Remarks by Hon. J. Derek Green

Chief Justice of Newfoundland and Labrador

On the Occasion of a Special Sitting of the NL Court of Appeal

To Mark the 40th Anniversary of the First Sitting of the Court

And to Pay Tribute to the Judicial Career of the

Hon. James Randell Gushue

Court of Appeal

St. John's, NL

March 17, 2016

Mr. Attorney General, Judicial Colleagues, Members of the Bar, former employees and officers of the Court, ladies and gentlemen,

Welcome to this special sitting of the NL Court of Appeal, which is being held to mark the 40th anniversary of the first sitting of this Court as a separate division of the Supreme Court of Newfoundland and Labrador and to pay tribute to the judicial career of the late Chief Justice James Gushue who passed away on October 25 of last year.

I extend a special welcome to the Honourable Michael Moldaver, justice of the Supreme Court of Canada, the Honourable Allan Hilton, justice of the Quebec Court of Appeal and the Honourable David Brown, justice of the Ontario Court of Appeal who are present with me on the bench this morning. Justices Moldaver and Hilton will be participating in a Continuing Legal Education seminar on appellate advocacy being held this afternoon, sponsored by the Law Society. Justice Moldaver will also be our keynote speaker at today's anniversary luncheon to be held before the CLE seminar starts. Thank you all for your presence here this morning.

Let me also welcome members of former Chief Justice Gushue's family – his son Jonathan, his sister Bobbie Redpath and her husband James Redpath, and a number of his friends. On behalf of all of the staff and judges of the Court, I express our sympathies to them on Jim's passing.

Present in the Court today are former justices of this Court, William Marshall and Margaret Cameron. Welcome to you both. Former Chief Justice Clyde Wells is out of the province at the moment. He has asked me, however, to express his regrets at not being able to be here and to bring his best wishes to the Court on this occasion and to express his condolences to the family of former Chief Justice Gushue.

The Chief Justice of the Trial Division, the Hon. Raymond Whalen, is also out of the Province but has asked me to express his best wishes to the Court on this occasion. I note the presence of a number of judges of the Trial Division as well as Justice Elizabeth Heneghan of the Federal Court of Canada, and Chief Judge Pamela Goulding of the Provincial Court. I thank you all for attending.

Let me also recognize and express our thanks to our other speakers this morning: Hon. Andrew Parsons (Minister of Justice and Public Safety and Attorney General), Ms. Susan Ledrew (President of the Law Society) and Mr. Steve Scrutin (President of the Canadian Bar Association, NL Branch).

Also, I am pleased to note the presence in the Court of Mr. John Kelly, one of the counsel on the first case called and disposed of by the Court 40 years ago. Welcome, Mr. Kelly.

I would also like to recognize a number of former employees and court officers of the Court, each one of whom has contributed greatly to the work of the Court over the years: Ms. Angela Williams (first Registrar), Ms. Sharon Burke (first judicial assistant) and Ms. Debbie Brennan (who, because of her longstanding service as assistant deputy registrar and deputy registrar has, along with former deputy registrar Madonna Morris, been regarded as the face of the Court for a good portion of its history). I also note the presence of former Registrars of the Supreme Court, Messrs. Barry Sparkes, Q.C. (1986-2006), David Jones, Q.C. (2006-2008), and Christopher Curran, Q.C.(2008-2011) as well as Ms. Pamela Ryder Lahey, the present Chief Executive Officer of the Supreme Court.

The Anniversary

On March 17, 1976 – 40 years ago today - the NL Court of Appeal sat for the first time as a panel to hear four appeals. The panel consisted of Chief Justice Robert Furlong, Mr. Justice Herbert Morgan and Mr. Justice James Gushue.

The Court had been constituted as a division of the Supreme Court of Newfoundland by legislation passed by the House of Assembly in 1974[1] after much importuning by the Law

[1] *The Judicature (Amendment) Act*, S.N. Nfld. 1974, No. 57. The creation of a separate appellate division was opposed by the then Chief Justice, Robert Furlong: telephone interview, June 29, 2015, with the late Hon. T. Alex Hickman, who was then Attorney General and responsible for introducing the legislation in the House of Assembly.

Society over a number of years.[2] At the time of the coming into force of the legislation,[3] only two judges were designated as justices of the new appeal division: Chief Justice Furlong, who had been Chief Justice of the old (unitary) Supreme Court,[4] and Justice Morgan, who had, very briefly, been a justice of that Court.[5] The third position on the Court remained vacant until Justice Gushue was appointed by the Governor-in-Council in February, 1976. That explains the delay in the Court's hearing of its first appeals until eight months after the legislation had been brought into force. Although single judges of the Court had been sitting to hear applications and other interlocutory matters prior to that time, the absence of the third judge effectively precluded the earlier hearing of full-fledged appeals, since a panel of three was required for that purpose.

Justice Gushue was sworn in as a justice of appeal on March 12, 1976[6] and, as indicated, the first appeals were scheduled for March 17th, St. Patrick's Day. There were four cases on the docket: *R. v. Vincent Barrington*[7]; *R. v. David Lawrence King*;[8] *R. v. Roy Patrick Conway;*[9] and *R. v. John Joseph Hennebury.*[10] The four cases were heard together. Mr. John Kelly, Director of Public Prosecutions (who is present with us today) appeared for the Crown and Mr. Hugh Coady (since deceased) appeared for all four of the respondents. The appeals had been filed by the Crown as appeals against sentence on the grounds that the sentences imposed at trial were "inordinately low." But by the time the dust settled following the appeals, not only had the sentences <u>not</u> been increased but the four respondents walked out of the courtroom free men, with their convictions quashed – even though they had appealed neither conviction nor sentence!

Talk about an activist court making its mark on the first day of its operation! Maybe it was just the euphoria of it being St. Patrick's Day. But, it is almost reminiscent of the time when, upon the official reading in the Court of the Royal Charter of the newly-constituted Supreme Court of Newfoundland on January 2, 1826 and the swearing in of Chief Justice Tucker,[11] the new Chief Justice announced, in view of the significance of the event and with the concurrence of the Governor, that all but five inmates of her Majesty's Penitentiary would be given a pardon and set free![12]

---

[2] See Minutes of Benchers of the Law Society of Newfoundland, June 29, 1971, October 4, 1971, December 6, 1971, October 2, 1972, June 25, 1974.
[3] July 25, 1975.
[4] Appointed 1959; retired as Chief Justice in Court of Appeal, 1979. Since deceased.
[5] Having been appointed on June 12, 1975, six weeks before his elevation of the Court of Appeal. He retired as justice in Court of Appeal, 1994. Since deceased.
[6] Minutes of Proceedings of the Court of Appeal, march 12, 1976
[7] Court File No. 1975/690
[8] Court File No. 1975/691
[9] Court File No. 1975/689
[10] Court File No. 1975/688
[11] See Memorandum contained in *Tucker's Select Cases of Newfoundland 1817-1828* , p. 319. It is also reproduced in 1 Nfld. L.R. 284.
[12] D. W. Prowse, *History of Newfoundland from the English, Colonial and Foreign Records* (London: MacMillan and Co. 1895), p. 423

I am sure there is, in actuality, a much more benign explanation for the conversion of a sentence appeal into a conviction-quashing but as there is no written record of the reasons given by the Court on that day, we may now never know.[13]

The Court continued to operate with three judges until 1982 when a fourth justice was appointed,[14] following an amendment to the *Judicature Act*.[15] The size of the Court was again increased to six judges in 1986.[16] That is the complement today, with one additional supernumerary judge.[17]

I should also comment at this point that the NL Court of Appeal, as presently constituted, is now the only court of appeal in Canada that still exists as a division of a superior court. All other jurisdictions have moved on from this format and re-created their courts of appeal as stand-alone courts under separate statute. Minister, there are a great many traditions in this wonderful province of ours that should be retained; however, if I may suggest, keeping our Court of Appeal as a division of the Supreme Court is not one of them.

We have decided to mark this 40th anniversary to highlight the operation of the Court of Appeal within the judicial system in the province. It is perhaps the least well known Court as far as the public is concerned. Yet, it performs a vital function. It is the court of last resort for over 95% of all appeals of cases initiated in the province. It sets the tone and provides direction for the way in which other courts conduct their business. In that sense, it can have an influence that extends far beyond the actual judgments that it makes.

It is our hope that throughout the remainder of this year, the Court will be able, through a number of events, including seminars on appellate practice, brown bag lunches for the Bar and

---

[13] The minutes of the hearing simply record:

> "The Chief Justice is heard.
>
> It is our view that the Information is defective and is not capable of amendment now."

As well, Justice Gushue's personal Bench Book has survived. In it he noted that Counsel for the Crown, Mr. John Kelly, advised the Court that in his view the Informations that grounded the original charges against all four accused were defective because they referred to the wrong charges. Justice Gushue's disposition simply reads "Conviction Quashed!!" His use of an exclamation mark probably indicates that he recognized the unusual nature of the disposition, given the fact that the appeal had only been launched by the Crown against sentence and that the accused had appealed neither conviction nor sentence.

[14] Hon. John Mahoney. Originally appointed to Trial Division in 1975; appointed to Court of Appeal 1982; retired 2001. Since deceased.

[15] S.N. 1981, c. 64, s. 1

[16] *Judicature Act, 1986,* SN 1986, c. 42, s. 156. The appointees were Hon. William W. Marshall (appointed 1986; retired 2003) and Hon. John J. O'Neil (appointed 1986; retired 2002; deceased).

[17] Since its constitution as a division of the Supreme Court, there have been only a total of twenty judges who have held office. The others are: Arthur S. Mifflin (appointed to CA 1979; deceased) ; Noel H. Goodridge (1986; deceased); Geoffrey L. Steele (1989; retired); Margaret A. Cameron (1992; retired); J. Derek Green (1996; still sitting); Clyde K. Wells (1998; retired); Denis M. Roberts (1999; retired); Gale B. Welsh (2001; still sitting); Malcolm H. Rowe (2001; still sitting); Keith Mercer (2003; deceased); Leo D.Barry (2007; still sitting as supernumerary); Charles W. White (2009; still sitting); Michael F. Harrington (2009; still sitting); Lois R. Hoegg (2010; still sitting). The Court has had six chief justices: Robert Furlong (1975-1979); Arthur Mifflin (1979-1986); Noel Goodridge (1986-1996); James Gushue (1996-1998); Clyde Wells (1999-2009) and Derek Green (2009 -).

public information sessions, to make the work of the Court better known and understood by those who are affected by it. We also hope to be able to make the Court more accessible, especially for unrepresented litigants, by demystifying some of its operations, simplifying procedures and reducing costs. We start today with a continuing education seminar, sponsored by the Law Society, dealing with appellate advocacy. While this event is designed for lawyers, we do intend to hold legal information clinics for the general public as well, to assist them in how to present and argue an appeal in the Court.

We also are of the view that the history of appellate jurisdiction in this province needs greater attention, just as many other aspects of our legal history remain to be documented and explored in a systematic way. It is our hope that in the near future, with the help of the Law Foundation and possibly others, the writing of a history of Newfoundland and Labrador appellate jurisdiction will be able to be commissioned.

The Court's Appellate Jurisdiction: Historical Overview

Lest one gets the impression that the first time the Supreme Court exercised appellate functions was only forty years ago when the separate appellate division of the Court was created, it should be noted that, in fact, the Supreme Court of Newfoundland and Labrador has been exercising appellate functions ever since 1792.[18] Next year will mark the 225th anniversary of that event. (You can guess what sort of special ceremony we may be having to recognize that milestone!).

When the "Supreme Court of Judicature of the island of Newfoundland" was created in 1792,[19] with both a civil and criminal jurisdiction, the Court was given civil appellate jurisdiction with respect to judgments or decrees in the surrogate courts that exceeded forty pounds.[20] Although the Court was only originally intended to last for one year,[21] its existence, including its appellate jurisdiction, was continued by the English Parliament periodically[22] until 1809, when the Court was made permanent.[23]

---

[18] Even prior to the creation of the Supreme Court, appellate functions, of a sort were exercised in the colony. The Governor acted as an appeal judge from decisions of the Fishing Admirals acting under King William's Act (1699), 10 & 11 William III, cap. 25, *An Act to Encourage the Trade to Newfoundland*: Keith Matthews, *Lectures on the History of Newfoundland 1500 – 1830* (St. John's, NL: Breakwater, 1988), p. 136

[19] *An Act for establishing courts of judicature in the island of Newfoundland, and the islands adjacent,* 32 Geo. III, cap 46 (1792) [*Judicature Act, 1792*]

[20] *Judicature Act, 1792,* S. 5. Interestingly, the right of appeal was accorded only to defendants. Plaintiffs whose claims were dismissed were not entitled to appeal.

[21] *Judicature Act, 1792*, s. 18: technically, until June 10, 1793 "and thence to the End of the then next Session of Parliament."

[22] 33 Geo. III. C. 76 (1793); 34 Geo. III. C. 44 (1794); 35 Geo. III, c. 25 (1795); 36 Geo. III, c. 37 (1796); 39 Geo. III, c. 16 (1799); 39 Geo. III, c. 17 (1799); 43 Geo. III, c. 29 (1803); 46 Geo. III, c. 29 (1806).

[23] *An Act for Establishing Courts of Judicature in the Island Of Newfoundland and the Islands adjacent; and for re-annexing part of the Coast of Labrador and the Islands lying on the said Coast to the Government of Newfoundland*,

In 1824, the Court system was substantially restructured. [24]A new "Supreme Court of Newfoundland" was constituted, consisting of a Chief Judge and two assistant judges. A new system of Circuit Courts was authorized to replace the surrogate courts. Either the Chief Judge or one of the assistant judges was to be the presiding judge. An appeal from a circuit court decision in most civil matters could be made to the Supreme Court.[25] There was nothing in the legislation, however, that addressed the question of who would sit on the appeal. Since there were only three judges and one of them would have presided over the circuit court trial, if the appeal were to be heard by the Supreme Court *en banc*,[26] the circuit judge would be sitting on appeal from his own judgment. This was the beginning of a problem that remained with the Court for the next 130 years.

Initially, the 1824 Court was intended to continue only for five years "and no longer."[27] However, like the situation regarding the 1792 Act, it was extended by Imperial legislation until 1832[28] when it was made perpetual and at the same time the ability to repeal or modify its provisions was given to the colonial legislature[29] which was being created at the same time.

The local legislature ultimately made many amendments to the judicature legislation relating to many matters.[30] With respect to appeals, by the time of the 1872 consolidation, the issue of who of the three-judge court should sit on appeals was specifically addressed – but not solved. It was provided that motions for new trials and appeals required that "at least two judges should be present."[31] Of course, the inevitable question arises: what happened when the two judges disagreed on the result? The legislation provided that in cases where the two judges "so sitting shall differ in opinion, the matter shall be re-heard as soon as conveniently may be by the three Judges." This concept was carried forward is subsequent re-enactments of the *Judicature*

---

49 Geo. III, cap 27 (1809). The Court initially took an expansive view of the scope of its appellate jurisdiction. Although the legislation specifically conferred a right of appeal with respect to claims *exceeding* forty pounds, Chief Justice Forbes in *Clift v. Holdsworth* (1819), 1 Nfld. L.R. 167 held that the Court's appellate jurisdiction also allowed it to entertain appeals involving sums *less than* forty pounds. Subsequently, a more restrictive (and perhaps more orthodox) view was taken. In *Hunter & Co. v. Hernaman and Howard* (1823), 1 Nfld. L.R. 285, Tucker C.J. held that appellate jurisdiction was confined to appeals involving sums exceeding forty pounds but, even so, the Court still had jurisdiction, by way of judicial review using the prerogative writs, to review decisions involving less than forty pounds.

[24] *An Act for the better administration of Justice in Newfoundland and for other purposes*, 5 Geo. IV, cap 6 [*Judicature Act, 1824*]

[25] *Judicature Act, 1824*, ss. 12,13, 14 and 19.

[26] Section 2 of the *Judicature Act, 1824* provided that "the said Supreme Court shall be holden by a Chief Judge *and* two assistant judges", thereby suggesting that an appeal to the Supreme Court must be to a bench comprising all three judges.

[27] *Judicature Act, 1824*, s. 36

[28] 10 Geo. IV. C. 17 (1829)

[29] *An Act to continue certain Acts relating to the Island of Newfoundland, and to provide for the Appropriation of all Duties which may hereafter be raised within the said Island*, 2&3 Wm. IV, c. 78 (1832)

[30] A complete list is contained in: Newfoundland Law Reform Commission, *Legislative History of the Judicature Act 1791-1988*, NLRC – IWD4, December 1989, pp. 49-61.

[31] *Judicature Act*, C.S.N. 1872, c. 9, s. 3.

Act[32] up to 1957. Prior to that date, the Court still faced the potential problem of sitting on appeals *en banc*, including the judge whose judgment was being appealed. While there were cases where an appeal was heard first by a panel of two[33] there were also instances where appeals were heard directly by a three-judge panel, including the trial judge. This was the situation in what was arguably one of the most important constitutional cases affecting Newfoundland, the challenge to the legality of the referenda regarding whether Newfoundland should join Canada as a province.[34] Dunfield J. who was the judge at first instance, also sat on the appeal and wrote a concurring opinion.[35] Clearly, the appearance of impartiality could be said to suffer when a judge sat on his own appeal. However it is refreshing to note that it was not unknown (albeit rare) for the judge whose judgment was appealed to reverse himself on appeal![36]

The situation was finally rectified by the creation of a position of a fourth judge in 1957[37], although the provision was not brought into force until 1963 with the vacancy actually being filled in that year.[38] That remained the structure of the Court, as an appeal court, until it was reconstituted as a separate division of the Supreme Court in 1974.

There, in brief compass is the "Coles Notes" version of the appellate history of the appellate jurisdiction of the Supreme Court. Within that skeleton, there is much to be added about the work of the Court, its personalities, its significance in the political and social life of the colony, dominion and province, and the jurisprudence it has produced over the past 225 years. As I indicated previously, our hope is that that history will be written.

In Memorium: Chief Justice James Gushue

No discussion of the history of the Court of Appeal since its creation as a separate division of the Supreme Court would be complete without emphasis on the role that the Hon. James Gushue played in that history. As I have already noted, he was one of the original three judges appointed when the Court was constituted and he served the longest of any judge in the Court's 40-year history, with three of those years served as Chief Justice. In many ways, the history of the Court is the history of Jim Gushue.

---

[32] Stats. Nfld. 1904, c. 3, s. 8, 26, 28, 29; C.S.N. 1916, c. 83, ss. 9, 27, 29, 30; R.S.N. 1952, c. 114, ss. 9, 27, 30

[33] See, e.g. *American Aerated Water Co. Ltd. v. Gadens Ltd.* (1948), 16 Nfld. L.R. 194 (Emerson C.J. and Dunfield J. on appeal from Winter J.); and *Peckford v. Peckford* (1948), 16 Nfld. L.R. 347 (Dunfield and Winter JJ. on appeal from Emerson C.J.)

[34] *Currie et al v. MacDonald et al* (1948), 16 Nfld. L.R. 365

[35] Pp. 420-423. Although he stated "I have little to add to what I said in my original judgment and have not heard anything in the appeal to lead me to change my views", he then when on to write an additional three pages of additional reasons.

[36] See, e.g. *Young v. Squires* (1936), 14 Nfld. L.R. 15 ("Full Court", including Kent J., reversing Kent J. at trial (1935), 13 Nfld. L.R. 350)

[37] Stats Nfld. 1957, No. 33, s. 3, 4. Section 27 specifically provided that the appeal panel shall consist of three judges, "none of whom shall, except in cases of urgency arising from absence, illness or other cause, or the vacancy in the office of any judge, be the judge whose judgment, finding or order is being questioned…".

[38] The appointee was Hon. Harold G. Puddester.

Born in St. John's on June 4, 1933, Jim Gushue attended Prince of Wales College and Memorial University where he obtained a Bachelor of Arts degree. He was Newfoundland's Rhodes Scholar for 1956, attended University College, Oxford and obtained a degree in Law in 1959. Following graduation from Oxford, he worked for a United Nations agency in Rome before returning to Newfoundland to practice law. He was called to the Bar in 1960 and practiced with the firm then known as Stirling, Ryan, Caule, Gushue and Goodridge (now Stewart, McKelvey, Stirling, Scales). His practice primarily involved civil litigation and insurance law. He developed a reputation as a solid, thorough and firm litigator who was scrupulously fair in how he conducted himself.

I experienced this fairness first hand in an insurance matter we were engaged in. I had only been shortly called to the Bar when I attended on Jim Gushue's offices to attempt to negotiate a settlement of a motor vehicle claim. Jim, of course, was representing the defendant's insurers. By that time he had had many years of experience under his belt. The negotiations went cordially as we discussed placement of a value on the various components of the claim. We reached agreement on these points and I offered to settle the claim for the total of the agreed amount for each of the components, to which he agreed. As I was gathering up my papers to leave, he hesitated, and then said "wait a minute, you haven't asked for anything for [some other potential claim component – I forget what it was now]. Why is that?" Of course, as soon as he mentioned the issue, I realized that I had dropped the ball and missed an important part of my claim. He saw my embarrassment. He immediately said "well, we should add something in for that, too, shouldn't we?" That led to further discussion with a resulting settlement that was larger than the original agreed amount. He could have tried to take advantage of the inexperience of a young lawyer and rush the conclusion of the settlement before I realized my mistake, but he didn't. He saw my mistake and refused to let experience trump fairness.

With his fairness gene well-enhanced, he was ideally suited to work as a judge. And, indeed, shortly after that incident, he was appointed directly to the Court of Appeal. His quiet understated personality belied a keen analytical mind that made a major contribution to the Court's jurisprudence. He quickly became a mainstay of the Court. He wrote a lot and he wrote concisely. He was careful with his words, often being motivated to write a concurring opinion rather than to sign on to language of a colleague with which he was uncomfortable. To say that, however, is not to imply that he was tentative or timid or hide-bound by precedent in his judgments. It is clear from reading his judgments that he was very concerned with the broader legal and social implications of what he wrote, but where he felt that the common law was out of step with current social or commercial needs he was prepared to step up and be counted and to modify the rules appropriately.

Let me give you two examples. In the first – *Chaulk v. Fairview Construction Ltd.*,[39]- I was counsel on the case, so I may not be totally objective when I say that the result was a

[39] (1977), 14 Nfld. & P.E.I.R. 13 (Nfld. CA)

brilliant development by Justice Gushue of the law relating to specific performance. My client, a construction company, entered into an agreement for the sale of three duplex apartment houses on standard size lots in a subdivision which it was proposing to develop. When the company discovered that the purchaser was proposing to "flip' the houses for profit, it refused to complete the deal. The purchaser sued and obtained an order for specific performance. On appeal, I argued that as there was nothing unique about the three houses (they were all of identical design on standard lots in a subdivision that had no special characteristics) and as the purchaser was going to resell them for profit, damages would be an adequate remedy. Specific performance was not needed.

As is well known, the conventional wisdom has been that each piece of land is unique and that specific performance is therefore generally available as the primary remedy for breach of a contract to sell land. Justice Gushue, writing for the Court nevertheless held that the order for specific performance should be set aside and that an order for damages to be assessed should be substituted. Going back to basic principles, he noted[40] that the right to specific performance of a contract to convey land did not depend on the fact that the subject-matter was in fact land, as opposed to personal property, but on the fact that in most cases damages would not be an adequate remedy if the purchaser was not allowed to have the property for which he had contracted. Applying this analysis to the case at hand, he concluded:

> The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. … It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case. … It is therefore obvious that damages do afford an adequate remedy to Chaulk, and that these damages should be capable of assessment, with very little difficulty. I would allow this part of the appeal.

This decision was regarded as controversial at the time. However, it is worth noting that the Supreme Court of Canada followed Gushue J.A.'s lead twenty years later where Sopinka J. in *Smelhagho v. Paramadevan*[41] quoted and adopted his analysis, concluding:

> [21] It is no longer appropriate … to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.

[40] Relying on *Adderly v. Dixon* (1824), 15 M & St. 607, per Sir John Leach.
[41] [1996] 2 S.C.R. 415

Another example of where Gushue J.A. was influential in reform of the common law was in the area of occupiers' liability. For over a hundred years the duty of care owed by an occupier of property to a person injured on that property was governed by the comments of Willes J. in the English case of *Indemar v. Dames*,[42] which drew distinctions between the status of the plaintiff, as invitee, licensee or trespasser. For many years, these distinctions have been regarded as arbitrary, unsatisfactory and productive of injustice in individual cases. As a result, in most jurisdictions in the common law world – at least in England, Australia and in Canada – the law has been reformed by legislation imposing a common duty of care that is not dependent on the legal status of the plaintiff vis a vis the property at the time the injury occurred. In Newfoundland and Labrador, the legislature failed to act. In *Stacey v. Anglican Church of Canada*[43] Gushue J.A. expressed his frustration not only with the unsatisfactory nature of the common law rules but also with the failure of the legislature to do anything about it. He took matters into his own hands. Noting that "[t]he permutations and combinations of circumstances which are often necessary to achieve a desired result have plagued the common law courts for over a century," he referred to the statutory reforms in other jurisdictions and continued:

> No such legislation has been enacted in this jurisdiction. The question for immediate consideration by this Court is whether we are still bound (or, perhaps better put, hidebound) by the traditional law …, thus requiring legislation to free us from those fetters; or whether the common law has itself evolved sufficiently to allow this Court to declare that it is no longer necessary to follow the traditional path.[44]

He stated that: "[o]ne can state in unequivocal terms that the archaic, cumbersome and often unfair rules of the law of occupiers' liability as it presently exists in this province cries out for reform."[45] He concluded that that the Courts can and should make incremental reform of the law in this area without waiting for the legislature to act, as it was necessary "to keep the law in step with the dynamic and evolving fabric of our society."[46] He then proceeded to formulate a duty of care owed by occupiers to all lawful entrants on property,[47] noting that the reformulated duty was "no more than a logical extension of the law of occupiers' liability to the general duty of care owed by one person to another,"[48]and it is that principle that has been applied in the Courts of this province ever since.[49] It has also been followed and applied in other jurisdictions that have not enacted reform legislation.[50]

---

[42] (1866), L.R. 1 C.P. 27
[43] (1999), 182 Nfld. & P.E.I.R. 1 (Nfld. CA)
[44] Paragraph 15.
[45] Paragraph 28
[46] Quoting McLachlin J, in *Bow Valley Husky v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 at 1262, which in turn quoted and relied on Iacobucci J. in *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670: "Courts should not be quick to perpetuate rules whose social foundation has long since disappeared."
[47] "such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there." (paragraph 29)
[48] Paragraph 30
[49] E.g. *Gallant v. Roman Catholic Episcopal Corporation* , 2001 NFCA 22; *Ledez v. Health care Corporation of St. John's,* 2008 NLTD 60; *Hollett v. St. John's (City),* 2008 NLTD 72; *10475 NF Ltd. v. Houston,* 2012 NLCA 34
[50] E.g. *Burton v. Westfair Foods Ltd.*, 2003 YKSC 24

In addition to serving in the appeal division for a substantial part of its existence, Justice Gushue also contributed in other ways to the public affairs of the province. Of particular note is the public Inquiry he conducted into the causes of the tragic Chafe's Nursing Home fire in which twenty-one persons died. His report[51] was remarkably wide-ranging, dealing not only with the causes and circumstances surrounding the fire itself but also with the condition, safety policies, day-to-day operation, financing, licensing and regulation of all nursing homes and welfare institutions in the province, involving visits to and actual inspections of most of the dozens of homes in the province. He developed a broad list of recommendations which led to new legislation as well as comprehensive government regulation over nursing homes and care institutions and the creation of new professional staff to enforce adequate standards.

I am glad to have had the privilege of having Jim Gushue as my chief justice. He was always very supportive of me and his other colleagues. His approach to court issues was always low-key and understated but he had an inner strength which he was willing to demonstrate when strong direction on matters of court administration was required, as it was on several occasions.

I know former Chief Justice Wells would also want me to express a special word on his behalf about the high regard in which he held Jim Gushue. I know he valued his advice which then Chief Justice Wells sought and Jim was only too willing to give, on many matters of court administration.

As we reflect on the career of James Gushue, I think it is fair to conclude that the province of Newfoundland and Labrador is the better for his presence both in terms of his jurisprudence and in terms of his impact on those – members of the Bar, judicial colleagues, government officials and friends – with who he interacted.

To his son Jonathan, his sister Bobbie and his family and friends, let me express on behalf of his colleagues on the Court, our condolences on Jim's passing and give you our assurance that he will be missed by us all.

I thank you for your attention. I will now call on (in turn):

1. Justice Moldaver
2. Justice Hilton
3. Justice Brown
4. Attorney General Parsons
5. Ms. Ledrew (Law Society)
6. Mr. Scrutin (CBA)

to say a few words.

Thank you for your attendance. The Court will now adjourn.

---

[51] *Report of the Commission of Inquiry into the Chafe's Nursing Home Fire, December 26, 1976, and into the Safety Standards and Quality of Care in Homes for Special Care and Welfare Institutions in the Province of Newfoundland.*