FINAL SITTING SPEECH

Friday 6 March 2015

Hon Justice John McGrath

1. No-one will have failed to detect that there has been a high degree of exaggeration in counsel's submissions today. All of what has been said is nevertheless greatly appreciated by me.

2. ***Mr Solicitor:***

   The Solicitor-General

   Mr Chris Moore:

   President NZ Law Society

   Karen Clark QC:

   On behalf of the NZ Bar Association

3. You have all heard a lot today about my career in the practice of law which to my great fortune had both private practice and public sector practice phases. In the former phase I was a partner with a general practice in a small law firm, which my grandfather had established, and in which my father was a partner with me. I moved to a bigger law firm, Buddle Anderson Kent & Co for focus on litigation. Following a merger it became Buddle Findlay. In these years I learned much from my father, in particular concerning the importance of public service including service to the legal profession. I also had the advantage of working with three outstanding advocates: in sequence, 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 techniques of persuasion in advocacy, and about how to cross-examine.

4. I then spent enjoyable years at the independent bar which brought home to me the degree of individual responsibility counsel who practice in that environment carry for their client's cases.

5. But the defining moment in my career in practice came in 1989 when Geoffrey Palmer, then Attorney-General, offered me the position as Solicitor-General which was to become vacant. He did so as we were walking together up the central aisle of the Old Town Hall in Wellington in an academic procession for a graduation ceremony. I had some warning this might happen and I recall accepting the offer before we got to the steps leading up to the stage, in case he developed second thoughts. At that point I left private practice for public practice as a public servant. I also assumed the responsibility of being the government's senior advocate in the appellate courts and head of the Crown Law Office.

6. This was a time when there was a lot of restructuring in the public sector. I soon found out that there were some officials who were not convinced that in the modern public service there was any need for a Solicitor-General who had overall responsibility for conduct of the government's legal business. Lawyers were seem as useful specialists, as were scientists and doctors, but there was, it was suggested, no particular reason why a public servant should have authority over legal business of government generally. That certainly was not the Attorney-General's view but I did at times suspect that one or two Ministers had sympathy with it. But that was as far as it went.

7. Underlying the role of the Solicitor-General as law officers is the government's responsibility to govern in accordance with the law. This is not an empty slogan. The Solicitor-General works to ensure there is trust between the government and the judiciary whatever tensions may arise during their exercise of their separate functions. The Solicitor-General also seeks to ensure there is trust between those lawyers who act for the government and those lawyers who act against it. They must be confident that, in an adversary system, the Crown will not act in a way that abuses its position.

8. But 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. This is achieved by the Solicitor appearing in the Courts, personally, in leading cases, and ensuring the Crown is represented by good counsel who are aware of their responsibilities in all cases. The Crown Law Office was pivotal to achieving this. I tried to organise it in a way that best enabled it to do so.

9. The decade I spent in the role involved many appearances in the High Court, the Court of Appeal and the Privy Council, most of which were seeking to uphold in judicial review proceedings, a position the government had taken, or appearing for the Crown on appeal in criminal proceedings. Novel issues were emerging in the Courts, prompted by new legislation during the late 1980s and 1990s concerning such matters as corporatisation of government trading entities and the link of that policy with claims of breaches of the principles of the Treaty of Waitangi. As well the Bill of Rights Act was passed in 1990 and its scope and effect on government action and statutory interpretation was soon extensively litigated in the Courts. 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 taking it in new directions and in ways not easy for me at least to foresee. It was a huge privilege participating in so much of our legal history. It was also a roller-coaster ride appearing before them. It was also at times a sobering experience reporting to Ministers on what had happened to their pet policy.

10. As Solicitor-General, I also had responsibility for the conduct of the Crown prosecution system and came to know and respect many Crown Solicitors, who then as now, practice with colleague trial prosecutors in private firms in cities which are High Court centres. I think the Crown Solicitor system works well. Overall, being Solicitor-General was for me one of the most stimulating and the most exciting roles a practising lawyer could have.

11. In due course I was asked by another Attorney-General, Margaret Wilson, to accept appointment to the Court of Appeal and a new phase in my career began. After taking the oaths of office as a Judge, I noted that I was moving from a public office as the advocate for the interests of the executive branch of government to an office within the separate judicial branch. The judicial oath which I had sworn was my declaration of independence of my 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 oath of impartiality and independence underpin our system of justice and would, I said, henceforth be my guiding philosophy.

12. Today's ceremony accordingly marks the end of my public service in two branches of government. Bearing that in mind, I hope you will forgive me if I detour for a few minutes to raise a matter of constitutional kind that causes me some concern.

13. 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 kind. 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 practices based on established understandings as to the proper exercise of powers. Most New Zealanders seem happy with this and so am I. I do not favour replacement of our arrangements with a written constitution at the present time. But I believe there are gaps in our constitutional arrangements which we need to be aware of if our informal constitution is to continue to provide a sufficient protection to our nation's good government. And we also need to ensure that we do not inadvertently create new gaps.

14. The Constitution Act 1986 provides that Parliament continues to have full power to make laws[1] recognising, with clarity, that Parliament is the supreme law making power of the nation. There is no equivalent provision stating the role of the judicial branch, or indeed the underlying concept of the judicial function which is to uphold the rule of law.

15. That gap was filled, to some extent, when this Court, the Supreme Court of New Zealand, was established in 2003. The legislation stipulated that nothing in it "affects

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[1] Section 15(1) Constitution Act 1986.

New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament".[2] 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.

16. Interestingly, there is a provision, expressed in similar terms, in the Act of the United Kingdom Parliament, passed two years later, which provided for the establishment of the Supreme Court of the United Kingdom. That statute states that the Constitutional Reform Act 2005 (UK) does not adversely affect "the existing constitutional principle of the rule of law".

17. To my mind, the provision in the New Zealand Act of 2003 was an elegant way of addressing concerns that the establishment of the Supreme Court should not alter the generally understood position of the different branches of government under the constitution. The roles of the Parliament and the Courts would remain the same. The inclusion of this statement in the Act that established the Supreme Court was also in my view appropriate legislative recognition that under our constitutional arrangements there is a system underlying our constitutional values. Parliament legislates and the Courts administer the law. The explicit recognition of these roles sends an important signal to those in executive government, including the public service which supports the government and the Courts. It also sends an important signal to the Courts themselves. Commitment to the rule of law requires Judges to interpret and administer the law in accordance with constitutional principle. Judges

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2 Section 3(2) Supreme Court Act 2003.

may not restrict the true scope of the law to accord with individual notions of fairness in cases before them.

18. So what is my concern? It is that this statutory provision affirming our nation's commitment to the rule of law will soon 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 section 3(2) of the Supreme Court Act might be better located in a revamped Constitution Act. Fair enough. But that 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 the statute book.

19. 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 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.

20. 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 Maori issues and the Bill of Rights, Taxation, Contract and Commercial law, torts, land law, family law, criminal law and evidence law. What the Court has achieved in this respect came under close scrutiny at a great conference held by Auckland University's Law Faculty last year 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 cases which raise important legal principles or where the circumstances indicate that a miscarriage of justice may have occurred.

21. I want to thank a number of people. First and foremost the Chief Justice – thank you for your very kind comments today and for the support you have given me over my time as a Judge, especially during our 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 very much appreciated that.

22. 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, Sir Kenneth Keith and Bill Wilson, both of whom I have known in the law for many years, at 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. And I remember the late Sir

Ivor Richardson, who died at the end of last year. He was President of the Court of Appeal when I joined it and I learned so much from him during the whole of my life in the law.

23. Thanks also to the Secretary of Justice, Andrew Bridgman, both personally and as Chief Executive of the Ministry of Justice. The Court of course does not consist of the Judges alone and I want also 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. And I am especially grateful to my associate, Deb Goodwin, for all she has done for me.

24. 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 huge love and support I have had from my wife Chris, our daughter Lucy and our son Tom. They are present today with their spouses Dougal and Göknil and our grandchildren Alex, Claudia, Ayla and Ozan. Many other family members are here, including my sister Caroline and my brother Gordon, who has come over from his busy practice at the Sydney bar. And other friends, some of whom have travelled long distances to be here.

25. And finally to all of you in the judiciary, the government and the legal profession who have come here today, to wish me well in retirement, thank you very much.