1

INTRODUCTION

Jacinta Ruru

Twenty years ago, on 29 June 1987, the Court of Appeal of Aotearoa/New Zealand handed down a landmark decision interpreting the principles of the Treaty of Waitangi: *New Zealand Māori Council v Attorney-General*.[1] It was, as the then President of the Court of Appeal, the late Sir Robin Cooke, acknowledged "perhaps as important for the future of our country as any that has come before a New Zealand Court".[2] Twenty years on the courts, government departments, and many others have continued to look to this 1987 case, commonly referred to as the *Lands* case, for guidance and stimulation in pursuing legislative commitments to the Treaty principles. Today, it is still described, for example, as "arguably ... New Zealand's most important 20th century constitutional decision",[3] and "the circuit-breaker for modern Treaty jurisprudence".[4] On 29 June 2007, the University of Otago hosted a symposium to mark this monumental case. This book is a record of what took place on that day.

---

[1] [1987] 1 NZLR 641. The High Court and Court of Appeal decisions are reproduced in Appendix 3, with the kind permission of LexisNexis. Note part of this chapter draws on a previously published piece: J Ruru,"Treaty of Waitangi principles 20 years on" (2007) NZLJ 87.

[2] [1987] 1 NZLR 641, 651.

[3] N Patel, "Lord Cooke of Thorndon (1929-2006): 51 Years in the Law" (2006) 32 CLB 443, 445.

[4] PA Joseph, *Constitutional & Adminstrative Law in New Zealand* (3rd ed) (Wellington: Brookers Ltd, 2007), 45.

I. THE CASE

The *Lands* case was a product of the radical changes that occurred in Aotearoa/New Zealand in the 1980s stemming from the notion that assets owned by the Crown and administered by various government departments could be transferred to state-owned enterprises which would operate as successful businesses. The enabling law – the State-Owned Enterprises Act - was enacted in December 1986 with a statement in section 9 that read: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[5] In brief, the Treaty was a document signed in 1840 between Māori and the British Crown in contemplation of how two peoples could live side by side in one land.[6] The significance of this legislative statement was recognition that for the most part the Crown had proceeded to colonise the lands with little regard to the Treaty promises. The mainstream judicial and Crown view had been one of the Treaty as "a simple nullity".[7]

The wording of section 9 of the State-Owned Enterprises Act was certainly unique but also reflective of a new era. No other statute had ever confined those with statutory power to have some level of regard to the Treaty of Waitangi. The closest example at that time was section 88(2) of the Fisheries Act 1983 which stated: "Nothing in this Act shall affect a Māori fishing right". The only other statute to use the phrase 'the principles of the Treaty of Waitangi' was the Treaty of Waitangi Act 1975. This Act established the Waitangi Tribunal as a permanent commission of inquiry empowered to receive, report and recommend on alleged Crown contemporary breaches (post-1975) of the principles of the Treaty of Waitangi. In 1985, the Treaty of Waitangi Amendment Act was passed granting the Tribunal retrospective powers to investigate claims dating back to 1840.[8] Concerned that the Crown, a mere one year later, was intending to transfer significant assets into state-owned enterprises thereby limiting the pool of assets available for Crown settlement of Treaty of Waitangi historical breaches, the New Zealand Māori Council and Sir Graham Latimer brought a case to the courts. Less than three months on, the Court of Appeal delivered an unanimous decision that is comparable in its ground-breaking aura to Australia's

---

[5] In Appendix 2 is a copy of the State-Owned Enterprises Act 1986 (in its updated 2007 form).

[6] See Appendix 1 to view Te Tiriti o Waitangi / the Treaty of Waitangi.

[7] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78.

[8] Treaty of Waitangi Amendment Act 1985, s 6.

Mabo v Queensland (No 2)[9] decision, and Canada's *Delgamuukw v British Columbia*[10] case.

The applicants first argued their case before Justice Heron in the High Court. Heron accepted that the case "raises very important constitutional questions and attendant matters of statutory interpretation"[11] and granted interim relief, forcing a stay of action by the Crown until the High Court or Court of Appeal further ordered. An application to remove the case to the Court of Appeal was accepted and heard in May 1987. Using section 9 of the State-Owned Enterprises Act, the applicants advanced a Treaty argument and were successful.

In the Court of Appeal's decision of 29 June 1987, all five justices (Cooke P, Richardson, Somers, Casey, and Bisson JJ) concurred to state that partnership, reasonableness and good faith are the hallmarks of the expression "the principles of the Treaty of Waitangi". Cooke P specifically stated that the Treaty can no longer be treated as a "dead letter"[12] and to do so "would be unhappily and unacceptably reminiscent of an attitude, now past".[13] Cooke P, concluded: "[Treaty] principles require the Pakeha and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality".[14] He stressed the importance of not freezing Treaty principles in time: "What matters is the spirit. ... The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas".[15] Richardson J observed that: "the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi",[16] and Somers J likewise stated: "Each party in my view owed to the other a duty of good faith".[17] Casey J emphasised the importance of an "on-going partnership",[18] and Bisson J described the Treaty principles as "the foundation for the future relationship between the Crown and the Māori race".[19] And, in a final

---

[9] (1992) 175 CLR 1. For a recent appreciation of the importance of *Mabo* for Australia: see PH Russell, *Recognizing Aboriginal Title. The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005).
[10] [1997] 3 SCR 1010.
[11] [1987] 1 NZLR 641, 644.
[12] [1987] 1 NZLR 641, 661.
[13] [1987] 1 NZLR 641, 661.
[14] [1987] 1 NZLR 641, 667.
[15] [1987] 1 NZLR 641, 663.
[16] [1987] 1 NZLR 641, 682.
[17] [1987] 1 NZLR 641, 693.
[18] [1987] 1 NZLR 641, 703.
[19] [1987] 1 NZLR 641, 714.

paragraph inserted as a concluding reflection into the published version of the judgment, Cooke P commented on how the Treaty partners were trying to work out the details of how Māori land claims could be safeguarded when land is transferred to a state-owned enterprise. He stated, in what is the final lines to a sixty nine page unanimous Court of Appeal judgment, that "The Court hopes that this momentous agreement will be a good augury for the future of the partnership. Ka pai".[20]

The judgment consolidated a new stance emerging in the courts at that time. It came a year after the landmark *Te Weehi v Regional Fisheries Officer*[21] decision where the High Court had held that Te Weehi did not commit an offence by taking undersized paua because he was exercising a customary Māori fishing right. It came only weeks after the High Court had stated, in *Huakina Development Trust v Waikato Valley Authority*,[22] that "There is no doubt that the Treaty is part of the fabric of New Zealand society"[23] and that Māori spiritual values cannot be trampled upon.[24]

II. SIGNIFICANCE OF THE CASE

The significance of the *Lands* case was that our highest domestic court had strongly articulated the meaning of the Treaty of Waitangi in a contemporary sense. Subsequent judicial decisions, including decisions from the Privy Council, confirmed the underlying tenor of this landmark decision, including respectfully not construing a finite list of Treaty principles. For example, in the litigation concerning the consequences of restructuring broadcasting on the survival of te reo Māori, Lord Woolf of the Privy Council stated "This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust".[25] Over the years as the jurisprudence has developed, the meaning of specific principles have been explored, including active protection and consultation. Many of these cases attribute the origins of the principles to the *Lands* decision.

The *Lands* case, and the subsequent judicial decisions on the Treaty principles, has been of immense interest to many here and overseas. In particular, as our neighbours in Australia debate whether Australia

---

[20] [1987] 1 NZLR 641, 719.
[21] [1986] 1 NZLR 680.
[22] [1987] 2 NZLR 188.
[23] [1987] 2 NZLR 188, 210.
[24] [1987] 2 NZLR 188, 223, per Chilwell J.
[25] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517.

should enter into a treaty with its Indigenous Peoples, the New Zealand experience is being reflected upon. Several major books have been published in recent years capturing this new nation-building project, all including close scrutiny of our *Lands* case.[26]

Today, twenty years on, government departments, regional government bodies, and many other decision-making boards must have some level of regard to Treaty principles. The Department of Conservation, for example, must "give effect to"[27] and education institutions have a duty to "acknowledge"[28] the Treaty principles. All persons exercising functions and powers under the Crown Minerals Act 1991,[29] the Resource Management Act 1991,[30] the Hazardous Substances and New Organisms Act 1996,[31] and the Energy Efficiency and Conservation Act 2000[32] must "take into account" or "have regard to" Treaty principles. More recently the Crown has recognised its responsibility to "take appropriate account of the principles of the Treaty of Waitangi" by explicitly providing in legislation the avenues for Māori contribution in the decision-making processes of local government, land transport, and health and disability services.[33] Government departments, local councils and so on have since developed comprehensive Treaty of Waitangi policy statements.[34]

Yet, in recent years Treaty references have come under intense political opposition. Doug Woolerton's (NZ First Member of Parliament) Member's Bill entitled Treaty of Waitangi Deletion Bill is currently before the Justice and Electoral Committee with its report due 21 December 2007.[35] Other MPs have drafted similar Bills. Pita Paraone, also a NZ First MP, is responsible for the Treaty of Waitangi (Removal of

---

[26] See M Langton et al (eds) *Settling with Indigenous People* (Sydney: Federation Press, 2007); S Brennan et al, *Treaty* (Sydney: Federation Press, 2005); and M Langton et al (eds), *Honour Among Nations* (Melbourne: Melbourne University Press, 2004). For another comparative example, see J Borrows, "Ground-Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22 NZULR 188.

[27] Conservation Act 1987, s 4.

[28] Education Act 1989, s 181.

[29] s 4.

[30] s 8.

[31] s 8.

[32] s 6(d).

[33] New Zealand Public Health and Disability Act 2000, s 4; Local Government Act 2002, s 4; Land Transport Management Act 2003, s 4.

[34] For example, see Environment Waikato Regional Council website at: http://www.ew.govt.nz/enviroinfo/profile/Māoriperspective.htm#Bookmark_tura (last viewed 23 November 2007).

[35] http://www.nzfirst.org.nz/feature/?i=27 (last viewed 23 November 2007).

Conflict of Interest) Amendment Bill,[36] and Rodney Hyde, Leader of ACT, is in charge of the Treaty of Waitangi (Principles) Bill. It was thus timely, in approaching the 20th anniversary of the first case to consider a legislative reference to the Treaty principles, to reflect on the legal phrase and how it has shaped two decades of jurisprudence.

It is also particularly timely to consider the *Lands* case bearing in mind recent issues specifically concerning state-owned enterprises and the Treaty of Waitangi. The proposed sale of Whenuakite Station in the Coromandel by the state-owned farming agency, Landcorp, in late February 2007 brought to the public's attention some of these tense issues. Moreover, the role of state-owned enterprises to act consistently with Treaty principles has recently been commented on by the Waitangi Tribunal.[37] Of significance, earlier this year, Federation of Māori Authorities Inc and the New Zealand Māori Council filed action in the High Court suing the Crown for breaching its Treaty responsibilities in regard to the Crown's proposal to confirm Crown ownership of specific Crown Forest Rental Trust lands and funds.[38] The Supreme Court has accepted leave to hear the appeal and is expected to do so sometime in 2008.[39]

III. THE SYMPOSIUM

The Faculty of Law at the University of Otago felt it imperative to host a one-day symposium to mark the twentieth anniversary of the *Lands* case. The event took place twenty years to the date, on Friday 29 June 2007, in Dunedin. Despite the chilly weather, and the poor lecture room heating, the day was a memorable occasion for the near two hundred people that gathered from throughout the country to reflect on the past and future significance of this case. We were treated to a day of recollections and forecasts from the prominent judges, practitioners and academics of then and now.

While I am reluctant to attempt a summary of the words spoken during the Symposium (and, anyway, they can be read for yourself in this book), the many players of that day deserve introduction as do

---

[36] http://www.nzfirst.org.nz/feature/?i=32 (last viewed 23 November 2007).

[37] See commentary by L Te Aho "Contemporary Issues in Māāori Law and Society" [2005] 13 Waikato L Rev 145.

[38] To view the statement of claim see www.foma.co.nz (Last viewed 23 November 2007).

[39] *New Zealand Māori Council v Attorney-General* [2007] NZSC 87. The High Court decision is unreported: 4/5/07, Gendall J, HC Wellington, CIV-2007-485-000095. The Court of Appeal decision is reported at [2007] NZAR 569.

some of the pertinent themes touched upon during the course of the occasion. In attendance were judges, MPs (including Hon Margaret Wilson, Speaker of the House), academics, legal practitioners, students, and hapū representatives from throughout the country, and representatives from government departments and independent think tanks. The former Deputy Kaiwhakahaere of Te Runanga o Ngāi Tahu, Edward Ellison, beautifully opened the proceedings. The Dean of Otago's Faculty of Law, Professor Mark Henaghan, followed with a welcoming address noting the many apologies for the day including: Sir Graham Latimer, Sir Gordon Bisson, Rt Hon Dame Sian Elias, Inspector-General Paul Neazor, and RB Squire – all key players in the *Lands* case.

Mr Jim Nicholls, the current Deputy Chairperson of the New Zealand Māori Council; Paul James, the Director of the Office of Treaty Settlements in the Department of Justice; Virginia Harding, team leader of the Treaty of Waitangi and International team at the Crown Law Office; and Nicola Wheen and myself, both senior law lecturers at the University of Otago, led the sessions acting as chairs. All the contributing authors to this book presented on the day, with only Hon David Baragwanath doing something slightly different – his speech was delivered on a pre-recorded video due to a prior family commitment in Europe. Moana Jackson was programmed to make an address but cancelled the day before the Symposium due to personal circumstances and his perspective remains a gaping hole in this book. The Symposium closed with thank you speeches, a gifting ceremony led by Michael Stevens, a Kai Tahu PhD student at Otago, and a karakia from Darryn Russell, Kaitohutohu Kaupapa Māori, Māori Affairs Advisor to Otago's Vice Chancellor, to wish us safe travels home. It was a special day, and I sincerely thank all who attended.

Hon Mark Burton, the Minister of Justice and Treaty of Waitangi Negotiations, spoke of the enduring nature of the Treaty principles, and the need for the Crown to rebuild Treaty relationships with the *Lands* case providing the "ground rules" for doing so. Rt Hon Sir Maurice Casey and Rt Hon Sir Ivor Richardson brought alive for us the 1987 courtroom and stressed that the Court had approached its decision-making powers by standard statutory interpretation rules. Hon David Baragwanath recalled for us the litigation and credited the case as illustrating "what can be done by the judges of a society if they give true effect to their role as protectors of the rights of those whose minority position makes them vulnerable". Sir Tipene provided us with a personal insight into the events leading up to the case and the role of Ngai Tahu in this history, and Emeritus Professor Jock Brookfield spoke of the jurisprudence that the *Lands* case. Hon Judge Carrie Wainwright reflected that the *Lands* case "rescued Treaty jurisprudence from the

possibility of the 'principles' being seen as endlessly fluid and captive to a group of biased do-gooders like those of us on the Waitangi Tribunal." Associate Professor Richard Boast poignantly observed that "the core problem of the present time is Māori challenges to transfers of strategic assets not to the private sector, but rather to *other Māori*". Professor Alex Frame focused our attention on the "in the nature of a partnership" ideal, and Linda Te Aho reminded us that "if the price of relying upon the *Lands* case is to privilege the English text of the Treaty, then, that price is seen by some, to be too high". Chief Judge Joe Williams made a weather forecast predicting that "we will have another constitutional moment of 1987 magnitude within the next decade". Both he and Jim Nicholls queried who will be the new players – in Nicholls' words: the new Sian Elias and David Baragwanaths, the new Sir Ivors and Sir Maurices of our future? With many students in the audience, it was a fitting proposition. The Chief Judge's final words on the day provided a powerful message for us all. But, as on the day and here too in this book, he does not have the final word that is deserving of him. The day itself concluded with thank you speeches. The final chapter thus provides a short glimpse into the significance of the gifts presented to the participants at the Symposium.

Before turning to the mainstay of this book, certain people deserve acknowledgment. As with all occasions it takes a large team to bring an event to fruition. The Symposium and the subsequent compiling of this book were no exception. Valmai Bilsborough-York, administrative secretary at the Faculty of Law, University of Otago, deserves first mention. She was instrumental in ensuring the success of this project from word go. Dean of the Law Faculty, Professor Mark Henaghan and Associate Law Professor Andrew Geddis provided crucial early enthusiasm and fundamental support to Valmai and I. Lynda Hagen, Director of the New Zealand Law Foundation and Otago's Pro-Vice Chancellor for Humanities, Professor Alistair Fox, generously gave us financial support. Part of this money allowed us to launch a Humanities student award programme to ensure a presence of Otago students at the event. All the other divisions at Otago (Commerce, Health Sciences and Sciences) ran similar student awards illustrating Otago's commitment to understanding Treaty principles across disciplines. Nessa Lynch and Abby Suszko, two of our PhD law students, offered invaluable research and editing assistance. Thank you to the Law Faculty's 9th floor team for ensuring the success of the day: Melanie Black; Rachael Fahey; Theresa Forbes; Marie-Louise Neilsen; Denise Weatherston; and, in particular, Matt Hall, our technician, for the many hours he dedicated to this project. Thank you to the law students who volunteered on the day of Symposium: Catherine Andersen, Nicholas Eketone-Te Kanawa, Haines

Ellison, Laura Fraser, Naomi Johnstone, Pip MacDonald, Emma Peart, Marcelo Rodriguez Ferrere, Jesse Wall. To Richman Wee, Project Manager of the University of Otago Human Genome Research Project, for publishing advice; and Bernard Robertson, from LexisNexis, for granting permission to reproduce the case in appendix 3, thank you.