

**Keynote Address by Mr Wesley Wong, SC, JP, Solicitor General
at the 15th ALB Hong Kong In-House Legal Summit 2018
5 September 2018 (Wednesday)**

“What have I done to promote the rule of law?”

Good morning, Ms [Lauren] Ellison (the Summit Chairperson, Supervising Counsel of Telstra Enterprise International), Distinguished Guests, Ladies and Gentlemen,

I am today as I was equally honoured last September to be given the opportunity to speak at the annual Asian Legal Business (“ALB”) Hong Kong In-House Legal Summit. When I accepted the kind invitation last time, I thought I would not be invited again. As it turns out, I was wrong. I also thought that even if I was to be invited again, no one would come to listen a second time. Obviously, the presence of this assembly of business leaders and legal talents here this morning proves that I was wrong on that count too. There is one thing, however, I am sure I am right: This has nothing to do with my popularity. The only reasonable inference I can draw on this occasion is that, not only as key players of the legal profession but also the moral compass of the businesses in-house lawyers serve, you all must entertain a strong passion in the maintenance and promotion of the rule of law. For this reason alone, I am more than happy to be proven wrong, twice.

ALB In-House Legal Summit

2. This ALB signature event provides an excellent platform for employed and practising lawyers alike as well as industry experts to gather together in the exchange of views and sharing of insights on recent regulatory

changes, hot pressing legal issues and best practice solutions in Hong Kong and the rest of the Asia-Pacific region.

3. That Hong Kong, among other places across this region where ALB Summits are held, is hosting this flagship forum for 15 years in a row is live testimony to ALB's enduring success in rallying mutual support among in-house lawyers. It also showcases the city's status as a leading international legal and dispute resolution services centre.

4. For those who were here last year, you may recall I asked, "Is there something I can do to promote the rule of law?" Now that a year has passed, I believe it is time to reflect on this. What have I done to promote the rule of law?

Charles Kades

5. Some years ago (and by that I meant 1996 to be exact), I happened to come across the obituary of one Charles Louis Kades¹. The reason why the piece caught my attention and what the gentleman did gets registered in my mind to this day is that it confirmed the correctness of my decision to join the government legal service some three years earlier.

6. Dubbed the "Architect of Japan's Postwar Charter"², Lieutenant Colonel Kades started as counsel at Washington, D.C. for the Public Works Administration, the Treasury and the Internal Revenue Service during the New Deal in the 1930s. In February 1946, he and his 23 colleagues in a "constitutional assembly" which he headed completed the draft of a new

¹ The obituary was published on *The Economist* on 6 July 1996, accessible at <http://tinyurl.galegroup.com/tinyurl/6xNXR3>.

² See "Charles Kades, 90, Architect Of Japan's Postwar Charter", 1996, accessible at <https://www.nytimes.com/1996/06/21/world/charles-kades-90-architect-of-japan-s-postwar-charter.html>.

constitution for Japan in just days. The document which seemed to have mysteriously appeared “overnight” surprised everyone and, subject to some refinements, it became the primary law of the land by the following November. The officer showed his genius in that his work was tough enough to stand the test of time, yet sufficiently flexible to allow for legally-sound interpretations when needed. He lived, by the way, to the mature age of 90³.

7. If this lawyer who survived the Normandy landings had ever been asked by his grandchildren what he did for the war (or, for this matter, the legal world as the case might be), I suppose he would have been very proud in telling them, “I drafted a constitution to entrench peace and procure economic growth”. The moral of this story, as I see it, is that lawyers, whether you are working for the government, businesses or private individuals, when we mean to do good can make the world a better place in which to live and, without you even realising, occasionally make history.

The Rule of Law in Hong Kong

8. Hong Kong is indeed blessed with its open and highly professional legal services sector which contributes to the city’s success as a major international financial and commercial centre. You may not at all be surprised that I, as Solicitor General, would mention Hong Kong’s fine rule-of-law reputation. That said, I am not asking you to take my word for it.

9. As President Ronald Reagan of the United States urged his equal number of the Soviet Union, General Secretary Mikhail Gorbachev, to listen to the wisdom of an old Russian maxim every time they met to work on a treaty between the two nations to strive for nuclear disarmament, I would

³ He passed away on 18 June 1996.

urge you to do the same when considering the rule-of-law condition in Hong Kong. The old Russian maxim is “Doveryai no proveryai (trust but verify)”.

Robust Common Law System

10. The Hong Kong Special Administrative Region (“**HKSAR**”) Government exercises powers subject to restraints of the law. It also formulates policies and proposes legislation in accordance with the Basic Law. The Basic Law is a Chinese national law. It is also the constitutional instrument which seeks to implement by law the basic policies of the People’s Republic of China in authorising the establishment of the HKSAR.

11. In accordance with the Basic Law and under the principle of “one country, two systems”, Hong Kong enjoys a high degree of autonomy, and is unique in maintaining its own legal system different from that of Mainland China’s.

12. The laws and legal system previously in force in Hong Kong, including the common law, shall be maintained insofar as the Basic Law is not contravened (see Article 8). National laws are not applied in the HKSAR except for those listed in Annex III to the Basic Law (see Article 18). The Basic Law further provides that the courts, when adjudicating cases, may refer to precedents of other common law jurisdictions (see Article 84).

Judicial Independence

13. At risk of stating the obvious, judicial independence is a fundamental aspect of the rule of law. An independent judiciary safeguards the fundamental rights contained in the Basic Law by enforcing them vigorously and fairly.

14. The Basic Law makes it clear that Hong Kong courts are to exercise judicial power independently, free from any interference, and members of the judiciary shall be immune from legal action in the performance of their judicial functions (see Article 85). They are chosen on the basis of their judicial and professional qualities (see Article 92) and appointed only upon the recommendation of an independent commission (see Article 88).

15. The statutory Judicial Officers Recommendation Commission, chaired by the Chief Justice with members comprising the Secretary for Justice, two local judges, one practising barrister, one practising solicitor and three eminent persons from other than the legal sector, ensures that appointments are merits-based. Members of the Commission must take an oath of office as solemn as the judicial oath taken by judges, i.e. to act “freely and without fear or favour, affection or ill-will” when giving their advice, and they are themselves afforded the same protection and privileges from suit in performing their function as if they were judges performing judicial function. It is also built into the system that a resolution of the Commission cannot effectively be passed when there are more than two votes against it.

16. Removal of judges from office which may only be on grounds of inability to discharge duties or for misbehaviour is also strictly regulated by the Basic Law (Article 89).

17. Systemic protection is therefore in place to ensure that the Hong Kong Judiciary is independent of both the executive and the legislature. Further, the power of final adjudication vested in the Court of Final Appeal (“CFA”) is exercised in such a way that judges from other common law jurisdictions may be invited to sit (see Article 82).

18. Eminent judges, serving or retired, from apex appellate courts of the United Kingdom, Australia, New Zealand and, very recently, Canada have been appointed as non-permanent judges of the CFA since its establishment on 1 July 1997. The appointments of the Right Honourable the Baroness Brenda Hale of Richmond (President of the Supreme Court of the United Kingdom) and the Right Honourable Madam Justice Beverley McLachlin (former Chief Justice of the Supreme Court of Canada) in July add diversity to our current list of 14 overseas non-permanent judges⁴. Not only are we now having female judges on the CFA bench, we also have our first appointee from North America.

19. The fact that Hong Kong can continue to attract such well-respected overseas judges to sit on our CFA speaks volumes about the status of judicial independence and the rule of law here.

International Ratings and Commentaries

20. A long list of international ratings and commentaries on Hong Kong speaks for itself:

- (a) Hong Kong has been ranked as the world's freest economy for the 24th consecutive year in the Heritage Foundation's 2018 Index of Economic Freedom⁵. According to this survey, the "high-quality legal framework which provides effective protection of property rights and strongly supports the rule of law" contributes to such favourable rating over such a long time.

⁴ For the full list, see <https://www.judiciary.hk/en/organization/judges.htm>.

⁵ Released on 2 February 2018. See <https://www.heritage.org/index/country/hongkong>.

- (b) Hong Kong is also ranked as the world’s freest economy in the Economic Freedom of the World: 2017 Annual Report of the Fraser Institute, Canada⁶. Except for two years, Hong Kong has been atop the study since 1970.
- (c) In the World Competitiveness Yearbook 2018 of the International Institute for Management Development (IMD), Lausanne, Switzerland, Hong Kong’s rank is only second to the United States as the most competitive among 63 economies⁷. Hong Kong’s position in “Government efficiency” and “Business efficiency” remains first globally.
- (d) Hong Kong is ranked as Asia’s No. 2 and No. 15 globally for the rule of law in the 2017 update of the World Bank Group’s Worldwide Governance Indicators (WGI) project⁸. Hong Kong’s percentile rank has improved from 69.9 in 1996 to 93.3 in 2016.
- (e) In the Human Freedom Index 2017 co-published by the Cato Institute (in Washington, D.C.), the Fraser Institute (in Canada), and the Liberales Institut at the Friedrich Naumann Foundation for Freedom (in Germany), Hong Kong ranks first in Asia and second in the world in terms of human freedom⁹. In terms of the personal freedom sub-index, we actually score 8.79 (out of 10) buttressed by a value of 8.0 for criminal justice, 8.8 for

⁶ Released on 28 September 2017. See <https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2017-annual-report>.

⁷ Released on 24 May 2018. See <https://worldcompetitiveness.imd.org/countryprofile/HK/wcy>.

⁸ Released on 22 September 2017. See <http://info.worldbank.org/governance/wgi/index.aspx#home>.

⁹ Released on 25 January 2018. See <https://www.cato.org/human-freedom-index>.

expression and information and as high as 9.4 for security and safety. In terms of the economic freedom sub-index, our score is 8.97, underpinned by a value of 8.9 for judicial independence, 8.0 for impartial courts and 8.3 for integrity of legal system.

- (f) In the Global Competitiveness Report 2017-18 published by the World Economic Forum, Hong Kong comes first in Asia on judicial independence¹⁰. We are in fact No. 13 across the whole world and if we only count common law jurisdictions, we come 6th.

Hong Kong's Ties with the Mainland

21. Strategically located at the heart of the Asia-Pacific, Hong Kong has long been the gateway to southern China. Forty years have passed since the implementation of China's reform and opening-up policies in 1978. The country's GDP has increased 82 times from USD149.54 billion (only 1.75% of the then global economy) to USD12.24 trillion in 2017 (15% of the global economy now), making it the world's second-largest economy¹¹.

22. Four decades on, Hong Kong no longer acts only as a springboard for overseas investors and businesses to enter the Mainland market. With the rule of law that it enjoys and the international legal and dispute resolution services that it offers, Hong Kong also plays an indispensable role in assisting Mainland enterprises to manage their legal risks and resolve cross-border disputes as they "go global".

¹⁰ Released on 26 September 2017. See <https://www.weforum.org/reports/the-global-competitiveness-report-2017-2018>.

¹¹ See "40 years after reform and opening-up: China's GDP 1978-2017", 23 May 2018, accessible at <http://www.globaltimes.cn/content/1103708.shtml>.

23. China's rising economic competitiveness has inevitably attracted some unkind comments and cynical language is sometimes employed. To engage the sceptics, President Xi Jinping who proposed the Belt and Road Initiative in 2013 calls for a strong stance against unilateralism and protectionism, stressing the importance of "strategic communication".

24. In the Belt and Road context, Hong Kong has its unique role to play. Its mature and sophisticated common law system is familiar to the international business community. Hong Kong's legislation is bilingual and the body of case law expressed in the Chinese language keeps growing. Hong Kong also has a strong team of legal and dispute resolution professionals, including many of you here today, who possess diverse expertise and international experience. They are multilingual and familiar with international and Chinese business, legal and social culture. With their vast network and connections, they understand how to meet clients' needs, and facilitate deal making and dispute resolution across boundaries.

25. Hong Kong's advantage under the principle of "one country, two systems" is further demonstrated by the enforceability in the HKSAR of an arbitral award against a wholly state-owned enterprise, even when the sole shareholder or investor of which is the State-owned Assets Supervision and Administration Commission ("SASAC") of the State Council of the Central People's Government ("CPG"). In *TNB Fuel Services SDN BHD v. China National Coal Group Corp* [2017] 3 HKC 588, HCCT 23/2015 (8 June 2017), Madam Justice Mimmie Chan held:

"86. ...[B-]earing in mind the nature and degree of the control which can be exercised by SASAC on behalf of CPG over [it], the [China National Coal Group]'s ability to exercise independent

*powers of its own, and that its business and operational autonomy are in fact enshrined in and guaranteed under the applicable PRC law, I consider that [the Group] is **not** entitled to invoke Crown immunity.” – emphasis added*

26. No one can now doubt that Hong Kong is a bridge between the Mainland and the rest of the world because this is also literally the case. Toll prices in anticipation of the imminent operation of the mega Hong Kong-Zhuhai-Macao bridge was announced just about a fortnight ago (23 August)¹². We also look forward to the full potential of the national network of the high speed rail being unleashed when the Hong Kong section of the Express Rail Link commences service in 18 days’ time (23 September)¹³.

27. Addressing his countrymen, American President J. F. Kennedy once warned, “Ask not what your country can do for you – ask what you can do for your country.”¹⁴ To those who cannot resist the temptation of asking both questions, my advice is this: Ask the first responsibly, as you may just as well get what you wish.

Policy Support at the National and SAR Levels

28. No effort has been spared by either the central or the SAR governments to make Hong Kong a more favourable environment for deal making and dispute resolving.

¹² See “Toll levels of Hong Kong-Zhuhai-Macao Bridge Main Bridge announced”, the HKSAR Government Press Release, 24 August 2018, accessible at <http://www.info.gov.hk/gia/general/201808/24/P2018082400928.htm>.

¹³ See High Speed Rail Progress Update, <http://www.mtr.com.hk/en/customer/main/high-speed-rail-progress-update.html>.

¹⁴ See United States President John F. Kennedy’s Inaugural Address on 20 January 1961: <https://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntF17SVAjA.aspx>.

29. In the “Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People’s Republic of China” (March 2016), the dedicated chapter on Hong Kong and Macao expressly supports Hong Kong in establishing itself as a centre for international legal and dispute resolution services in the Asia-Pacific region as well as the participation of Hong Kong in the Belt and Road Initiative. This was followed by the *Arrangement between the National Development and Reform Commission [(“NDRC”)] and the HKSAR Government for Advancing Hong Kong’s Full Participation in and Contribution to the Belt and Road Initiative* signed on 14 December 2017.

30. At the SAR level, a long-standing policy of enhancing Hong Kong’s status as a leading international legal and dispute resolution services centre has been in place since the 4th term of Government and reinforced by the Chief Executive in her first policy address for the 5th.

31. To strengthen Hong Kong’s dual role as the “deal making” and “dispute resolving” hub for the emerging markets along the Belt and Road routes, the HKSAR Government is actively looking at ways to attract relevant transactional lawyers and dispute resolution professionals to come here.

32. The Department of Justice (“**DoJ**”) has proposed that dispute resolution professionals specialising in resolving international financial and investor-state disputes, and transactional lawyers with specialised knowledge and experience in cross-border transactions from investing or host states be

included in the first Talent List for Hong Kong. It was promulgated just last week (28 August)¹⁵.

33. Weaving into this tapestry of arrangements is the *Framework Agreement on Deepening Guangdong – Hong Kong – Macao Cooperation in the Development of the Bay Area*¹⁶. It was signed between the NDRC, the HKSAR Government, the People’s Government of the Guangdong Province and the Macao SAR Government. This is no mere rhetoric.

34. On 3 August 2018, the State Council announced the abolition of a work permit requirement for employees from Hong Kong, Macao and Taiwan to work in the Mainland¹⁷. This was coupled with a successive announcement made by the State Council in less than two weeks on 16 August 2018. It is now reality, since last Saturday (1 September), that residents from these three parts of China working or studying for more than six months in the Mainland are permitted to apply for new identity cards in the form of “Residence Permits”. Holders are entitled to equal access to social and public services and facilities in the Mainland, meaning greater convenience in obtaining banking and financial services, social insurance, housing and education¹⁸. These measures would certainly facilitate talents, including in-house counsel of Chinese nationality of the three places to work and live in the Mainland and better grasp the opportunities across the country. I learnt from the news yesterday that so far about 8,300 (out of a total of

¹⁵ See “Talent List to attract quality people”, <http://www.info.gov.hk/gia/general/201808/28/P2018082800360.htm>.

¹⁶ 《深化粵港澳合作 推進大灣區建設框架協議》

¹⁷ See “China work permit requirement for Hong Kong, Macau and Taiwan jobseekers on the mainland to be abolished”, accessible at <https://www.scmp.com/news/hong-kong/politics/article/2158247/chinas-work-permit-requirement-hong-kong-macau-and-taiwan>. See also http://www.gov.cn/zhengce/content/2018-08/03/content_5311485.htm.

¹⁸ See http://www.gov.cn/xinwen/2018-08/19/content_5314917.htm and http://www.gov.cn/xinwen/2018-08/16/content_5314248.htm.

some 20,000) applications have already been received from Hong Kong people.

Ongoing Initiatives

35. Legal and dispute resolution professionals from Hong Kong are also encouraged to look out for the opportunities to be brought about by an *Investment Agreement* signed on 28 June 2017 under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (“CEPA”) between the HKSAR Government and the Ministry of Commerce providing for promotion and protection of investments between the two places. The Agreement provides for a Mediation Mechanism for Investment Disputes. It encourages the use of Hong Kong’s mediation services by Mainland investors, and Mainland’s mediation services by Hong Kong investors, to resolve cross-boundary investment disputes in accordance with the Mediation Mechanism under the CEPA Agreement. To complement this mechanism, Hong Kong can offer training and capacity building on international investment law and international investment dispute resolution skills for legal practitioners and government officials in Asia and elsewhere so as to build up a pool of experts on investment mediation.

36. At the same time, DoJ is providing policy support to the development, by non-governmental organisations, of using innovative technology to facilitate Hong Kong’s legal and dispute resolution services sector to reach out to the international market. “AI” and “blockchain” will prove most useful for a user-friendly but secure combined smart contract and online dispute resolution platform where transactions will be evidenced contemporaneously trampling language and geographical barriers. Hong

Kong cannot be better positioned for all these because of our strong legal protection of intellectual property rights and privacy.

37. We hope this will create synergy with the work of the APEC Economic Committee’s Friends of the Chair on Strengthening Economic and Legal Infrastructure (or “SELI” for short) working group. Chaired by a DoJ representative, the SELI working group promotes the use of online dispute resolution platforms by micro, small and medium sized enterprises.

38. As what I have just said is not meant to steal her thunder when the Chief Executive delivers her second Policy Address, so I have to say “Watch this space!” before it unveils next month.

How one may answer the question?

39. So, returning to the question I posed earlier: How should each of us answer it? This brings me to the story of a corporate lawyer who, when engaged in 1903 to draw up the papers for the incorporation of what we would today call a “start-up”, was confronted with the scepticism expressed by the president of the Michigan Savings Bank that an investment in that new company would be a waste of money. Corporate lawyer Horace Rackam resolved to look at the future of what was to become the Ford Motor Company differently. That “the horse is here to stay, but the automobile is only a novelty – a fad” turned out to be one of history’s worst predictions. The 50 shares Mr Rackham acquired at the not inconsiderable sum of \$5,000 resulted in a 2,500 times return when they were sold back to the Ford family in 1919.

40. As individuals, you can do more than just applying your professional skills in going about the tasks assigned to you as a lawyer. Your

experience working in or being a frequent traveller to Hong Kong places you in a good position to tell the people you meet about the city's first class legal system and that the rule of law and judicial independence are alive and kicking.

41. I think many of us would have heard of the so-called "broken windows theory" and the dangers of self-fulfilling prophecies. The two branches of Hong Kong's legal profession must be congratulated for having made joint or separate statements on occasions when abuses were hurled at judges and when ungrounded attacks were made on judicial independence¹⁹. Perception is important. Unless we have misconceptions over Hong Kong's rule-of-law condition corrected, one cannot give meaningful advice on making choices such as those on a sustainable business model, place of incorporation, forms of capital raising, governing law, as well as method and seat of dispute resolution.

42. The question I posed may therefore be answered by simply asking yourself this: Did I ever speak up in defence of the rule of law? If you have, there is every reason to be proud of yourself. If you haven't, it's not too late to start doing it.

¹⁹ See (a) a statement issued by the Law Society of Hong Kong on 20 September 2015, accessible at http://www.hklawsoc.org.hk/pub_e/news/press/20150920.asp;
(b) Statement of the Hong Kong Bar Association in Response to Certain Recent Statements Made in relation to Judicial Decisions dated 25 February 2016, accessible at <https://www.hkba.org/events-publication/press-releases-coverage/2016>;
(c) Joint Statement of the Hong Kong Bar Association and the Law Society of Hong Kong in Response to Criticisms of Judicial Independence in Hong Kong dated 18 August 2017, accessible at <https://www.hkba.org/events-publication/press-releases-coverage>;
(d) Joint Statement of the Law Society of Hong Kong and the Hong Kong Bar Association in Response to Personal Attacks on a Judge dated 4 July 2018, accessible at <https://www.hkba.org/events-publication/press-releases-coverage>.

Concluding Remarks

43. Finally, I think I can be forgiven for stealing some airtime for advertising two on-going public consultations that DoJ is conducting.

44. The first is on a proposed framework arrangement between Hong Kong and the Mainland on the reciprocal recognition and enforcement of judgments (“**REJ**”) in civil and commercial matters²⁰. To have in place an REJ mechanism to embrace a wider range of civil and commercial matters than those already covered in arrangements concluded in 2006 (on choice of court agreements) and 2017 (on matrimonial and family cases) will reduce the need for re-litigation and offer better protection to the parties’ rights. This consultation is open up to 24 September (or the Mid-Autumn Festival when we all expect a full moon).

45. The other is seeking views on the draft Code of Practice for Third Party Funding of Arbitration and Mediation which started just last Thursday (30 August)²¹. The Code is meant to set out the practices and standards with which third party funders of arbitration under the *Arbitration Ordinance* (Cap. 609) and mediation under the *Mediation Ordinance* (Cap. 620) are ordinarily expected to comply in carrying on their business activities. The two-month consultation period will, however, end on 30 October.

46. In Hong Kong, when we do a public consultation, we mean it. I sincerely urge you all to participate actively in them. Together we can change the legal landscape for the better.

47. On this note, I wish you a very successful summit. Thank you.

²⁰ See https://www.doj.gov.hk/eng/public/pr/20180731_pr1.html.

²¹ See https://www.doj.gov.hk/eng/public/pr/20180830_pr2.html.