for example, that the justice system should be equally as important as our health care system and that reform had to put the public first, focus on outcomes, not just processes, and that specific action plans should be developed through the support of Local Action Committees.

During the past year, I can tell you that the courts and the legal profession in this province have taken the admonitions of Justice Cromwell to heart and taken a number of steps to see if concrete action towards improving access to justice could be taken.

As a first step, we invited Justice Cromwell to come to St. John's and to participate in both a public meeting and a symposium of stakeholders on what could be done at the local level to improve access to justice. He responded

[2] *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87

positively and a group of judges, lawyers, government officials, under the leadership of the Canadian Bar Association, Newfoundland and Labrador Branch, organized a public forum last April where stakeholders in the system and members of the public could come to hear him speak, to ask questions and make observations and suggestions. Over 125 people attended.

The next day we held a roundtable discussion among 60 invited stakeholders to consider the comments made the previous night and to brainstorm on what practical ideas could be followed up on to improve the system. The persons invited were not merely judges, lawyers and court staff. They included other persons who represented organizations that were affected by the justice system in a broader way. For example, the Advisory Council on the Status of Women, child protection authorities, the Child and Youth Advocate, government Justice officials, and the Community Sector Council were all invited.

By all accounts, these meetings were very successful. The organizers were eager to ensure, however, that the interest and enthusiasm generated by the discussions did not dissipate – which is often the result of "one off" events if someone does not take the initiative to keep them going. The organizers held a debriefing session and, following the suggestion in Justice Cromwell's report, resolved to constitute an on-going steering committee to promote continuing access to justice projects that were relevant to the local Newfoundland and Labrador scene. Terms of reference were adopted with the stated purposes to be:

- To promote an accessible, efficient and cost-effective justice system for all Newfoundland and Labrador
- To promote an understanding of the importance of the right to equal and accessible justice
- To encourage the coordination and collaboration by justice stakeholders and community partners along with the courts to most effectively and accessibly address the legal needs of Newfoundland and Labrador
- To promote advanced legal literacy through legal education directed at the public at large and particularly youth

Members of the Steering Committee include the Assistant Deputy Minister of the Department of Justice and Public Safety, the President of the Canadian Bar Association-Newfoundland and Labrador Branch, the Executive Director of the Public Legal Information Association of Newfoundland and Labrador, President of the Advisory Council on the Status of Women, the Provincial Director of the Legal Aid Commission, educators, judges and lawyers.

The organizers recognized early on that what they were undertaking was a major effort that would be ongoing over several years. Nevertheless, they felt that a start had to be made and that specific time-limited targets had to be established. They undertook to try to accomplish at least one concrete improvement within the first year and to report back to another stakeholder symposium in approximately a year's time on progress that had been made and with a view to getting further direction as to where to go from there.

The project that was undertaken was to develop websites that provide information to persons trying to access the legal system to enable them to understand the processes better and to navigate what for many is an almost incomprehensible thicket or terminology, rules and substantive law. Allied with this goal was to provide broader information, particularly in the family law area, to persons about the impact of family law litigation on the family and how to take steps to minimize negative effects on children and other family members. Work has commenced on this project and is being led by the Public Legal Information Association of Newfoundland and Labrador. The intent is to make the website very user friendly and also mobile-friendly. We are drawing on ideas that are already in use in other jurisdictions, as well as developing material that is specific to this province.

In addition to pursuing the website project, the committee also decided to encourage the institutions that were represented on the committee to develop an action plan for their own institution that would set some specific time-limited goals for improving access to justice in their institution that could be accomplished within a reasonable time frame. My reference to an Action Plan for the Court of Appeal is one of the results of this work.

With respect to the undertaking to report back to stakeholders, representatives of the committee have been invited to participate in a Symposium sponsored by the Supreme Court, the National Judicial Institute and the Law Society in June 2015 – the Whitbourne Symposium – which is focused on two things: (i) looking back at Newfoundland and Labrador's legal history over the past 400 years; and (ii) looking forward at the delivery of justice services in the 21st century. The hope is that the committee will be able to conduct its annual report-back either as part of, in association with or at about the same time as the holding of this Symposium, since the committee's mandate is directly relevant to the subject matter of the symposium.

Hopefully, in the years to come, the momentum will continue and real improvements will be achieved. It is in all our interests that this occurs.

**The Past: 400 Years of Legal History**

I now want to spend the few minutes remaining to speak about a piece of Newfoundland and Labrador's legal history. You may recall that two years ago, I spoke about Chief Justice Routh, who was Newfoundland's third chief justice from 1797 to 1801. I spoke about him because he was little known, and I thought it was important that the contributors to Newfoundland and Labrador's unique legal development should be better known.

Today, I would like to follow in that theme and speak about another individual – and a specific and important legal event - that is particularly relevant in 2015 because it marks the 400th anniversary of the delivery of justice in Newfoundland and Labrador. The person in question is Sir Richard Whitbourne. His name is relatively well-known to people familiar with Newfoundland and Labrador history generally because he wrote several books about the colony and spent a lot of time here. He was present when Gilbert entered St. John's harbour in 1583 and claimed the island of Newfoundland for the English Crown, and he was present on the east coast for many years after Guy founded the first English colony at Cupids in 1610. He also served as governor of Sir William Vaughan's colony in 1618. He also interacted with pirates such as Peter Easton, who were terrorizing the English shore at that time and in fact ended up as Easton's prisoner in 1612. However, I want to focus on his contribution to the rule of law and administration of justice in the colony rather than these other matters.

To do that, I first have to rewind the clock a bit. Perhaps the first attempt at law-making by the English in Newfoundland was the promulgation by John Guy in 1611 of what came to be known as "Guy's Laws". Guy did not take it upon himself arbitrarily to do this. He purported to act pursuant to the Charter that had been granted by James I to the Bristol Company, for whom Guy was acting, authorizing the colonization of the eastern parts of the island from Cape Bonavista to Cape St. Mary's. That Charter conferred authority to make laws for the governance of the colony so long as they were "as near as conveniently may be agreeable to" the laws of England. This is important since it shows that the people attempting to colonize the island were not just 'starting from scratch" so to speak but were importing the basics of English law into the new habitations.

Guy issued proclamations purporting to regulate not only the colony but also all those engaged in the fishery who frequented to shores covered by the Bristol Company's grant. The Laws declared that they were directed at "disorders, abuses and bad customs… which are continued and yearly practiced"

The Laws included prohibitions against:

- Dumping of ballast in harbours
- Destroying or defacing stages and flakes
- Monopolizing harbor space
- Defacing boats
- Setting fire in the forests

This last item is arguably the first attempt at environmental protection legislation in the new world.

Guy was also very concerned about the destruction that Peter Easton, Henry Mainwaring and other pirates were causing on the coast. In 1613, the colonists petitioned the Admiralty to establish a vice-admiralty court for trial of the pirates.

Guy's attempt to regulate the fishery did not sit well with the fishermen who claimed that his attempt to regulate them was illegal because the Company's Charter appeared to preserve "all liberties, powers and easements" relating to the fishery "heretofore used and enjoyed … without any impeachment, disturbance or exception". The fishermen therefore ignored Guy's Laws.

Thus we have a situation where piracy was rampant and the fishermen were ignoring any attempt to regulate them.

Enter Sir Richard Whitbourne. He tells us in his book *Discourse and Discovery of Newfoundland*, published in 1620, that he was granted a commission by the High Court of Admiralty to attend at Newfoundland as a vice admiralty court judge and to inquire into the state of law and order in the colony and "authorizing him to empanel juries, and to make inquiry upon oath, of sundry abuses and disorders among the fishermen." Pursuant to this commission, he went to Newfoundland, arriving in Trinity on June 4, 1615. There, he held a court of admiralty and received, he says, the complaints of 170 masters of English vessels of injuries committed in trade and navigation. He then went up and down the coast

doing the same thing in other harbours and coves where fishermen had shore properties.

The court of vice admiralty was the vehicle through which the Admiralty enforced its jurisdiction outside of England. Its original function was to hear cases between merchants and seamen but its jurisdiction had expanded over time to include piracy matters, control of maritime trade, vessel salvage and collisions at sea.

Whitbourne itemized the types of abuses he found:

- Non-observance of the Sabbath day
- Injury to the harbours by discharging ballast
- Destroying fishing stages and huts
- Monopolizing convenient space
- Burning forests
- AND – idleness – the parent of all evils.

Whitbourne, in his book, claimed that he held "the first Court of Admiralty in Your Majesty's name, that ever was (as I believe) holden in that Country, to the use of any Christian prince." Now, the Commission authorizing Whitbourne to hold court appears to have been lost. We have only his word for this, as well as for his claim that it was the first court.

Can we rely on these claims? Any good lawyer (or judge) would of course inquire into the credibility of the claimant. In this regard, we are confronted with the disturbing fact that Whitbourne also claimed to have seen a mermaid in St. John's harbour! That raises a question about his grip on reality. (I suspect if I went around announcing I had seen a mermaid in St. John's Harbour it wouldn't be long before someone would be suggesting that it was time for my retirement). Nevertheless, there is evidence that upon his return to England he made a fulsome report to the Admiralty about what he did and several years later many of the fishing merchants petitioned the Admiralty not to continue with a vice admiralty court, claiming that they were exempted from its jurisdiction and that it was in any event a great disruption to the fishing activities. (Remember, Whitbourne arrived in June, in the middle of the fishing season.) These subsequent events are good corroborative evidence that the court of vice admiralty was held. As well, most historians also concede that the holding of the court was the first of its time in the new world.

So, there you have it: Sir Richard Whitbourne holding the first court of vice-admiralty in North America, in Trinity, Newfoundland. To put that into perspective: at the time in 1615 when the great French-Canadian explorer Étienne Brulé was visiting the wilderness that subsequently became Toronto, we were already dispensing justice in Newfoundland.

We ought to be proud of that fact, as it attests to the richness of our legal history. Our legal system is grounded in a long history of the application of English law, adapted to local conditions. We can have confidence that our system operates according to well-recognized and accepted conventions, processes and principles.

It is the significance of this event that has prompted the planning of the Whitbourne Symposium in his name in June of this year. This conference of judges, lawyers, historians and other academics, and members of the general public will focus on two aspects of the administration of justice: (i) a review of the past 400 years of legal history and (ii) a look to the future – the face of administration of justice in the twenty-first century.

I mention these things in part because it should cause us to reflect on what people 100 years hence may say about the efforts we are making today to ensure that the rule of law is maintained and that the law applies equally to everyone in a fair and impartial manner. There are two sides to this early attempt of Whitbourne to bring justice to Newfoundland. On the one hand, the effort to import and set up a vice-admiralty court in the new world was, for its time, a monumental task. There was expense. Communications and travel were costly and time-consuming. The conditions were primitive. Yet, Whitbourne made the effort to bring the court not to just one central place but up and down the coast. Justice was brought to the people rather than requiring people to come to the court. But, it required effort and vision. It was an important development.

On the other hand, Whitbourne's effort can also be characterized as a failure. After the initial season, the court did not continue. As I mentioned previously, the fishing merchants lobbied the government not to continue the court because it was disruptive to their customary practices which they said were preserved by the Bristol Company's Charter. Thus, it could be said that countervailing self-interested forces ultimately prevailed. It would take another century before the reign of the Fishing Admirals was challenged by the appointment of justices of the peace in 1729 and later by the establishment of another Vice-Admiralty Court in St. John's in 1736. This perspective reminds us that efforts to establish and

maintain the rule of law through formal adjudicative structures require constant attention or the important values which they represent may be lost to us.

Turning, then, to the present day, we should ask ourselves, do we (and by "we" I include the whole of our community) have the vision to recognize the importance of the rule of law and the need for proper access to justice and are we prepared to make the effort to ensure that these values are preserved by constant efforts at renewal in accordance with modern conditions, or are we prepared to allow the countervailing forces of expediency and self-interest to chip away at them, with the potential of waking up one morning to realize what we have lost but that it is too late to get them back?

My hope is that we will have the vision and will make the effort. I hope you do too.

Thank you.