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CONSEQUENCES FOR JURISPRUDENCE

Professor Alex Frame

The *Lands* case represented a vital step in the emergence of our New Zealand jurisprudence.[215] The boldness of its conclusions administered a kind of shock treatment to a legal system which had become frozen as to the Treaty of Waitangi, with rare exceptions such as Te Weehi's case in the mid 1980s, and was in danger of being discarded by Māori as a settler device for the maintenance of power. The Judges of the Court of Appeal, working at speed, produced a result which credibly challenged that perception, imposed a justified restraint on the State, and cleared the jurisprudential decks for further action on the Treaty of Waitangi. Our country owes much to that Court of Appeal and to the bold vision of the President and his fellow judges. Accepting Parliament's statutory invitation in section 9 of the State-Owned Enterprises Act 1986, the Court smashed through the ice in its observations on the content of the principles of the Treaty. As I will argue, however, the force required for the task may not always have produced conceptual precision.

I have been asked to comment on the impact of the *Lands* case on our jurisprudence. Two issues came to mind. First, the acceptance by the Court of Appeal of the decision of the Privy Council in Hoani Te Heuheu's case in 1941 denying justiciability to the Treaty of Waitangi except where, and to the extent, that Parliament had enacted. That acceptance was constitutionally unremarkable, given the hierarchy of our courts at the time, and I leave it aside for the present, having

[215] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682 (commonly refered to as the *Lands* case).

recently written at length on the fragility of the Privy Council's reasoning in the light of detailed analysis of the authorities on which it relied.[216]

A second issue of interest concerns the Court of Appeal's alleged finding that the relationship created by the Treaty of Waitangi was in fact, or was "in the nature of", or was comparable for some purposes to, a "partnership". The vagueness of the Court's statements on the issue provides the reason for my selecting this issue for treatment this afternoon. It may be of interest also that this "jurisprudential" issue, concerning judicial reasoning, turns out also to have very practical implications at the level of government administration. At the risk of repetition, the exegetical analysis of the judgments which I will offer, and which will be expected of a teacher of public law, is not incompatible with the general conclusion that the *Lands* case was, as to result, a bold, necessary, and desirable development of our jurisprudence.

The very wise Lon Fuller has offered some advice to authors tempted to defend their books against critical reviews. Fuller warned that they generally serve themselves badly, because the author

> has published his book, he has already had his day in court and the becoming posture for him may seem to be that of awaiting quietly the verdict of the intelligent and disinterested reader. Furthermore, any reply to critical reviews is apt to become a muddled thing. Mixing charges of misinterpretation with rearticulations of what the author claims he meant to say, intermingling awkwardly defense and counteroffensive, and ending with dark intimations that only limitations of space prevent him from demonstrating with devastating finality how completely mistaken his critics are...[217]

I have managed to publish two books without departing from Fuller's advice – and in the face of appreciable provocation! This afternoon I am going to make a mild exception.

In 1990, the *New Zealand Universities Law Review* devoted a special issue to the Treaty of Waitangi.[218] The then editor, the future Professor Peter Spiller, badgered a busy official, recently charged with advising on the avalanche of claims based on the Treaty of Waitangi then descending

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[216] A Frame, "Hoani Te Heuheu's Case in London 1940-41: An Explosive Story" (2006) 22 NZULR 148.
[217] L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 187-188.
[218] (1990-91) 14 NZULR.

on government, into contributing a chapter. Sir Robin Cooke, the President of the New Zealand Court of Appeal, was asked to provide an introduction to the collection of essays. Most contributors fared relatively well in Sir Robin's appraisal. My little contribution, ploddingly titled "A State Servant Looks at the Treaty",[219] however, encountered gentle but unmistakable resistance from the President:

> The intermediate part of Mr Frame's paper is an apologia for the 1989 document entitled "Principles for Crown Action on the Treaty of Waitangi". Here we are in rather muddy semantic waters. In 1987 the Court of Appeal judge had found the analogy of partnership helpful in discovering the principles of the Treaty, because of the connotation of a continuing relationship between parties working together and owing each other duties of reasonable conduct and good faith. The analogy was of course not suggested to be perfect, but it was a natural one.[220]

Sir Robin went on to discuss the failure of the group of officials, which it was my privilege to have convened, fully to adopt the partnership concept. In mild language, and with a rather good joke, that great New Zealand judge wrote:

> Instead they formulated the "Principle of Cooperation" of which, it is said, "the outcome... will be partnership", and four other principles. Further, Mr Frame's paper analyses co-operation into seven characteristics or conditions...I do not know that the vision of New Zealand as a co-op has any advantage in clarity over the idea of a partnership between races.[221]

I should explain that the seven characteristics were as follows:[222]

> **1. Two or more parties**. The parties being mutually accepted as distinct and proper parties.

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[219] A Frame, "A State Servant Looks at the Treaty" (1990-91) 14 NZULR 82.

[220] Sir R Cooke, "Introduction" (1990-91) 14 NZULR 1, 5.

[221] Sir R Cooke, "Introduction" (1990-91) 14 NZULR 1, 6.

[222] A Frame, "A State Servant Looks at the Treaty" (1990-91) 14 NZULR 82, 90-91. As acknowledged in the article, these were the result of discussion with a philosopher friend, now Dr Derek Melser of Masterton. Dr Melser's recent book, *The Act of Thinking*, (Cambridge, Mass., MIT Press, 2004) going well beyond the analysis presented here, seems likely to take a place among the seminal works in its field.

2. **Acting as free agents**, neither party being coerced into participation.

3. **Engaged together in purposeful activity**.

4. **That is based on a shared understanding** of such matters as the facts of the situation, the goal to be achieved, the means to be used, the allocation of roles and rights, and the rules to be observed.

5. **And commitment** consisting of genuine desire to contribute to the cooperation.

6. **Both coordinating their respective actions**, which may well be different and asymmetrical.

7. **To a common goal** which is believed to be mutually beneficial.

I should turn now to a detailed study of the way in which the Judges of the Court of Appeal in the *Lands* case arrived at the decision that it was a "principle" of the Treaty of Waitangi that the Crown must act towards Māori with the "utmost good faith". President Cooke's approach was to find the obligation by deduction of a partnership:

> The Treaty signified a **partnership between races**, and it is in this concept that the answer to the present case may be found .... It is equally clear that **the Government, as in effect one of the Treaty partners**, cannot fail to give weight [to certain matters] (line 20)...the issue becomes what steps should be taken by **the Crown, as a partner** acting towards the Māori partner with the utmost good faith, which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty.[223]

We see that there are no fewer than three different identifications of the literal "partner" on this single page of the judgment: race, government, and crown. The subsequent protestation of analogy in 1990 is not foreshadowed in this passage. Reflection suggests that each

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[223] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 664 (emphasis added).

supposed partner has a different constitution and character, and each raises different issues as to performance and enforcement. How, for example, should a 'partnership between races" be given operational effect? Who is to represent these races in meetings between the "partners"?

Justice Richardson was more careful and nuanced in finding "one paramount principle" which "rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres".[224] Justice Richardson's approach was explicitly based on analogy:

> No less than under the settled principles as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.[225]

Justice Somers also preferred the analogy approach. Recalling the instruction of the Marquis of Normanby to Captain Hobson of 14 August 1839, and the reference there to the need for "good faith" in all dealings with Mäori, his Honour said:

> It was upon those principles that the Crown entered into the Treaty and upon which it must be supposed the Māoris also adhered to it. Each party in my view owed to the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other.[226]

Justice Casey used language intermediate between the literal and the analogical approaches:

> From the attitude of the Colonial Office and the transactions between its representatives and the Māori chiefs, and from the terms of the Treaty itself, it is not difficult to infer the start in 1840 of something in the nature of a partnership between the Crown and the Māori people.[227]

Finally, Justice Bisson avoided use of the expression "partnership"

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[224] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 680-681.
[225] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682.
[226] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 693.
[227] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 702.

altogether, and was able to find a requirement of "utmost good faith" without it:

> The Māori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner in which their existing rights would be guarantee.[228]

Should our conclusion from the foregoing review be that the majority of the Court did not think that the Treaty relationship was a partnership, but rather that it was sufficiently like a partnership to justify the imposition of one of the hallmarks of the partnership relationship, namely the duty of partners to act towards one another with the utmost good faith? This is of course a perfectly reputable technique of legal reasoning: to find sufficient similarity between two situations to transfer some legal consequences known to attend one situation to the other. But it is surely important to remember that the situations were not identical – if they had been, no talk of analogy would have been necessary.

Have I done more here than paddle in what Sir Robin called "rather muddy semantic waters"? First, a degree of semantic rigour is important in law, otherwise things will get into a mess. Indeed, the President's varying formulations of the partnership concept must accept some blame for any "muddiness" we may find. Second, I will claim a little more substance for the point I have tried to make. I should tell you that when officials came in 1989 to prepare for Cabinet's consideration the "Principles for Crown Action on the Treaty of Waitangi", the initial draft included a heading called "Principle of Partnership". But it was the task of "operationalising" such a principle which revealed the difficulty. What instruction should be given to government officials in respect of such a principle? It became clear that what was needed was an "action word", not a "status word", and that neither "partnership", still less "like a partnership", could perform that task. Further analysis suggested that "cooperation" – with something like a distillation of the seven conditions referred to earlier - was the "action word" which was both more fundamental and more demanding. That principle thus became the "Principle of Cooperation" elaborated in the Commentary.

The ease with which the comfortable, but insubstantial, concept "partnership", which government regularly applies also to its

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[228] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 714.

relationships with industry and other sectors, draws attention away from the need to formulate in respect of each matter arising in the Treaty relationship such conditions as agreement on purpose, coordination of effort, and common goal. These are all most important questions from an operational point of view, whether the object in view is the development of good health policies for Māori, the advancement of language, or other economic development. If that essential and practical planning requisite for authentic cooperation does not occur, then the parties will oscillate between inactivity and unrealisable expectations.