Remarks by Hon. J. Derek Green,
Chief Justice of Newfoundland and Labrador,
On the Passing of the Honourable Keith Mercer,
Justice of the Court of Appeal -
The Courthouse, Duckworth St., St. John's, NL
Courtroom #1
September 11, 2015

It is with great sadness that we convene this special joint sitting of the Supreme Court of Newfoundland and Labrador, Court of Appeal and Trial Division, to enable the Court, the Government of Newfoundland and Labrador and the members of the Bar to record the passing of the Honourable Keith James Harold Mercer, a sitting justice of the Court of Appeal, to pay tribute to him and to reflect on his contribution to the legal life of this country.

Justice Mercer passed away on Saturday, August 15, 2015 at the age of 69 years.

I welcome in the Court today members of Keith's family, his wife Harriet, his daughter Lesley and his son Nick. I also recognize and welcome special family friends the Hon. Lynn Spracklin, former Judge of the Provincial Court, John Green Q.C. and his wife Margot, Gayle Hogan, Jim and Sharon Winter, Robert and Karen Driscoll, Ian MacPherson, Shan and Moira O'Dea and Eileen Young.

I recognize and welcome the Honourable Felix Collins, Attorney General of Newfoundland and Labrador.

A welcome is also extended to the Honourable Mark Pike, Chief Judge of the Provincial Court and to Justice Elizabeth Heneghan, justice of the Federal Court of Canada.

I also note the presence of the Honourable Clyde Wells, former Chief Justice of NL. Justice Wells was chief justice for a considerable portion of the time during which Keith served in the Court of Appeal. I also recognize and welcome former appellate Justices Marshall and Cameron. Justice Marshall was a member of the Government when Keith was in the Department of Justice and also a colleague of Keith's both in the Department and on the Court. I am also pleased to see here today former Justices William Marshall, David Riche, Gerald Lang, James Puddester, Robert Wells and Douglas Cook, colleagues of Keith in the Trial Division.

Keith served the legal system of this province with distinction for a total of 44 years. Twenty-one of those years were spent as a member of the legal profession and 23 as a judge, first as a member of the Trial Division for 11 years and then as an appellate judge for 12. He was called to the bar in 1971, worked in private practice in St. John's at various times, as well as a senior official in the Department of Justice. He was appointed Queen's Counsel in 1984. Those are the raw statistics of a life in the law. They do not, however, begin to describe the depth or significance of that life or its contribution to our community.

In 1967, at the age of 22, Keith was awarded the Rhodes Scholarship for Newfoundland. The Canadian edition of Time magazine ran an article on the Canadians who were awarded the Rhodes scholarship for that year describing their backgrounds and their accomplishments. In the commentary on Keith, the writer referred to the fact that Keith had impressed the selection committee with his dedication to the province of Newfoundland and his desire to return home following his studies at Oxford "to make a difference".

True to his word, Keith did return to Newfoundland when he graduated and spent the whole of his career here. In preparation for that career, he had, following graduation from Bishop Field College where he won the provincial Jubilee Scholarship, taken a B.A in History from Memorial University in 1966. He spent one year at Queen's University Law school before winning the Rhodes Scholarship, and then completed his law degree at Oxford, where he took a B.A. in Jurisprudence in 1969 followed by the graduate (and oddly-named) BCL degree in 1970, which has been described (perhaps a little self-servingly) by the current Dean of the Oxford Law Faculty as "the toughest law degree on the planet."[1]

Upon his call to the Newfoundland Bar in 1971, he practiced law with the firm Mercer, Spracklin and Mercer for three years. During that time, he also served as Law Clerk of the House of Assembly. In 1974 he joined the Department of Justice and quickly rose to the rank of Assistant Deputy Minister and then Associate Deputy Minister.

During his time in the Department, his ability as an insightful and careful legal advisor was recognized early. He was involved in major files involving important public issues, including the many bond issues and other government financings that were dealt with at that time. These were the early days of a new

[1] Hugh Collins, "Forty Years On", *Oxford Law News*, 2015, No. 19, p. 11

government which had taken over from the Smallwood administration. There were new directions to be taken, new policies to be developed to underpin new legislative initiatives – in short many legal issues on which the government needed advice. At a relatively early professional age, Keith Mercer was drawn into these matters, giving advice and assistance to government departments as well as certain Crown corporations and agencies. For example, he acted as one of the counsel for the government in connection with the litigation arising out of the bankruptcy of the Come-By-Chance oil refinery,[2] at that time the largest commercial bankruptcy in North America. Demonstrating the trust the Court had in his judgment and ability, he also served as the Government's representative on the trustees of the bankrupt estate of the refinery. Colleagues who worked with him during this period describe him as a person with an enormous depth of legal and general knowledge, thoughtful, methodical and kind in his dealings with others.

Keith returned to private practice in 1981, first with Fowler Kendall and Mercer and later with Stewart, McKelvey, Stirling, Scales where he became a partner. Notwithstanding his leaving the Department of Justice, the government of the day continued to seek his counsel on a number of major matters. For example, he was engaged as one of the counsel representing the Attorney General in the Newfoundland Government's attempt to recapture power from Churchill Falls in the so-called *Churchill Falls Recall Case.*[3] One of the more junior counsel working with Keith on that case recently spoke to me in glowing terms of his role in the preparation of the case for trial. Again, the words "thoughtful, methodical and intelligent" were used along with the observation that overall he was "a great senior counsel to work with." In truth, he was a mentor and a role model as a legal counsel.

A view commonly (but mistakenly) held by the public of what good lawyers are like is that they are often vociferous, great orators and strongly (perhaps even bombastically) argumentative. Keith Mercer did not fit that mold. Yet he was a superb lawyer. He was quiet, reflective and soft-spoken, but once he did speak it was evident that the positions he espoused and the advice he gave was always based on a rock-solid foundation and could not but impress the listener with the strength of his arguments.

During his time with Stewart McKelvey, Mercer (by now, Mercer Q.C.) developed a thriving commercial practice of national and international dimensions.

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[2] *Re Provincial Refining Co.* (1980), 33 Nfld. & P.E.I.R. 40 (Nfld, T.D.); and on appeal [1981] N.J. No. 10 [QL]
[3] *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Limited* (1983), 49 Nfld. & P.E.I.R. 181 (Nfld. T.D.)

In the words of one former partner, he was "a great commercial lawyer." Interestingly, his practice drew him back to the Come-By-Chance oil refinery where he acted for the post-bankruptcy new owners in major corporate matters and financings. Again, words like "organized, meticulous, insightful" have been used by his colleagues to describe his work, as well as his quiet demeanour, quick wit and infectious hearty laugh. He never took himself too seriously. One StuMac partner commented, almost in amazement, that despite being a lawyer of prodigious output, Keith always was able to achieve the lawyer's impossible dream of keeping a completely clean desk except for the file he was working on. Once again, he was described as a great mentor for younger lawyers.

In 1992, Mercer Q.C. was appointed a justice of the Supreme Court of Newfoundland, Trial Division. I was privileged to have been appointed to the Court on the same day. We attended New Judges' Orientation together and talked much about what we expected the life of a judge to be like. We both expressed apprehension about what would be expected of us in this new role. I remember Keith saying to me that he had read somewhere the following description of the judicial role by an English judge: "A judge appears like the swan gliding gracefully across the surface of the lake – but what people don't see is that the swan is always paddling madly underneath!" In a sense, that sums up Keith's judicial career. His quiet unflappable demeanour always gave the impression that he was on top of things on the Bench, but he was never so puffed up with a sense of his own importance or his obvious abilities that he believed he always had the answer to every issue. He knew that judging requires major work behind the scenes, in preparation, in research and in thoughtful, often solitary, analysis. One counsel recently described him to me as a judge of "skill, erudition and grace," who was always prepared but at the same time was "even-tempered and balanced."

One of things that has been commented on to me over and over in recent weeks is Justice Mercer's thoroughness and attention to detail in his cases. His judgments were comprehensive, while at the same time fine examples of clarity and conciseness in writing style. As a trial judge, he received many commendations from appellate courts for the way in which he wrote his judgments, with the Supreme Court of Canada in a very contentious case involving conditional sentences for sexual offenders describing his trial judgment as "very thorough." [4]

As trial judges know, they often have to search in vain through appellate judgments to find even a crumb of a compliment thrown their way. Yet, in

[4] *R. v. L.F.W.* , [2000] 1 S.C.R. 132

Mercer, J.'s case, compliments not infrequently occurred in the Court of Appeal, where phrases like "thoughtful and comprehensive"[5] and "carefully considered"[6] have been used by the court to describe his judgments.

One the characteristics of Justice Mercer the trial judge that struck me was the range of his judicial knowledge and expertise. As Chief Justice of the Trial Division I had the responsibility for assigning judges to individual cases. I very quickly recognized that although Keith's experience in private practice was primarily in the commercial and corporate area (and he had probably not touched a criminal file in his life prior to coming to the Bench), I did not have to be concerned about his ability to handle cases of wildly different subject-matter. For example, he enjoyed sitting on criminal cases and was particularly adept at handling them. He became one of the "go-to" judges for trying complicated criminal jury cases. Unfortunately, a judge's jury charges do not get written up in the law reports (except when portions are under appeal). Thus, most of his work in this area is not accessible for review. By all accounts, however, his jury charges were a model of clarity and comprehensibility. They were rarely appealed.

Justice Mercer the trial judge was, as I have said, equally adept in virtually all areas of the law. He was just as much at home when sitting on personal injury, family, bankruptcy or class action matters – to name just a few - and brought to each case the same level of broad legal knowledge and commitment to each case he sat on. Many of his trial decisions continue to be cited in other cases as accurate statements of the law, both locally and across the country. For example, his judgment in a divorce case as to when a husband and wife could be said to be living separate and apart under the *Divorce Act* even though living under the same roof [7] and his analysis in a class action case of when disclosure of medical records could be refused because of lack of relevance to certification issues[8] are often relied on.

I mentioned that Justice Mercer's decisions were not often overturned on appeal. He has the distinction, however, of having two of his cases reversed even though he was right and committed no error of law. In the first[9], the Court of Appeal observed that he meticulously, comprehensively and correctly described the principles relating to occupiers' liability but nevertheless reversed him because

[5] *R. v. Carroll* (2002), 207 Nfld. & P.E.I.R. 317 NLCA) at para. 6
[6] *R. v. Taylor* (1995), 135 Nfld. & P.E.I.R. 215 (Nfld. C.A.)
[7] *Woolgar v. Woolgar* (1995), 10 R.F.L (4th) 309 (Nfld. U.F.C.)
[8] *Pardy v. Bayer Inc.* 2003 NLSCTD 130
[9] *Murphy v. St. John's (City)* (2001), 200 Nfld. & P.E.I.R. 181 (NFCA); on appeal from (1998), 50 M.P.L.R. (2d) 243 (NFSCTD)

although he was right at the time he gave his judgment, the Court of Appeal in another case[10] had changed the law in the interval between the time when he rendered his judgment and the appeal from it had been heard. In the other,[11] a drug trafficking case, he had handed down a sentence to an offender that matched the length of time a similarly-placed co-conspirator involved in the same crime had received in another sentencing decision by another judge. Although Mercer J. had properly applied the parity principle, the Court of Appeal nevertheless reduced the sentence because, since Mercer J.'s decision, the co-conspirator had had his sentence also reduced on appeal.

In 2003, Keith was appointed a justice of the Court of Appeal where he served until his passing this year. I know I speak for all of the judges of the Court, both past and present, who had the opportunity to serve with him, that he was universally regarded as a wonderful colleague who was always engaged and added so much to the intellectual life of the Court.

He was admired for his carefully crafted judgments. He was known both within the Court and the legal profession for his tight and precise use of language to express the legal principles applicable to the case at hand. He was not given to making broad, general statements of principle or policy, and very much believed that the statement of law in a given case should be confined to apply to the specific facts at issue. That is not to say that he did not see the broader picture. He wrote with a view to how the principle he was describing might have implications for future cases with varying fact situations.

His approach to decision-writing can be characterized as methodical, meticulous, nuanced and textured. In many ways, his judgments can be regarded as a textbook on how to write judicially, both as to style and approach. His skill at judgment writing was recognized nationally. He was invited to participate in conferences in judgment writing and even had a manual for judges named after the phrase he coined to describe the hardest thing a judge has to face when preparing to write a judgment ("Getting Started").[12]

Keith's contribution to the Court extended beyond his skill as a judgment writer. He was a very collegial member of the Court. He demonstrated a great interest in all the Court's cases, even ones he was not sitting on. He was very good at picking out potential problems with, and identifying implications of, language

[10] *Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1 (NFCA)
[11] *R. v. Gauthier* (1999), 173 Nfld. & P.E.I.R 181 (Nfld. C.A.)
[12] National Judicial Institute, *Getting Started*

chosen by other judgment writers in their judgments. He loved discussion and debate, and his contribution in this regard no doubt elevated the level of analysis in a court which has as its raison d'etre the notion of collective decision-making. Even in later days, when the pain of his illness prevented him from sitting on the Bench, he continued to participate in the life of the Court by reviewing judgments and enthusiastically discussing points on which his opinion was sought.

As I was preparing these remarks, I set out to identify and highlight one or two judgments of Keith's that to me stood out above the rest of the body of his jurisprudence. I found that difficult to do. As I reflected on why that was so, I concluded that it was not because his work was uninteresting or not worthy of mention but, rather, because his judgments were, hardly without exception, of such a level of quality in terms of clarity, insight and strength of analysis that to highlight some would by implication denigrate others. As one of Keith's colleagues on the Court observed, when you look at the whole body of his work, one cannot single out one judgment that stands out because they all stand out. While one can point to individual judgments that continue to have influential effect, such as his decisions on the principles of contractual interpretation,[13] the defence of officially induced error[14] and the importance of deference owed to joint submissions in sentencing,[15] one cannot single them out because of rhetorical flourishes or colourful language in their presentation, but because they represent, in their carefully-chosen language, a certain understated brilliance in analysis, as another colleague of mine recently observed. When one thinks about it, that is a characteristic that is perfectly in line with Keith's quiet, thoughtful and methodical way of doing things generally.

All that said, there is one case that I am going to dwell on for a few moments, not because it is somehow better than the rest but because to me it typifies Mercer J.A.'s approach to judging. It is one of his last judgments,[16] a child protection case involving the question of how procedural fairness could be maintained if a family court judge made a continuous custody order at the preliminary step of a presentation hearing rather than, as is usually the case, at a protective intervention hearing. Recognizing that the judge had the statutory jurisdiction to make such an order at a presentation hearing, Mercer J.A. was concerned that, unlike in the case of a full-blown protective intervention hearing, there was nothing in the legislation or the Court's procedural rules which mandated

[13] *Donovan v. McCain Foods Ltd.*, 2004 NLCA 12
[14] *Canada v. Shiner*, 2007 NLCA 18
[15] *R. v. Barrett*, 2011 NLCA 5
[16] *Newfoundland and Labrador (Manager of Child Youth and Family Services) v. T.R.*, 2014 NLCA 19

a set procedure for how that determination should be made. That did not mean, however, that the decision could be made in the judge's unregulated discretion. Stressing procedural fairness as being of "enduring importance" in child protection proceedings, he fashioned a set of principles to be observed to ensure a fair hearing for the parents of the child under consideration. In so doing, he drew upon the notion that effective parental participation in child protection hearings was a protected right. He declared these principles to be applicable to presentation hearings as a matter of common law, even though the rules of procedure, by their terms, only applied to protective intervention hearings. He then went on and carefully laid out how, as a practical matter, a judge contemplating making a continuous custody order at a presentation hearing, should proceed.

What is significant about his approach in this case is Mercer J.A.'s refusal to be hamstrung by the absence of specific legislation or rules bearing on the issue under consideration. He was not prepared to throw up his hands and leave the matter, unregulated, to the trial judge. Yet, he had no precedent to draw upon and upon which he could base an exposition of applicable principles. Instead, he reverted to basic concepts of fairness and tried to balance the competing interests of providing for protection for the child while at the same time providing meaningful parental participation in the process. As he said in his judgment, "prime regard must be had to the substance, not the form, of the steps taken to ensure a fair hearing." It was a sensitive and nuanced analysis that demonstrated an appreciation of the implications for all the parties affected. At least Justice Welsh and I thought so, since we signed on to the judgment.

During his years on the Bench, Keith contributed to other aspects of the law and public life that I believe are also deserving of at least passing mention. He believed in continuing legal education and worked with the Law Society in presenting, along with his co-presenter David P. Jones, co-author of *Principles of Administrative Law*, a number of seminars in the area of administrative law. His years in government provided him with a broad perspective on the importance of facilitating legitimate government action while at the same time protecting individual rights from abuse. His judgments in this area[17] reflect a balanced approach to administrative law issues.

More recently, even while facing the difficulties of his illness, he served, on my recommendation, as head of the federal Electoral Boundaries Commission

[17] See, e.g., *Newfoundland (Workers' Compensation Commission) v. Miller* (1998), 167 Nfld. & P.E.I.R 115 (NFSCTD); affirmed on appeal 2001 NFCA 20.

charged with re-drawing the electoral map in the Province of Newfoundland and Labrador ,which now governs the current federal election campaign. When asked which member of the judiciary should be tasked with this difficult and sensitive task, I could think of none better than Justice Mercer.

One could go on at greater length about the career of this wonderful friend, colleague and judge. My thoughts at this time can be summed up by reverting to young Keith Mercer's stated desire at the time he was awarded the Rhodes scholarship that he wanted to make a difference in his home province. His professional life was clearly devoted to the law. To Harriet, Lesley and Nick, I hope you will agree with me from this short recitation of Keith's legal and judicial career that to the lawyers he interacted with and mentored, to the friends and colleagues he infected with his humour and wit, to the government of Newfoundland and Labrador whom he faithfully and competently served, to the litigants by whom he carefully and earnestly tried to do right in each case he sat on, to his colleagues on the bench and to the administration of justice generally, he made a profound difference.

On behalf of the judges and staff of the Court, I express our deepest condolences to you on your loss. We will all miss him greatly.