

IN THE SUPREME COURT OF NEW ZEALAND

Date: 6 March 2015

Coram: Elias CJ  
William Young J  
Glazebrook J  
Arnold J  
O'Regan J

Speakers: Dame Sian Elias – Chief Justice  
Mr M Heron QC – Solicitor-General  
Mr C Moore – President NZ Law Society  
Ms K Clark QC – On behalf of the NZ Bar  
Association

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**FINAL SITTING SPEECHES FOR HONOURABLE JUSTICE  
JOHN MCGRATH**

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**ELIAS CJ:**

*(Māori greeting)*

In accordance with our traditions I will now call upon the Queens Counsel who are present to make their appearances. Mr Solicitor, Mr Farmer, Mr Carruthers, Mr Upton, Mr Rennie, Ms Ablett-Kerr, Mr Millard, Ms McDonald, Mr McKenzie, Ms Scholtens, Mr Goddard, Mr Cooke, Mr Lithgow, Mr Gudsell, Ms Clark, Sir Geoffrey Palmer, Mr Hodder, Mr Stapleton, Mr Fowler, Mr Churchman, Mr Pike, Mr Laurenson.

When I came in I greeted this courthouse and the shades of those who have gone before us. I have also greeted all of you who follow in their tradition and you are all very welcome to the special sitting of the Supreme Court of

New Zealand, Te Kōti Mana Nui, held to mark the retirement from office of the Honourable Justice McGrath, and to give us all the opportunity to express our respect and gratitude and to offer our very best wishes as the Judge completes this stage of his remarkable service to New Zealand and New Zealand law.

We are especially pleased to have with us Justice McGrath's family, particularly Chris, Lucy and Tom. I think we have a full house of McGrath descendents and siblings here and a number of the Judge's close friends. Family and friends keep any Judge anchored to the real world. They provide balance, context and warmth and they are a very important part of this sitting.

We are also delighted to have with us Judges of other Courts and I want to acknowledge in particular the President of the Court of Appeal, the Chief Judge of the High Court and the Chief Judge of the District Court.

This is not an occasion for a formal appreciation from the Judges of this Court or for any lengthy introduction from me. It is an occasion for reflections by the profession and by the retiring Judge. There are, however, some things those of us on the Bench today, who have been lucky enough to serve with Justice McGrath, would not wish to leave unsaid.

First, and overwhelmingly, we wish this time had not come, and we have some sense of disbelief that it has because Justice McGrath has been a dear colleague of this Court for 10 years, that is, for most of the life of this institution. But he has been part of the life of all on this Bench in the judiciary and in the profession for very much longer than that. Some, I know here, have known him since he was in short pants. Those of us of a certain age, however, have found him a constant colleague for nearly half a century in legal practice. Almost all of us had dealings with him when he was Solicitor-General in which difficult role he was, quite simply, a star. For the past 15 years he has been a Judge sitting for five years on the Court of Appeal before coming to this Court.

So the associations of all those on the Bench with Justice McGrath are long and very close and when you are close up halos often slip from time to time, flashes of irritation can erupt, and even the most congenial can sometimes grate a little. But no one who has ever worked with Justice McGrath says that of him. Even those of us who were on opposite sides, in very heavy cases indeed, found him unfailingly courteous and personally encouraging. While appropriately firm as Solicitor-General in protecting executive power, he was always fair in his dealings with others. As a new Chief Justice I also benefited greatly from his sound and thoughtful advice, which was always highly principled.

When Justice McGrath was sworn in 15 years ago, I said then in my remarks that while we had such expectations of him as a Judge, I pointed out that he had been scrupulous in the observation of constitutional conventions in the high office of Solicitor-General and that, of course, is an office which requires independence and courage no less perhaps more even than is required of Judges. I refer to the generosity and compassion shown by McGrath QC when Solicitor-General, and the way in which he had worn the authority that comes with office with humility and fidelity. He helped very many people in the profession and outside of it, and he earned their admiration, respect and gratitude of all of those he had advised and represented, those he had appeared before, and those who he had appeared against, and throughout the community more generally.

The inevitability of his appointment to the Court of Appeal did not diminish the pleasure the whole profession took in it. It was recognition of extraordinary capacity and talent and demonstrated the confidence of the community and indeed, as he was at the beginning of his appointment, so Justice McGrath has continued throughout his judicial service. The expectations we had that he would be an outstanding Judge were not disappointed. He has had the full confidence of the profession in his work, he is greatly admired as a Judge, and it is impossible to find anyone who does not like the man.

The judgments written by Justice McGrath are the public dimension of his work. They are thoughtful, brave and careful. They have been mainstays of the work of this Court. But outside the public work of the Court there are many chores which have to be undertaken in administration both of the Court itself and the wider judiciary, and Justice McGrath has never shirked chores, and he has cheerfully shouldered very many chores since joining the Bench. One of them was as the representative of this Court on the group that piloted the construction of this building. So this beautiful courtroom, and our lovely working space, are testament to his perseverance and care. His vast experience, deep commitment to principle, and conscientious discharge of all obligations, have meant that his contribution to judicial administration has been unparalleled. He has been an able and dependable acting Chief Justice whenever the need arose, and I think Justice Young will not reproach me for saying quite truthfully that Justice McGrath's retirement leaves a gap we will struggle to fill.

Even in a Court like the Supreme Court where there are colleagues to share burden, judging can be a lonely responsibility. The burdens are greatly eased by the company of others who are companionable and supportive and no one, in my experience, has been a better and more supportive colleague to all on the Bench than Justice McGrath. He takes the responsibilities of a collegiate Court very seriously but his serious mindedness does not inhibit an impish sense of humour. It has been one of the outstanding pleasures of belonging to this Court to have had John McGrath as a friend and colleague. He and Chris have been enormously hospitable, especially to those of us from out of town. John has also run the social side of the common room and has taken a keen interest in maintaining stocks of good wine. We hope in retirement there is more time for friends and music and reading and analyzing sport from his armchair and good wine and conversation.

No one doubts the impact of this retirement on the Court. We will continue, of course, to profit from Justice McGrath's judgment. We will continue to seek out his advice and we will continue to claim his friendship but at this time we

are more sorry than we can say to lose such a colleague and such a fine Judge. Nō reira, tēnā koutou, tēnā koutou, tēnā rā tātou, katoa.

**SOLICITOR-GENERAL:**

May it please the Court and Justice McGrath. I start with a message from the Attorney. He is unable to be here today as he is in Turangi signing an agreement in principle with Ngāti Tūwharetoa. He has, however, asked me to read out a message on his behalf to pay tribute to Your Honour's service to the Crown and contribution to the academic world over many years.

As a fellow Victoria University graduate, the Attorney would like to recognise your enduring dedication to that institution, first by serving as President of the Student Association and then by sitting on the Victoria University Council for 20 years, which is something in itself, before going on to become the Pro-Chancellor and Chancellor. You truly, as the Attorney says, gave your all which the University recognised by awarding you an honorary doctorate of laws in 1992. The Attorney records that Your Honour has had an impressive legal career, that is a majestic understatement if I may say, both in the private and public sectors. Your service as Solicitor-General and Chief Executive of Crown Law for over a decade was outstanding. You represented the Crown in the most difficult cases of the 1990s, were noted for sound and practical advice to Chief Executives, and for being very supportive of gender equality in the legal profession and more will be said about that. The Attorney would also like to make special note of, as the Chief Justice has commented on, your pivotal contribution to the new Supreme Court during the first decade of its existence. The courtesy, conscientiousness and rigour you have brought to the Bench will be missed by all and your fellow Judges in particular and by the legal profession. On behalf of the Government I note the Attorney conveys and records his thanks for your service and best wishes for your retirement.

If I may I would like to add some comments of my own. Your career, Sir, is characterised by service. Great skill, strategic skill, and a remarkable generosity to the people around you. I have been lucky enough to benefit from each of those things. I am also lucky enough, I suppose, to be able to

access your judicial and Crown Law files, hopefully for one of the approved purposes, and over the last few days and evenings I have been able to review them and to talk to some of those who have worked with you. I confess that I have an overwhelming sense of the magnitude of your career and the history reflected not only in those files but in the words of those people. Words cannot really capture it, and I will do my best, but I know I will fall somewhat short. The thing that struck me is there is a strong sense of interconnectedness with people as you go through your career. I will try and reflect that. You have been on a remarkable journey. Nonetheless, of course, is the Chief Justice, who presided over your swearing in as she said in almost 15 years ago, and Her Honour has been on this journey, the judicial part, with you throughout. At your swearing in on 28 July 2000 as a Judge of the High Court, but also the Court of Appeal, the then Attorney Margaret Wilson said of your time as Solicitor-General during your time you have worked with five Attorneys. Sir Geoffrey Palmer, he is here today, David Lange, Paul East, Sir Douglas Graham and herself. She said, "I know that I speak for the previous Attorneys when I say that your understanding of constitutional principles, legal expertise and analytical skills were greatly appreciated."

Behind the scenes of that appointment there were many people involved and this comes through from the file. Ellen France was the then Deputy Solicitor-General. Tania Warburton was drafting the speech. Karen de Malmanche was drafting the Gazette notice. Lynette Maru, the Chief Justice's current associate, was receiving the documents, and Jan Fulstow was keeping a careful eye over the file. Now those names and many more are close to legend in Crown Law, and so many people in the office and in the wider Government legal network have commented to me about your generosity of spirit. I will come back to that if I may.

But in preparing this speech a comment was gathered from Sir Thomas Eichelbaum, again it is great to see him here today, about your time as Solicitor-General. He said, "John is an excellent lawyer with a keen analytical mind and a great sense of perception of the wider view of any problem confronting him whether legal or administrative. He has been an

excellent number one Court lawyer for the Crown.” In the press release announcing your appointment to the Court of Appeal the Honourable Margaret Wilson said, “You were responsible, amongst many things, for research and development of significant policy papers including reform of judicial appointments process and the consideration of an alternate appeals structure following the abolition of the Privy Council.” It could not have been a surprise to many then that five years later you were appointed to this Court, one which you had helped design. The letter to the Attorney-General with your appointment documents was in the name of the then Solicitor-General, and now your colleague on this Bench, Justice Arnold. It was a different Attorney, Dr Cullen, but I want to just comment, if I may, on your time as Solicitor-General. It was extraordinary. You arrived at a time when the Executive was demanding a more modern legal service, a more modern Crown Law. You, and John Pike has taken me back through this, but I also went back through the review that you conducted and the challenges that you put in place. Those remain influential today.

Just the breadth of cases that you did, the range of cases, is extraordinary. *New Zealand Māori Council v Attorney-General*, *New Zealand Stock Exchange v Commissioner of Inland Revenue.*, *Petrocrop v Ministry of Energy*, *Minister of Transport and Noort Police v Curran*, *R v Goodwin*. The early Bill of Rights cases. *Baigent’s case*. *Gisborne Herald v Solicitor-General*. I have even got more on my computer but that – *Choudry*, *Ramstead*, *Tangiora*, to name but a few.

You did these cases at the same time as performing the role of Chief Executive and the advice that you have heard me refer to from the then Attorney Margaret Wilson. I, by coincidence, I realised yesterday that the last case I wanted to refer to you, that you did in the Privy Council, is a case called *Tangiora*, which you will remember well, and I realised yesterday that behind my desk, on top of the cabinet of judicial folders that I have been looking through, I had a framed extract here of a quote from one of those cases that you won, this *Tangiora* case, and the quote contains the ratio of the case, and it’s headed, “Michael, with thanks, Dad.” And I will explain the reason.

20 years ago in a break between jobs I helped my father, only a small bit, research and write a judgment for him and the relevance of the quote, to my father and I, was that Lord Millett in *Tangiora* cited Justice Heron's conclusion in that case and said, "Their Lordships agree." Now that was a highlight for my father. I didn't realise, Sir, that you had argued that case and cited Justice Heron's authority which was decisive in favour of the Crown. As I said I think you had eight or so appearances in the Privy Council, unlike the fashion nowadays, you won some of them too and it is, as I said, serendipity or coincidence, that you argued that and won it and thanks to you I am going to argue that I am one all in the Privy Council, thank you.

Your articles, for example, on the role of the law offices remain not only relevant but seminal. We all know the article of the sharing of law officer power but there are others on the Crown Law intranet. You have been of immense support to me before and during my time as Solicitor-General and I am one of hundreds that have felt that support, colleagues, judiciary, students, academics, Pegasus scholars. I have been extremely fortunate to have you, and there are so many others, to bounce things off or to give encouragement.

A final example, if I may, of the generosity of spirit has characterised your service and it has come through again and again. People have said to me, incredible, incredible generosity with his time. That final example involving another man dear to our hearts, I came to you for advice when I was about to be interviewed for the role of Solicitor-General, and I came up to your chambers, you might recall, it is approaching three years ago, and as we walked in we bumped into none other than Robert Chambers, unsurprisingly. He looked at me, and he looked at you, and he looked at me, and he looked at you, and he smiled and he went, "Aha," and with that smile that we all remember, and I made some inculpatory remark, as one does, and when you and I walked away you gave me the first gentle lesson in the art of circumspection. You would think I would know that you can refrain from making a comment but that advice is something I think is invaluable.

Sir, your service, your skill, your generosity, glow from the pages and from the comments and from the people and what I think is remarkable is that with all this dedication to others, it is your family that remain the most important, and it is lovely to know that Christine, Lucy and Tom and your other family are here. You are, in conclusion, amongst a few extraordinary people who have managed to hold true to the Māori saying, “He aha te mea nui o te ao. He tangata! He tangata! He tangata!” You understand it is the people and service to them that count and whilst, in my submission, it is convenient for some to criticise this system of ours, you need not look too far away to find systems that are considerably less effective. In my submission it is important like you and others around you that have kept it this way.

Very best wishes, Sir, from the Government on your retirement. Thank you.

**MR MOORE:**

May it please Your Honour. It is a privilege to convey to you best wishes on behalf of the profession and the New Zealand Law Society. Your Honour graduated from Victoria with an LLM and then clerked with Bell Gully before your admission in 1968. You became a partner in McGrath and Blennerhassett, the firm started by your father, before joining Buddle Findlay, as it is now, as a partner in 1975. Your Honour commenced practice as a barrister sole in 1984 before being made Queens Counsel in 1987. Your Honour was the Chancellor of Victoria University from 1986 to 1989 and was awarded an honorary doctorate of laws by that university in 1992. Your Honour held the position of Solicitor-General, as we have heard, between 1989 and 2000 and has been a Judge of the Court of Appeal since 2000. Your Honour having sat on this distinguished Bench since 2005.

Other speakers will, I am sure, cover your time at the Bench, barring Crown Law, in more detail. I would like to focus a little on some of your earlier achievements and on the views of some of the people you have worked with in practice.

Your Honour's father, Denis McGrath, was President of the Law Society from 1968 to 1971. You followed in your father's footsteps in service to the profession and the Law Society. We are grateful for your heavy involvement in Law Society affairs in the 1980s. At a glance it did appear that you may have sat on most of the branches' committees at one point. These included the publications committee, education committee, tribunals, legal assistance, lawyers outside private practice, finance and library committees, lawyers in commerce and Government, and you were on the Wellington District Law Society council from 1983 to 1987 and apparently in your spare time, if there were such a thing, you also organised a large conference for the branch.

Now often when researching for these speeches I receive a lot of amusing stories and inappropriate anecdotes which usually cannot be repeated. However, as one of your colleagues said, that is simply not the case for Your Honour. It appears that in spite of your reputation for having a delicious sense of humour, you have somehow bordered upon being a paragon of virtue while in practice. This is, of course, very disappointing. If you made early mistakes, or had moments of sheer foolishness, you have managed to hide these extremely well.

Those who work with you in private practice said you have always had care, focused goals, and clear career paths in mind, and that your actions were designed and carefully thought through to lead to those goals with a minimum of fuss and without deviation. According to your colleagues you have immense organisations skills and make a particularly good project manager, as this Court shows. Those skills were called on and appreciated by both parties to the Buddle Anderson, Findlay Hoggard merger in 1982. Your Honour's quiet but firm touch promoted a very successful merger despite some rather strong and noisy personalities in both firms.

On a personal level, many of your colleagues remember your extraordinary legal abilities and skills. One spoke of you successfully arguing, invoking the doctrine of dependent relative revocation. Knowledge of this relatively obscure doctrine, certainly obscure to me, was just one example of the variety and

breadth of your expertise at such an early stage in your career. When I asked my brother for insight into your career, and to your career highlights, he modestly suggested that defending a charge brought by his client in the Pukekohe District Court against your large corporate client for having a stuffed Kiwi and Morepork in its boardroom was perhaps not one of them.

Turning briefly to Crown Law. Following your appointment as Solicitor-General, and we have heard this from the Solicitor-General, you reorganised the Crown Law Office. You brought it into the modern world and made it accountable, introduced new systems and mitigated external risks. Recognising the monopolistic nature of the Crown Solicitor network and its public function, you introduced the local panel system and thus engaged the local Bar in each district. You had a reputation for listening to any argument and valuing different views and opinions. Crown solicitors, I am told, say you were the consummate lawyer and apparently were in awe of you. In spite of this at all times, and without exception, you maintained a genuine humility. The level of respect with which your colleagues speak of you, pales in comparison to the comments I received from those who have worked directly for you. These came from both men and women but I would like to concentrate on remarks from the women because it is here that you made such an extraordinary contribution to the legal profession.

The Law Society is focusing on advancing the career progression of women in the profession and it seems apt that Your Honour's final sitting falls on International Women's Day. You were a real pioneer in this area and appear to have almost single-handedly been responsible for the career progression of a large number of our senior women practitioners. When you entered Crown Law your predecessors had employed a number of talented and skilled women. You had, as one person said to me, the brains of New Zealand working for you, and you used them well. I know that you have often been modest and said you simply built on the foundations of those before you. However, what you did was offer your talented women staff members opportunities for leadership and career progression that were rare at the time. You were more than a mentor. You empowered your employees. You gave

them support. Backed their skills and their abilities. You opened doors for them. You made at least four women team leaders. You fully supported them and were always looking for opportunities for them to gain experience. When they doubted themselves, you gave them the confidence to believe they could do, and achieve, more. You gave them the resources and support they needed to reach their full potential. You worked quietly in the background without ego and always with such humble grace. You made a path for the women who worked for you that had not previously been there.

You may not be aware of how very grateful so many people are to have had you as a mentor and role model. Small things that you have probably long forgotten remain centered in their memories. When the other side instructed a QC and your client asked whether the Crown should do the same, you backed your staff wholeheartedly and reinforced that they were more than capable and had your full confidence. I know that I will forget a number of the senior women who worked with you during your time at Crown Law but to name just a few, Justices Goddard, Ellen France, Duffy, Ellis and Queens Counsel Scholtens, Clark and Aikman.

So many women have expressed their gratitude and said that you of all the people they were privileged to work with. Your Honour was the one that made the real difference and because of that you will always hold a special place in the hearts of so many. You changed lives. However, I think one of the simplest descriptions I received from one former employee probably epitomises the rest and it is with this that I would like to end my address today. She said quite simply, "Your Honour is a marvelous man." May it please Your Honour.

**MS CLARK QC:**

May it please Your Honours. Today I have the privilege of appearing and addressing Your Honour on behalf of the New Zealand Bar Association at this special sitting to mark Your Honour's retirement. Beyond the pleasure of preparing this address, there was also the mild frustration in not being able to reflect in this restricted context the full extent of the claim and the deep regard

which Your Honour draws. Your Honour has many profiles but it is appropriate today that I simply touch upon two. Your Honour, the mentor, and I do touch upon this briefly. Mr Moore, on behalf of the New Zealand Law Society, has described your contribution to the advancement of women in the law as pioneering. The Bar Association endorses all that has been said about your leadership in that regard. On a personal note, I know that the fact that I stand here today is in consequence of Your Honour's past guidance and oversight. But while it is true that Your Honour has actively provided opportunities for women in the profession, and encouraged them to believe in themselves and take those opportunities, it would be a mistake to go from this special sitting in the belief that women lawyers were the sole beneficiaries of Your Honour's personal interest, support and encouragement. I know many men who as, for the women, have their own memories of the time you have spent, the encouragement you have given, and the interest you have shown. The fact is, there are so very many of us, lawyers in Government, private practitioners, lone lawyers, academics, past colleagues, people in passing, who feel their association or relationship with you is particular to them. Your fight, Your Honour, is your humanity and the gift to those whose path you have shared for even the briefest time is the privilege of being taken seriously by someone who is held in the highest esteem.

Coming to Your Honour, the Judge. There is deep respect for Your Honour's approach to judging. You are dispassionate and impartial in every case, discharging your judicial function without fear or favour, affection or ill will. If, as sometimes happens in the course of a hearing, it goes off track, Your Honour's style of bringing it back on track is often to ask counsel a question, a question which counsel is able to answer. For instance, "Is it intended, Mr or Ms so and so, at some stage to take us to the judgment under appeal?" Always judicial, unfailingly courteous, sensible and thoughtful, counsel enjoy appearing before Your Honour.

Aligned to this facet of judging is your concern to maintain the standing and independence of the judiciary in the public eye. In terms of your preparations for judging, Your Honour is known to be fastidious, researching intensely in

advance of a hearing, even if Your Honour is not the Judge attending to the judgment. That you are assiduous and conscientious is demonstrated in your preparation of separate judgments, if it is thought a separate judgment might usefully add to the majority judgment. Your Honour's judgments are recognizably yours. In the constitutional and public law sphere they reflect Your Honour's profound understanding of the way Government works. Distinguished academics consider your knowledge in this area to be unsurpassed. Your Honour's approach to the construction of statutory powers enables Governments to get on with the business of Government. The purpose or object statement for the Crown Law Office which was introduced during your time as Solicitor-General, continues to reflect the twin themes of the Crown Law ensuring lawfulness in the operations of executive Government, while also ensuring Government is not prevented through legal process from discharging its Governmental responsibilities. Your judgment frequently reflect this vision of public law.

In *Unison Networks v Commerce Commission* Your Honour delivered the judgment of this Court in determining whether the Commerce Commission had lawfully set thresholds for control, Your Honour summarised the constraints on the exercise of public power in six paragraphs under the heading, "The limits of public power." This part of the judgment, effectively, summarises the purpose and function of judicial review. Public lawyers agree that *Unison* greatly assists in clarifying fundamental administrative law principles. *Unison* is widely recognised by public lawyers as New Zealand's own *Padfield*.

More broadly Your Honour's approach to statutory interpretation is distinctive, interpreting statutes in a contextual not a technical way, and thus enlivening their purpose. This purposive approach was to the fore in Your Honour's judgment in *McAlister*, a case in which a senior pilot was demoted when he turned 60. He brought a personal grievance claim alleging discrimination by reason of age, contrary to the Employment Relations Act. There was an evident drafting error in the Act. Your Honour preferred not to read down the language of the primary provision, or engage in a notional amendment

exercise, rather Your Honour undertook a meticulous examination of the legislative history in order to understand how the drafting error had actually occurred. The exercise satisfied Your Honour of Parliament's purpose and in light of that purpose Your Honour determined whether there had been unlawful discrimination.

Decisions such as *Abdula* reflect Your Honour's commitment to ensuring fairness in the administration of criminal justice. The standard of interpretation to be attained in a criminal trial must be a standard that is compatible with the right to understand the proceedings, and have a full opportunity to answer the prosecution case. A breach of this right would be a breach of the right to a fair trial and constitute a serious miscarriage of justice. Likewise Your Honour's decision in *Wiseline*, a Court of Appeal decision, reviewing the refusal of a registrar to waive a Court filing fee. Your Honour held that if access to justice is impeded because Court fees are set at a level that poses significant impediments to access, then both the constitutional principle of access to justice, and the fundamental right are breached. *Wiseline*, in passing I observe, was relied on in the complaint which the New Zealand Law Society and the New Zealand Bar Association made to the Regulations Review Committee on the increases in civil Court fees.

Your Honour's judgments cover the field. This special sitting is not the place to list or discuss them. Beyond observing that they reflect an approach which is distinctively and recognizably yours. Whether the context is a Treaty dispute, construction of a commercial agreement, a human rights breach, a tax dispute, or concerns the administration of criminal justice, or fundamental constitutionalism, Your Honour's approach is marked by careful analysis of the statute, awareness and examination of the policy underlying the law, consistently a concern to achieve a fair process, thoughtful, methodical tight reasoning and balance.

Your Honour gave a speech at the launch of the third edition of Professor Joseph's remarkable constitutional text in 2007. Many who were present had the very strong impression you had read the entire work. I was

one of those present. It was a thoughtful speech which exemplified that qualities Your Honour has brought to the Bench. Your Honour's hallmark conscientiousness in desiring to get it right, always, is apparent in all that you undertake. Your approach exemplifies the ethical standards expected of Judges and lawyers generally. You have been described as the consummate lawyer, as advocate, as Solicitor-General and as Judge. The New Zealand Bar Association honours your outstanding and valuable contribution to the law and to the legal profession.

On behalf of the Association may I wish Your Honour a long and happy retirement. May it please Your Honours.

**McGRATH J:**

No one will have failed to detect today the high level of exaggeration in the submissions from the Bar.

I want to thank, nevertheless, each of those who have spoken and just say something briefly about the officers and institutions that they represent. Mr Solicitor, your office is important to the Government who you represent, and to the Courts, whose values you protect. Thank you for that. And thank you for what you have said for the Government today. The messages you have passed on from the Attorney-General who has been kind enough to write to me, with whom I have had a brief conversation, and thank you also for the references to my tenure in the office you hold in past years.

Mr Moore, the New Zealand Law Society represents and regulates the independent legal profession of this country and members have statutory responsibilities to uphold the rule of law and administration of justice, bringing to the functions of your society an important public responsibility. I thank you for your presence representing the society today and for what you have said, and thank you also for referring to my father's role as one of your predecessors.

Now Karen Clark, representing New Zealand Bar Association, probably hiding. You represent the independent Bar and the functions of the Bar Association including maintaining the independence and integrity of the judiciaries and so the presence of a Bar Association representative at a function such as this is highly appropriate. But you, perhaps coincidentally, perhaps not, but certainly most happily from my point of view, are one of my colleagues from Crown Law Office days, from all of the time at my Crown Law Office, and I very much appreciate you representing the Bar and thank you for what you have said.

You have all heard a lot today about my career in the practice of law which to my great good fortune had both private practice and public sector practice phases. In the former, as you have heard, I was a partner in a small firm, which actually my grandfather had established, and in which for a short time I was a partner with my father. I moved to a bigger firm and very much enjoyed my days in Buddle Anderson Kent & Co, I made that move to foster my interest in litigation and it has been said following a merger it became Buddle Findlay. I learnt much in the years I spent in those firms. With my father I learnt the importance of public service and service to the profession if you wanted really to be a true lawyer. I also had the advantage, in my younger days, of working with three outstanding advocates: and in the sequence with which I worked for them, R B Cooke QC, J F Jeffries and Gerald Tuohy QC.

I am delighted that Sir John Jeffries is here today. I learned a lot from him about the techniques of persuasion in legal advocacy, and he also did his best to teach me how to cross-examine.

I spent enjoyable years after that at the independent bar and that very much brought home to me the degree of individual responsibility that counsel at the independent bar carry in that environment carry for their client's cases.

But the defining moment in my career in practice came in 1989 when while I was walking down the aisle in a graduation ceremony in the old Town Hall, alongside the Attorney-General graduation speaker that night, the Honourable Geoffrey Palmer, he offered me the position as Solicitor-General. Now I did have some warning this might happen and I recall accepting the offer before we reached the steps leading up to the stage of the Town Hall where we were going to be separate. I thought I better do that in case he had second thoughts. But at that point I left my private practice for practice as a public servant and I assumed the responsibility, as you have heard, of being the Government's senior advocate in the appellate courts and the head of the Crown Law Office.

This was a time when there was a lot of restructuring in the public sector. I soon came across some officials in Government who were not at all convinced that in the modern public service there was any need for a Solicitor-General who had an overall responsibility for the conduct of the Government's legal business. Lawyers were seen as useful specialists, like scientists and doctors, but there was, it was put to me, no particular reason why a public servant should have authority over Government's legal business generally. Now that, fortunately, was certainly not the Attorney-General's view but I did at times suspect during my tenure as Solicitor-General that one or two Ministers had sympathy with it. In the end, that was as far as it went.

Underlying the role of the Solicitor-General as a law officer is the Government's responsibility to govern in accordance with the law. This is no empty slogan. The Solicitor-General works to ensure there is trust between the Government and the judiciary whatever tensions may arise during the exercise of their separate functions in Government. The Solicitor-General also tries to ensure that there is trust between those lawyers who act for the Government and those lawyers who act against it. The latter must be confident that, in an adversary system, the Crown will not in the Courts act in a way that abuses its position.

But, echoing what Karen Clark QC said today, the Solicitor-General also works to ensure that when the Government seeks by lawful means to implement its chosen policy it is not impeded from doing so. That is achieved in a number of ways. One of them is by the Solicitor appearing in the Courts, personally, in leading cases, ensuring that the Crown is represented by good counsel aware of their responsibilities in all cases. Now I found that the Crown Law Office was pivotal to achieving these aims and I tried to organise it in a way that enabled it to do so.

The decade I spent in the role involved many appearances in the higher Courts, and some of these have been touched on by counsel who have addressed us so I can skip through some of this. But what my budding memory is that there were novel issues emerging in the Courts during these years, prompted by new legislation enacted in the late 1980s and 1990s, covering such matters as corporatisation of Government functions and the link between that and claims for breaches of Treaty grievances and breaches of the principles of the Treaty of Waitangi. As well the New Zealand Bill of Rights Act was passed and the scope of its effect on Government action and on interpretation of statutes was extensively litigated in the Courts. So these were the years in which the Court of Appeal, under the successive presidencies of Sir Robin Cooke and Sir Ivor Richardson, were developing New Zealand's law in new directions and in ways not always easy for a Government lawyer to foresee. It was a great privilege participating in this phase of our legal history. It was also a roller-coaster ride and often I had the sobering experience of reporting to a Minister on what had happened to his pet policy.

As Solicitor-General, I also had responsibility for conduct of Crown prosecutions and I came to know and respect many Crown solicitors who then, as now, practice with colleague trial prosecutors in private firms in High Court centres. I think the Crown solicitor system works well. Overall, I found that being Solicitor-General was simply one of the most outstanding, stimulating and the most exciting roles that I believe that a lawyer can have.

In due course I was asked by another Attorney-General, Margaret Wilson, to accept appointment to the Court of Appeal and a new phase began. The Chief Justice has referred to my swearing in. I recall that in speaking on that occasion I noted that I was moving from a public office as an advocate for the interests of the executive branch of Government to an office within the separate judicial branch and that the oath I had sworn was in practical terms a declaration of independence of former loyalties to the Government and of my commitment thereafter to uphold the rule of law as our society's protection of the rights of the citizen. The concepts in the judicial oath of impartiality and independence underpin our system of justice and would, I said, henceforth be my guiding philosophy.

Now all that was 15 years ago and this ceremony marks the end of the public service I have had in two branches of Government. Just bearing that in mind, I hope you will forgive me if I detour for a few minutes to raise a matter of a constitutional kind that causes me some concern.

Our constitution is an informal one. It is not set out in any single document. It has been described as the product of a complex mass of forces of a political, legislative, prerogative and judicial in nature. As a result the New Zealand constitution is found in some rules that have been enacted by Parliament, some rules of common law stated by the Courts and a number of conventions which are appropriately described as established understandings on the proper exercise of powers. Most New Zealanders are happy with these arrangements and so am I. I do not favour replacement of them with a written formal constitution, at least at the present time. But I do believe there are gaps in our constitutional arrangements which we need to be aware of if our informal constitution is to continue to provide sufficient protection for our Governmental institutions. We also need to ensure that we do not, as a society, inadvertently create new gaps in our constitution.

The Constitution Act 1986 provides that Parliament continues to have full power to make full laws. Now that recognises, with clarity, that Parliament is the supreme law making power of the nation. There is no equivalent provision in that Act stating the role of the judicial branch, nor indeed the underlying concept of the judicial function which is to uphold the rule of law.

The gap was, however, filled to some extent, when this Court, the Supreme Court of New Zealand, was established in 2003. The legislation stipulated that nothing in the Act “Affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.” Commitment to the rule of law is a simple but important constitutional concept. It means our nation’s commitment to the principle that all persons and all bodies, whether public or private, must comply with the law and are entitled to exercise all rights that it gives them. Upholding this principle is the central role of the Courts.

Interestingly, there is a provision, two years later, appearing in an Act of the United Kingdom, in remarkably similar terms. The statute that established the Supreme Court of the United Kingdom states that nothing in it will adversely affect, “The existing constitutional principle of the rule of law.”

To my mind, the provision in New Zealand in 2003 was an elegant way of addressing concerns that the establishment of the Supreme Court should not alter the generally understood position as to the different branches of Government under the constitution. The roles of the Parliament and the Courts, in other words, would remain the same. The inclusion of this statement in the Act did, however, make a very appropriate legislative recognition that under our constitutional arrangements there is some system. Parliament legislates and the Courts administer the law. This explicit recognition of these roles sends, I believe, an important signal to those in executive Government, including the public service which supports the Government and supports the Courts. It also sends an important signal to the Courts themselves. Commitment to the rule of law

requires that Judges to interpret and administer the law in accordance with constitutional principle. Judges may not restrict the true scope of the law to accord with individual notions of fairness in cases before them.

So what is my concern? It is that this statutory provision now in the Supreme Court Act affirming our nation's commitment to the rule of law is likely soon to disappear from the statute book. It will be repealed if the Judicature Modernisation Bill, which recently received its second reading in the House of Representatives, is enacted in its present form. If that happens, in the new statute providing for senior Courts, we will no longer have this meaningful statutory recognition of both the judicial and the legislative roles. It has been suggested that provisions such as this are better located in a revamped Constitution Act. Fair enough. But such an outcome will take time to achieve, possibly a very long time. In the meantime there is a risk that an important recognition of constitutional principle will disappear from our statute books.

To sit as a Judge of the Supreme Court of New Zealand, for most of its first decade, and previously as a judge of the Court of Appeal, has been a great privilege. All Courts in our system have the task of elucidating and applying the law, but the Supreme Court has the ultimate responsibility for doing so. Our Act recognises that the Court was established so that important legal matters might "be resolved by a Court that has an understanding of New Zealand's conditions, history and traditions." That general statement of purpose underlies much of the Court's jurisprudence in its first decade.

The Court has, I believe, sought to assert its role in developing the law of New Zealand and guiding lower Courts, most notably in areas of constitutional law, including Māori issues and the Bill of Rights, taxation, contract and commercial law, and also in torts, land law, family law, criminal law and evidence law. What the Court has achieved in this respect came under close scrutiny last year at a great conference held by the University of Auckland law faculty to mark the Court's first decade. The papers, which

were mainly prepared by leading academic and practising lawyers, were enlightening and occasionally chastening. But the acceptance by a leading group of academic and practising lawyers of the importance of what the Court has been doing was reassuring. We are not here simply to provide another level of appeal. Rather, we seek out the cases that raise important legal principles or where the circumstances indicate that a miscarriage of justice may have occurred.

Now I want to thank a number of people. First and foremost the Chief Justice Sian Elias, thank you for your kind comments today and for the support you have given me over the whole of my time as a Judge, especially during this first decade together on this Court. Your arduous and wide-ranging responsibilities have not stopped you from ensuring that the environment in which the Judges of this Court work is one which stimulates wide-ranging intellectual discourse and hard thinking about the important issues we address. I have found much satisfaction in that.

My thanks also to the other Judges of the Supreme Court, Willie, Susan, Terence and Mark for their collegiality and support. I am also grateful for that of my retired colleagues who preceded them. I am pleased to see two of them here today, Sir Kenneth Keith and Bill Wilson, both of whom I have known in the law for many years in different capacities. So thank you for coming to this sitting today. I also wish to acknowledge the presence of the former Chief Justice, Sir Thomas Eichelbaum, with whom I had a most stimulating and constructive working relationship when I was Solicitor-General which has also been referred to. And I remember the late Sir Ivor Richardson, who died at the end of last year. He was the President of the Court of Appeal when I joined it but more than that, I learned so much from him during the whole of my life in the law and in public life more generally.

Many thanks for coming, also to the Secretary of Justice, Andrew Bridgman, that is both personally and as Chief Executive of the Ministry of Justice

which supports the Court. The Court, of course, does not consist of the Judges alone and I want to thank its registrar, Gordon Thatcher, and his staff, without whose conscientious and principled assistance, we Judges simply could not administer justice. I also am particularly grateful for the service of the Court's librarian during its first decade, Sarah Cleghorn, and all the Judges clerks who have worked with me as research assistants represented here by Alec Dawson. I am especially grateful to my associate, Deb Goodwin, for all that she has done for me.

The pleasure in retirement will come from the greater flexibility it will bring in my family and recreational life. Throughout my working life I have been sustained by the constant and love and support that I have received from Chris, and from Lucy and Tom. They are present today with their spouses Dougal and Göknül and our grandchildren Alex, Claudia, Ayla and Ozan. Other family members are here, including my sister Caroline and my brother Gordon, who has come over from his busy practice in the Sydney bar, and other friends have come to, some of whom have travelled long distances.

So finally to all of you in the judiciary, the Government, the legal profession who have come here today to wish me well in retirement, thank you very much for being here. The Court will now adjourn.