

**SUPREME COURT OF THE
AUSTRALIAN CAPITAL TERRITORY**

**CEREMONIAL SITTING FOR THE SWEARING IN OF
THE HONOURABLE JUSTICE DAVID MOSSOP**

TRANSCRIPT OF PROCEEDINGS

CANBERRA

9.35 AM, MONDAY, 13 FEBURARY 2017

MOSSOP J: Chief justice, I have the honour to announce that I have been appointed a judge of the court. I present to you my commission.

5 MURRELL CJ: Thank you, Mossop J. Please sit while the commission is read.

THE ASSOCIATE:

10 *Supreme Court Act 1933 commission. The Australian Capital Territory executive under section 4 of the Supreme Court Act 1933 appoints David John Campbell Mossop to be a resident judge of the Supreme Court commencing on 13 February 2017.*

15 Dated 14 December 2016 and signed by the attorney-general, Gordon Ramsay MLA, and Minister Fitzharris.

MURRELL CJ: Madam Sheriff, please hand me the affirmation of office. Thank you. Mossop J, I invite you to take the affirmation of office under the Supreme Court Act.

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MOSSOP J: I, David John Campbell Mossop, do solemnly and sincerely affirm that I will well and truly serve in the office of a judge of the Supreme Court of the Australian Capital Territory and that I will do right to all manner of people according to law without fear or favour, affection, or ill-will.

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MURRELL CJ: I invite you to sit and subscribe the affirmation and I will witness it. I direct the registrar to take this document and enter it in the records of the court. Mossop J, on behalf of all the judges of the Australian Capital Territory I am delighted to welcome you as a judge of this court, or as a resident judge.

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You are already a highly esteemed colleague of ours and you are assured of our continuing goodwill and support. Thank you for the invaluable work that you have already performed for the court as an associate judge. Mr Attorney.

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ATTORNEY-GENERAL: May it please the court. Noting the significance and the power of ancient traditions such as today, I am even more mindful of the ancient culture to which we owe our respect. And so today, again, I acknowledge the traditional custodians of the land on which we meet, the Ngunnawal people. I acknowledge their elders, past, present and emerging. I acknowledge and respect their continuing culture and the contribution that they make to the life of this city and this region. I also acknowledge and welcome Aboriginal and Torres Strait Islander people who are attending this sitting today.

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As the first law officer in the Territory I am most pleased to be able to make these remarks in the presence of the chief justice, your fellow justices of the Supreme Court, the chief magistrate and other magistrates, Gageler J of the High Court of Australia, judges of the Federal Court, past and present leaders of the legal profession here in Australia, other members of the profession and my fellow minister, Shane Rattenbury, and the leader of the ACT Opposition, Alistair Coe.

It is with great pleasure that I welcome a new judge to the ACT Supreme Court this morning. I welcome your Honour and I congratulate you on your appointment to this court. I am also pleased to welcome your wife, Helga, and your children, Petra, Carl and Ingrid, as well as your extended family and friends.

I suspect by now that you are becoming quite accustomed to these ceremonies. This is your third judicial appointment to the ACT in less than five years, and since the time that my predecessor, Simon Corbell, had the pleasure of welcoming you as an ACT magistrate in April 2012 you have now been promoted twice. In 2013, you were appointed to the office then known as master, the title of which has now been changed to associate judge. And now, today, I have the pleasure to welcome you as an ACT Supreme Court judge.

No doubt I am likely to repeat what others have said in the past, but if your Honour will insist on winning so many appointments, new material does become hard to find. My predecessors by now have covered your illustrious career in quite some detail, and so I will not revisit today your CV, which we all know so well, but I will instead focus on some of the standout examples of your service to the community.

Your career history is one of contributions to the study, to the practice and to the reform of law at every level. Firstly, I wish to highlight your Honour's service to the community through the Environmental Defenders Office in the ACT. I am pleased to note that the ACT Government is funding the EDO for the new two years, starting with \$140,000 this year, building on the work that your Honour has done.

Your Honour's service to the community legal sector demonstrates your commitment to achieve a more just society, which is a key purpose of our work in the law, and it's without any doubt that I say that your experience makes a tremendous contribution to this court. Throughout your appearances in ACT and Federal Courts and tribunals now across 14 years you have developed excellent experience in commercial, constitutional, corporations, human rights, environmental, administrative and planning law matters.

In many cases you have dealt with difficult or untested points of law.

Your Honour's expertise in local civil law was emphasised by the number of significant ACT cases in which you appeared. You have written several articles on constitutional matters, many of which relate directly to the constitutional position of the territory.

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Your Honour is highly regarded by your colleagues for your integrity and your superior intellect. When you were appointed to this court as Master, the then President of the Law Society noted that you brought an acute legal mind and tremendous experience from your time as a barrister and your service as a magistrate.

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Your career so far on the bench has served to demonstrate that the confidence expressed to you was very placed but, of course, with respect to the tradition of excellence in this particular court, an impressive resume for its new appointees should be no surprise.

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His Honour Refshauge J has served the court faithfully since his appointment in 2008, and filling the void that he leaves is the purpose of today's appointment, and I'm sure that his Honour is most pleased that a person of your calibre is being appointed. Through his term, his Honour Refshauge J has been active in making recommendations to improve our laws, and over your term as associate judge you have sent clear messages where our laws need improvements.

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To quote your recent judgment, In the adoption of LGL: "Sometimes when cleaning up you throw out something useful." I could not deliver a more succinct explanation of the quirk in our adoption laws that was at issue. In reading the decision which you served upon me I was impressed by how you put people first and then recommended a legislative fix to the problem.

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For those not familiar, this was a case where a legislative clean-up of the Adoption Act had unintended consequences, and as a result his Honour was prevented from helping a Canberran who had been adopted from Germany to recognise his relationship with his biological father on a birth certificate. I hope to be in a position to respond by the end of this week, and that way you can get on with helping the person before the court, for it is right that our system is timely in its response.

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I am sure that this is the first of many times that I will be considering your Honour's advice on our legislation, and it is with great pleasure that I look forward to working with this court to continue to improve our legal system. This government has an ambitious law reform program for this term and aims to continue to build a first-rate justice system for Canberra. As the pre-eminent jurist in our courts, I will be looking to you for your expertise and advice throughout the next four years.

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On a related subject, I am told that your Honour has expressed one minor disappointment about your appointment today, and that is that you might cease to be a member of the court's Joint Rules Advisory Committee. I sense in the court some bemusement at that statement, but again, it speaks to your Honour's commitment to the ACT achieving the highest standard of justice possible.

Your Honour has made a great contribution in every capacity in which you have served the Territory, as a solicitor, in academics and on the bench, and I join all those present today in commending your skills and your achievements, and I congratulate you on your appointment as a resident judge of the Supreme Court of the Australian Capital Territory. May it please the court.

MURRELL CJ: Thank you, Mr Attorney. The President of the Bar Association, Mr Archer.

MR ARCHER: May it please the court. Attorney-general, justices of the Supreme Court, present and former, Gageler J, justices of the Federal Court, of the Federal Circuit Court, magistrates, distinguished guests, members of Judge Mossop's family, ladies and gentlemen, on behalf of the ACT Bar I rise to welcome your Honour and to offer the Bar's warmest congratulations on your appointment as a justice of the Supreme Court. I too acknowledge the traditional owners of the land on which we meet and pay my respects to the Ngunnawal people, to their elders, past and present.

Your Honour's appointment is a reflection of your exceptional abilities, both in practice as a barrister on the bench, first as a magistrate and then later as a master and an associate judge of this court. Your Honour, I acknowledge the presence of your wife, Helga, and your children, Carl, Petra and Ingrid, and today is undoubtedly one of great pride for them and satisfaction for them, as it is for you.

The attorney-general has ducked his responsibility of outlining biographical details in relation to you. So I will just trouble those present with a few of them. You hold a bachelor of science and a bachelor of law from the University of New South Wales and a master of laws, public law, from the Australian National University. You were admitted to practise as a solicitor in 1992 and thereafter spent time as a solicitor with the Environmental Defenders Office in New South Wales.

That expresses the interest and commitment your Honour has to the protection of the environment. In my preparation of the speech, I dug out some publications of that office, including IMPACT!, which was a newsletter put out by the Environmental Defenders Office in New South Wales, and there was an article or two penned by your Honour in that context. They're interesting

reading. They are a presage of times to come, not just a mere polemic but often a very careful argument advanced in very legal terms about changes to the role of the EPA in New South Wales, which clearly indicates your interest in environment matters, but also the careful way in which you analyse the law.

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Your time as Justice Michael McHugh's associate in 1995 was rewarding at many levels, mutually inspired/inspiring, I'm told, and I'm told that you remain in touch with him. You were employed, as the attorney has indicated, with the Environmental Defenders Office in the ACT in 1996 and 1997 and came to the ACT Bar in 1998. It was, in many ways, a brave move.

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You had, at that time, only limited connections in the legal profession in the ACT, but with the help of some good mentors at the bar, who stand behind me or sit behind me, you were encouraged to make yourself known to the profession, often through the delivery of lectures and seminars to those who are interested.

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The charm of your delivery and the clarity of the legal reasoning you reveal alert the profession and the community at large to your talents as a legal reasoner. Your Honour's early time at the bar saw even some criminal briefs come your way. The cab-rank rule compelled that you accept them, although they may not have been your preferred source of work. As a prosecutor back then, I felt your capacities as a legal researcher, your careful analysis of the amendments to the Crimes Act over a period of time revealed a lacuna in that Act that prevented the prosecution of certain historical sexual matters for some years. Only recently, with the Mossop vortex, as it has become known, has only recently been filled by amendment to cure the problem with retrospective effect. This is typical of your Honour's approach to cases: facts are important, but let's start with the law.

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Your time at the bar was enormously successful. A specialist in commercial, governmental, human rights law, planning law and constitutional law. Your legal opinions and analyses were keenly sought out by governments and the legal profession. You were also actively involved in the affairs of the bar.

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You have been a consultant to the Australian Law Reform Commission and a contributor to a review of governance in the ACT.

You have published extensively, not quite *et al Montesquieu*, but with a frequency and quality that speaks of your considerable intellect and energy.

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Perhaps the most famous, or perhaps notorious, of these publications is an article you published in the November 2012 edition of the ACT Bar Bulletin, a very prestigious publication indeed.

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I'll spend some time on this article, not just because the Bar Bulletin is always compelling reading and deserves the attention, but it speaks of your Honour's

courage and good humour. The article rejoiced in the title Intemperate Remarks. The article began an analysis of the decision of the High Court in *JT International SA v The Commonwealth* about cigarette packaging. The article started in a conventional way, and your Honour analysed, with your usual insight, how the decision stood in the context of constitutional jurisprudence concerning the acquisition of property by the Commonwealth.

Your Honour observed that given the approach taken by the court it was not necessary for the court to deal with some of the more expansive - you called them "ambitious arguments" that had been advanced by the Commonwealth during argument. However, his Honour Heydon J chose to do so. At this point, I paused, probably like other readers, and wondered where this was going. Your Honour went on and quoted his Honour's judgment at some length. It included this passage:

Solicitors-General go. New Solicitors-General come. The world is transitory. But some things never change. The flame of the Commonwealth's hatred for that beneficial constitutional guarantee, section 51(xxxi) may flicker, but it will not die. That is why it is eternally important to ensure that the flame does not start a destructive blaze.

Your Honour then got stuck in:

Plainly enough, these are extremely strong and combative words directed to one of the parties. The language here is florid and goes beyond what is necessary in order to reject an argument of one of the parties. It personalises the criticism of the argument put by the Commonwealth. It places the judge as a partisan player in combat with the Commonwealth.

You went on to observe that:

*Heydon J is a commanding writer with a mastery of language and metaphor rivalling that of George Orwell. His paper, written in 2002 shortly before his appointment to the High Court, *Judicial Activism and the Death of the Rule of Law*, is an excellent and entertaining piece of writing. The biting, dry humour of that piece has also been reflected in the language of some of his Honour's judgments. Best known to members of the bar in the ACT is his Honour's judgment in *Aon Risk Services v ANU*. His Honour's sentence "The torpid languor of one hand washes the drowsy procrastination of the other" is one which will long be remembered by practitioners and judicial officers in the Territory. I am even told that T-shirts have been printed with the sentence emblazoned upon them.*

5 I observed this point, but the T-shirts, I believe, were printed by your Honour, and I have it on good authority that there was also a range of coffee mugs that were produced with the same thing emblazoned upon them. I'm not sure if a mug is to be found in your chambers today, but I'm sure in the coffee room at Blackburn Chambers there's a residue of that line of wear.

10 Your Honour finished your analysis in this way, and it says something, I think, about your Honour's approach to the law and bears repetition:

15 *Inevitably litigation involves the clash of significant interests. The rule of law suppresses and diverts the powerful forces that might otherwise be at play into the judicial process where disputes can be resolved by a rational and fair process. Often those underlying forces are only barely suppressed by the legal rules and cultural norms of the legal system. One of the functions of court should be to reinforce the subordination of power to the rule of law by dealing with matters clinically and dispassionately.*

20 *That is a leadership role which, if adopted by judicial officers, will affect the culture and approach of those appearing before them and hence have a broader cultural effect on the community. Overstated, extravagant language and personalised attacks on parties or other judicial officers are inconsistent with such an approach. The adoption of such language and the making of such attacks will also infect the culture of litigants and practitioners in the court. Such an approach is inconsistent with the subordination of power to the rational process compelled by the rule of law.*

30 In an age where the independence of the court is under question and the rule of law under threat, your Honour's words offer a different and a compelling insight. Those who have appeared before you would recognise these values are given life in every case in which you preside.

35 Your Honour's time as a magistrate and then as the master and associate judge of this court has been marked with a ruthless efficiency, to use a Pythonesque phrase, and an impressive standard of case management and prompt and very well reasoned decision-making. The civil practice direction you have developed has introduced a real rigour to the conduct of civil litigation in the
40 Supreme Court, and for that reason Heydon J's remarks really have no relevance to present day litigation in this court.

45 Your Honour's decisions in the Magistrates Court and as an associate judge have already established important landmarks in ACT jurisprudence, in human rights, the quantification of legal costs in criminal cases in summary

proceedings, much to the chagrin of the criminal bar, I must say, the abuse of process in criminal cases and the role and responsibility of solicitors and counsel in litigation.

5 Your Honour's associate judge's shoes are going to be hard to fill. But
your Honour is more than just a judicial officer. You're a farmer. Is that
putting it too high? But at least you're the owner of a substantial body of land
not far from Canberra and you share your household between your rural and
town addresses. You're a great kayaker, regularly undertaking very long trips
10 along the waterways along the New South Wales south coast, amongst other
places, and pictures of these expeditions have appeared in the Bar Bulletin over
the years.

As a person who walks an unruly dog at night, I can say your Honour can be
15 seen walking often quite late at night, in practice, no doubt, for the long
bushwalks and treks your Honour is known to have undertaken both in
Australia and overseas in places such as Nepal, New Zealand and America.
Your Honour is also a keen and accomplished photographer.

20 Your Honour's appointment has been met with universal acclaim amongst the
legal profession. That is not only because both sides of the profession
recognise your already proven abilities as a judicial officer, you are a popular
and well liked figure in the Canberra legal profession. Compassionate, decent,
good fun, as well as smart and tall are the attributes that come from vox pop
25 I've conducted in preparation of this speech.

On behalf of the ACT Bar, once again, I extend the Bar's warmest
congratulations on your appointment and wish you well in the years to come.
May it please the court.

30 MURRELL CJ: Thank you, Mr Archer. The President of the Law Society,
Ms Avery.

35 MS AVERY: May it please the court. To acknowledge that this ceremonial
sitting is being held on the traditional lands of the Ngunnawal people, and I pay
my respects to their elders, both past and present.

As President of the ACT Law Society, it is my great honour to represent the
ACT legal profession's 2200-odd solicitors - I don't mean "odd" - 2200 or so
40 solicitors in welcoming you, Mossop J, as a resident judge of this court. As has
already been outlined, you bring to the position your many years of experience
as a solicitor, a barrister, a magistrate presiding over criminal and civil hearings
and here in the Supreme Court as master and associate judge. Your Honour is
mildly well-known by your colleagues at the bar for wearing a Hawaiian shirt
45 occasionally on weekends in chambers.

5 The ACT civil and criminal law solicitors trust you to hold fast to your
grounded nature and to your compassion in this new role. Defendant lawyers
and prosecutors and you, your Honour, will be privileged to work with and for
the community, upholding the rule of law and interacting every day with our
community's most vulnerable and disadvantaged people. The Canberra legal
community holds you in the highest regard for your intellect and integrity, as
well as your skill, compassion and efficiency. The profession congratulates
you on your appointment and looks forward to appearing before you in your
10 new role. Welcome, and may it please the court.

MURRELL CJ: Thank you, Ms Avery. Justice Mossop.

15 MOSSOP J: Mr Attorney, Mr Archer, Ms Avery, judicial officers, former
judicial officers, ladies and gentlemen, thank you for the honour that you do to
the court and myself by your presence here today. Thank you also,
Mr Attorney and Mr Archer and Ms Avery, for your overly generous remarks.
It is only at funerals and swearing-in ceremonies that such kind things are said
20 about the subject of the occasion. I am, for obvious reasons, particularly
appreciative of the fact that we are all present at an occasion of the latter, rather
than the former, although I note that what is said of the subject on either
occasion may stray somewhat from an accurate portrait.

25 I wish to say something about the court that I am joining, something of the past
which, as fate would have it, has led me here and in doing so acknowledge
some of the many debts that I owe. At his recent swearing in ceremony,
Elkaim J noted that he was the first fifth judge to be appointed to the court.
I have the pleasure of being the first sixth judge appointed to the court;
although I anticipate that I will revert to being the second fifth judge in May of
30 this year upon the retirement of Refshauge J.

35 While addressing matters of statistics, I am the 22nd judge of the court and the
fifth member of the ACT Bar to be appointed as a judge of this court. I am
privileged to be joining a court which is small and collegial. I'm also
privileged to be joining it at a time when it will soon be the beneficiary of new
and substantially improved facilities as a result of the construction of the new
court building which is present well under way.

40 I wish to acknowledge the friendship and support that I have had from the
members of the court and its staff since my appointment as master in May
2013, as well, in particular, of the current members of the court, both in my
role as associate judge and when facing the challenge of my new role as
resident judge. I very much appreciate the attendance here today of former
judges of the court, the former master and current acting and additional judges
45 of the court.

Notwithstanding all the legitimate criticism that may be made of the court system, the limits on access to justice and the adversarial process of litigation, it has, at its core, ideals of which all those involved should recognise and be proud of. There are few areas of public discourse where rationality, fairness, courtesy and historical continuity are institutional values affecting the daily experience of all those who participate. Those are values which received less emphasis than they deserve in the public discussion of the court. It is a privilege to play a role of significance in an institution at the heart of which those values lie.

It is also an honour to do so in the service of a community which has had from its inception, and continues to have, a degree of idealism underlying its development and government not mirrored in other Australian jurisdictions. I have been the beneficiary of public and private education which has provided me with very significant opportunities. I was fortunate enough to attend the University of New South Wales and the Australian National University. I note the presence here today of Prof Fiona Wheeler, who supervised my masters thesis at the ANU.

As pointed out by earlier speakers, my experience at the small community legal centres, the Environmental Defenders Office, both in Sydney and in Canberra, was an excellent introduction to many aspects of the law and litigation, access to justice, the relationship between government and law and the capacity of law to affect or influence societal change.

I have a significant debt to Michael McHugh, for whom I was associate in 1995. Unlike many others, I had no particular plans to be a judge's associate, let alone a High Court judge's associate. It was only through a fortunate combination of circumstances that I was engaged as his associate, and I am very grateful for the opportunity that I was given. Working at the court opened my eyes to the legal world beyond environmental law and to the possibility that I could become moderately proficient in at least some other areas of the law.

Now moving from the role of associate judge to resident judge, in which criminal rather than civil proceedings will dominate, I recall the words in a speech given by McHugh J shortly before his retirement when he said:

You would not have to be on the High Court for very long before you concluded that the only limit to human evil, depravity and dishonesty was physical impossibility, nor would you have to be there very long before you concluded that there is no limit to human gullibility.

I bring to my new role my resignation to these facts of human behaviour. My 14 years at the bar were spent in Blackburn Chambers. That was a friendly and

collegial environment, and I thank my colleagues, both past and present, for their support and camaraderie. While at the bar I had the good fortune to work with many leading silks, a number of whom are now on the bench, and I have endeavoured to absorb the lessons that they provided for me. One of those was
5 Gageler J, who does me and the court the honour of his attendance here today.

I wish particularly to acknowledge the debt that I was to John Harris SC, formerly of Blackburn Chambers, with whom I read in 1998. He took me on as a virtual unknown who had only recently moved to Canberra, with no
10 previous contact with the legal profession in Canberra. His tutelage was very valuable to me because of his long experience as a barrister at the Sydney Bar and his perspective on the life of a barrister.

I wish also to acknowledge John Purnell SC, who led me in many cases from the beginning of my time at the bar and was, for many years, my next-door
15 neighbour in Blackburn Chambers. I greatly valued his friendship in chambers and respect his skill and courage as an advocate.

The work of a barrister is determined by the cases, good and bad, in which the barrister is briefed by solicitors. I acknowledge my debt to the solicitors who, in my early years at the bar, were prepared to brief me and those who briefed me throughout my period at the bar. I particularly note the solicitors from the ACT Government Solicitor who gave me a great deal of very interesting public
20 law work over the years.

I also acknowledge my debt to the magistrates of the Magistrates Court. I had anticipated, when leaving the bar, that I would remain one of their colleagues for much longer than I did. They uniformly gave me great encouragement and assistance when I was coming to grips with my first experience of judicial
30 office and the diverse aspects of the Magistrates Court jurisdiction.

As magistrate, master and associate judge I have had the pleasure of working with six associates. I am pleased that many of them could attend today's ceremony. It is truly a pleasure to work with intelligent and enthusiastic young
35 lawyers. I value their contribution and ongoing friendship.

Finally, today is also an occasion to recognise my family, some of whom are here today. I must recognise the great good fortune bestowed upon me and my sisters through the efforts and sacrifice of my own parents, Rilda and Stanley, who gave each of their children opportunities which provided them with a firm
40 foundation for a satisfying and productive life. Although both are now deceased, I was particularly grateful that my mother, Rilda, survived long enough to see me appointed master of the court in 2013.

45 I acknowledge the constant love and support of my wife, Helga, and of my

children, Ingrid, Petra and Carl, who are all here today. Without them I would not be here. Thank you. I also appreciate the attendance today of my sisters, Elizabeth, Ann and Kate, who have each taken time out of their busy lives to come from Sydney and Melbourne for this ceremony.

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Having been in the role of associate judge for some time I recognise that the work of the court is unremitting and that the job of a judge is a marathon and not a sprint. I will do my best to discharge the duties of a judge of the court and thereby to serve the ACT community. I thank you all for your attendance here today.

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MURRELL CJ: Thank you, Mossop J. The court will now adjourn.

ADJOURNED

[10.11 am]