

Four Hundred Years Of Law Reporting In Newfoundland and Labrador

Parlour conversation informs that 55 years ago today, a St. John's lawyer made the maiden voyage in his Siren Class sail boat from Trinity Town Harbour. His only passengers were the invited Chief Justice and two of the other three Justices of Newfoundland Supreme Court. Off Jobs Head, scant minutes after weighing anchor, the lawyer realized his boat was in peril—and would capsize, unless one passenger promptly disembarked.

Just as well, thought the lawyer. Already, the three Justices were displaying animus among themselves. One Justice remarked to another, “you know, you are you're own worst enemy”, prompting the third—the Chief Justice—to inject, “not while I'm alive.”

The lawyer decided whoever among the three Justices incorrectly answered questions he devised would be ‘put down’ into the sea on a surf board with half a litre of grog.

To the Justice he regarded with affection, the lawyer asked: “How many volumes are planned for the Newfoundland Law Reports?” “Sixteen”, the Justice correctly answered.

To the Justice toward whom he felt ambivalent, he asked: “Decisions from what years will be contained in the Reports when completed?” “1817 to 1949”, the Justice accurately replied.

To the Chief Justice, whom he regarded with transparent contempt, he asked: “Name the decisions.”

The Chief Justice was dumbstruck.

Just as well, thought the lawyer, because the Reports would occupy 9,202 pages including 1,543 Newfoundland Supreme Court judgments. Even if an attempt at citing them all were made, before the Chief Justice could have finished, all aboard would have been lost.

My brief—ever so briefly—this afternoon, is: A History Of Law Reporting In Newfoundland And Labrador, from sitting of the first court in Trinity, this day, in 1615, to 2015.

In other words, dissemination of judicial decisions comprising work product marking 400 anniversaries of trials in Newfoundland courtrooms.

Speaking of anniversaries:

This day —800 years ago —finishing touches were, with iron gall ink, being quilled to the first copy of the single-sheet Magna Carta parchment; written in Latin, for benefit of King John's French-speaking Barons and illiterate English-speaking peasants, and signed 11 days later.

This day—in 1876—ink wells were being flooded, and a bench polished, in preparation for the first sitting; next day, of Supreme Court of Canada.

And, this day in 1906, the third Chief Justice of Canada was appointed. He served, as such, for longer than any other, except the second Chief Justice, and the incumbent; but he lived longer, post retirement, than any other to date.

Even in 1615, Newfoundland's first court, at Trinity, was a late-starter; bearing in mind the birth date of legal memory is 03 September 1189.

Trials usually involve the strict grammar of black letter law being engaged by the rhetoric of counsel advocacy.

Needs be added, however, local custom instead of black letter law, historically, often resolved Newfoundland court litigation.

Moreover, counsel advocacy did not exist from 1615 until 1826 when the first barrister signed the Newfoundland Supreme Court Rolls.

For the period 1615 to 1816, finding Newfoundland Court judgments is almost as daunting a challenge as defining competence to marry.

In fact, the person currently most-qualified to inform us about those judgments is not a lawyer. Rather, he is a history scholar. He is Professor Jerry Bannister. He authored the seminal work on much of early Newfoundland legal history, entitled *The Rule Of The Admirals* [1699 to 1832]. His adult life, I surmise, has been a solitary quest, seeking rich seams, though often finding splinters, of judgment and other court records, and rescuing them from archival obscurity in St. John's and London.

Indicative of the copious archival documentation of court decisions, from 1615 to 1816, are events originating in Trinity. Many of them are narrated in Professor Bannister's book.

Maurice Power died in Trinity in May 1772. During his funeral, a rector noticed “marks of violence” on Power’s person. Abruptly, the rector discontinued the funeral service. He conveyed his disturbing observation to a surgeon practicing in Trinity. The surgeon was D’Ewes Coke. Twenty years later he would become Newfoundland Supreme Court’s second Chief Judge. Dr. Coke sent his resulting report to the Governor in St. John’s. Charged with murder were Mary Power, spouse of deceased, and her rumoured-to-be lover, who had been aptly christened James Fling. Their murder trial was conducted in anoyer and terminer commissioner’s court, in St. John’s. The jury acquitted Fling, but convicted Mary Power. She promptly ‘pleaded the belly’. A three member matron’s jury reported to court she was about five months’ pregnant. The Governor

reprieved her; citing her expectancy, and the frailties of Crown evidence relied on by the trial jury in convicting her.

Newfoundland historian D. W. Prowse—about whom you will shortly hear more—thought English barrister John Reeves exhibited “beautiful hand writing”. Of course, all records of court judgments from 1615 to 1816 were handwritten. Some of Reeves’ written judicial decisions, as Newfoundland’s first superior court judge—called Chief Judge in 1791 and Chief Justice in 1792—apparently are the oldest surviving accessible records of judgments of what was Newfoundland Supreme Court. Two of his judgments are summarized by Prowse in his book, *A History of Newfoundland*.

Although Prowse reports that “fire, damp and gross neglect has made sad havoc with ... [the] valuable papers” of Supreme

Court, sufficient of them were preserved to enable the first volume of Newfoundland law reporting to be published in 1829. The volume is entitled *Select Cases from the Records of the Supreme Court*. Included are many decisions of the Court rendered from 1817 to 1828. The volume, published in St. John's and London, was edited by Robert Wakeham, admitted as twelfth barrister of the Newfoundland Supreme Court.

After the 1829 volume of Supreme Court judgments, sixty eight years would elapse before another.

Commencing 1897, a law report series, called *The Reports*, appeared. The appellation was curious: lacking disclosure of either authorship or content. The Reports preserve many decisions of Newfoundland Supreme Court from 28 July 1817 to 22 January 1949, in sixteen volumes.

But the first published volume of The Reports does not enjoy the designation of being Volume I.

That distinction was accorded the decisions of the Supreme Court from 1817 to 1828, originally contained in the 1829 *Select Cases* volume; when it was, largely, republished in 1901.

Because volumes of The Reports were not published with regard, chronologically, for their contents, the first volume of The Reports, published in 1897, was designated Volume 7, although it appeared four years before Volume 1. And, Volume 6 appeared in 1898; Volume 5 in 1899; and so on. Only Volume 10, published in 1930, was, when originally released, embossed with a volume number.

The Reports had but three editors. The first was E.P. Morris, K.C., eventually a Prime Minister of Newfoundland and the only Newfoundland-born person elevated to British peerage. He edited five volumes and co-edited a sixth with D.M. Browning, K.C., Registrar of the Supreme Court. The second editor was Browning, K.C. who was sole editor of one volume. The third editor was Sir Brian Dunfield, K.C.—eventually, a Justice of Newfoundland Supreme Court—who edited the other nine volumes.

Those other nine volumes include the final—sixteenth—volume. Editing by Sir Brian of that volume was completed before 1968, but not published until 1997 by The SS Daisy Legal History Committee of the Law Society of Newfoundland. The reason for the delay was that metal page plates resulting from typesetting of volume 16 were destroyed by fire. Before the fire, however, a full paper copy of printer's page proofs had been sent,

for editing, to editor Dunfield. A subsequent Chief Justice Newfoundland Supreme Court's Trial Division, T. Alexander Hickman, later discovered the paper page proofs and took initiatives to have them made print-ready and published. When that eventually occurred in 1997, volume 16 appeared with editor Dunfield's handwritten marginalia—unprecedented in law reporting anywhere.

The three editors of *The Reports* enjoyed the flexibility and ambiguity of uncontrolled discretion in selecting judgments they reported.

Several church proceedings tasked the Supreme Court of Newfoundland to write decisions included in *The Reports*. An 1823 case decided that a pew holder could not erect curtains around his pew. In 1859, the Court was required to adjudicate in

circumstances where wardens at St. Thomas' Church physically removed the docile church clerk from the sanctuary while he participated with the congregation in Sabbath worship. Removal occurred, the Court noted, as the seraphine was being played.

Beyond doubt, an industrial strength affront to the rule of law, committed by a Stipendiary Magistrate in exceeding his authority, commanded the Court's attention in 1852. The Magistrate assaulted and beat the Plaintiff, forced him aboard a vessel which transported the Plaintiff from St. Georges to St. John's where the Magistrate imprisoned him ten days in the vessel hold, then escorted him in handcuffs and iron manacles to a St. John's jail—and likesuch. A Supreme Court decision in the Reports, replete with incendiary fact-finding, recorded a judgment for the Plaintiff of 150 pounds damages. Pedestrian, in contrast, was a trial conducted in Trinity in 1875, when the

Supreme Court adjudicated liability for damages to a potato patch whose plants were eaten or trodden by roaming Trinity sheep.

When, in 1900, historian D.W. Prowse—admitted to the Bar in 1857—discovered he had been underpaid \$478.49 of his Central District Court judicial wages, the issue for Supreme Court was whether he was entitled to \$176.35 in interest on the underpayment. The Reports record that he was.

Another author sued for damages when 631 copies of his self-published book, *The First Five Hundred*, were destroyed in a fire. He claimed the retail value of each destroyed copy and, additionally, one dollar thirty three and one-third cents per copy for his intellectual investment in the publication. In 1922, The Reports disclose, the intellectual claim was denied.

This result did not sit well with him. In 1924 he was admitted to the Bar. By 1931, however, he was again before Supreme Court, again seeking justice, and again unsuccessful. When a client refused payment for his services, as a solicitor, he refused to deliver his legal work product to the client. Rather, he sent it to a bank in Quebec for safe-keeping. The client obtained the work product by agreeing in writing to pay the solicitor. What next occurred was predictable. The client reneged on the agreement. The solicitor sued for specific performance. The Reports inform us he lost. The Court concluded the client had executed the fee agreement under duress.

The Reports continue to be relevant. Most recent citation is, probably, contained in a counsel's memorandum filed on 27 November 2013 in Federal Court sitting *In Rem* in a proceeding from Newfoundland.

To and including 31 March 1949, appeals from Newfoundland Supreme Court were, ultimately, to the Judicial Committee of the Privy Council. The Reports include decisions resulting from 24 of the 43 appeals to the Judicial Committee from 1792 to 1939. The outcomes have been ascertained in 35 of them: the Judicial Committee sustained 21, overturned 11, and partially overturned 3 of the judgments of Newfoundland Supreme Court On Appeal. A forty-fourth appeal was not heard. It impugned the last decision published in volume 16 of The Reports; delivered on 22 January 1949. Involved was an unsuccessful request that the Court declare Commission of Government obligated to restore Responsible Government.

Not least of appeal issues accosting mental hard drives of the judicial Privy Councillors was responsibility for snow removal

from St. John's streets. The company operating street cars, not the City, was held to be responsible.

Months after Newfoundland joined Confederation in 1949, Supreme Court of Canada became court of last resort for all appeals from provincial and territorial superior courts (having been such for criminal appeals since 1933). Included in Canada Supreme Courts Reports published from April 1949 to May 2015 have been 85 judgments determining appeals from Supreme Court of Newfoundland (On Appeal)—now Court of Appeal. The first of the judgments, rendered in 1955, partially allowed an appeal from Newfoundland Supreme Court in deciding that two saw mill operators had equal rights to float logs on Colinet River.

Overall, the 85 Supreme Court of Canada judgments sustained forty-one, overturned thirty-seven, and partially

overturned seven of the decisions on appeal from Newfoundland and Labrador.

Besides many judgments of Newfoundland Supreme Court, and the Judicial Committee, The Reports included a few other documents.

One is a transcript of the high octane address to the jury by Peter Cashin on 18 April 1947, at conclusion of his trial alleging defamation of the eighteenth Chief Justice, another Justice and the Court Registrar of Newfoundland Supreme Court. The jury was unable to agree a verdict. Noteworthy, from 1791 at least until the 1930s, jury trials were a common feature both in criminal and civil litigation in the Court. Not a few judgments included in The Reports are, in fact, jury trial summaries of testimony, jury addresses and jury charges.

Another is a Memorandum, which appears in Volume 1 of The Reports; written on or about 12 August 1828. Its effect, in my opinion, is that J. Derek Green is 25th—not 24th—Chief Justice of Newfoundland and Labrador.

An exertion of Biblical dimension was undertaken by Newfoundland Supreme Court Justice Nathaniel Noel to index The Reports; lacking only the last decision in volume 16, decided 22 January 1949.

From 1949, judgments of the Court appeared, occasionally, in Maritime Provinces Reports until 1968, and continue to appear in Dominion Law Reports to date.

From 1970, a new series of reports published many decisions from superior—and other—courts of Newfoundland and Labrador, and of Prince Edward Island.

Digital technology has published most decisions of Newfoundland courts on commercial websites from 1973, and the *gratis* Canadian Legal Information Institute CanLII website from 2001.

In an age of profound political correctness, authors of contemporary court decisions exercise exceptional restraint in analyzing the evidence, and arguments of represented, self-represented, and unrepresented litigants. Historically, such was not always so. Justice Dunfield, as recently as 22 January 1949, in Volume 16 of *The Reports*, commented on pleading and argument of a barrister who—ten years later—would become the

twentieth Chief Justice of Newfoundland. Dunfield J. characterized his pleadings as “gossamer webs of words ... [lacking reality]” — as “nonsense,” or as “a mass of nonsense”. And, Dunfield’s decision stated he was pre-occupied making “observations on the logic of ... [counsel’s] argument, rather than on the law; but after all — the law is usually logical.”
