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THE SUPREME COURT OF

WESTERN AUSTRALIA

FAREWELL TO THE HONOURABLE JUSTICE SIMMONDS

FULL BENCH

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THURSDAY, 30 JUNE 2016, AT 4.31 PM

**MARTIN CJ:** The court sits this afternoon to acknowledge the contribution made by the Honourable Justice Ralph Simmonds, as a member of this court for more than 12 years, to express our gratitude to his Honour for that contribution and to wish him every happiness in his retirement which commences just after midnight tonight.

I would like to particularly welcome members of his Honour's family to this afternoon's sitting, including his Honour's wife, Francine Giguere; his Honour's son, Doctor Philippe Giguere-Simmonds and his partner, Alison Limb; his Honour's sister, Caroline, and brother-in-law, Joseph; nephews Matthew and Mark; and his Honour's cousin, Mark Matulich, and his partner, Sally Humphries.

I would also like to welcome his Honour Justice Michael Barker of the Federal Court of Australia; his Honour Judge Eaton; representing the Chief Judge of the District Court, Chief Judge Sleight; his Honour Judge Denis Reynolds, President of the Children's Court of Western Australia; his Honour the Chief Magistrate, Chief Magistrate Steven Heath; Ms Katrina Banks-Smith SC, judge elect; Mr Peter Quinlan SC, solicitor general elect; the Acting Director General of the Department of the Attorney General, Ms Pauline Bagdonavicius; Mr Joe McGrath SC, Director of Public Prosecutions; and other distinguished guests including many past members of this and other courts.

I would also like to particularly welcome those who will address the court this afternoon, being Mr Paul Evans representing the Attorney General of Western Australia; Ms Elizabeth Needham, President of the Law Society of Western Australia; and Mr Stephen Davies SC, Vice President of the WA Bar Association.

Justice Simmonds was appointed a member of this court on 22 February 2004. Some indication of the changes which have occurred during his Honour's term of office can be drawn from a brief consideration of those who attended and addressed the ceremonial sitting which marked his Honour's appointment. Chief Justice French joined the bench in his then capacity as a member of the Federal Court and those present included Chief Judge Antoinette Kennedy who had only just been appointed to that role, Judge Nicholas Tolkien representing the Chief Judge of the Family Court of Western Australia, the Honourable Michael Holden, and the then President of the Children's Court, Judge Kate O'Brien. The only one of those still holding judicial office is

Chief Justice French and he is fast approaching his statutory use-by date.

The court was addressed by the Attorney General, the Honourable Jim McGinty MLA, Mr Ian Weldon in his capacity as President of the Law Society and Mr Ian Viner QC in his capacity as President of the WA Bar Association. Much was said on that occasion of his Honour's career prior to appointment, which had not followed the usual path, as it involved a significant academic career in Canada and Western Australia and included service as foundation dean of this state's second law school at Murdoch University.

On that occasion, mention was also made of your Honour's conspicuous service on the Law Reform Commission of Western Australia, upon which I had the pleasure of serving with your Honour for six years, after which you took over my role as chair of that commission for a further two years. In that capacity your Honour made an outstanding contribution to various important projects undertaken by the commission, including the commission's review of the civil and criminal justice systems of this state which made recommendations which showed reforms which had been implemented by government and by the courts in the years which have followed and to the commission's review of the role of Aboriginal customary law.

But today we sit to mark your Honour's contribution to the work of the court since February 2004 and I will not dwell any further upon your Honour's contribution to the administration of justice prior to that appointment. Since appointment to the court your Honour has served in all areas of this work, including on the Full Court, prior to the creation of the Court of Appeal, and in all areas of the trial work of the court, including civil work, corporations work and, more recently, extensive work in the burgeoning criminal jurisdiction of the court.

In reacting and responding to the different demands opposed by work in the diverse areas of this court's jurisdiction your Honour has displayed the intellect, diligence of research, meticulous attention to detail and dedication which had characterised your Honour's academic career. I expect that the stress and anxiety inevitably associated with the performance of judicial duties in cases serious enough to fall within the jurisdiction of this court were exacerbated on those occasions when your Honour must have found yourself a little outside the zone of comfort to which you had been accustomed in the cloistered environs of academe.

Your Honour has nevertheless been unfailingly calm and composed and invariably polite to all in court, including counsel, witnesses and parties. Your Honour's unflappable equanimity has provided a shining example to those happily few of us who might very occasionally succumb to the temptation of exuberant or intemperate language. I have no doubt that this is a characteristic of your Honour's court craft that was very well received and respected by the profession and litigants alike.

Your Honour has also made an outstanding contribution to the administration of the court in a variety of capacities over your 12 years of service. You've served as member and long time chair of one of the court's most important committees, the Information and Technology Committee, and also as chair of the inter-jurisdictional Courts and Tribunal Technology Committee. You also served a lengthy term as convenor of the Courts Library Committee and of the Joint Courts Library Advisory Group and undertook a major project aimed at improving the way in which the court responded to the needs and challenges posed by self-represented litigants.

It's difficult to either state the importance of the issues addressed by your Honour in the course of all of that work and the various achievements of the committees on which you served stand as testament to those qualities of intellectual rigour, research and diligence which have characterised all stages of your Honour's career.

As the judicial phase of that career draws to a close I have no doubt that other phases will fill the gaps left by retirement, both in Canada and Australia. It only remains for me to express on behalf of all members of the court our most sincere gratitude for your contribution to the work of the court and to wish you and Francine all health and happiness in whatever follows. Mr Evans.

**EVANS, MR:** May it please the court. It is a pleasure to be here today representing the Attorney General, the Honourable Michael Mischin MLC. The Attorney General sends his apologies as he is unavoidably detained on government business. The business of farewelling a judge from the court on which they have served is, first and foremost, one of congratulating them on the contribution that they've made during their service to the community as a judge.

Sometimes, though, prior life bears on that contribution and in your Honour's case that is particularly so. Like many on this court and in the courtroom today, myself included, your Honour is not a native of the state,

having been born, some years ago, in Sydney in New South Wales. At some time, my sources couldn't reveal when, precisely, your Honour made his way or had it made for him across the Nullarbor for you were to study law at the University of Western Australia in one of its halcyon periods.

You commenced your studies in 1968, one of the first occupants of what was then the new law school. The inimitable Douglas Hayne and Eric Edwards and a host of some of the finest barristers of the period were amongst the faculty of the university at that time. Having graduated with honours in 1972 you went on to take articles with Neil Williams Nicholson & Co under my later principal, Robert Nicholson, and working also with David Malcolm and Robert Anderson before being admitted to practice in 1974.

Though your articulated years were spent working with three lawyers, all of whom were to become judges of this court and one a distinguished chief justice, it might have suggested a particular direction for your career. It did but that's, though, a slightly different than orthodox route. In part, that may have come from your interests. On commencement I'm told by your principal that he inquired of you what area of law you were most interested and you replied, "Constitutional law."

That was not what one would regard as a central part of a new audience practice of its day. But, by happenstance, Mr Nicholson had a problem of advising in relation to the enforcement of a security over offshore areas. You were set to work on that problem. In due course, you produced a most thorough opinion, one could imagine at the time, although the only guidance on the issue was available from a passing comment of Justice Windeyer in a judgment in the High Court. It solved the problem.

Now, whether that was to mark the commencement of the interest in securities law which was later to mark a significant part of your academic or not, I don't know. But you did wish, at least, initially, to pursue academic interest and that's not as common then as it is today and that was to take you overseas. Indeed, it was to take you to the University of Toronto where you studied for and achieved your master's degree.

The academic bug and perhaps not that alone had bitten and you were to remain in Canada for a considerable number of years, embarking upon a career as a legal academic teaching at the University of Windsor, Ontario, from 1976

to 1979 and then, for the next 10 years, at the University of McGill - McGill University, my apologies, in Montreal. And you made a speciality out of aspects of corporate law and, at one phase, the law pertaining to Canada's adventure into the statutory recognition and registration of interests in personal securities which were later visited upon this jurisdiction, not necessarily happily.

It was a productive time with your Honour publishing at least 10 texts over that and the succeeding period. In a now distant home the legal scene was also changing. The resources boom and bust of the 1970s was followed by the entrepreneurial corporate boom and bust of the 1980s and out of both had emerged a significantly changed legal profession. Its ranks were boosted by skilled lawyers from Southern Africa, generally, of considerable seniority and this court was to benefit considerably from their skills.

But senior lawyers need junior lawyers and there was some disquiet in the profession that the law school at the University of Western Australia had become, to be polite, a little lazy in the production of job quality - quality of job-ready applicants and for articles. The Beasley education reforms and the catchcry of competition combined to make possible the creation of a second law school at Murdoch University and you were to be recruited to take a position as its foundation dean in 1990.

Tasked with creating a new, vibrant and different law school, your old firm was a major supporter of that project. It was to be an outstanding success in creating a vibrant, competitive tension with the incumbent law school in the succeeding years. It was not to be your only accomplishment because while mastering the challenge of a new law program in a new school you also served as national convenor of the National Committee of Law Deans from 1994 to 1995 and your success in launching that school led to the award of the Senate Medal from the Murdoch University for your outstanding work as dean in 1998.

In case you were bored, in your idle moments you also served on the Law Reform Commission, as the Chief Justice has noted, building on your prior work with the Ontario Law Reform Commission until, after 14 years, you were appointed to this court. You have been a tireless and productive judge. Some 300 published decisions appear on the sites on these courts, a database of judgments as well as, of course, numberless less formal determinations, jury charges and sentencing remarks.

In addition to your core judicial duties you've chaired the Supreme Court Information Technology Committee and also the Supreme Court Website Committee. You will not now have the joy of experimenting with the information technology of the new David Justice Malcolm system - Malcolm Centre as those who are already there are having pleasure in experimenting with that technology. On behalf of the Western Australian Government and the Western Australian community, I pass on the thanks of the Attorney General for your years of service in both judicial and academic capacities.

And, personally, in taking the liberty of doing so on behalf of your past and present colleagues on the faculty of the Murdoch Law School, I also wish you a long and happy retirement which will provide more opportunity for you to spend time with your wife, Francine, and to pursue your interests in travel and photography. If it please the court.

**MARTIN CJ:** Thank you, Mr Evans. Ms Needham.

**NEEDHAM, MS:** May it please the court. Today I have the pleasure of conveying the gratitude of the Western Australian legal profession through the Law Society of Western Australia to his Honour Justice Ralph Simmonds for his more than 12 years outstanding service on the bench of the Honourable court - his Honourable court. The path your Honour trod that led you to this bench is not one often travelled in Western Australia with you being the first to take it and, therefore, bears comment being made as perhaps it provided a different perspective or attitude to the wider community role of the judiciary.

Forgiving your place of birth being New South Wales, something over which you had no control, your Honour has been adopted as a Perth boy. For your Honour academia and its advancement has been a passion and something at which you have excelled, so much so that you made your mark on the international stage, most particularly in Canada. This is even more the remarkable because at least part of your Honour's academic career saw you teaching for nine years at McGill University Montreal in Quebec, a province in which all except the Federal criminal law is civil law rather than common law.

This appears to have fired your interest - fired an interest with your Honour that you brought back to Perth and there is little doubt that your Honour used this to great effect in both legal education and on the bench. Your Honour has been known to comment on the great strength

in consideration of comparative law and legal systems, forcing people to stand outside their traditional background and, anew, consider the issue, whatever that issue may be.

Your Honour used this in your approach to matters before you, both on the bench and at the Law Reform Commission. For example, a review of the work done by the Law Reform Commission under your Honour's stewardship in the Aboriginal Custody Law Project is a testament to this approach. This interest in education of both the profession and the public is an important one.

One of the important roles that the legal profession and the judiciary can play is in providing education to both the next generation of the profession and to the wider community, something that you have continued to take very seriously throughout your career. Even as recently as earlier this month, your Honour was providing education at public forums on topics that give the public a much greater understanding and help to demystify legal proceedings. For example, the one recently entitled Sentencing: What Really Goes On.

Your Honour has been an active member of the Law Society, having joined in 1990 on your return to Perth from Canada to take up your role as the Foundation Dean of Law at Murdoch University. Your Honour has contributed greatly to the work of the Law Society over many years for which we are very grateful, for example, having served on various Law Society committees such as - surprise, surprise - the Education Committee and as convenor of the Professional Liability Committee.

Another example of your Honour's commitment to the society, education and public service is your Honour's longstanding association with the Law Society's Francis Burt Law Education Programme and the Old Court House Law Museum as a founding member of the Advisory Committee and the Sir Ronald Wilson Lecture Sub-Committee amongst numerous other contributions. On behalf of the legal profession of Western Australia through the Law Society, I wish your Honour all the very best in your retirement. May it please the court.

**MARTIN CJ:** Thank you, Ms Needham. Mr Davies.

**DAVIES, MR:** Your Honours, on behalf of the Western Australian Bar Association, may I present our compliments to your Honour on the occasion of your Honour's retirement

as a judge of this court. As has been observed, your Honour came to the court on a path other than what might be regarded as the usual path. To some extent, your Honour came to the court unencumbered by the practices and conventions observed by those who come to be appointed on the more conventional route.

Perhaps reflective of that, your Honour was never afraid to sit long hours, sometimes very late into the day, hours characterised by some of the less robust members of the bar as being "not really barristers' hours". Your Honour's background as an academic was evident in other ways. Your Honour was always known for listening carefully to every submission that counsel wished to make and for the provision of careful and thoughtful reasons.

Your Honour also had a practice that was much remarked upon by the criminal bar. In criminal trials, your Honour commonly directed counsel to return to court 10 minutes early from lunch, that is, 10 minutes before the jury returned. At that time, your Honour would come onto the bench and say the words either "Ladies and gentlemen, I commend you to your papers while we await the return of the jury," or, "Ladies and gentlemen, we will commune with our papers". Although in some ways quite an unusual practice, it was, in fact, quite a salutary direction for many of our colleagues practising at the criminal bar for whom attention to the papers is not one of their core competencies.

It was, in fact, in the area of crime where your Honour shouldered a considerable share of the burden of the court, particularly in relation to methylamphetamine-influenced murders and robberies in which area your Honour presided over many trials. It is by no means glamorous work but such work comprises a very significant share of the work in this court's criminal lists. It was work that needs to be done and work that your Honour undertook with confidence and distinction.

From the perspective of the bar, the ultimate question is always as to the experience of appearing before a judge. Your Honour was unfailingly polite, careful and attentive to submissions, known for ensuring that everyone appearing before you got their say, for challenging counsel's submissions where necessary with respect and courtesy and for approaching the work that had to be done in court by all participants - the bench, counsel and witnesses - with a demeanour that was both enthusiastic and friendly.

There is no greater compliment of a judge than to say that the judge listened carefully to all submissions, treated all participants with respect and gave careful and thoughtful reasons and that is a compliment most certainly due to your Honour. On behalf of the Western Australian Bar Association, may I express our sincere thanks for your Honour's contribution to the work of the court and to wish your Honour a happy and fulfilling retirement.

**MARTIN CJ:** Thank you, Mr Davies. Justice Simmonds.

**SIMMONDS J:** Thank you, Chief Justice. I should first acknowledge the remarks of those who've just addressed the court; Mr Evans, Ms Needham, Mr Davies. Those remarks, can I say, have all been in the tradition of such remarks on occasions such as these as I've observed the matter at other retirements. In my case, you have been unduly but also heart-warmingly flattering, and thank you for that.

I also acknowledge those who sent me messages on my retirement for which I am most grateful. I next acknowledge those whom I had invited today, a high proportion of whom I'm delighted to say were able to come. All of those I had invited have, in their special ways, as family, including extended family, as wise friends and as insightful mentors, or some combination of all three, made this period of just over 12 years possible.

I especially need to thank my immediate family: my wife, Francine Giguere, who put up with the still further loss of our time together and with my failure to advance on the Argentinian tango front despite no less than three tries; and my son, Philippe, who was a boon companion in discussions of US and Canadian politics at Newton Circle away from his rounds at RPH. I came to judicial life enormously excited at the prospect of what work on the bench would draw from me and with a measure of trepidation at how it would all work out.

I was richly supported in my work, as that work turned out, by the staff I had been fortunate to have had. I acknowledge the outstanding contributions in their different times of my eight associates, Samina Gougoulis, Michael Cuomo, Alex Naylor, Robert Corr, Emma Story, Emilio Carda, Amy Sinclair and Hiruni Alwishewa, and of my nine research associates shared with my colleague Beech J, Kendra Hagan, Elizabeth Dowson, David Shackles, Nicolette Strauss, Melita Parker, Jonathon Horne, Ben Craig-Wadham, Dick Shakhul and Leila Hughes.

I acknowledge, too, the great assistance in their different times of my orderlies - Jim Code and Ted Mann - and the great skills of the secretaries who, in their different times, have had to cope with my italic scrawl on printed copy; Alison Hewkin, Sandra Murphy and Deanne Jaffe. Before joining the bench, I had had no experience of such a body of varied support for my work. All of those named showed me, in different ways, how valuable to the work of a judge such a body of support can be and how much better she or he can be with people of such quality to rely upon.

My work turned out to be not only as varied as I had expected but as fulfilling as I had hoped. I did not miss teaching evaluations or university budgets in the slightest. I learnt to speak more directly than in my previous writings, to do so with somewhat less prolixity than I had sometimes exhibited and to cure myself of foot-and-note disease, the peculiar affliction in much academic legal writing, except that I'm now a convert to end notes, at least for my own purposes.

In my endeavours to meet the challenges of the work, I had the support of colleagues past and present who proved most valuable sources of advice, example and acute criticism. The trepidation I referred to was mostly in relation to how well I would respond to what I had not seen in my professional career before the bench, most notably non white-collar criminal matters. Here, I must acknowledge the inspirational advice and example of two former colleagues on the court with particular expertise in the criminal side of the court's jurisdiction.

One was Michael Murray whose understanding of and patience with me exemplified outstanding andragogical - I knew I would mess that up - practice. The other colleague was Geoffrey Miller who generously shared with me his stock of trial directions. I especially valued the example of his use, rare as he found it necessary to be, of notes he compiled on appellate review of some of his directions. My notes of that kind on my adaptations of his stock are much more frequent.

I never lost the trepidation I refer to but I believe I learnt to use it, most importantly to over-prepare for everything I did even if that over-preparation did not always pay off. In what I did, I came to value the role of advocacy of the high order that we often encounter in this court. It is impossible to overstate the significance to this court service to the community of the conversation

between thoughtful, careful, clear and economical advocates meeting well prepared judges.

When we are all on-song, the conversation brings out the great virtues of the common law tradition. Those virtues, it seems to me, are to refine the understanding of what does and does not need to be decided, to martial the tools for decision and rigorously test them for what they are worth and to come to a language of decision that builds sensibly on the past, a language that speaks to all parties but most particularly to the losing party and represents the resources for efficient appellate review of what was decided, should it come to that. Sounds good.

Most certainly, the process doesn't work that way as often as we would wish but when it does work that way the time away from other things and the energy absorbed are hugely worthwhile. Of course, being a former academic, I have constantly wondered about how theories of adjudication match the experience. One of my favourite law books on that topic, Problems of Jurisprudence, is by Richard Posner of the United States Court of Appeals for the Seventh Circuit.

I need to say a bit more about Judge Posner, you will be delighted to learn, because I have reflected on his example and his work throughout my time on the bench and I am working now on understanding why I did that. I have found Judge Posner most interesting ever since watching him smile through student abuse of some of his scholarly work at a conference at Yale University in 1981 at about the time of his employment to the bench. He came to the bench as a law professor at the University of Chicago known for his work in law and economics.

He was described by the distinguished economist, Robert Solow, as:

An apparently inexhaustible writer on nearly everything. To call him a polymath would be a gross understatement. Judge Posner evidently writes the way other men breathe.

At the same time, Mr Solow, reassuringly for ordinary mortals, describes Judge Posner grasp of economics as "in some respects, precarious."

Judge Posner has been called the most cited legal scholar in the United States at almost twice of the rate of the runner-up in 2000, Ronald Dworkin, and by a significant if lesser margin over the likely runner-up in 2012,

Cass Sunstein. I have the references to the studies so finding if anyone lacks a sleep aid.

His non-curial output to January 2015 included 39 or 50 books - I have been profoundly lazy in that department depending on how you count the matter - on topics as varied as the economic basis of justice, intelligence reform, Bush v Gore, the failures of capitalism, the Clinton impeachment, law and literature, antitrust theory, disaster response and the origins of nude dancing.

The last book with the arresting title Sex and Reason was one he was moved to write by the US Supreme Court's reversal of the decision of his court for which he wrote a concurring opinion, his opinion being that erotic dancing in a strip joint in South Bend, Indiana, was a form of protected speech under The First Amendment to the US Constitution. Extraordinary at several levels. To January 2015, his non-curial output also included 649 articles, book reviews and short papers.

Taken as a whole, that body of non-curial writing is simply astounding in range, quality, quantity and impact, to which one needs to add 3092 published judicial opinions to the same date. But he is only 77 after all. Problems of Jurisprudence, by my count, one of five books of his devoted to matters of particular interest to judges without distinction by their areas of substantive interest is, amongst other things, about the array of decisional resources on which superior court judges, original and appellate, can draw in the making of good decisions and how they may best do that.

Better than just about anyone I know, he explains how superior court judges are indispensable in the elaboration of the law we all serve. Two of his quotable published remarks, nicely illustrating both the difference between judges in his tradition and in ours and what judges in his tradition have sometimes said publicly, are the following. (1) Describing his intellectual conservatism is that he became "more and more conservative, first during the turmoil of the late 1960s which I found extremely repulsive".

The other is that most recently "I have become less conservative since the Republican Party started becoming goofy". I'm really not entirely sure what to make of those two, especially the second quote. I do know that I do not share all or even most of his intellectual, let alone his judicial politics, but I am hugely stimulated by all of those politics. I've also noted what he said in one of his

interviews, that a public official is always more guarded or should be when communicating with the public. Reconciling that with the two previous quotations is a challenge I'm presently undertaking.

Academic colleagues here and in Canada have asked me how I have found judicial life. I have replied to the effect that its great blessings are the enormous variety in the law that it has provided, to which my previous life in the law had had no equivalent, and the form of intellectual discipline it has fostered which I have found of great value. That variety and that discipline, as I have put the matter to those academic colleagues in shorter form, have meant enormous stimulation in service of the law punctuated by moments of sheer terror.

I have tried, in these remarks, made to a different audience to elaborate somewhat on those replies to those colleagues from the perspective of the completion of my time on the bench. In retirement, I look forward to the possibility - I put it no higher than that - of arriving at a rather more rigorous evaluation of judicial life that I have achieved thus far in publishable form from our tradition not Judge Posner's. However, no such evaluation could ever do justice to what all of you, and most especially my colleagues on the court, have given me over the last 12 years. Thank you all.

**MARTIN CJ:** Thank you, Justice Simmonds. That concludes the formal portion of this afternoon's ceremony so we will now adjourn.

AT 5.04 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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