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## Swearing in Ceremony of The Honourable Robert Calder McDougall as a Judge of the Supreme Court of New South Wales

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT

SPIGELMAN CJ  
AND THE JUDGES OF  
THE SUPREME COURT

Thursday 21 August 2003

### **SWEARING-IN CEREMONY OF THE HONOURABLE ROBERT CALDER McDOUGALL AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

1 McDOUGALL J: Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court. I present to you my Commission.

2 SPIGELMAN CJ: Thank you Justice McDougall. Please be seated whilst the Commission is read. Principal Registrar, would you please read the Commission.

(Commission read)

Justice McDougall, I ask you to rise and take the oaths of office, first the oath of allegiance and then the judicial oath.

(Oaths of office taken)

Principal Registrar, I hand to you the oaths so that they may be placed amongst the records of the Court and the Bible so that it may have the customary inscription placed in it and presented to his Honour as a memento of this occasion.

3 Justice McDougall, on my own behalf and on behalf of all the Judges of the Court, I welcome you. I congratulate you on your appointment and I look forward to serving with you on this Bench for several years to come.

4 MR B WALKER, PRESIDENT OF THE BAR ASSOCIATION OF NEW SOUTH WALES: May it please the Court.

5 On behalf of the Bar Association, may I welcome your Honour by whose temperament, experience, learning and service as a barrister, is so well-fitted for your appointment.

6 Your Honour overcame a secondary education at the Scots College, much as your Master did, to succeed at the Bar at which you commenced in December 1974. Your Master was, of course, one of your new colleagues, though still alas senior to you, namely Justice Tobias. The other pupil of your Master is another of your colleagues, who is also senior, namely Justice Beazley.

7 Your Honour started in Frederick Jordan, moved to Selborne, changed floors in Selborne but was otherwise, if I may say so, unperipatetic for the modern Bar.

8 You were appointed Queen's Counsel in November 1990. At that stage in your career, those of us who had appeared against you can supply the following summary report, which bodes particularly well for the case management which your Honour will now have committed to you as an everyday duty.

9 The preparation by your Honour of an ordinary case was extraordinarily careful. The preparation by

your Honour of extraordinary cases was prodigious. Your presentation in court was always dignified, always calm, and had, of course, therefore, the cumulative effect, together with the preparation, of considerable gloom felt by your opponent, but, most significantly, considerable relief felt by the Bench. That calm, that preparation, and that movement through the issues of a case in an order which is logically sequential is one which the Bar looks forward to as marking your judicial career.

10 The subject matter of your Honour's practice was as varied as commercial life and commercial perfidy can make it in the modern world.

11 Although there are the aspirational ideas of the Consumer Credit Code of which you are said, unkindly perhaps, to be a guru, there are also the other parts of commercial life which can best be summed up by the large briefs very often unreportable, both as to the language to be used about them and as to the nature of the issues decided in them in which you had a leading role in the last decade or so.

12 Estate Mortgage, which some could unkindly say had neither estates nor mortgages mentioned in any case. I don't know what unkind comment should be made about the National Roads and Motorists Association, for whose activities you were a very important part, including, it might be said, as some kind of probative arbiter in relation to some notorious inquiries for which you were responsible.

13 The HIH Royal Commission, of course, concerned what was, for some people, laughably called "insurance" and your Honour played a particularly important role as leading counsel for one of those parties most affected in that case.

14 Quite apart from what can only be described as an extremely busy, extremely creditable, and very heavy commercial practice, your Honour was responsible in a way which is remembered with great gratitude and respect by those of us at the Bar Association for year in year out hard work in relation to ethics and professional discipline.

15 Your Honour performed the almost impossible task of giving coherence by way of annual report to the patterns that might be observed by the wretched cases that were dealt with and publicly determined in the PCC and disciplinary tribunals over the years: more significantly, in what might be called justifiably a wilderness of first instance decisions, in that disciplinary work. Your Honour remained a most important and leading member of professional conduct committees and an inspiration towards improvement year by year of the manner in which those reports were prepared and presented.

16 We will not quickly forget the great service that you have performed in that role. May I add a personal note that over the years your Honour has been of great assistance to me in a number of difficult and sensitive matters in relation to discipline and ethics and for that I thank you, in particular.

17 Your Honour comes to the Bench, of course, not entirely unfettered by heredity. Your greatly esteemed father, engineering arbitrator, par excellence bodes particularly well by way of your inheritance with respect to temperament - equitable and fair - and intelligence, incisive and, perhaps, sometimes slightly at the risk of being too obviously superior to those over whom you are adjudicating.

18 Finally, of course, it has to be said that your Honour has, in a particularly important, but less professional role, joined a very lonely band of pioneers in the much overdue move from law books, as a form of decoration in chambers, to ceramics. It is greatly regretted that the Bar is a very lonely band of pioneers in that regard and is, I think, halved by your Honour's appointment. I don't think, in that regard, the Bench has greatly increased.

19 May it please the Court.

20 MR R BENJAMIN, PRESIDENT OF THE LAW SOCIETY OF NEW SOUTH WALES: May it please the Court.

21 My appearance at these ceremonies this year have been quite numerous to the extent that I may be able to claim to be a specialist in the field, I suspect that very few solicitors can claim to have appeared before so many Supreme Court Judges in such a short period of time.

22 Your Honour, on behalf of the solicitors of New South Wales, I congratulate you on your appointment as a Judge of this Court.

23 I wonder, in those long ago student days at Scots College, when you were awarded the nickname "prof", if you had already given your school mates an intimation of what lay before you. Were you even then a judge in the making?

24 Whilst your Honour was admitted as a solicitor in 1972, you spent precious little time with us, moving to the Bar some two years later. In that brief intervening period, you managed to marry and embark upon creating a family. So it was, when you were setting up your chambers, not much work about and your wife pregnant with your first child. You were eagerly awaiting cases to come through the door and cases did come, for you kept ordering them, cases, that is, apparently of red wine.

25 All your colleagues speak about your passion for wine, particularly fine French wine, and the wine merchant who keeps you well supplied. Perhaps your appreciation of the grape provided you with the insight and passion to appear for the fellow who, under the influence, reclined or decided to recline in the middle of the road whereupon he was run over. You successfully argued an award of damages for him.

26 Not content to restrict yourself to wine, your Honour is a connoisseur of many fine things, as Mr Walker has said, including food, music and art. I am told that your elegant chambers are decorated with works from William Robinson and Tracey Moffat, or ceramics and glass pieces. On one occasion, apparently you invited your wife to view two sculptures by Robert Klippel and once she had approved them, you were kind enough to advise her that the purchase had already been completed.

27 So fond are you of the collection that when you were installed in an office of the State Bank during the State Bank of New South Wales Credit Act case, you transported a number of these items with you to decorate your temporary chambers.

28 Apparently, an unknown at the bank, you had the surreal experience of travelling in the lift one day, only to overhear someone saying to a colleague, "We have to do this report and see this barrister McDougall. I hear he is a real" - I'm sorry, I just can't quite read the word. Subsequent to that exchange, you did meet the person and got on quite well with them.

29 In fact, the whole experience of that case must have been a rewarding one, resulting as it did in a Clayton Utz verses the bank internal cricket match, which you were invited to umpire. Clearly, your judicial skills were recognised very early or, alternatively, your playing skills were not attractive to either side, and this is in spite of your history at school as a fast bowler.

30 Indeed, you are said to have incredible knowledge of cricket minutiae. On the steps of the Court, waiting to have a case heard, you have been known to exchange details of some ancient cricket tour of England. Perhaps a calming touch to deflect attention from the matter at hand.

31 Your dry sense of humour has also done much to relieve the tension of anxious clients and their equally anxious solicitors. "He will just throw something in", our solicitors say, describing your brand of humour as owing much to the Barry Humphries/Les Patterson school of mirth. One solicitor said that, whilst she was dealing with a particularly Teutonic client over the phone, your Honour was on the sideline and indulging in Dr Strangelove impersonations. It was all she could do to contain herself.

32 Your Honour has conducted a fair amount of work in the construction field, with some nasty rectification issues, as well as work on strata title legislation. This predilection might owe something to your father, Max, who, we have already heard, is a most highly regarded building arbitrator who has just retired.

33 An engineer by training, your father worked on the Snowy Mountains Scheme, taking the family to live at Cabramurra. Proximity to the stuff gave you a dislike for snow, and your sporting pursuits since that time have been far removed from the ski fields. Mountain hikes, exotic walks in overseas destinations tend to be the go, though not necessarily with the approval of your orthopaedic surgeon, Dr Merv Cross.

34 Unfortunately, even when you forego travel by foot in favour for the car - apparently a Nissan GTX - except perhaps a walk down Phillip Street over the next few months - the medical concerns for your welfare and that of your passengers is no less significant. One solicitor said, "He used to hoon around in this car, accelerate quickly and dodge in and out of traffic. It was a hair-raising experience."

35 As has been said, your Honour has worked on many large commercial matters, including the NRMA litigation and the HIH Royal Commission. You also appeared in a leading case in the Court of Appeal which completely changed the existing practice in relation to actions for recovery of unpaid workers compensation premium.

36 As a barrister, you have always been helpful and forgiving of the less than well-prepared briefs, not that my branch of the profession would allow many under prepared briefs to be sent to the Bar. In spite of your formidable knowledge, described by some as "scary", there is no arrogance. You have a good nonsense detector, getting to the nub of things quickly, and you come to a considered opinion and stand behind it.

37 Your view is broader than just the legalistic. You are able to look at how clients can achieve the outcomes they desire. You are a strategic thinker and you are very aware of how business works.

38 While my fellow solicitors are delighted with your deserved elevation to the Bench, their only regret is that you have gone so soon. They had hoped you would be around for a few more years to help them out.

39 However, your Honour's move is a benefit for the broader community. May you have many productive years in your service to the public and I for one, given the right drop, would drink to that.

40 As the Court pleases.

41 McDOUGALL J: In what may be thought by some to be an inauspicious start to a career as a Judge, I thought for very many hours about the appropriate form of salutation with which to begin these remarks. What variation on the well-worn theme of "friends, Romans, countrymen" would I use? But I was unable to come to a decision on the topic.

42 It is a perilous activity, firstly, because you run the risk of omitting reference to someone who either should be or thinks that she should be or, indeed, that he should be referred to and; secondly, of course, because the problem of classification into "friends, Romans, countrymen" raises, immediately for a lawyer, the question of whether the categories are mutually exclusive.

43 If you are friends, are you not family, are you not colleagues? You see the problems. And so, I have launched, somewhat abruptly, into these remarks. I do apologise for my somewhat brisk commencement, but it is, I think, something not entirely without precedent in the Equity Division to which I have been assigned. I do offer my sincere thanks to everyone who has been here today: friends, colleagues, old and new, and family.

44 I thank the speakers, Mr Walker and Mr Benjamin, for their very kind words. It is perhaps a sad comment on the decline of advocacy that the duties of candour and frankness seem to be more in the breach than the observance at functions like these.

45 As to Mr Walker, all I will say is that, if my predilection for ceramics has halved the number of people at the Bar who share it, then it has increased infinitely the number of people in this Court who share it.

46 And as to Mr Benjamin, I will simply say that the epithet with which I was apostrophised in the lift was disyllabic, not monosyllabic.

47 I spent 28 years at the Bar, not a very long time by the standards of Mr Hughes, who I see, with gratitude, in the front row today - not by his stature - his stature in physical terms, of course, not in terms of the Bar. Over that time, I have really enjoyed the friendship and camaraderie of colleagues and, from time to time, the work that has come my way.

48 I have very many people to thank for such success as I have had at the Bar. As Mr Walker has pointed out, they include, if I may use the personal terms: Murray Tobias, with whom I read, and his colleagues on the sixth floor who were very good to me in my early days in such and supplied me, among other things, with enough devilling to keep the wolf from the door and to keep the cases rolling in and, of course, I have the privilege of reading together with her Honour Margaret Beazley.

49 The profession and litigants will doubtless be very glad to know that Tobias JA now, as before, is waiting zealously to detect and correct error, but, unlike before, can do it with the overt rather than the

covert assistance of Beazley JA.

50 I have had a number of pupils and they have really been a source of great inspiration to me and I should mention them in both chronological and alphabetical order: John Armfield, Stuart Donaldson, and Greg Waugh. If they got a fraction from me in terms of knowledge, what I have received back from them in terms of friendship, then I have been a very good Master indeed, but I suspect the truth is otherwise.

51 I wish to record my thanks and appreciation to my clerk for more than 13 years, Bob Rymer, who is here today, and to my secretary for more than ten years, Marika Pythagorus, who is, unfortunately, not here. She is enjoying the fruits of long service leave, which so few predicted she would qualify for. But over the years, their loyalty, their friendship and their assistance has lightened immeasurably the burden of a busy barrister's life and, as I said, I thank them greatly.

52 I have made many colleagues and friends, though these are not exclusive categories, on both sides of the profession and I do thank them for their assistance and their support over the years and for the friendship and for the companionship that sometimes segregated life at the Bar involves.

53 I would like to make particular mention of the late Jeremy Badgery-Parker. Jeremy was in Frederick Jordan Chambers when I started there. In the early years, his support and encouragement, in both material and other terms, was of enormous value and for the whole of his life thereafter, his friendship was one that I treasured.

54 I need to record what is an incalculable debt to my family. First, to my parents who brought me up to seek to achieve whatever my capacity would allow and to understand the value of hard work. It is a great shame that my mother, Betty, died last year without seeing today's spectacle. It might perhaps have finally persuaded her that I made the right decision in choosing Law over Medicine as a profession. But my father, Max, as you have heard, is here today and his example is one that I shall strive to emulate. He has told me that he is very definitely retiring, if not quite retired, which is probably a good thing. It means I no longer have to consider the question of adoption of his reports or of disqualification of him as an arbitrator for misconduct.

55 There is another family connection with the Courts that has not been mentioned. The architects of the building were McConnell, Smith and Johnson. My uncle, Stan Smith, the Smith of that firm, was one of those responsible for the design. Stan can't be here today, but his son-in-law, Robert Scobie, is. All I wish to say on the topic of the Court's design is that Stan was not responsible for level 11 as it now stands.

56 Most important of all, however, are my wife, Jenny, and our children, Kirsty, Hamish and Angela. Angela is unable to be here today. She is studying in Spain. Some people have terrible lives. But their love and support over the years has helped me in difficult times and has given me great joy at all times. The words "thank you" are hopelessly inadequate, but it is difficult in a public ceremony of this nature to say more.

57 There are too many others to mention, but I gratefully acknowledge the presence of family and friends and colleagues and the thoughts and wishes of all those who cannot attend.

58 So that leads me to my last point: my new career at the Bar - I'm sorry for that slip - my new career at the Bench, after 28 years at the Bar.

59 I have, I think, a justifiable feeling of pride in being asked to join this Court, but also a very considerable sensation of humility reflecting upon my perceived inadequacy for the task. It is a court of long and proud history. Its ranks have been adorned by many great judges and its reputation today stands justly high in the Common Law world.

60 I do look forward to contributing to the work of the Court. I am aware of the challenges that face me, of the need for a total change in the approach and attitude to the task of being a Judge, as compared to the task of being a barrister, and to the need to develop new skills. I look forward to meeting those challenges. I know that in striving to deal with them I will have the support and assistance of the profession, and the support and friendship of my colleagues on the Bench.

61 I trust that with that assistance and my own efforts I will discharge, in an appropriate way, the duties of the high office to which I have been appointed.

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