

**Edited Remarks by Chief Justice J. Derek Green
On the passing of John J. O'Neill
Retired Justice of the NL Court of Appeal
The Courthouse, Duckworth St., St. John's, NL
Courtroom #1
February 10, 2015**

This special joint sitting of the Supreme Court of Newfoundland and Labrador, Court of Appeal and Trial Division, has been convened to enable the Court, the Government of Newfoundland and Labrador and members of the Bar to reflect on the passing of, and to pay tribute to, the Honourable John James O'Neill, who passed away on February 2 at the age of 83.

I welcome in the Court today members of John O'Neill's family, his daughter Maureen, her husband John Moores and their children, Kelly and Mary Beth, as well as John's other daughter, Kate, her husband Robert Evans and their children, Maggie, Lucy and Jake. John's son, John, Jr., who was in St. John's last week for the funeral, had to return to his home in Calgary and is unable to be here. However, we are pleased that John, his wife Leslie and their daughters Kiley, Claire and Katie are able to participate in this proceeding by way of teleconference. So, welcome, John and family.

Let me say on behalf of the judges and staff of the Court, I extend our sincere sympathies to each member of the O'Neill family on the loss of a much-loved father, father-in-law and grandparent.

John O'Neill had a lengthy and intense 52-year involvement with the law of this province, primarily as a lawyer and judge from the time of his call to the Bar in 1954 upon his graduation from Dalhousie Law School to the date of his retirement as a judge of the Court of Appeal in 2002. For those of you who just did the math, you will have noticed the period of time I just referred to is 48 years, not 52. I nevertheless count John's active involvement with the law to include up to at least 2006 because in that year he was appointed by the then Chief Justice as the chair of the Electoral Boundaries Commission to prepare a report on possible readjustment of the boundaries of provincial electoral districts – something, as we know, is again very much front and centre of public life in the province. No doubt the choice of John O'Neill as chair of the 2006 Electoral Boundaries Commission was made at least in part based on his experience as a judge and the confidence held in his impartiality. Using 2006 as a benchmark, therefore, we can safely say that John

O'Neill has devoted over half a century to the law and, through the law, to the public of this province.

When I was called to the Bar in 1974, John was already a senior twenty-year practitioner and a Queen's Counsel. He also had the distinguished accomplishment of being a Fellow of the prestigious American College of Trial Lawyers. He had a reputation as a formidable civil litigator and corporate and commercial lawyer. He approached every matter in which he was involved in an intense, no-nonsense, take-no-prisoners manner. Whether he was at the negotiating table or in the courtroom, he was known as a force to be reckoned with. I learned that first-hand. I had many dealings with him over the years as counsel.

As corporate counsel, he had been heavily involved with the opening of the Wabush Mines in Labrador and participated in the drafting of the documents creating the business structure of the mine. Unlike most business entities which employ the relatively simple structure of a corporation, Wabush Mines was set up as a very complicated and involved joint venture. I had occasion to review the voluminous documentation many years later for another client. It was one of the most intricate and involved business structures I had ever come across. It is a testament to the intricate work that John put into that project that this unusual structure stood the test of time for over 50 years.

During his years in practice, John appeared frequently before the Newfoundland and Labrador Court of Appeal and the Supreme Court of Canada. On more than one occasion, he was engaged on behalf of the Government of Newfoundland and Labrador to represent its interests, for example on the challenge by CNR to the jurisdiction of the province to regulate CNR's fares on its island-wide bus service¹ and on the reference regarding the repatriation of the Constitution². In the latter case, the Supreme Court's conclusion that there was a convention that required provincial agreement before Parliament may amend the constitution followed in large part O'Neill Q.C.'s submissions on that point. Other significant cases involving the public life of the province saw him representing ODECO Drilling of Canada in the litigation involving the tragic loss of life on the *Ocean Ranger* drilling platform³ and Quinlan Brothers Ltd. in a case that went all the way to the Supreme Court of Canada⁴. It dealt with alleged adverse possession of a fish plant against an individual title holder who had allowed the company he had

¹ *CNR Co. Newfoundland (Public Utilities Commission)*, [1976 2 S.C.R. 112

² *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

³ See, e.g. *Odeco Drilling of Canada v. Hickey's Estate* (1985), 59 Nfld. & P.E.I.R. 165 (NLCA)

⁴ *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.*, [1975] 1 S.C.R. 684

incorporated and of which he was the majority shareholder to occupy and use it. In resisting the argument that adverse possession applied, O’Neill Q.C. successfully led the Supreme Court to rely on precedents reaching back to the seventeenth century⁵ (I love those old cases) which drew the distinction between a bare non-exclusive licence and a tenancy at will.

I mention the *Quinlan* case because of the obvious interest O’Neill Q.C. maintained in limitations issues later his career. Among his many appointments, John served as chair of the Newfoundland and Labrador Law Reform Commission from 1982 to 1987. I was also a member of that commission during John’s tenure⁶. The report issued by the Commission on limitation of actions⁷ ultimately formed the basis for our current *Limitations Act*.⁸ In that sense, it can be said that John has also had an indirect influence on legislative developments in the province as well as on the common law. I noted with interest at the time we were discussing what reform recommendations the Commission should make that John had a keen interest in the distinction, for limitations purposes, between the concept of a possessory licence and a tenancy at will, the very distinction he was successful in persuading the Supreme Court of Canada to recognize and maintain in the *Quinlan* case. It is interesting to note that the resulting legislation has done nothing to disturb this distinction!

When John O’Neill was appointed to the Court of Appeal in 1986 direct from private practice, I had many opportunities to appear as counsel before him. He was an imposing figure in Court: glasses pulled down to the tip of his nose, leaning forward intently and not hesitating to put to counsel his own theory of the case, waving his glasses as if they were a blackboard pointer. We often did not see eye to eye on the legal issues in the cases I argued. In fact, I asked one of the Court of Appeal legal research counsel to check on the number of cases in which I was successful in persuading O’Neill J.A. to my point of view and she could only find one⁹ in which there was a concurring opinion in which he, almost reluctantly, agreed only with part of my argument and dissented on the rest!

I fared better as a trial judge in front of O’Neill J.A. He treated me more gently than when I was counsel. In one case¹⁰ I was pleased to read his conclusion: “I am in complete agreement with the reasons for decision of the trial judge and in his

⁵ E.g. *Thomas v. Sorrell* (1673), Vaughan 330; 124 E.R. 1098

⁶ and ultimately succeeded him as chair

⁷ Law Reform Commission, *Working Paper on Limitation of Actions*, NLRC – WP1 (1985)

⁸ SNL 1995, c. L-16.1

⁹ *Apache Construction and Development Limited v. H.P Holdings Limited* (1988), 71 Nfld. & P.E.I.R. 52 (NFCA)

¹⁰ *Non-marine Underwriters, Lloyds of London v. Hiland Insurance Ltd.* (1997), 156 Nfld & P.E.I.R. 267 (NFCA)

disposition of the matter.”¹¹ Those words are music to the ears of a judge whose judgment is under scrutiny by a higher court! In later years, I was his colleague on the Court of Appeal¹² and worked with him on many cases.

Although John was primarily a civil litigator and corporate counsel, he developed a great interest in criminal law when on the Bench. He became known to defence counsel as a judge sympathetic to the rights of the accused. He expressed concern in his judgments for ensuring that the fundamental principles of reasonable doubt, the standard of proof and the need for correctness of jury charges were properly observed. It was even postulated that O’Neill J.A., wanting an accused to have another chance at arguing his case would go out of his way to write a dissent to ensure that the appellant would have an appeal as of right to the Supreme Court of Canada. A number of his dissents were accepted by the Supreme Court, which allowed appeals using those magic words to which I referred: “substantially for the reasons of O’Neill J.A. dissenting in the Newfoundland and Labrador Court of Appeal”.¹³ No doubt he was pleased.

During his time on the Court, O’Neill J.A. became involved in the Canadian Superior Court Judges’ Association, a body representing superior court judges throughout Canada. He served for many years on the Association’s Board of Directors and executive and in 1997-1998 he was the Association’s president. In that capacity he was the face of the Canadian judiciary in its dealings with the public and the Government of Canada and in the promotion of a better understanding of the role of the judiciary in Canadian society.

John was known throughout his time as a lawyer and judge as a person who paid close attention to protocol, especially how one should dress appropriately for the occasion at hand. Those of us who knew him remember him as someone who was impeccably turned out, with a handkerchief always in the breast pocket of his suit, a gold watch chain in his vest, and when he was in court, the hard-starched wing collar for his tabs. He was hands down the best-dressed judge on the court (at least amongst the men). I am afraid I was a great disappointment to him in this regard. I remember an incident one warm summer day in July. I had taken a week off but had to go down to the court for a few minutes to pick up something. I was dressed in a pair of summer slacks and a golf shirt. As I entered the building, I met John coming down the stairs from the second floor. He was in a white dress shirt and tie. His only concession to the summer was a sports jacket instead of dark suit.

¹¹ Ibid., para 17

¹² 1996 - 2000

¹³ E.g. *R. v. Squires*, [2002] 4 S.C.R. 323 and *R. v. Allen*, [2003] 1 S.C.R. 223

He took one look at me and recoiled in horror at my attire. The very thought of attending at the court for any purpose in anything other than a shirt and tie was anathema to him. He retreated up the stairs, muttering things like “disgraceful lack of standards” and “an affront to the dignity of the court.” I don’t think he ever got over the incident. I certainly didn’t.

Another type of case in which John showed a special interest as a judge flowed, I think, from the fact that he was a keen hunter and excellent marksman. He loved the outdoors and throughout his life would often go on hunting trips with friends as well as, of course, his wife, Mary. In later years he enjoyed immensely going bird hunting with son John in Alberta. I remember a number of occasions when he spoke to me enthusiastically about his and John’s time together, which he regarded as special.

But how does this interest in wildlife relate to John’s judicial career, you may ask. Well, the Chief Justice has unfettered power to assign cases to members of his court. But, John was, if anything, not shy. I noticed how he was always offering to “help out” the Chief by offering to sit on cases that had some connection to hunting or wildlife legislation. As a result he ended up on a number of such cases, one of which went to the Supreme Court of Canada.¹⁴ In that case, which involved the constitutionality of the federal marine mammal regulations pertaining to sale of blueback seals, O’Neill J.A. dissented and, of course -you guessed it- the appeal was allowed by the Supreme Court substantially for the reasons of O’Neill J.A. in the Court below.

Finally, mention must be made of the Supreme Court of Canada’s decision in the *Shepard* case¹⁵ which established the principles relating to the duty of judges to give reasons for their decisions. The case originated in Newfoundland. At the Court of Appeal level, I had the privilege of working with John on that case. He and I both wrote separate but similar concurring reasons which were essentially affirmed by the Supreme Court. No doubt, the *Sheppard* case will stand as one of John’s legal legacies.

Over the years I have had many different opportunities to interact with John O’Neill in a professional way: as opposing lawyer, working with him on law reform projects, appearing before him as counsel, having my trial judgments analyzed by him and finally, working with him as a judicial colleague. In all

¹⁴ *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569

¹⁵ *R. v. Sheppard*, [2002] 1 S.C.R. 869

circumstances, he will be remembered by me as an interested, intense but fair-minded individual who always showed unfailing courtesy to those with whom he dealt. He was a multi-faceted man with many differing interests. He will be long remembered.

Once again, I express to the O'Neill family my sympathies and those of the other judges and staff of the Court of Appeal on his passing.