AN ANECDOTAL HISTORY OF THE NEWFOUNDLAND SUPREME COURT AND ITS CHIEF JUSTICES

by Chief Justice Noel Goodridge

Remarks to the provincial Judges Association, October, 1991.

n the early summer of 1939, Edward Emerson who was then Commissioner for Justice and Attorney General of Newfoundland, was in London. While there, he received a telegram from Brian Dunfield, his Deputy Commissioner, which simply read: "If not Edward, why not Brian."

There is a rather simple explanation for this mysterious telegram. Those of you who have not heard it before must remain in suspense for a few minutes.

I was appointed Chief Justice of Newfoundland nearly five years ago on November 17, 1986. At that time I was one month short of my 56th birthday. One of the many persons who was kind enough to call and congratulate me on my appointment was the late W.J. Browne. He remarked, among other things, that I was very young to be chief justice. Age like beauty is in the eye of the beholder and, no doubt, to him who was then 89, I, at the age of 55, was indeed young.

His comment caused me to think. I realized that, with one exception, I was at the time of my appointment as chief justice older than any chief justice in this century had been at the time of his appointment. The sole exception was my predecessor Chief Justice Mifflin.

The youngest of all was the first chief justice appointed in this century, Sir William Horwood. He was appointed in 1902 to succeed Sir Joseph Little who had held the office from 1898 to 1902. Sir

William was only 39 at the time of his appointment. He had been elected to the legislature in 1894 and was a member of the Greene Administration and the Whiteway Administration. At the time of his appointment as chief justice, he was a member of the Bond administration as Minister of Justice and Attorney General. Probably no one foresaw at that time that he would remain in office for 42 years. He is incidentally probably the only chief justice featured on a Newfoundland postcard.

The Chief Justice Superannuation Allowance Act, a 1944 Act of the Commission of Government, euphemistically recites that "the Honourable Sir William Henry Horwood has expressed a desire to retire at the earliest date consistent with the interests of the public service, from the office of the chief justice of the Supreme Court of Newfoundland." There are those who suspect that his advancing years had diminished his effectiveness as chief justice and that the so-called "desire to retire" was not necessarily his own desire. Whether or

not this is so I cannot say, but his retirement brought him a pension of \$9,000 a year for his own life, with no provision then for his widow. I suspect that this pension was greater than he would have received under the Supreme Court Judges (Pensions) Act.

On the day that Sir William stepped down as Chief Justice he addressed the Court. In those days the Bench in Courtroom No. 1 was on the east wall and the jury box on the south wall. Those two positions are reversed nowadays. As he was about to speak, Sir Edward Emerson, who was to replace him as chief justice, solicitously leaned forward to pull the chain on a green reading lamp to assist Sir William. Sir William was apparently annoyed by this gesture and angrily and with some force pulled the chain to turn the light off. He thereupon gave his valedictory address, stood up, turned and left the courtroom without waiting for Sir Edward to be sworn in.

Sir William died a year or so after his resignation and much to everyone's surprise he left a very small estate. He had not married until 1908. His wife was Julia Hutchison who was a niece of the poet Wordsworth. There were no children of the marriage and they lived fairly modestly in a home on Church Hill.

There has been some speculation as to

why he left no estate. Some attribute it to the fact that he was very generous with what money he had and assisted Church of England theological students while at college. Others say he invested unwisely.

He owned some land in the area that was taken over by the St. John's Housing Corporation. He was apparently somewhat disturbed that he received only \$20 per acre for his land. No doubt Sir Brian Dunfield, who had been his colleague on the bench and was Chairman of the St. John's Housing Corporation, was equally disturbed that he could not compensate his former chief justice more generously without being inconsistent with his duty to the corporation.

Edward Emerson was only 12 years old when Horwood was appointed to the Bench. He entered politics in 1924 and formed part of the Hickman administration and later of the Alderdice administration. Following the appointment of the Commission of Government, Emerson was out of public life for a few years but returned in 1937 as Commissioner for Justice and Attorney General. He was subsequently appointed Commissioner for Defence but apparently continued to hold also the Justice portfolio.

As Commissioner for Justice, Edward Emerson's recommendations on judicial appointments would obviously carry great weight. When Justice James Kent died on June 23, 1939, Brian Dunfield would have been aware that Emerson could probably have claimed for himself the position left vacant by Kent's death. He was probably aware too that Emerson had his eve on the position of Chief Justice, Horwood then being about 77, and that Emerson would be unlikely to vacate his position of influence as Commissioner for Justice to become a puisne judge of the Supreme Court when, by waiting a few years, he could probably become chief justice. Hence Dunfield's telegram. "If not Edward, why not Brian." If you don't want the job, why not give it to me.

Whatever may have been Emerson's reaction at the time of receiving the telegram, Dunfield was appointed as a puisne judge of the Supreme court to succeed Kent.

Emerson's patience was to pay off. Horwood retired in 1944, and the position of chief justice became vacant. Emerson, who was knighted in the same year, was sworn in just as Sir William stepped down. He was 54.

Sir Edward had married Ruby Ayre. She was the daughter of Fred Ayre, a dynamic businessman of his day. In keeping with the parochial attitudes of the time, Mr. Ayre, a staunch Methodist, did not warm to his Roman Catholic son-in-law at first. However, an admiration developed and some cordiality grew between them as the years went by.

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Emerson died suddenly on May 19, 1949 less than seven weeks after Newfoundland became part of the Canadian federation. He had died relatively young but not before being the first chief justice in Newfoundland as part of Canada.

One of Sir Edward Emerson's last public functions was to swear in the first Lieutenant Governof of Newfoundland.

There was some speculation as to who might succeed him but there was no doubt about his successor in the eyes of at least one man.

The battle for Confederation had been a bitter one. Newfoundlanders had to some extent divided along religious grounds, with Protestants favouring Confederation and Roman Catholics opposing it. There were wounds to be healed and what better person to heal them than Albert Walsh, a devout Roman Catholic.

Walsh was born in 1900 and taught school for a number of years, always intending to become a lawyer. I was told that he had won a sealing sweep and that this had provided him with at least some of the capital which enabled him to abandon his teaching career to embark upon legal studies. I asked his son about this. He told me that he had not heard the story. Whether it is true or not he did become a lawyer and had a distinguished career. He was a gold medalist at Dalhousie. He practiced law with the late R.A. Parsons in the so-called dirty 30's and later with Eric Cook. He served as a

magistrate. He entered politics and became Speaker of the House. He served on the Woods Labour Board and was later a member of the Commission of Government, latterly as Commissioner for Justice, a portfolio he held at the time of Confederation. He led the team which negotiated the terms of union with Canada.

It had been largely assumed that Sir Leonard Outerbridge would become the first Lieutenant Governor. Given the desirability of appointing a Roman Catholic, the job fell to Walsh who was knighted at that time.

Sir Albert called on Mr. Smallwood to head the first administration of the Province of Newfoundland. An election was held on May 27 just a week after Sir Edward died and of course you all know the results of that.

It must be remembered that prior to Confederation Sir Albert had been Commissioner for Justice. Had Sir Edward died two months earlier Sir Albert might very well have been appointed Chief Justice himself at that time. When Sir Edward died however the matter was out of the hands of Sir Albert. He did however lay claim to the office of Chief Justice and not unexpectedly his claim was respected. He was only 49.

I was privileged to have been enrolled as a solicitor of the Supreme Court by Sir Albert. His tenure of office was regrettably shortlived. He died suddenly in the latter part of 1958. At the time of his death I was before him on a bankruptcy matter. Court was adjourned in accordance with the practice at 5:00 one afternoon for argument the following morning. When I carried my books to court that morning I was advised that Sir Albert had died in the night.

We were all gravely shocked by his death. While Sir Albert has been described as a cold man, he was always helpful to me as a young lawyer both in court and in his chambers. He was of course a perfectionist and required no less of others. His judgments illustrate the painstaking manner in which he approached his work.

Once again speculation arose as to who would succeed Sir Albert. One would think the obvious choice would be Sir Brian Dunfield. He had by then been a judge for nearly 20 years. He had been passed over to succeed Sir William in 1944 and Sir Edward in 1949.

I should pause at this time to say that Sir Brian had had a distinguished career himself. He had been active in the legal and business community and had been Deputy Commissioner of Justice for

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seven years prior to his appointment to the bench. The account of his life in Volume One of the Encyclopedia of Newfoundland does not do justice to him. Among his many achievements was the orderly development in the northern part of St. John's. During the war, he headed a commission to inquire into the development of housing in the city when hostilities ended. He recommended the formation of the St. John's Housing Corporation and became its first chairman. He saw to the implementation of many of his recommendations. He continued in this position while still a judge.

But by 1958 when the office of chief justice became vacant he had blotted his copy book. At about that time harbour development was underway. This was a federal project. He had written a lengthy letter to the *Evening Telegram* strongly opposing the fact that the development stopped at the foot of Prescott Street and did not continue eastward toward the premises of A. Harvey & Co. Ltd. Diefenbaker was Prime Minister of Canada at that time. After learning about Dunfield's intrusion into public matters, he would not hear of his appointment as chief justice.

Diefenbaker might have appointed Judge Winter but Winter was not interested in the position. He too like all the others was a fine man who had had a distinguished and varied career. He had at one point been editor of the Evening Telegram. He had been a speaker of the House. At the time of his appointment to the Bench, he was—would you believe it—Commissioner for Justice. His varied interests extended from archery to worms. He attempted to breed worms, and was distressed when they all inched their way out of his garden. I told him

they left because they couldn't stand the Newfoundland winters.

Judge Winter was nearly 70 when Walsh died and did not aspire to the position of chief justice at that age.

Diefenbaker appointed R.S. Furlong to be chief justice. Chief Justice Furlong was then 54 and remained in that office for over 20 years. He left it reluctantly at the age of 75 toward the end of 1979 because of the revised provisions the British North America Act had made his retirement mandatory.

From the inception of the Court in 1825 until 1963 there were only three judges of the Supreme Court at any one time. Although there was provision for two judges to sit on appeal, the practice, certainly in recent years, was for three judges to sit.

This meant that, on an appeal from a Supreme Court trial, the trial judge himself would sit.

That this extraordinary state of affairs should have been allowed to continue for so many years is in itself extraordinary. The rules of natural justice are no different in that respect now than they were then. I am not aware that the issue was ever raised or even mentioned on the few appeals that found their way from the Supreme Court of Newfoundland to the Supreme Court of Canada.

There was the strange case of Power v. Winter. This illustrates the many problems that were encountered by a three

member court. Power and Winter had a motor accident on the Southern Shore. Sir Albert Walsh presided at the trial and apportioned liability 75 percent against Winter and 25 percent against Power. The matter went to appeal. Judges Dunfield and Winter decided to take a view. It was not unusual for trial judges to take a view, but this is not to procure evidence but to obtain a better understanding of the evidence. There was no precedent for appeal judges taking a view. However Dunfield and Winter took measurements and made other observations which they introduced into their judgments. Sir Albert in his dissenting decision on appeal spoke very strongly against this practice. Sir Brian attempted to justify it, although he was on poor legal grounds. He altered the division of liability that had been prescribed by Sir Albert at trial. Judge Winter supported Dunfield on appeal but was obviously a

reluctant participant because the Winter in the case was his nephew. Those of you who had the privilege to know Justice Winter would know that he would never do a dishonourable thing. He had no choice but to sit, as there were only three

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judges. The fourth judge came along much later.

Legislation was enacted in 1957, providing for a fourth judge but the legislation was not proclaimed until 1963. I wonder how many of you remember who the fourth judge was. He was appointed on September 27, 1963. He was the very popular James D. Higgins, QC, whose father William J. Higgins had been a judge before him.

It was 12 years after the appointment of Justice Higgins that the Court was divided. In July 1975 the Court of Appeal was created as a separate division. Up to that time there was only one chief justice in Newfoundland and he was designated as Chief Justice of the Supreme Court of Newfoundland. Upon the division of the court into a Court of Appeal and a Trial Division, Chief Justice Furlong became Chief Justice of Newfoundland and Justice Mifflin was appointed Chief Justice of the Trial Division.

Chief Justice Furlong was joined by recently-appointed Justice Morgan in the Court of Appeal. Chief Justice Mifflin and Justice Noel were joined in the Trial Division by Justice Mahoney who was appointed at that time. Both divisions were then one judge short. The Court of Appeal continued with two judges until February, 1976 when Justice Gushue was appointed as a third judge of the Court of Appeal. The Trial Division continued with three judges until November, 1975 when I was appointed.

In developments since then, the Court of Appeal has expanded to six members, and the Trial Division has expanded to nineteen members, one of whom presides in the Unified Family Court.

The stories about Sir Brian Dunfield are legendary. I appeared before him when I was a young lawyer defending in

a civil dispute a lady who, in repairing her house on Flower's Hill, had had her eave so reconstructed that it extended beyond her boundary. Sir Brian reminded me of the principle that the freeholder owns his land and what is above it. Using the latin expression of that maxim, he said: "Has your client never heard of the principle - "Cuijus est solum, ejus est usque ad coelum?" I said: "My lord, on Flower's Hill, they talk of little else."

Because of rather strict liquor laws that prevailed in the province prior to 1949, bootlegging was fairly prevalent. Sir Brian presided with a jury in the trial of a bootlegger. In those days most trials only lasted one day. Upon conviction Sir Brian wondered what sentence to impose and consulted with Sir Edward. He burst into his office and said, "I say, Edward, what would you give a bootlegger?" To this Sir Edward replied with a bland face, "Certainly no more that \$4 or \$5 a bottle."

Dunfield was in the office of Chief Justice Furlong one morning. Furlong,

while browsing the paper, noted that an appointment had been made to the bench in another part of Canada and observed that it was not a very good appointment. Sir Brian said, "Well, of course, Diefenbaker hasn't made a decent appointment since he became Prime Minister." Furlong looked at him severely and said, "Of course, Brian, you're forgetting that he appointed me." Dunfield looked at him blankly and said, "No, Robert. I'm not forgetting that."

Of course all that was said in jest. While Furlong had a spirited disposition, he was a fine judge. He had and has an extremely kind nature, always mindful of people less fortunate than himself. Regretfully his activities are somewhat restricted now by bad hearing and rheumatism.

Most of you will remember Jimmy Humphries, the popular porter on the Newfoundland Railways. When Sir Brian was first appointed a judge, Jimmy did not know him. One day, Sir Brian set off on the Overland Express for Corner

Brook where he was to reside on circuit. Unable to get a berth in the Corner Brook car, he had a berth in one of the cars bound for Port aux Basques. He instructed Jimmy that it was essential that he get off at Corner Brook. He said he was a heavy sleeper and that, no matter how hard he resisted, he was to be awoken, dressed and put off the train at Corner Brook when it arrived early in the morning. When Sir Brian woke up, he was in Stephenville Crossing. He berated Jimmy angrily, explaining the importance of his being in Corner Brook. He ended: "Do you have any idea how angry I am?"

Jimmy responded: "Yes, Sir Brian, I do. But you are only half as angry as the man we did put off the train at Corner Brook at 4 o'clock this morning."

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THE HONOURABLE LYNN VERGE
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On the third floor of the Law School atrium, this plaque describes one of Newfoundland's many ties with Dalhousie Law School.