Remarks by the Hon. J. Derek Green

Chief Justice of Newfoundland and Labrador

On the passing of the Hon. T. Alex Hickman,

Former Chief Justice of the Supreme Court of Newfoundland and Labrador, Trial Division

Courtroom #1

Courthouse, Duckworth Street

St. John's, NL

February 8, 2016

Thank you, Chief Justice Whalen.

First, let me express to Nancy, Alex's children, Sandy, Heather, Harry and Peter, and those members of his extended family present, on behalf of the judges and staff of all of the courts in this province and also on behalf of Alex's former colleagues on the Canadian Judicial Council, how sad we were to hear of Alex's passing. We are all glad to have this opportunity to express our regard for our colleague and friend.

Alex Hickman's whole judicial career was spent as Chief Justice of the Trial Division of the Supreme Court of Newfoundland and Labrador. It is fitting, therefore, that this special sitting of the Court should take place in this Courtroom, presided over by the current Chief Justice of the Trial Division – the courtroom, more than any other, that Alex loved to appear in and in which he presided with such a commanding presence not only over trial and other legal proceedings but also special events such as calls to the bar and the swearing-in of Queen's Counsel. He especially relished such special events because, amongst other things, they gave him a platform for him to expound on his vision with respect to the broader issues relating to the administration of justice, matters which he felt passionately about.

He, of course, had a special affection for this court building. He defended it whenever he could, calling it "this historic temple of Newfoundland justice" and "one of St. John's most impressive landmarks."[1] He was the driving force behind having the building designated as an historic site. Yet he also recognized that it was, in his words, "not adequate"[2] any longer. (Where have I heard that refrain before?) Nevertheless, he could not quite bring himself to advocate

[1] "History of the St. John's Courthouse", an address to the Newfoundland Historical Society, February 26, 1998, reproduced in J. Derek Green and Christopher P. Curran, *T. Alexander Hickman: Speeches and Writings from a Life in the Law* (St. John's, NL: Privately printed, 2000), p. 55
[2] Ibid., p. 50

scrapping the courthouse altogether. At his Convocation address to Memorial University on the occasion of his receiving an Honourary Doctor of Laws degree in 2013, he uttered the following plea:

> It is not necessary to close down or make major changes in the use of some of our historic buildings simply to accommodate the computer age. Skillful architects and our determination to maintain our culture can ensure that such historic buildings continue for their intended use.[3]

Fifteen years after his retirement, he still speaks to us of issues of current moment.

Alex's impact on the law, the court system and the administration of justice extended far beyond his role as judge in the Trial Division. It is that about which I propose to speak for a few moments this morning.

Let me start by recording that Alex Hickman did not attend the annual Christmas cocktail party hosted by the Law Society in December 2015. It was the first such annual event that he had not attended in 67 years, since his call to the bar in 1948. Alex had a strong affection for the Law Society, having served as a Bencher and Honourary Secretary for nine years, that the fact that he had been fully retired as a judge for fifteen years had not dissuaded him from making the effort to attend in the past. People knew that only something like failing health would have kept him away. The judges and lawyers present at the 2015 event missed his presence. Law Society members had a great affection for him and looked forward to his presence and his inevitable story-telling, usually woven around some aspect of Newfoundland and Labrador's legal history. It was his interest in people and their background that set him apart.

Alex Hickman loved his job as a judge. He loved the law. Although he retired 15 years ago, he would not have done so if he had not been required to comply with the mandatory judicial retirement age of seventy-five. He called that rule "a constitutionally-entrenched discrimination provision." Since his retirement, he had maintained an active interest in what was happening in the Court and at the Canadian Judicial Council. He was a fountain of knowledge to me, his successor, about how the court operated in the past and was always willing to provide advice when it was sought.

Of course, Alex Hickman's love of the law and his concern for keeping the law responsive to modern social conditions did not start with his appointment to the bench. No reference to Alex's professional life in the law would be complete without some reference to his work as Attorney General of the province.in two political administrations.[4] Amongst the significant changes in Newfoundland's substantive law and administration of justice that

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[3] Honourable T. Alexander Hickman, O.C., *Address to Convocation Memorial University*, October 25, 2013 [MS].

[4] Smallwood (Liberal), 1966–1969; Moores (Progressive Conservative) 1972–1979.

occurred during his time as Attorney General were the reform of matrimonial property law and other aspects of family law; the creation of the Unified Family Court; the reform of the provincial magistracy; the creation of the Court of Appeal as a separate division of the Supreme Court of Newfoundland; reform of legal aid; the restructuring of the Law Society; and the reorganization of the Department of Justice. It can truly be said that he very much believed in law reform as a legislator and government minister. In my view, he was certainly an Attorney General who – more than most – made significant improvements in the justice system by proactively promoting law reform. He carried that approach forward to his time on the bench. His judgments are replete with references to the need to keep the common law responsive to modern social needs, and even outside of his judgments, he was known to exhort young lawyers on their call to the bar to be creative in their arguments so as to ensure that common law legal principles remain relevant and useful in the modern era.

Even in his jurisprudence, he wrote in such a way as to frame sterile legal issues in terms of their larger jurisprudential or societal impact. In other cases, his judgments have been the catalyst for development of legal principles by higher courts in a variety of contexts. Infused throughout his judgments are attempts at statements of broader principle that have lived on through constant reference and reliance by other judges struggling to apply principle to new factual contexts.

Let me start with a reference to one case where he was ultimately not successful in gaining acceptance of his views. Notwithstanding this, however, his judgment illustrates a lot about his approach to law and legal reasoning. This was the case of *Piercey v. General Bakeries Ltd.*[5] where Chief Justice Hickman took a direct charge against the basic principle of workers' compensation law that barred an injured worker access to the courts to sue for negligence in return for access to a no-fault compensation insurance scheme administered by the workers' compensation board, as it was then known. The estate and the widow of a worker who had been electrocuted in the course of his employment sued his employer for damages but was met with the argument that the action was barred and that the claimants were limited to the amounts to which they were entitled under the workers compensation scheme. The widow claimed that the legislative provision barring the right to sue was of no force and effect because it violated section 15(1), the anti-discrimination provision, of the *Canadian Charter of Rights and Freedoms.* Chief Justice Hickman was forced to conclude, however, that because the worker's death occurred seven months before section 15 of the *Charter* came into force, and the *Charter* was not retroactive in its effect, the claim had to be dismissed. All this he did very quickly and concisely. Nevertheless, he could not resist the opportunity to express his views on the broader question, assuming the *Charter* had applied, whether the legislative bar against suing in the courts was of no force and effect because it was discriminatory within the meaning of section 15 of the *Charter*. He concluded that it did violate s. 15 and could not be saved by section 1. Listen to his rationale:

[5] (1986), 61 Nfld. & P.E.I.R. 147 (Nfld. S.C.)

> It is difficult to conceive that a victim, who has suffered damages as the result of the negligence of a third party, could enjoy the equality and protections of the law so clearly contemplated in section 15 of the Charter if such person's right of redress in the Courts is restricted or denied. Of all the institutions required to ensure the well-being of a democratic society, the Courts alone stand free and totally independent of Parliament, the Crown and any individual or group of individuals. The Courts acting through their inherent jurisdiction, strengthened by the clear intention of the framers of the Charter, stand between the would-be oppressor and the intended victim; between the Crown and the accused, between the state and the individual and between the tort feasor and the sufferer. There is no doubt that courts have the machinery, power and legal skills to guarantee any citizen the rights enshrined in section 15, of the Charter. On the other hand, statutory tribunals, such as the Workers' Compensation Commission, created for the purpose of carrying out the will of the Legislature, do not have the same unimpaired independence or knowledge of the law and the skill to interpret same which the judiciary and courts have and must continue to enjoy. No substitute has been devised, to date, to replace the Courts as the guardian of the liberty and freedom of all Canadians and to deprive a class of citizens of access to the Courts is at variance with the intent of the Charter and in particular, section 15 thereof.

This rhetoric is vintage Hickman. The refrain of the independence of the courts and their crucial role as the protectors of legal rights and freedoms in Canadian democratic society emerges from virtually every speech Chief Justice Hickman gave relating to the administration of justice. It motivated his passionate insistence, in dealing with government on matters pertaining to the courts, on maintaining the separation and independence of the courts from the executive branch of government. It also dictated his approach to applying procedural rules and determining questions of jurisdiction.

This attack on the "sacred cow" of workers' compensation law – the historic trade-off of the right to sue in return for no-fault insurance that had been operating for 60 years – of course, could not go unchallenged. Even though his comments were technically *obiter dicta*, they were so powerfully expressed that the provincial government felt that they had to be dealt with. The problem was that because they were *obiter* and the claimants had lost on the main point, they could not be appealed. One can just imagine the grin on the Chief Justice's face, thinking that he was able to assert his points in this controversial area and that there was no mechanism for their challenge by way of normal appeal. The government got around the problem, however, by submitting a reference case directly to the Court of Appeal for that Court's opinion on the legality of the sections of the workers compensation legislation that Chief Justice Hickman had impugned. The case drew such interest that the Attorneys General of seven other provinces and territories intervened and asked to be heard in the case, along with the Canadian Manufacturers' Association, the Canadian Labour Congress and the Canadian National Railway, amongst others.

Ultimately, the Court of Appeal concluded that the impugned sections were not inconsistent with section 15[6] and this view was upheld by the Supreme Court of Canada[7], with the Supreme Court noting, however, that the applicable test for the application of section 15 had been only enunciated by the Supreme Court of Canada after the appeal had been filed[8], and hence after the time when Hickman C.J. had rendered his judgment and which he was not therefore able to consider as part of his analysis.

The fact that Alex lost this specific battle does not in any way detract from the broad concepts he enunciated, in particular, the strong emphasis he placed on the importance of the courts and their role in our democratic society. He never missed an opportunity to drive these points home – even after retirement. As recently as 2013, in his address to Convocation at Memorial University when he received his Ll.D. degree, he was continuing to emphasize the "first obligations" of government:

> to ensure that the populace were not only served by the proper administration of justice but that they felt comfortable with their access to our courts and that the protection of a justice system was speedy and relatively cheap.[9]

Time does not permit a comprehensive discussion of the complete body of Chief Justice Hickman's jurisprudence. It can be said, though, that he loved writing and he had a knack of dealing with serious legal matters in a comprehensible and entertaining way. Consider, for example, his comments in a case where the issue was whether the spousal relationship between a solicitor for an employer, who was a party before an arbitration board appointed to hear a grievance under a collective agreement, and the employer's nominee on the board, was sufficient to disqualify the employer's nominee, on the ground that the familial relationship created a reasonable apprehension of bias.[10] In rejecting the argument of bias, he dealt with it in this way:

> In my view, it is time that the courts moved away from the stereotype thinking that a woman or man can influence their spouse simply because of their marital relationship and that their independence of thought and adherence to professional ethics will in any way be affected by the fact that they are husband and wife. If such concern still exists, it is incumbent upon the courts to assure the public that it is unreasonable in the extreme to believe that the bonds of marriage are so stringent as to prevent a husband from serving on a board in a totally unbiased manner simply because his wife had furnished legal advice to one of the parties on other issues. "Pillowtalk" has no place in jurisprudence.[11]

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[6] *Reference re Workers' Compensation Act, ss. 32 & 34* (1987), 62 Nfld. & P.E.I.R. 16 (Nfld. C.A.)
[7] *Reference re Workers' Compensation Act, ss. 32 & 34*, [1989] 1 S.C.R. 922.
[8] *Andrews v. Law Society*, [1989] 1 S.C.R. 922.
[9] Honourable T. Alexander Hickman, O.C., *Address to Convocation Memorial University*, October 25, 2013 [MS].
[10] *Newfoundland (Treasury Board) v. Newfoundland Assn of Public Employees* (1999), 184 Nfld. & P.E.I.R. 237 (Nfld. S.C.).
[11] Ibid., paragraph 25.

I could go on but his reported decisions are too great in number. The references to them are collected in the book Christopher Curran and I published in 2000 at the time of Chief Justice Hickman's retirement.[12] I will have to be content with just mentioning a few cases which have had a lasting impact that is broader than the actual precedent that they created. In *O'Dea v. O'Dea*[13] his enunciation of a high standard for conflict of interest for a solicitor was quoted at some length by the Supreme Court of Canada[14] in a case that is still fundamental precedent for the modern law on this subject. In another his broad statement of principle in 1988 in *Bradbury v. Cabot Insurance Co.* [15] that the rules of court must be interpreted liberally to effect pre-trial disclosure continues to be cited and relied upon. His decision in *Cabot Institute of Applied Arts and Technology v. Tripp* [16], which found a breach of procedural fairness in the failure by a tribunal to give reasons, anticipated the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*[17] by ten years.

Of course, Chief Justice Hickman's contribution to the public life of this country through his chairmanship of the *Ocean Ranger* and the *Donald Marshall* inquiries is well- known. What is perhaps less well-known is the impact, outside of the carefully crafted and insightful recommendations in those Inquiry reports themselves, that his work, especially in relation to the *Marshall* Inquiry relating to wrongful convictions and the litigation that arose from it[18], has had on the development of other important legal principles and concepts. As was his wont, he attempted to site the specifics of the issues in the Donald Marshall case in broader principle. He wrote, for example:

> … a properly functioning criminal justice system is the bedrock on which society's acceptance of our system of law and the maintenance of order is based. … This can only be accomplished through the unwavering and visual application of the principles of absolute fairness and independence.[19]

The analysis in the *Marshall Report* and the discussion of the legal concepts engaged by the issues dealt with in the report have been referred to and relied upon by the Supreme Court of Canada in a wide variety of circumstances, including: the development of the duty to disclose in criminal cases;[20] the right to production of records;[21] the law on jury bias;[22] the law on judicial

[12] J. Derek Green and Christopher P. Curran (eds.), *T. Alexander Hickman: Speeches and Writings from a Life in the Law* (St. John's, NL: Published privately, 2000), pp. 217-311.
[13] (1987), 68 Nfld. & P.E.I.R. 67 (Nfld. S.C.),
[14] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235
[15] (1988), 70 Nfld. & P.E.I.R. 310 (Nfld. S.C.).
[16] (1989), 75 Nfld. & P.E.I.R. 23 (Nfld. S.C.).
[17] [1999] 2 S.C.R. 817.
[18] *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.
[19] *Donald Marshall, Jr. Inquiry, 1987-1989*, Vol. 1.
[20] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307.
[21] *R. v. Mills*, [1999] 3 S.C.R. 668.
[22] *R. v. Spence*, [2005] 3 S.C.R. 458.

bias;[23] the distinction between the police and the Crown;[24] the availability of common-law damages for wrongful convictions;[25] and the scope of judicial immunity and judicial independence.[26]

Alex's work on the Canadian Judicial Council was also significant. He chaired the Council Committee on Administration of Justice for a number of years and in that capacity he was able to pursue his interest in promoting matters pertaining to court administration as well as other matters of national concern. He was, of course, well-liked by his colleagues on the Council, not only for his contribution to the resolution of the difficult issues the Council was dealing with but also for his comradery and his ability to entertain with witty stories and his vast knowledge of history, things that were his trademark. Upon hearing of Alex's passing, several of his former Council colleagues wrote to express their feelings for him and his work. For example, Chief Justice Fraser of Alberta wrote:

> Canada has lost a great jurist. He signaled concerns about wrongful convictions long before this became a recognized concern in Canada. And he always had access to justice concerns foremost in his mind. It was my great pleasure to serve with CJ Hickman on the CJC.[27]

On a personal note, Alex was my Chief Justice for four years and I have to say I witnessed firsthand his people skills and his ability to inspire the best from the judges he worked with. It was he who persuaded me to accept an appointment to the bench in the Judicial Centre of Grand Bank, his birthplace and favorite judicial centre (the courthouse there is now named after him). He assured me that it would be the greatest experience of my life and not to worry about the fog because the sun always shined on Bennett's Hill overlooking the Town. Well, I learned that he could exaggerate a little but I remain grateful to him for encouraging me to go to Grand Bank for my first judicial posting. It was indeed a wonderful experience. When I think of the commencement of my career as a judge, now almost 25 years ago, I always think fondly of Alex.

Speaking for myself, he will be missed and remembered. And I am sure he will also be missed and remembered by those gathered here today in his honour. In ending, I could not do better than to quote the words of Chief Justice Heather Smith of the Ontario Superior Court, another of Alex's former Judicial Council colleagues:

> Alex Hickman was a masterful story teller, a wonderful politician of several political stripes, a pragmatic and able judge and a wonderful human being. He was the

[23] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.
[24] *R. v. Regan*, [2002] 1 S.C.R. 297.
[25] *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.
[26] *Mackeigan v. Hickman*, supra, fn. 18.
[27] Email, January 13, 2016.

> embodiment of Newfoundland at its very best. He will be missed – we are not likely to see his like again![28]

Thank you.

[28] Email, January 13, 2016