13

FUTURE DIRECTIONS

Hon Chief Judge Joe Williams

I. HE MIHI, HE MAIMAI AROHA

Hei tuatahitānga ake māku ki a koutou e Tīpene koutou ko tō iwi e pae nei, e ngā uri o Tahu Potiki rāua ko Hamo, ko Hemo rānei, e mihi ake ana ki a koutou. Koutou e tahutahu ana i ngā ahikā o te kāinga nei kia tau ai tā koutou mana ki runga ki te mata o te whenua kia kīa e horapa ana te mana o Tahu Potiki ki ngā koawa katoa o te takiwā nei. No reira, e mihi ana ki a koutou me ngā tini mātua tūpuna kei muri i a koutou e whakatōtika nei ana o koutou tuara. No reira, tēnā koutou, tēnā koutou.

Tēnā hoki tātou, e ngā iwi, e ngā reo, e ngā mana. Kei ngā kaiwhakawā, Sir Maurice, Sir Ivor, koutou atu. Ngā tangata ī parau ai i tēnei whīra, e mihi ake ana ki a koutou. I a au e mihi ana ki a kōrua, kei te tangi tonu ki a Robin Cooke kua hinga, no reira hāere e ngā mate, hāere, hāere. Ki a Martin Dawson ano hoki, i hingā, hāere e ngā mate, hāere, hāere, hoatu. No reira, tēnā koutou, tēnā tātou e te whare.

II. THE PROTECTION OF THE LAW

"Ka tatakī mai te whare o ngā ture
Ka whiria rā
Te Māori
Ka whiria rā

Ngau nei ona rēiti!
Ngau nei ona tāke!
Te taea te ueue
I a hahā!"

I thought I'd use that to wake you all up. But it is relevant as it's an extract from a very famous Ngati Porou haka called Te Kiringutu composed by Tuta Nihoniho. In his frustration he stood at the front door of the Magistrate's Court in Gisborne and delivered this protest in haka format. I've quoted the first five or six lines of Te Kiringutu. It gets hotter further on but it wouldn't be appropriate for me quote those lines as there are too many young people among you. This is what Tuta Nihoniho was saying in the bit I have quoted:

"The pronouncements pour forth
The pronouncements of the House of the Law
They bind me in chains
Me the Māori
They bind me in chains
Its rates bite deep
Its taxes bite deep
These chains I cannot break"

And actually I think having completed that eloquent protest he then took off down south. He moved to Tuahiwi and married into Ngāi Tahu. He lived happily ever after there by all accounts probably because the Queen's writ didn't run in Tuahiwi back then.

I thought that was a good start to my comments today: a very famous Ngati Porou chief at the dawn of the 20th century delivering his deeply felt protest about the exclusion of Māori from the protection of the law. Appropriate because the discussion today has been about the re-inclusion of Māori into the law's protection in 1987. The questions under discussion have really been protection on what terms, at what cost and for what benefits? My few comments will be what I call a realist's wrap-up, just because it's got lovely alliteration. I was thinking about doing it in rap, a realist rapper's wrap-up, but Judge Wainwright told me that that wouldn't be consistent with the standing of the Chairperson of the Waitangi Tribunal and that I shouldn't do that, so I won't.

III. THE CAST

The *Lands* case was such a watershed in New Zealand's constitutional law that it is usual for lawyers with an interest in such things to try and recall where you were when the judgment was delivered. Like the moment Neil Armstrong walked on the moon, or John F Kennedy was assassinated. Where was I on 29th June 1987? I was actually studying at the University of British Columbia in Vancouver, so it just goes to show that as soon as you leave the country they start the revolution without you! I heard about this Baragwanath QC, this Sian Elias, this Martin Dawson, only from a great distance. First from the newspapers and then from phone calls. People were calling me and telling me that exciting things were going on with the Court of Appeal.

I wondered about this Baragwanath man. I had never left New Zealand apart from this trip to Canada so I was untutored and naïve shall we say. I assumed that Baragwanath must have been a Sri Lankan name. I imagined this Ghandian figure in a pinstriped loin cloth bravely, wisely, peacefully saving the Māoris. You can imagine my disappointment when I met him. He wasn't this saintly Asian gentleman at all, he was this Methodist minister's son from Balclutha who was a built like a prop.

And then Elias of course, even by then, a famous and charismatic young lawyer who had acted for Hone Harawira, Arthur Harawira, Ben Dalton and others in the so-called Haka Party case and got them off. I think she had acted for a number of those parties during the Springbok tour period. And she acted for Ngāneko Minhinnick in the Manukau Harbour claim and in her struggles in the Planning Tribunal, as it then was. But a woman, one of the few Pākehā lawyers well known to the Māori grassroots. So I had heard of her.

And then Martin Dawson, who was, bless his memory, an absolute institution. There is a wonderful story of him in Wellington having gotten the interim report of the Waitangi Tribunal in respect of the government's proposal to introduce the Quota Management System in New Zealand. The report had been faxed down by the Tribunal from Te Hāpua, our northern most settlement, so the story goes. It suggested that enforceable rights were at issue and that the "QMS" should not proceed until those rights had been protected. The report arrived in Wellington, Martin had it, and in Martin's brilliant but dishevelled fashion, clasping this report, he was trying to figure out what to do with it. He went racing along The Terrace to see if he could find a judge of the High Court to consider an urgent oral application for interim injunction. He went past the hairdresser's, and who should be sitting

there getting his hair cut but George Barton QC. He runs inside and says "George, George, I need your help with an injunction" and George says "I'll be 2 minutes". He gets his haircut finished and they rush off to be heard by Justice Grieg in a chambers hearing, just the two of them, George probably barely understanding the case but sensing that it was big. They secure the interim injunction stopping the quota-isation of the New Zealand commercial fishing industry.

The rest is history, including a lengthy period of employment for Sir Tipene O'Regan. And I must say, employment and enjoyment, and I say that most respectfully as during that period he was my client.

On the other side in the *Lands*[249] case was Paul Neazor QC, the Solicitor-General at the time, this wonderful rumpuddlian character for those of you who know him, a short portly, brilliant advocate, famously disorganised and straight as a die. Martin, in particular, when I spoke to him about this had the highest regard for Paul Neazor's straight shooting in the *Lands* case. It appears for his sins that he has now been sentenced to be the Inspector General of Security and Intelligence and has to deal with Mr Zaoui. It goes to show if you're acting for the Crown it doesn't pay to lose big cases against Māoris.

I was tempted, Your Honours, to go on to discuss the judges but I will not succumb to that temptation.

Anyway, to my wrapping–up comments. I want to talk about converging streams, then and now. That's really what this case is about. Despite Sir Ivor adopting his best New York policeman tone in his paper and saying to us onlookers that there was "nothing to see here, move along, everything is fine, just some routine statutory interpretation", there was in fact a great deal to see. I think none of that was lost on any of the judges, least of all Sir Ivor himself.

IV. PUKENGA WĀI TANGATA: CONSTITUTIONAL MOMENTS

There is a famous proverb in Māori:

> *"He pukenga wai he nohanga tangata, he nohanga tangata he whakawhitiwhiti kōrero"*
>
> "At the confluence of a river, people come together, and where people come together, there is inevitably discussion and debate".

---

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

I think this case allows us to take a little poetic licence and add a further line to the proverb:

> *"Engari, he pukenga wai tangata, ka rū ai te motu"*, which means:
> "But when the converging streams are streams of human history, the very land will shake".

What we were watching there on 29 June 1987 was the convergence of two important human streams or elements, and that is what I want to explore. Not for its own sake but because it helps us to understand when these convergences will occur again in the future and to plan for them. At least that's going to be my thin theory, Your Honours. I will call these particular kinds of pukenga wai tangata, constitutional moments.

The *Lands* Case was a constitutional moment, a "pukenga wai tangata", two converging streams. The first stream came from the inability of the then firmly controlled economy to cope with the challenges of the day. The disasters of the 1970s: the departure of Britain to the European Union, the fall in primary product prices, the oil shock, the collapse of 'Think Big', the run on the New Zealand dollar during the arrival of the fourth Labour government all meant that a deep and radical restructure of the economy and the state's role in it would be required. Control would be relinquished and the government would get out of business by selling non-core assets.

That was the first stream.

The second stream was the rise of the Māori presence, demographically, culturally and politically in New Zealand; and therefore the potential social impact on Māori of the restructure I have just identified. These factors drove a second political consensus around the need for a comprehensive scheme of transitional justice. Hence the work of the Waitangi Tribunal and wider policy thinking on Treaty settlements: All of it necessary for the sake of social cohesion and, perhaps at least, the perception of legitimacy.

Now the restructuring of the economy and the state's role in it raised Māori and Treaty issues for consideration because the proposed sell off of state assets would see the loss of the very items sought by Māori in the transitional justice process. There had therefore to be developed a third political consensus at the confluence of these two

streams. That is around how the restructure could proceed without undermining the integrity of the developing transitional justice scheme. The consensus settled eventually on section 27B and so forth of the State-Owned Enterprises Act as the mechanism for resolving the conflict.

Thus the meeting of those two powerful forces created an unavoidable clash between State asset divestment as the key to the restructure, and Māori access to the divested assets themselves as the basis for a credible transitional justice process. The rise of the Māori presence and the state of the economy meant there was no choice but to find an accommodation. That convergence created the constitutional moment.

So as their Honours' identified, the enactment of section 9 of the State-Owned Enterprises Act made the legal issues relatively straightforward. But the conflict provided an opportunity for the Court of Appeal to engage with the Treaty and with Crown/Māori relations for wider benefit. That is, it provided at a time of tense conflict between Māori and the Crown, an opportunity to affirm the legitimacy of the post-colonial state and majoritarian rule. And Professor Brookfield you'll be pleased to know that I'm not saying that from a neo-Marxist perspective. I'm saying it because if we can remember ourselves back to those times, legitimacy was an issue, at least in the dawning consciousness of a new and much larger generation of Māori.

V THE PRICE FOR LEGITIMACY

But in this constitutional moment, I think their Honours' accepted that there was going to be a price to pay this time for the legitimacy so proclaimed. The price would be a credible transitional justice process and a place for the Treaty in government and the constitution. As to transitional justice, the Court delivered in the judicially sanctioned amendments to the State-Owned Enterprises Act, a guarantee that the Crown would retain the ability to make reparations if claims were upheld. As to the place of the Treaty, the Court acknowledged for the first time that Māori issues were legal and constitutional issues as well as political ones. Up until that point the law had been as articulated by Chief Justice Prendergast in 1877, the Treaty was generally not justiciable and most importantly, the Crown was to be 'the sole arbiter of its own justice' in matters of Māori rights.

As of 29 June 1987, in joint venture, the Courts and the Parliament agreed that Māori issues were now to be bona fide legal and constitutional issues. They would no longer be matters of unreviewable high policy. The Crown would not be its own judge any more. This is

the price the judicial and legislative branches were prepared to accept to protect social cohesion, and I think that is very important to remember. Māori had rights that were enforceable in the courts and could not be easily overridden by the political process. Of course override was still possible as the foreshore and seabed legislation shows, but it would no longer be easy.

Second, the Treaty came to be accepted as the touchstone of those legal rights. It became at that point, not just in Māori consciousness, but in the wider New Zealand consciousness, a constitutional document. No longer a simple nullity as Chief Justice Prendergast had said, no longer the 'dead letter', Sir Robin Cook posited if Māori had been unsuccessful in that case.

This, I confess, is hardly a legal analysis, but I think it is a fair historical cum political analysis. This was the Court of Appeal branding New Zealand to itself and to the world as a caring, post-colonial, western liberal democracy committed to social justice and the rule of law. Not surprisingly, within the decade Canada came to do the same thing with *Delgamuukw* and Australia with *Mabo*. This was our equivalent of those constitutional moments: legitimating the result of colonisation, but accepting that would come at a cost to the state and officially putting the cost on the table.

VI. AND A DASH OF REALISM

So that was a powerful moment, but I think we must avoid sliding into self-congratulation about it. It wasn't so much that Parliament and the Courts had been blinded by their own enlightenment in 1987. It is important to understand that the five judgments in the *Lands* case were absolutely necessary for their time. The confluence of human events required it. This is the realist's perspective.

Can we contemplate what might have happened if Sir Graham's application had failed? What might have been the cost to our national peace of mind if the Māori case had been rejected? Apart from spending a lot more time in further debilitating litigation, there was a likelihood of significant social cost. I say that for a couple of reasons. Firstly, remember the Māori demographic had changed from 4 or 5% of the population after WWII to 10 to 11% of the population by the mid-1980s. Significantly urbanised; about 70% back then. An increasing proportion of the first generation urban children tertiary educated and utilising the various levers within the system to make their views known.

The first thing, the significant increase in the Māori population was keenly felt at that time. The second, the Māori cultural and political

revival of the 70s of course is often referred to in analyses of Māori development of the last 50 years. But I think what is forgotten in this period is that in the 70s when the Waitangi Action Committee, Te Reo Māori Society, Ngā Tama Toa and so on were maintaining the political profile for Māori causes, there was a deep split between the rural conservative tribal leadership on the one hand and the urban, younger activists on the other. Older more rural Mäori were embarrassed and angered by the actions of the younger more urban generation. By the 1980s that split had disappeared. The new consensus favoured the position of the more radicalised urban activist groupings. In other words leaders such as Sir James Henare, Sir Graham Latimer, Robert Mahuta and so on shifted their strategic ground further toward the edge as it were. This was a significant internal revolution in the Māori world that occurred quietly in the period from 1975 to 1985. It spawned a broad-based sense of Māori 'nationalism' that had the potential to be formidable. It could well have led to a rejection of the strategy of incrementalism and co-operation that had been the Māori approach since Carroll and Ngata.

I would add to that mix something that really can't be ignored, and that was the Springbok tour. The fact that in those few weeks in 1981, New Zealand saw up close and personal, the potentially destructive effect of internal conflict, and was appalled.

I think that increase in Māori population, the developing internal consensus around the radicalised Māori position and the national pain of the tour in 1981, still keenly felt, meant there was no appetite whatever for racial conflict in 'mainstream New Zealand'. In fact if there was an appetite for anything, it was for reconciliation. This was the constitutional moment where the search for peace would begin.

This is my perspective and I am sure the judges sitting here listening to me have another view but its hard to see that moment as a mere matter of statutory interpretation. There was just too much at stake for us as a country. It was very important that there be wise, thoughtful, careful, even conservative judges thinking about those underlying issues and deciding what the next step would be in our coming of age. And thankfully for us that is what happened.

I wanted to make a point about partnership that I had skipped over. Both Sir Ivor and Sir Maurice expressed concern at the way the partnership idea in the *Lands* decision was picked up by Māori as requiring an even split of resources. One can see why in context they would be concerned about that. But I think in 'constitutional moment' terms its power was greater than the risk of its use. I say that for this reason. There is no way that the Canadian Supreme Court would have

come up with that metaphor to describe First Nation/federal relations. There is no way that the Australian High Court would have used it as an analogue for Aboriginal/commonwealth relations. Nor the United States Supreme Court in its context. Yet it was a powerful and elegant metaphor in the particular context of Aotearoa and Māori/State relations. Why? Because of our intimacy, because of our ability to talk and negotiate at the same level as Māori and Crown and because of the relatively higher level of Māori access to power here compared to those other places. Far from being a problematic idea, partnership took us outside the vertical relationship between citizen and state and spoke instead of a horizontal relationship between Māori and the state at the same level. It would still be an asymmetrical partnership, but the structure was one of empowerment for Māori. Unlike the pre-existing sovereignty metaphor of United States and Canadian jurisprudence that emphasised separation from the state, partnership emphasised continued connection. So there was something in it for both sides. That metaphor got us through the five years that followed 1987 and still speaks, still resonates for us today.

VII. A WHETHER FORECAST

That brings us to the future. The lesson in the *Lands* case for the future is in asking whether the elements present then will come together again in the next generation. Whether those or similar confluences are likely to return, and if so, whether they will play out in litigation, in political action, or as in 1987, in both. I ask the whether questions because, like increasingly severe storm events, it seems clear to me that we will have another constitutional moment of 1987 magnitude within the next decade.

Let me suggest some possibilities here that you can mull over and take away.

Historical Treaty claims are completed. New Zealand will transit out of the settlement phase leading to the question of the disestablishment of the Waitangi Tribunal. Abolition is not possible without Māori support and in return for that support Māori require legislative entrenchment of the Treaty. A constitutional moment ensues.

A second possibility is that republicanism and the national identity debate heat up over the next decade. A proposal to remove the British monarchy will require Māori support, which in turn will require a constitutional quid pro quo probably about the status and enforceability of the Treaty and that will produce a constitutional moment.

A third possibility relates to the make up of the legislature. The Māori rolls will steadily increase over the next 2 or 3 options and subject to immigration, will raise the spectre of a Parliament divided significantly along race lines. I say that because, over the last 15 years a consistent figure of 80% of 18yr old Māori enrol on the Māori rolls. Young Māori are treating the Māori rolls as an expression of identity. That may take us to a potential breaking point sometime in the next 10 to 15 years and a serious proposal to abolish the Māori seats. A negotiation ensues with Māori representatives. They require constitutional concessions in other areas. That will produce a constitution moment.

In addition to all of that there will be the undeniable impact of immigration and the environment. These constitutional moments will come about at the same time as debate heightens yet again around the future demographic settings of the country i.e. immigration, and the increasing attraction of a temperate maritime climate in a warming world. I know there will be mutual impacts between that particular factor and the other factors already in confluence. It is unclear to me what these mutual impacts will be, but there seem to be three streams conflating. The question will be how we handle the new pukenga wai tangata. That is whether as with the 1987 case, the earthquake which one predicts in that whakatauki, will produce positive change for the country or regression to a less confident past.

I think the signs are generally good that the constitutional moment will be well handled, although they are not universally good. Our isolation causes us to fear change and to fear looking at international models to help guide us. There is a certain exceptionalism in our culture as New Zealanders, whatever our ethnicity. On the other hand, our intimacy makes dialogue and therefore negotiated change easier to achieve. I think that 1987 has taught us that we are a nation of lovers not fighters and we mostly make deals on these things.

Finally who will the players be when the new moment arrives? Well it won't be the Court of Appeal it will be the New Zealand Supreme Court. Will the plaintiff be the New Zealand Māori Council? I wonder after the closure of historical claims whether the Supreme Court will be dealing with a new national tribal forum convened by the remaining ariki leaders: King Tuheitia and Tumu Te Heu Heu or their successors. A large forum containing iwi representatives with their own war chests and peace chests, no longer dependent on state funding for influence. And the Crown? Well, perhaps it won't be the Crown on the other side. Perhaps it will be the people represented by the Republic of New Zealand. There is also a new element not as powerfully present in

1987. What will be the role of the Māori politicians of whom there are a greatly increased number? Will they have key negotiating roles not seen in the 1980s and 90s? Will the line between Māori and the state have become significantly blurred when we face the new challenges? One thing we can be sure of: If we thought 1987 was exciting, we ain't seen nothing yet! All is before us and they will be exciting times.

VIII. THE NEED TO HEAL

Can I just finish by reflecting on David Baragwanath's reference to Lord Cooke being brought to tears by the affidavit of Dame Whina and also on Sir Tipene's elegant view of the sea (and government) as having neither grief nor malice. These images made me think of the famous words King Tawhiao uttered after having been beaten in battle with the Crown and having lost his entire tribal estate to confiscation. He spoke in his pain to the two pacifist prophets Te Whiti and Tohu of Parihaka. He said:

> *"E Whiti, e Tohu, rapua te mea ngaro. Ko ahau ka hoki ki te riu o Waikato, he roimata taku kai i te ao i te pō"*
>
> "Te Whiti, Tohu, I bequeath to you the search for that which I have lost. As for me I will return to the Waikato valley and I will eat my tears from sunrise to sunrise."

The question for us in the next constitutional moment is whether we will be able to put the grief felt by those great leaders behind us and move on with new leaders, new ariki, new ways, with the healing complete and the future before us. To get to that point we will have to grab those constitutional moments with four million pairs of hands.

Kia ora tātou katoa.