

REMARKS BY CHIEF JUSTICE J. DEREK GREEN
ON THE SWEARING IN OF ELEVEN (11) BARRISTERS
AS QUEEN'S COUNSEL
COURT ROOM NO. 1, COURT HOUSE
DUCKWORTH STREET, ST. JOHN'S, NL
SEPTEMBER 29, 2011

Thank you Chief Justice Orsborn. Your Honour, members of the Bar, special guests and ladies and gentlemen,

As Chief Justice Orsborn noted, traditionally, this ceremony has been conducted by the Chief Justice of the Trial Division. I was therefore very pleased, that despite my absence from the Trial Division Bench for nearly three years, I have been invited to preside at this ceremony. It is a special pleasure for me because a number of the persons being invited to the Inner Bar today were lawyers who appeared before me in Grand Bank the first year after I was appointed to the Bench as a puisne judge. They, in essence, "broke me in" to the business of judging. I am pleased to be able to renew acquaintances with them again in the context of this ceremony.

This occasion also gives me the opportunity to recognize a neglected part of our legal history – the tenure of Richard Routh, Newfoundland's third Chief Justice, who served from 1798 to 1801. More about that later.

We will first proceed with the swearing-in of Queen's Counsel. I turn the proceedings back to Chief Justice Orsborn.

[The Commissions are read, and the Oaths or Affirmations are administered by the Registrar and counsel are invited to sit at the inner Bar by Chief Justice Green and Chief Justice Orsborn.]

On behalf of Chief Justice Orsborn and myself, as well as all the judges of the Court I wish to congratulate and welcome these eleven new Queen's Counsel who have accepted our invitation to sit at the Inner Bar of the Court.

The process of appointing Queen's Counsel goes back to the late 16th century when Sir Francis Bacon was appointed as counsel to the sovereign to give advice and assistance to the permanent law officers of the Crown. The appointment is made by the issuance of letters patent from the sovereign and as described by Lord Watson in the decision of the Privy Council in *Attorney General for the Dominion of Canada v. Attorney General for Ontario* as "a mark and

recognition by the sovereign of the professional eminence of the counsel upon whom it is conferred".¹

Today, in this Province, under the provisions of the *Queen's Counsel Act*, the Lieutenant-Governor in Council makes the appointments of Queen's Counsel and a certificate is issued under the great seal of the Province and presented by the Lieutenant-Governor to each person so honoured. That process of the delivery of the commissions occurred yesterday morning at Government House, presided over by His Honour the Lieutenant-Governor. The ceremony this morning is a tangible recognition and acknowledgment by the Court of the seniority and eminence of the persons appointed Queen's Counsel by inviting each of them to the "inner Bar" of the Court, a place closer to the Bench which sets apart those counsel from other lawyers appearing in the court room.

A conferral of the designation of Queen's Counsel on a lawyer is the highest professional honour that a member of the Bar can receive. It is recognition of dedication and contribution to the practice of law as well as of professional ability, experience, integrity and service both to the law and to the community at large.

Katrina A. Brannan, Q.C. a graduate of Osgoode Hall Law School, was called to the Bar in 1987 after articling at my former law firm, White, Ottenheimer and Green, as it was then known. I got to know first hand the young Ms. Brannan's legal abilities, especially her research skills and her ability to construct a formidable legal argument. I predicted at the time a very promising career for her at the Bar. The firm offered her a position as an associate and we were fortunate to have her practice with us for the following three years. In 1990, however, much to our chagrin, she abandoned the firm and moved to Clarenville to get married. She entered into association with James Hughes of Clarenville under the firm name of Hughes and Brannan. While carrying on a general practice of law, which is a necessity in rural Newfoundland, she nevertheless developed a special focus on family law and has appeared before all levels of court in the Province. When I was appointed a judge of the Court in the judicial centre of Grand Bank in 1992, I quickly learned that the Clarenville lawyers regarded Grand Bank as part of their bailiwick. Members of the firm Hughes and Brannan, including Ms. Brannan herself, appeared on a number of occasions before me. I found the new relationship to be somewhat disconcerting. Before, when she was my articulated clerk, my word was the law and if she and I disagreed on a matter, she had to accept my view. In my new capacity as a judge, however, while I could rule against her, both she and I knew that if she disagreed with my conclusions, I could always be reversed

¹ [1987] A.C. 247 at p. 252.

by the Court of Appeal. All of a sudden I realized I should pay closer attention to what she had to say.

Brannan, Q.C. has had a stellar academic career both at law school and in the bar admission course where she was the recipient of the Hunt Award. She has certainly settled into her adopted community of Clarendville and is now known as one of the leading legal practitioners in that area of the Province. From 2005 to 2008 she was a member of the Canada Pension Plan Review Tribunal and chaired many hearings across the country. I am very pleased that my initial assessment of Brannan, Q.C. as a young articling clerk has been proven correct by her subsequent career at the Bar.

Welcome to the inner Bar, Ms. Brannan.

Sandra M. Burke, Q.C. a graduate of Dalhousie Law School, as it was then known, was called to the Bar in 1989. She commenced her legal career in private practice with the firm then known as Lewis, Day, Cook, Dawe and Eaton. Throughout her whole career, she worked in association with Jean Dawe, Q.C. and since 1997 they have practiced together under the firm name of Dawe & Burke. Her practice has focused primarily upon family law and related litigation. Burke, Q.C. has been actively involved in affairs of the Law Society throughout her career, serving on a variety of committees, including the disciplinary panel and she has lectured on family law in the Bar Admission Program. She has acted as counsel before three public inquires. In addition to her professional life, Burke, Q.C. has been actively involved in the community, serving in a variety of capacities with the Canadian Mental Association and as a board member of the Mental Health Care and Treatment Review Board. She also made a major contribution to the work of the Family Law Rules Subcommittee of the Unified Family Court.

Although she practiced primarily out of St. John's, Burke, Q.C. appeared before me as counsel against Picco, Q.C. in a very difficult child mobility case in the Judicial Centre of Grand Bank during my first year on the Bench. It was a titanic struggle, well-presented and thoroughly argued by both counsel. Strongly contested but well-argued cases prepared by competent counsel are always the best cases for a judge to decide. I was fortunate as a young judge to have the type of assistance they provided.

In recognition of her contribution to the community and to her profession, Burke, Q.C. was awarded the Dr. Clarence Pottle award by the Canadian Mental Health Association, Newfoundland and Labrador Division and has recently been recognized by the National Post/Best Lawyers in Canada in the field of family law.

You are a welcome addition to the Inner Bar, Ms. Burke.

Shawn C. A. Colbourne, Q.C. is another graduate of Dalhousie Law School. He was called to the Bar in 1988 and commenced practice at Marystown with well known senior practitioner Donald A. MacBeath, Q.C. Colbourne, Q.C. frequently appeared in the Provincial and Supreme Courts in the Judicial Centre of Grand Bank. When I became the resident judge there in 1992, Colbourne, Q.C. was another of those, along with Brannan, Q.C., Burke, Q.C., and Picco, Q.C. who had the problem of breaking in this new judge. They did it respectfully and with good humour, never unnecessarily drawing my deficiencies to my attention. I remember Colbourne, Q.C. appearing before me mostly in respect of criminal cases, in my early days on the Bench. He always presented a thoughtful and spirited defence for his clients often advancing novel arguments which challenged my analysis of the case law.

In 1995 Colbourne, Q.C. left Marystown to set up his own legal practice in Springdale, which is where his family originated. He was, I believe, the first lawyer to open a law practice in that area. It obviously was an appropriate move because he has successfully practiced there as a sole practitioner for the last sixteen years.

Colbourne, Q.C. has contributed to his profession by serving as a Bencher of the Law Society and as an adjudicator for the Royal Newfoundland Constabulary Complaints Commission. A long time member of the Lions Club, he was made a life member of the Lions Foundation of Canada.

Welcome to the Inner Bar, Mr. Colbourne. It's nice to see you again.

Anne Marie Fagan, Q.C. is a graduate of the University of New Brunswick Law School. She was called to the Bar in 1986. She has practiced for the whole of her career with the firm of Mercer, MacNab, Vavasour & Fagan in St. John's. A well known litigator, her practice varies widely and includes the areas of family, fisheries, criminal law, personal injury, product and manufacturer's liability, commercial, employment and marine law. She has appeared at all levels of court in the Province and in the Federal Court of Canada. Despite her litigation focus, she has also received training in alternative dispute resolution at the University of Windsor. Most recently she has been in the public eye as counsel to Commissioner Robert Wells, Q.C. relating to the offshore helicopter safety inquiry.

Fagan, Q.C. has been heavily involved in the Law Society and Canadian Bar Association, serving as a member of the disciplinary panel of the Law Society

and as member of the National Council of the Canadian Bar Association. She was also recipient of the Deputy Minister of Fisheries Certificate of Recognition for exceptional professionalism in successful fisheries prosecutions.

You are very welcome at the Inner Bar, Ms. Fagan.

Rachel Huntsman, Q.C. is a graduate of Dalhousie Law School and was called to the Bar of this Province in 1991. She practiced for many years as a Crown Attorney, appearing on criminal cases in all levels of Court in the Province. She has also appeared as counsel before the Supreme Court of Canada. Since 2007 she has acted as legal counsel to the Chief of Police of the Royal Newfoundland Constabulary.

It is perhaps worth mentioning that Huntsman, Q.C. is the spouse of well known former defence counsel Jerome Kennedy, Q.C. While Kennedy, Q.C.'s focus in recent years has been on different matters, one has to wonder what the conversation around the Huntsman/Kennedy dinner table was like when it strays to legal matters. Neither Kennedy, Q.C. nor Huntsman, Q.C. is known for anything other than their passion and dedication to their profession but with each of them being on opposite sides, one can imagine that the sparks would fly. Apparently Huntsman, Q.C. and Kennedy, Q.C. did actually face off against each other in court in one case. The result ? Huntsman 1; Kennedy 0. I am told that Kennedy, Q.C. still mutters over what he considers to be a wrong decision. Notably, however, he did not appeal.

Huntsman, Q.C. was born in England and still has an English accent. In a case in which she acted as Crown Attorney early in her career in Trepassey, Huntsman, Q.C. was cross-examining an accused who had a thick southern shore accent. She couldn't understand a word he was saying and kept asking the witness to repeat himself. Eventually the witness, frustrated, looked up at the judge and said "Your Honour I can't understand a word she is saying. She don't speak proper English". The judge replied: "Sir, she speaks the Queen's English". This comment was lost on the witness, as, ultimately, was the case.

Ms. Huntsman, I am pleased to welcome you to the Inner Bar of the Court, English accent and all.

Gary Kearney, Q.C., another graduate of Dalhousie Law School was called to the Bar in 1989. He sought and obtained a position as a Legal Research Officer with the Newfoundland Law Reform Commission. At that time, I was chair of the Commission and got to know Kearney, Q.C. quite well. I appreciated his quiet thoughtful analytical approach to legal issues. Many of the reports

issued by the Law Reform Commission contained the imprint of Kearney, Q.C.'s careful analysis.

When the Law Reform Commission was discontinued in the early 1990's, Kearney, Q.C. moved to the Newfoundland and Labrador Legal Aid Commission as a staff solicitor. At the time, the only position available was in Corner Brook. As a townie, he did not particularly want to move to the west coast and gave every indication that as soon as a position was available in St. John's he would be seeking a transfer. What he didn't anticipate at the time, was that he would meet and marry a Corner Brook girl. He never requested a transfer. In the twenty or so years that he has been in Corner Brook, he has developed, with the Legal Aid Commission, a major litigation practice, particularly in the criminal law field appearing in all levels of court in the Province.

Mr. Kearney, it is nice to see you again, after all these years. I welcome you to the Inner Bar.

Peter J. Kearsy, Q.C. is a graduate of the University of New Brunswick Law School. He was called to the Newfoundland and Labrador Bar in 1983. For the first five years of his legal career, he was in private practice. He then moved to the Newfoundland and Labrador Legal Aid Commission in 1990 and continues to practice there as a staff solicitor. He is a well known criminal defence counsel. Since 2009 he has been employed with the Legal Aid Mental Health Project, dealing with those difficult cases where mental health and law intersect.

Mr. Kearsy has the distinction of inadvertently having impersonated a lawyer. I am told that when he was articling with Toby MacDonald, Q.C. after his first year of law school, MacDonald left the Province on vacation and left the young Kearsy in charge of the office. While he was away a matter was to be called in Supreme Court. He told Kearsy, Q.C. that the application was being made by counsel on the other side and all Kearsy, Q.C. had to do was stand up and consent. For some reason, MacDonald, Q.C. told the young Kearsy that he should wear court garb, including a gown and tabs. So when he appeared in front of then Chief Justice Hickman, he appeared to all intents and purposes as a fully qualified lawyer. However, he did not escape Chief Justice Hickman's practiced eye, who took pride in knowing the name of every lawyer who appeared in court. Not recognizing him, after the case was over, Hickman, CJ made some inquiries only to be told that Kearsy had not yet been called to the Bar. A little later Kearsy, Q.C. received a phone call from the Deputy Registrar of the Court with the strong suggestion from Chief Justice Hickman that he wait until he got called to the Bar before he appeared in Supreme Court again.

Fortunately, that experience did not deter Kearsey, Q.C. from continuing to appear in Court. As a result, many subsequent individuals have had the benefit of his excellent representation.

I guess, Mr. Kearsey, your call to the Inner Bar today certainly legitimates your right to appear in Court for all time. Welcome.

Laurie A. Mennie, Q.C. attended the University of New Brunswick Law School on a Beaverbrook Scholarship and graduated in 1992. She was called to the Bar of Newfoundland and Labrador later in that year. She practiced for a year with the Corner Brook firm Poole, Althouse and then joined the Newfoundland and Labrador Legal Aid Commission in 1994. She practiced with the Commission until 2007, when she moved to the Civil Division of the Department of Justice. Throughout her career, she has practiced primarily in the areas of family law and criminal law. Most recently, with the Department of Justice, she works in the Family Litigation Unit, acting as legal counsel for the Director of Child, Youth and Family Services in the Western Region of the Province. Interestingly, her interest in the family law field has resulted in her pursuing a Masters of Law degree with Osgoode Hall.

I welcome you to the Inner Bar, Ms. Mennie.

Glen W. Picco, Q.C., a graduate of the University of New Brunswick Law School, was called to the Bar in 1984. He commenced practice in Marystown with Garrett Handrigan, now Mr. Justice Handrigan of this Court, under the firm name of Handrigan & Picco. When Justice Handrigan was appointed to the Provincial Court Bench in 1989, Picco, Q.C. continued his practice with Terry White under the firm name of Picco & White and this practice has continued to the present day. Picco, Q.C. developed a reputation for being a tenacious and spirited litigator both on the civil and criminal side of legal practice. He has acted as agent for the Attorney General of Canada and the Attorney General of Newfoundland and Labrador in prosecution of a wide variety of offences. He has not hesitated however, to act as defence counsel when the occasion has demanded it.

Picco, Q.C. is another one of that group of lawyers whom I encountered during my stint as resident judge in Grand Bank. In fact he may have been the counsel on one of the first, if not the first, cases I ever sat on as a judge. You always knew when Mr. Picco was in the court room. His demonstrative and passionate style on occasion raised eyebrows. In one case, I remember him struggling to gain an admission from a witness on cross-examination. The witness was unco-operative. Picco, Q.C. persisted and kept coming back to the subject matter over and over again. I'm sure he knew that at some point I would

have to cut him off as beating the subject to death. I recall vividly that just as I was prepared to intervene, he asked the question again and finally the witness conceded the point. Overcome with joy that he had achieved his objective, Picco, Q.C. unthinkingly shouted "Right on" and raised his arm in triumph. It can be said without a doubt that, although a little unorthodox in his methods sometimes, Picco, Q.C. always gave his clients value for their money.

Picco, Q.C. has made significant contributions to his community throughout his career, volunteering with minor hockey associations, the Marystown Burin Area Chamber of Commerce and serving as a member of the Kinsmen Club. Professionally he has served as member of the Canada Pension Plan Review Tribunal and as an adjudicator under the *Newfoundland Labour Standards Act*.

You are a welcome addition to the Inner Bar, Mr. Picco.

Rolf Pritchard, Q.C. is a graduate of the University of Alberta Law School. He was called to the Bar in 1996. He commenced his legal career in private practice but in 2001 he joined the Litigation Unit in the Civil Division of the Department of Justice. He has served Her Majesty as a Crown lawyer ever since, acting as counsel in major civil and constitutional litigation and as counsel for the Province at public inquiries. Pritchard, Q.C.'s face is a familiar one in the Court of Appeal, he having appeared on behalf of the Province on several major appeals in recent months. Her Majesty can take considerable comfort that her interests are well represented by him on all occasions.

Welcome to the Inner Bar, Mr. Pritchard.

Peter Edward Ralph, Q.C. is a graduate of Dalhousie Law School. He was called to the Bar in 1992. He commenced practice with the Newfoundland and Labrador Legal Aid Commission. He is very involved in mental health organizations in the Province and takes a particular interest in representing clients with mental illness. He was the first lawyer to work in the Mental Health Office of the Legal Aid Commission and was extensively involved in working with groups and organizations that led to the establishment of the Mental Health Court within the Provincial Court of Newfoundland. He is currently the President of the Consumer Health Awareness Network of Newfoundland and Labrador (CHANNAL) and is a member of the Provincial Advisory Council on Mental Health and Addictions. Since 2008 he has been in private practice with the firm now known as Simmonds + Partners Defence. He is actively involved in criminal defence litigation in all levels of court in the Province. Like Pritchard, Q.C. he is a frequent counsel on cases in the Court of Appeal.

You are also very welcome at the Inner Bar, Mr. Ralph.

So, there you have them – eleven lawyers who have distinguished themselves through excellence in their legal practice, forensic skill in the courtroom or contribution to their profession and the community at large. As we review the career accomplishments of these individuals, it is noteworthy how different each one is in personality, interests, skills and abilities. Yet all contribute greatly to their profession and community in their own way. Wherever they have placed their emphasis and however they have gone about it, they are all highly skilled and competent. The legal system and the community at large are lucky to have them.

On behalf of the judges of the Court, I congratulate each of you (and if I may be forgiven for saying so, especially the Grand Bank cabal) on your appointment as Queen's Counsel and I wish you health, happiness and prosperity as you continue in the practice of law.

Now, as I indicated at the outset of my remarks, this ceremony has a dual aspect. In addition to calling Queen's Counsel to the inner Bar, we are also here this morning to remember and record an aspect of this Court's early legal history.

Most of you will have noticed that outside on the walls on the foyer of this Courthouse are a number of portraits of former Chief Justices of the Supreme Court of Newfoundland and Labrador. Despite the monumental efforts of the Daisy Committee of the Law Society to preserve and promote our legal history, we have not, in my opinion, paid enough attention to our legal heritage. Much of it remains unwritten and unrecorded.

Those of you who have looked at the dates on the plaques on the portraits outside may have noticed that there are some portraits missing in the long line of Chief Justices who have served the colony of Newfoundland, and latterly the Province, since our first Chief Justice, John Reeves, was appointed in 1791. In fact, for a while even the portrait of our first Chief Justice was missing. I remember as a lawyer, while waiting for my case to be called in Court, looking at Chief Justice Reeves' portrait and wondering what he would have been like to appear before. A number of years later I noticed that his portrait had been removed from the wall. I made inquiries and was told that in a plan to spruce up and modernize the building, some of the "dusty old uninteresting pictures" had not only been taken down but had been thrown out. I was outraged that Chief Justice Reeves, who contributed so much to the development of our legal institutions and to our early history generally, had been so disrespected. I expressed myself to the person I was talking to in loud terms.

It turned out that one of the Court Criers overheard me. He approached me a few minutes later and told me that he had seen the portrait in a dumpster and, thinking he could use the frame (not the portrait, mind you) he took it home with him. He said he had no idea of the historical significance of the portrait and offered to give it and the frame to me. I took him up on his offer and stored the portrait in my law office to await the time – which I was sure would come – when someone interested in the history of the Court would make inquiries about what happened to Chief Justice Reeves' portrait. When that happened, my intention was, with a flourish, to produce the portrait and use the incident as a means of lecturing the Neanderthals in the system about their terrible neglect of our legal heritage.

Well, to my surprise, there was a deafening silence. No one raised any questions about the lost portrait. So, when I was appointed a judge, I brought the portrait with me and had it hung once more in its rightful place in the Courthouse.

After that experience, I made it my mission to ensure that portraits of other missing Chief Justices were located and placed on display. The easy ones, of course, were of the most recent vintage. Chief Justice Mifflin who served as Chief of the Trial Division and Court of Appeal from 1975 to 1986 and Chief Justice Hickman who served as Chief of the Trial Division from 1979 to 2000 have now been so recognized.

The more difficult Chiefs to memorialize were, as one might expect, the early ones. In an era before photography, we had to rely on paintings and sketches to obtain an image. We had no images from the two Chiefs who immediately followed Chief Justice Reeves – D'Ewes Coke and Richard Routh. I had virtually given up on ever finding an image of these two. Then, out of the blue, this year, one of the Sheriff's Officers reported to me that "some Americans" who claimed to be descendents of an early Chief Justice had visited the Courthouse and had made inquiries about that person's career on the Bench. I subsequently made contact with them and discovered that it was Chief Justice Routh they were talking about. I asked the fundamental question, "Do you have a portrait of him?" and, low and behold, they did. They sent a digital copy to me and at my request our Chief Administrative Officer, Pamela Ryder-Lahey, has had it enlarged and framed. It is now displayed on the right side of the court room.

I want to thank Ms. Geraldine Routh of Columbia, Missouri, the great-great-great-granddaughter of Chief Justice Routh, and Mr. Jim Routh of Grafton, Ontario for making this portrait available so that we can contribute to the

completion of the visual history of the Court. I would also like to recognize Mr. Ian Glashan, the son of Geraldine Routh who is here from Corner Brook to witness this event.

It is important, I think, that we maintain an awareness of our legal history and, in particular, of those who contributed to the administration of justice in our Province over the years. So, before I leave this subject, I propose to take a few moments to identify for the record some matters pertaining to the legal career of Chief Justice Routh, Newfoundland's third Chief Justice who served from 1798 to 1801.

Richard Routh was born in Bristol² (or possibly Yorkshire),³ England in 1749⁴. He immigrated at the age of 17 to Salem, Massachusetts where he married and had 7 children. This perhaps accounts for the fact that some of his descendants still live in the United States. He became a storekeeper and later Deputy Collector of Customs. He returned to England with his family in 1778. He developed an association with Benjamin Lester of Poole who was arguably the wealthiest and one of the most influential merchants in the Newfoundland trade. Through Lester's influence he obtained the position of Collector of Customs on the island. He arrived in 1782 only to find himself in the middle of a controversy between the merchants of Poole and those of Dartmouth, the latter of whom were campaigning to have the customs house abolished. With his job on the line, he acted quickly to mediate the dispute using "a modest and placatory demeanour"⁵ - perhaps the first example of mediation in Newfoundland - by promising "to do everything in his power to lessen the grievances they complained of and put the fees on a more equitable plan". In 1791, 9 years after Routh's arrival in Newfoundland, the colony was finally provided with its first *Judicature Act* which created a court of civil jurisdiction, with Reeves at its head. The next year the Court was expanded to the Supreme Court of Judicature of Newfoundland and Reeves was named as Chief Justice. Reeves only stayed in office until 1793 but on his return to England he advocated for the continuation of the original court experiment on an annual basis and this was done until 1809 when the Court was made permanent.

The intention when Reeves was appointed was to have an English barrister of at least 5 years experience occupy the position of Chief Justice. However, upon Reeves retirement no one with legal training could be found to

² DCB.

³ Routh History, p. 22.

⁴ Details of Richard Routh's early life are taken primarily from two sources: (i) Chris Humphrey (ed.) *A Short History of the Family of Routh*, (2002), available on line: www.langhorns.co.uk/langhornline/Routh%20Booklet.pdf ("Routh History"); (ii) *Dictionary of Canadian Biography Online*: <http://www.biographi.ca> ("DCB")

⁵ DCB (per Keith Matthews).

replace him. D'Ewes Coke, who had served under Richard Routh in the Customs Office and who also acted as a surgeon and Justice of the Peace of Trinity was offered the job and accepted. He did not like living in Newfoundland year round, so when the Governor in 1798 insisted on year round residency, D'Ewes Coke resigned.

Still unable to find a candidate with legal training, the government appointed Routh as Chief Justice. While it is hard for us today to conceive of a judge of a superior court not having legal training, we must remember it was a different era then. Certainly, Routh's experience as a Customs Collector would have exposed him to regulatory matters and to what could be said to be quasi-legal activities. As well, Prowse records him as having served for a short time as a judge in the Court of Oyer Terminer, which had been set up by the Governor.⁶ So, he at least had some judicial experience. Perhaps more importantly, however, he was very interested in the judicial system and its reform. While Collector of Customs, he was recorded as being very critical of the type of harsh justice being dealt out by the existing magistrates.⁷ Presumably, this would have tempered Routh's judicial approach when he ascended the Supreme Court Bench. Anspach, a contemporary writer, described him as "a gentleman of integrity and nice honour"⁸ and Prowse, writing some time later, called him "a man of considerable ability, and firm, determined character".⁹

The few biographical sketches of Richard Routh that exist describe his life in the Colony, his difficulties with the merchant classes in St. John's and with the Governor and other non-legal aspects of his life. What is missing from the record is an assessment of his jurisprudential career. Such an analysis is hampered, of course, by the absence of any system of published law reports for the period when Richard Routh acted as Chief Justice. Law reporting in Newfoundland was instituted by Chief Justice Tucker in 1831 when he published judgments of the Court starting with the judgments of Chief Justice Forbes, which go back only to 1817, which, of course, is after the time when Chief Justice Routh served.

Fortunately, however, some of the earliest minute and record books of the Supreme Court of Newfoundland still survive and are accessible in the provincial archives at the Rooms.¹⁰ Thanks to the interest and diligence of

⁶ D.W. Prowse, *A History of Newfoundland*, p. 653.

⁷ Prowse, pp. 356-357.

⁸ Lewis Amadeus Anspach, *A History of the Island of Newfoundland, Containing a Description of the Island, the Banks, the Fisheries and Trade of Newfoundland and the Coast of Labrador* (London: T & J Allman, 1819), p. 229.

⁹ Prowse, p. 360.

¹⁰ PANL, Gn 5/2/A/1, Box 24, 1795-1802 minutes. The neutral citations of the cases that are referenced in the footnotes have been devised by Michael Collins, with each case in the minute books being numbered consecutively for each year covered. "NSC" means "Newfoundland Supreme Court".

Michael Collins, Legal Research Officer in the Court of Appeal, we have been able to access and analyze some of this material and thereby re-construct a number of Chief Justice Routh's judgments.

Today, time does not permit a comprehensive re-counting of Chief Justice Routh's jurisprudence. We leave that for a later time. As a generalization, however it can be said that Chief Justice Routh's court was very busy. He sat on a wide variety of civil matters, including claims to land,¹¹ actions in debt,¹² contract,¹³ and bills of exchange,¹⁴ disputes between landlords and tenants,¹⁵ actions for wages by employees against employers,¹⁶ and fishing joint venture claims.¹⁷

In dealing with his cases the Chief Justice took a very practical, almost solomonic approach to settling the dispute. For example, he recognized that the tender of a heifer and other tangible goods to the value of the claim as payment of a debt due under a bill of exchange constituted valid payment¹⁸ and in another complex case about an alleged dispossession of a plantation and claims for occupation rent during the period of dispossession, the Chief Justice held that the claimed rents should be considered as a compensation for having maintained the claimant's widow's children and for maintaining and improving the property.¹⁹ In a suit to recover the balance of wages for carpentry work done on a boat,²⁰ the Chief Justice observed that "the parties had been allowed too much rum which occasioned this disagreement" and while awarding a modest amount to the plaintiff for the work, denied him his costs.

Another of the Chief Justice's cases²¹ is an early example of the application of the doctrine of constructive dismissal in employment law, a doctrine that was only developed maturely in England a century later. A seaman operator sued the captain of his ship for wages due and the captain defended by arguing that the seaman had abandoned the ship and thereby forfeited his wages. As the law stood at that time, seaman's wages were usually paid on a per voyage basis and as such the contract was regarded as entire and indivisible, with the result that if the seaman did not substantially complete the whole contract, he was entitled to

¹¹ *Jones v. Duggan*, 1798 NSC 1; *Doyle v Hodge*, 1798 NSC 17; *Andrews v. William Newman & Co.*, 1798 NSC 19; *Nicholas Gill, Jr. v. Winter*, 1798 NSC 37.

¹² *Nobile v. Flinn*, 1798 NSC 2.

¹³ *Martin v. Curiven*, 1798 NSC 12; *Ryan v. Walsh*, 1798 NCS 34.

¹⁴ *Corman v. Cormack*, 1798 NSC 15; *Bryan v. Stable*, 1798 NSC 16.

¹⁵ *Colford v. Hall*, 1798 NSC 10.

¹⁶ *Barry v. Edmund Muprhy & Co.*, 1798 NSC 234; *Brown v. Redpath*, 1798 NSC 35.

¹⁷ *Barnes v. Macbraire*, 1798 NSC 29.

¹⁸ *Bryan v. Stable*, 1798 NSC 16.

¹⁹ *Andrews v. William Newman & Co.*, 1798 NSC 19.

²⁰ *Coffe v. Doyle*, 1798 NSC 33.

²¹ *Brown v. Redpath*, 1798 NSC 35.

nothing. Chief Justice Routh recognized, however, that the abandonment of the ship should not work against the claim of the seaman if the captain was responsible for his leaving. He concluded:

... Captain Redpath used the plaintiff unworthily to induce him to leave the ship and forfeit his wages.

The report of the case states that “the Chief Justice gave immediate judgment in favour of Plaintiff for the balance of his wages.”

Two other themes in Chief Justice Routh’s jurisprudence are also worth mentioning. Perhaps as a reflection on his previous criticism of the harsh justice meted out by the magistracy, he appeared to be particularly sensitive to the consequences of judgments for debt on impecunious defendants. His judgments are replete with examples of attempts not to cause undue hardship for such defendants.²² For example, in *Woodmason v. Nicholls*²³ he enunciated and relied on a principle that, even where a creditor has proven his entitlement to the debt, the defendant should only be required to satisfy the judgment “by installments in proportion to the defendant’s means”. In subsequent cases, where payment immediately would place undue hardship on the defendant, he was quite willing to devise a repayment schedule to fit the circumstances. In *Cody v. Glin*²⁴ for example he observed that the defendant “appeared to be a poor man and had been in a melancholy situation” and while giving judgment for the full amount, only required half of the debt to be paid immediately, giving the defendant a year to pay the other half.

The other theme worthy of comment is Chief Justice Routh’s emphasis on use of alternative dispute resolution mechanisms within the judicial process. The Court records disclose attempts by the Chief Justice to encourage the parties to resolve their dispute by agreement²⁵ and he often persuaded them to have the issue resolved informally by arbitration,²⁶ with the result being confirmed by Court order. This approach appears to be consistent with his mediated resolution of the dispute between the Poole and Dartmouth merchants regarding the proposed abolition of the customs house referred to earlier. It may well be that Chief Justice Routh was the first judicial officer in Newfoundland to promote alternative dispute resolution as a legitimate mechanism for resolving

²² *Woodmason v. Nicholls*, 1798 NSC3; *Colford v. Hall*, 1798 NSC 10; *Macdonald v. Mumper*, 1798 NSC 13; *Dingle v. Kennedy & Sons*, 1798 NSC 21; *Cody v Glin*, 1798 NSC 23.

²³ 1798 NSC 3.

²⁴ 1798 NSC 23.

²⁵ e.g. *Williams v. Currin*, 1798 NSC 18: “the Chief Justice recommended the parties to agree among themselves if possible”.

²⁶ *Woodcock v. Barnes*, 1798 NSC 22; *Burton v. Sawyer*, 1798 NSC 25; *Thomas & Stokes v. Rowe*, 1798 NSC 30

cases within the court system. As such, he was well ahead of his time and perhaps would feel quite at home in this courtroom in the 21st century where we now recognize mediation and settlement conferencing as legitimate dispute resolution mechanisms, with litigation being regarded in many situations, especially in family law, as the method of last resort.

Finally, I must tell you about a very unusual but interesting case of Chief Justice Routh's where, it appears, he took a very liberal and perhaps unorthodox view of the Latin maxim *nemo debet esse iudex in propria causa* and ended up being the judge in a case where he had been previously involved as a participant. It seems he was very interested in promoting the development of schools in St. John's. A group of individuals subscribed money to pay for hiring a school teacher to be brought out from England. Chief Justice Routh was asked to interview and engage a suitable candidate on one of his return trips to the home country. He did so, and the school teacher and his family arrived in St. John's in late 1799. Things did not get off on the right foot. The Governor asked the teacher, who was also a clergyman, to preach the sermon at church. This offended the regular clergyman who, in the words of Anspach, "conceived a most inveterate hatred for the poor stranger".²⁷ To make matters worse, the subscribers to the original plan for engagement of the teacher, including the local clergyman, began to renege on their commitments and sought changes in the conditions of engagement. They "became as hostile to the institution as they had before been anxious to see its formation... Every measure, that the deepest and most exercised cunning could contrive, was employed to harass, frighten and discourage the stranger".²⁸

The teacher, however, stood his ground. Chief Justice Routh, being concerned that the expectations he had engendered on hiring the teacher were being frustrated, encouraged him to remain in the colony and ultimately suggested that writs be issued to enforce the terms of the original bargain. This was done and the subscribers in turn sued for damages alleging professional incompetence on the part of the teacher. The following description of the trial,²⁹ presided over by Chief Justice Routh, is given by Anspach:³⁰

His opponents, strong in number and insolently confident in looks, opened all their batteries with a most tremendous and continued fire, relieving one another in succession pouring in affidavits, which are very cheap in that country, and exhausting all their stock of malignity and eloquence.

²⁷ Anspach, p. 230.

²⁸ Anspach, p. 231.

²⁹ *Rennells v. Anpach*, Pleas in the Supreme Court, December 16, 1800.

³⁰ Anspach, p. 234-236.

When they had done, and were already enjoying the satisfaction of their expected triumph, the stranger was called upon for his defence. He had sat up the whole night with his assistant to look over his notes. He had during six year's residence in England made a particular study of Blackstone's Commentaries and frequently attended the courts in Westminster and at the assizes in the country. He was *prepared*. The sight of his folio brief, which he then deliberately drew out of an inside pocket, operated upon his opponents like a thunder bolt. Surprise and confusion were conspicuous in the countenance of every one of them. He began, and twice an attempt was made to interrupt and disconcert him; 'til at last he appealed to the Court for protection and was then permitted to proceed without any further interruption. He gave a detailed, and rather amusing history of the several transactions that had taken place from the time of his arrival to that very day; as he went on, spontaneous marks of approbation and disgust burst out from various parts of the room, the crowd gradually withdrawing on his side, until at last, the party were left by themselves on the opposite side of the Bench. After he had concluded, not a word of what he had advanced was contradicted, and judgment was given in his favour in terms most honourable and most gratifying to his feelings.

Whatever one could say about the propriety of Chief Justice Routh's involvement in the trial, there can be no doubt that the result was the correct one. (Indeed, given the fact that Chief Justice Routh was the only judge appointed to the court at that time, the doctrine of necessity probably would have dictated that he sit on the case notwithstanding his previous involvement). In any event, the result certainly appeared to resonate with the people assembled in the crowded court room. As Anspach records, by the end of the teacher's oration, all of the spectators were on his side. After the trial, Chief Justice Routh was overheard saying to the teacher "they have treated us both in the most unhandsome manner".

There is, however, a postscript to this story. The flowery description of what happened at the trial, which is so flattering to the teacher, comes from the history of Newfoundland written by the Reverend Lewis Amadeus Anspach. I asked Michael Collins, my Legal Research Officer, to check the records at the Rooms to verify from the court records that the trial did in fact take place. He did so and, lo and behold, discovered that the teacher in question was none other than the Reverend Lewis Amadeus Anspach himself! So, we must take Anspach's detailed description of what happened in the courtroom with a grain

of salt. However, what the record does confirm is that the reported result is accurate and the Court found in favour of teacher Anspach.

Chief Justice Routh's judicial career was cut short when he was lost at sea while sailing back to England in 1801. It can be said, however, that his four short years on the Bench were productive ones. He displayed sensitivity to the impacts of his judgments on the litigants, developed the law where he felt he needed it and he was innovative in devising practical ways of resolving disputes. I obviously would like to go on. There is much more to tell but time does not permit. You will just have to wait for the book!

It is sufficient to say at this time that Chief Justice Routh's portrait deserves to be hung on the walls of the Courthouse along with the other Chief Justices of the Court. I am pleased that we are able to arrange for this recognition. Once again, I thank his descendents for making that possible.

I also thank the Queen's Counsel and everyone else present for having the patience to allow me to go on at such length. I will now turn the proceedings back to Chief Justice Orsborn to close the Court.