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ARGUING THE CASE FOR THE APPELLANTS

HON JUSTICE DAVID BARAGWANATH

I. INTRODUCTION

To protect Māori interests that had been the subject of adverse Crown conduct for a century and a half, the Council and its chairman Sir Graham Latimer sought to stop dead in its tracks the major policy of the Fourth Labour Government. That policy affected the bulk of the so-called "Crown" assets, which term begged the question of whose they actually were. It involved fifty-two per cent of the land area of the country, other assets worth some 11.8 billion dollars at that time, and 54000 staff members who were transferring to new departments as well as 5000 who had taken voluntary severance at a cost of ninety-three million dollars.

The three test cases extended from Otakou in the south, through the confiscations or "raupatu" of central New Zealand, to Woodhill north of Auckland. To the communities of Otago, both Ngāi Tahu and the descendants of the Scots settlers, as to New Zealanders generally, the importance of these events, both historically and in terms of today's New Zealand, is fundamental.[59] It is a privilege twenty years after to be invited to speak about them.

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[59] The presence of Sir Tipene O'Regan marks the dual heritage of the Ngāi Tahu *tangata whenua* and the Celtic *tangata tiriti*.

We now know that this province[60] not only introduced university education to New Zealand but, because of failure to ensure an adequate economic base for the Māori inhabitants, was founded in fundamental breach of the obligations owed to them by the Crown.[61] That makes this an especially appropriate venue to discuss the case; to do so accords with this University's statutory role, as critic and conscience of society.[62] I begin with some account of how the case appeared to me at the time and end with a comment on what seems to me to be its continuing significance.

II. BACKGROUND

The case presented formidable obstacles. First, the State-Owned Enterprises Act 1986 was open to an interpretation that would have allowed the process of assets transfer to proceed without impediment. Unelected judges will not lightly construe general language in a way that impedes the policy of the elected representatives. Secondly, the indigenous minority had not fared well before the courts of this country. *Wallis v Solicitor-General* had met with derision in an unprecedented protest by the bench and bar of New Zealand.[63] And *Nireaha Tamaki v Baker*,[64] in which they had had success in the Privy Council, had been overturned by Act of Parliament.[65] The wartime decision *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*[66] did not bode well for recourse even to the Privy Council in the unlikely event, the Māori Council lacking funds, that means could be found for approaching it. Moreover, as counsel for the Crown in *Keepa v Inspector of Fisheries*,[67] which by effectively following *Waipapakura v Hempton*[68] applied the excoriated judgment of Prendergast CJ in *Wi Parata v Bishop of Wellington*,[69] I had been party to the familiar juridical process of reading

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[60] Where I was born and brought up.

[61] Waitangi Tribunal, *The Ngāi Tahu Report 1991 Vol 2* (Wai 27, 1991), 281.

[62] Education Act 1989, s 162(4)(a).

[63] (1902-03) NZPCC 730.

[64] (1901) NZPCC 371.

[65] Native Land Act 1909. See A Frame, *Salmond: Southern Jurist* (Wellington: Victoria University Press, 1995), 111-115.

[66] [1941] NZLR 590, [1941] AC 308.

[67] [1965] NZLR 322.

[68] (1914) 33 NZLR 1065 (cited in argument although not in the judgment).

[69] (1877) 3 NZ Jur (NS) 72.

down clear language favouring Māori rights.[70]

Yet on 29 June 1987 the full Court of Appeal unanimously declared that the proposed wholesale transfer of assets to State enterprises, without establishing any system to consider in relation to particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi, would be unlawful. That is law-speak for a prohibition of threatened Crown conduct. How did that happen? And what is its significance? You have heard the judges' story. This is my perception as counsel.

III. MY PERCEPTION

Undoubtedly, as Sir Ivor put it, "For its part the Crown [in 1840] sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees".[71] But up until the *Lands* case those guarantees had been of little avail to Māori. In the week of Monday 8 December 1986 I was in the far north before the Waitangi Tribunal at Te Reo Mihi marae, Te Hapūa, on the Parengarenga Harbour appearing on behalf of the Muriwhenua Fisheries claimants. It proved to be tumultuous.

Because of their rich fishing resources and sophisticated techniques that astounded the French explorers, the five tribes of the Aupouri Peninsula had once been the wealthiest in New Zealand. Despite the Treaty promise of protection of their lands, estates, forests and fisheries for as long as they might wish to retain them, they saw the last vestiges of their commercial fishing rights being expropriated by the ultimate in a series of governmental policies. Indeed two days later the Tribunal was to issue a memorandum to try to stop another major Government policy – the privatisation of the fish resource by the issue of Individual Transferable Quota. But that important process had to be deferred because of more compelling business.

The *Lands* case has several true parents in addition to the claimants in the three test cases. The first was Dame Whina Cooper, the matriarch forever associated with the land march, of whom more shortly. The second was the Hon Matiu Rata, whose genius invented the Waitangi Tribunal which as a purely advisory body seemed an innocuous response to the land march. But Matiu knew that it would be enough to provide a forum: once the true facts were drawn to public attention the

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[70] It may be contrasted with the later decision *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641 which demolished *Waipapakura v Hempton*.

[71] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 673 (commonly referred to as the *Lands* case).

basic decency of New Zealanders would do the rest. He was right.[72]

The third, Nganeko Minhinnick, has received little public attention. But this quietly spoken, formidably intelligent woman had been the impetus behind the *Manukau* Tribunal claim[73] to which Sian Elias (now Dame Sian, Chief Justice) and David V Williams (now Dr and Professor) lent their support. It was she who drew attention to the fact that on 30 September 1986, the Deputy Prime Minister, the Rt Hon Geoffrey Palmer, had introduced the State-Owned Enterprises Bill. The Bill was about to pass to a third reading. Fortuitously the Tribunal was sitting. I invited it to intervene.

The consequences of assets passing from the Crown, with which Māori had its Treaty compact, to state-owned enterprises with the objective of operating as a successful business as efficient as ones not owned by the Crown, and having the power to sell off its assets to the private sector, were both obvious and inevitable. The Crown was about to deprive itself of the capacity to honour by return of disputed assets the manifold breaches of its Treaty obligations. They would pass into the hands of third parties and be irrecoverable.

The Monday was spent arguing the point and later that day the six distinguished members of the Tribunal[74] put their names to a bold and farsighted Interim Report on the State-Owned Enterprises Bill, written by Judge Durie in his minute and impeccable hand and addressed to the Minister of Māori Affairs. The Tribunal, aptly named by Ngāi Tahu's silk (later Justice) Paul Temm "the Conscience of the Nation", is certainly a parent of the *Lands* case.

That was on 8 December. Three days later the Government Administration Committee of the House foreshadowed changes to the Bill which was enacted on 18 December with new sections 9 and 27 incorporated. They were the focus of argument before the Court of Appeal. The first provided:

> **9. Treaty of Waitangi** – Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

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[72] He told me that his reason for instructing me was my role for the Crown in *Keepa v Inspector of Fisheries* [1965] NZLR 322. My reaction was mixed.

[73] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manakau Claim* (Wai 8, 1985).

[74] Chief Judge (later Justice) Durie, Georgina Te Heuheu (later MP and Cabinet Minister), Monita (later Sir Monita) Delamere, William Wilson (now Judge of the Court of Appeal), Professor Keith Sorrenson and Bishop Bennett.

The second dealt in some detail with Māori land claims.

Over a very unhappy Christmas the State–Owned Enterprises Bill receded from sight. Of more immediate concern was the decision of the Director-General of the Ministry of Agriculture and Fisheries in defiance of the Tribunal's advice to proceed to privatise most of the commercial fisheries.[75] But in February we were spurred into further action. One weekend I found on my desk a note from Sian that Nganeko was unhappy with the form of the legislation and would I please have a hard look at it? Tainui, of which hers was a sub tribe, had been a major victim of the raupatu – the confiscations after the land wars. I examined the new sections and realised that section 27 drew a distinction between cases where a Tribunal claim had been submitted before 18 December, where transfer to a state-owned enterprise was prohibited, and other cases where findings were made by the Waitangi Tribunal, in which event the Governor-General in Council was empowered to resume the land *but only if it was still held by the state–owned enterprise.* So there was no safeguard in relation to land already disposed of by the state-owned enterprise before the Tribunal finding or in relation to assets other than land. The result later that day was a council of war attended by Bob (later Sir Robert) Mahuta on behalf of Te Arikinui. A letter to the Solicitor-General, Paul Neazor QC, was followed by his oral undertaking by telephone that assets claimed by Tainui would not be subjected to the State–Owned Enterprises Act. Paul's credit was (as it remains) such that his unwritten assurance was accepted and no proceedings were ever issued by Tainui on that topic.[76]

But of course the Crown soon appreciated that similar undertakings to other tribes would deprive the State-Owned Enterprises Act of its intended effect. So they were declined. With the large-scale transfers of assets due to take place at midnight on 31 March 1987 there was need for urgent action. We met with the Chairman of the New Zealand Māori Council Sir Graham Latimer to discuss what might be done. We did not want to meet an argument as to standing, which was much more of a problem in those days – that the functions of the Māori Council did not extend to impeding fundamental Government policy. And so Sir Graham made the bold decision to put on the line his and his family's personal security by becoming a plaintiff and exposing himself to both costs and potential liability on an undertaking as to damages. If the claim failed he could face bankruptcy. But he gave instructions for the issue of proceedings in his name as well as that of the Council. His

[75] There followed a long painful process of claw-back of the fisheries resource.

[76] Written confirmation took about a year to come through.

courage and determination is an outstanding feature of the case.

IV. PREPARATION FOR TRIAL

The next task was to get the case together. Heron J made an order giving protection until 5 pm on 31 March and Sir Robin Cooke, President of the Court of Appeal, extended it until trial. At a directions hearing a tight timetable was imposed. We were required to nominate three test cases. While Otakou was an obvious choice I could not understand why Sian wanted the Woodhill Forest included; it seemed to turn on its own facts. And where Sian thought the raupatu was too crudely obvious to warrant inclusion I saw a need for its brutal directness. After much debate all three were selected as representing a broad spectrum of examples. We later agreed that each had been needed to illustrate the range and enormity of the Crown conduct.

An afterthought at the directions hearing led to the oral formulation and debate of an interrogatory which we were granted leave to require the Crown to answer. It was in the following terms:

> Did the Crown establish any and if so what system to consider in relation to each asset passing to a State-owned enterprise whether any claim by Māori claimants in breach of the Treaty of Waitangi existed?

The negative answer proved vital to the decision.

The task of assembling affidavits and literature was immense. It would be invidious to identify only some of those who helped and of those who made affidavits. The President's judgment lists the names of the latter. But exceptions must be made among the former for the late Martin Dawson, who quite literally carried that part of the case, and Denese Henare who not only acted under the aegis of her late uncle[77] in Ngati Hine's special relationship with the Kingitanga, but added her legal skills and unlimited devotion to remedying the wrongs of the past. Among the latter, the late Dame Whina Cooper.

It was Whina's part in the land march that had captured public imagination and allowed Matiu Rata to get the Treaty of Waitangi Act 1975 on the statute book. Pauline Kingi brought her in to make her affidavit. Offers of help were declined; after a dictaphone was set running I was shooed out of the room. What Whina declaimed became her affidavit without amendment. It proved pivotal.

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[77] Sir James Henare, himself a deponent in the *Lands* case.

V. THE HEARING

By Day Three of the hearing before the five judges there was much apprehension among the great number of Māori who had taken over the Number One Court of Appeal. Unprecedented waiata each morning had certainly changed the normal atmosphere. But even the English newspapers were reporting the President's displeasure at my taking two full days to get through a century of New Zealand history; he wished to get to the point. The morning of Day Three was no better.

At lunchtime I was summoned by Dame Whina. She presented me with a photograph which contained in the foreground some unattractive mud flats, in the middle ground some nondescript foliage, and in the background a less than exciting landscape. I puzzled over it as we returned to court. Then the penny dropped. I handed the photograph to the crier to pass up to the President and said "to a European eye..." and gave the description I have just recounted and added "But this is what this land means to Dame Whina".

I began to read her affidavit. By the end of the first paragraph the President's familiar handkerchief was out. As it continued his emotion became evident. By the end of the affidavit Dame Whina had taken the case from his head to his heart and we had captured him. His colleagues agreed. The judgments included themes of partnership between the races (Cooke P), good faith (Richardson J), being fair to one another, and acting honourably (Casey J).

There followed the negotiations that gave rise to section 27B of the State-Owned Enterprises Act which placed a memorial on all titles to state-owned enterprise land so that whoever deals with the state-owned enterprise knows it is subject to a special regime. Any claim by Māori to the Waitangi Tribunal is dealt with without consideration of any purchaser's interest. A recommendation by the Waitangi Tribunal that the land be restored to the claimant has the force of law. There was also a collateral undertaking by the Crown, of which sight may have been lost, as to the continued resourcing of the Waitangi Tribunal.

Time does not permit discussion of the Crown reaction that required first the *Forests* case[78] to be brought to the Court of Appeal pursuant to leave to apply that the Court had astutely reserved;[79] and then the *Coal* case,[80] which vindicated Tainui's claim to an interest in the

[78] [1989] 2 NZLR 142.

[79] The results included the Crown Forest Assets Trust which proved a useful fund to finance Tribunal claims.

[80] [1989] 2 NZLR 513.

coal under its land. Nor it is my role to discuss the extraordinary aftermath in terms of legislative, executive, and judicial responses, one of which was the recognition of a treaty claim by a Dutch New Zealander *against* Māori,[81] bearing out Sir Maurice's point that the Treaty cuts two ways.

But why did all five judges, some by disposition more and others less conservative, unanimously go that way, cutting loose from the colonial jurisprudence since *Wi Parata* and realising the Māori dream of giving more than lip service to the words of the Treaty?

VI. APPRAISAL OF THE DECISION

It is greatly to the credit of Sir Geoffrey Palmer that he caused section 9 to be enacted. By providing the Court of Appeal with a statement of Parliamentary policy which its members were able use as the linchpin of their judgments he is in a real sense yet another parent of the *Lands* case. But why did the Court of Appeal choose to adopt the construction advanced by the plaintiffs rather than an obvious alternative?

On past form of the New Zealand courts it would have been easy for that Court to have accepted the simple and logically impeccable arguments of the Solicitor-General and David Williams QC for the Crown that could be summarised in the maxim *generalia specialibus non derogant*: given the specific language of section 27, the general concept of section 9 must be read down to give effect to the evident intent of Parliament. As to that Sir Robin Cooke said:

> What is now our responsibility is to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty... Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter. That would be unhappily and unacceptably reminiscent of a attitude, now past, that the Treaty itself is of no true value to the Māori people.[82]

My view is that in this case we experienced in New Zealand the phenomenon seen in *Somerset's Case*,[83] where the Scot Lord Mansfield, acutely aware of the economic consequences which he had previously found daunting, placed the interests of justice ahead of those of

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[81] *Kruithof v Thames District Council* [2005] NZRMA 1.

[82] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 660-661.

[83] (1772) 20 St Tr 1.

expediency and freed the slave; and in *Brown v Board of Education of Topeka*[84] where the US Supreme Court outlawed the apartheid that had been a feature of that society from the earliest times.[85] Put simply, they saw a great injustice and used their authority to meet it. Was that course legitimate? And what is its significance?

VII. THE LEGITIMACY AND SIGNIFICANCE OF THE DECISION

The whole of the common law has been created by the judges over the centuries in response to the needs of their society. The great cases exhibit a bigness of spirit and vision that society, once educated in the issues, accepts for that reason. By the judge-made concept of aboriginal title, employed for example, in *Oyekan v Adele*,[86] the Privy Council converted indigenous custom into property rights actionable under colonial law. An early New Zealand decision at first instance had adopted US authority to similar effect: *R v Symonds*.[87]

Indeed, as later appeared in some of the *Radio Frequencies* cases[88] where section 9 was not available, in principle there should actually have been no need for section 9. It is a rule of the common law that the judiciary will presume that legislation is to be construed in conformity with the treaty obligations assumed by the Executive on behalf of the state. So there was always available the more direct route employed by the Court of Appeal in *Tavita v Minister of Immigration*,[89] which was one of the arguments we advanced in the *Lands* case.

The Executive, being answerable to the electorate every three years, will inevitably have to be sensitive to the apparent voice of the majority as expressed in opinion polls. But as Cardozo once observed[90] that can operate not only as vox dei, the voice of God, but as the voice of the herd; what Toqueville[91] called the tyranny of the majority. Judges, as

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[84] 349 US 294 (1954).

[85] For another view see A Butler "Taking the Treaty Seriously" in *Leading Cases of the Twentieth Century* (Dublin: Round Hall Sweet & Maxwell, 2000), 404.

[86] [1957] 1 876, [1957] 2 All ER 785. See also *Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

[87] (1847) NZPCC 387. Endorsed in *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

[88] *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129.

[89] [1994] 2 NZLR 357.

[90] BN Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press,1975), 175.

[91] A Tocqueville, *Democracy in America* (New York: Knopf, 1953), 262.

Cardozo also pointed out,[92] have the same propensity for prejudice as others. They also have advantages. That is not because of greater wisdom; most jury trials provide the judge with a feeling of comfort that the decision is in better hands than one's own. But they have the benefit of focussed evidence subjected to cross-examination; argument from the opposing sides; and in an important case, both historical and comparative perspectives. The established principles of law which guide them incorporate a solid moral base.[93] Their security of tenure, given for that very reason, gives them the capacity and duty to stand for what is right. And they are obliged by a process of open justice to give reasons that will satisfy not only the parties – especially the losing party, but also fair-minded critics in the wider community, and their peers in New Zealand and elsewhere. The educative effect of the *Lands* judgment was immense and contributed greatly to public acceptance of their result.

Four centuries before the *Lands* case Sir Edward Coke in *Calvin's Case*[94] had imposed on the Crown duty to protect its subjects reciprocal to their obligation of allegiance. The third Article of the Treaty conferred on Māori all rights as British subjects, which include the right of protection of their legitimate interests. That is reciprocal to the duty not only to refrain from treason, breach of which took "Lord Hawhaw" to the gallows,[95] but to defend the state in time of war. The Māori contribution to that is unsurpassed.

Under our system the judges must defer to the clearly expressed will of Parliament, whose elected legitimacy coupled with access to resources makes it definitive. But very clear language is required to override such basic principles of the common law as that of protection. In an address to this University two decades ago I suggested:

> The process is like that of a spring: as the Crown attempts to depress the court's powers of control of constitutional balance the courts' resistance increases progressively...[96]

That process was made explicit by the House of Lords in two subsequent judgments: *Pierson v Secretary of State for the Home*

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[92] BN Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1975), 167.

[93] *R v Bridger* [2003] 1 NZLR 636 (CA) at [42].

[94] (1609) 7 Co Rep 1a.

[95] *Joyce v DPP* [1946] AC 347.

[96] D Baragwanath, 'The Dynamics of the Common Law' (1987) 5 Otago L Rev 355, 367.

Department[97] and *R v Secretary of State for the Home Department ex p Simms*[98] and has been applied by it in a number of others.[99]

The *Lands* case showed that our courts too can contribute towards the just society that other pressures tend to imperil. That case received international acclaim, including the citations in Lord Cooke's Oxford and Cambridge doctorates. That is because it illustrated 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.

The reality is not only that we should never have needed Sir Geoffrey's section 9 of the State-Owned Enterprises Act; the same is the case with his important New Zealand Bill of Rights Act 1990. As the Legislation Advisory Committee Guidelines demonstrate,[100] each of the BORA principles is in fact to be found in the antecedent common law. Important among the principles of the common law is that of equality.[101] South Africa, Canada, Zimbabwe and England have adopted the strong European requirement of proportionality, rather than the thin formula of *Wednesbury*, as a protection of the basic rights for which New Zealand has traditionally stood.[102] These include those[103] expressed in the international conventions to which we have acceded. It is difficult to see that a lower standard could be appropriate for basic Treaty rights.

It is not too difficult to discern what common decency requires. But

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[97] [1998] AC 539.

[98] [2000] 2 AC 115.

[99] In *A v Secretary of State for the Home Office* [2005] 2 AC 68 the House of Lords applied principles of non-discrimination to strike down the Home Secretary's order of derogation from article 5 of the European Convention, made as a response to 9/11, because it breached the UK's international human rights treaty obligations to treat equally before the law all individuals within its territory. Likewise in *R (Limbuela) v Home Secretary* [2006] 1 AC 396 it found that asylum seekers were entitled to a minimum standard of protection by the Crown that would avoid a condition that was inhuman or degrading. Most recently in *A v Secretary of State for the Home Office (No 2)* [2006] 2 AC 221 the House of Lords has eschewed the use of evidence obtained by torture, even though recognising that the Executive is unable in its sphere to adopt such standards.

[100] Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (2001), 45ff.

[101] In a forthcoming work Professor Taggart draws attention to *Constantine v Imperial London Hotels* [1944] 1 KB 693 which anticipated the Race Relations legislation. Its theme is continued in *R (European Human Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees Intervening)* [2005] 2 AC 1.

[102] See *Huang v Home Secretary* [2007] 2 WLR 581 (HL) at 19 per Lord Bingham.

[103] Such as the right to family life: see *Tavita v Minister of Immigration* [1994] 2 NZLR 357.

it is necessary always to recall Herbert Butterfield's insight: the very notion of "progress" is suspect; there is no a priori reason why what our generation of decision-makers is doing is superior to that of our ancestors.[104] We are capable of the very kinds of abuse of power for which we criticise our predecessors.

Despite the *Lands* case and more recently *Ngāti Apa*,[105] we judges have not kept the common law up to the mark, as has been seen in our failures in relation to women, children and minorities. That is why Parliament has too often had to intervene.

Any comment by a judge on the work of the legislature must conform with the convention of courtesy to other limbs of government.[106] The judiciary may however draw to the attention of Parliament for its consideration concerns of which they become aware. It may therefore be noted that sections 37-8 of the Foreshore and Seabed Act 2004, which deprive Māori with property rights of an independent forum to assess compensation, are of the same character as provisions rejected the previous year by the Constitutional Court of South Africa.[107]

The distinguished sometime Mainlander Karl Popper argued in his *Open Society and its Enemies*[108] that the raison d'être of the state is to ensure justice: that the strong do not bully the weak. That protection of basic decencies is the role both of Parliament and of the Court, even without the presence of a solemn treaty. It may be expressed as ensuring respect for the dignity and distinctiveness of those who do not control the levers of power, and especially minorities.

That is what the Court of Appeal did in *Lands* case. The Māori people were shown that the Court can and will recognise their dignity and distinctiveness and thereby do justice; that the Treaty promise that they should enjoy the rights of British subjects under the rule of law is not a meaningless formula imposed by a colonial power in the knowledge that it would be ignored, but a commitment that will be given practical effect by our highest institutions; that Māori have the

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[104] Expressed in H Butterfield, *The Whig Interpretation of History* (1931) and summarised by P Watson *A Terrible Beauty-The People and Ideas That Shaped The Modern Mind* (Weidenfeld and Nicolson, 2001), 254.

[105] *Attorney-General v Ngāti Apa* [2003] 2 NZLR 643 which rectified the plain injustice of *Re the 90 Mile Beach* [1963] NZLR 461.

[106] See for example *Cooper v Attorney-General* [1996] 3 NZLR 480, 483 and 484 and *R (O'Brien) v Independent Assessor* [2007] 2 WLR 544 at [31] per Lord Bingham.

[107] *Alexkor Ltd v Richtersveld Community* (unreported, Constitutional Court of South Africa, 14 October 2003).

[108] K Popper, *Open Society and its Enemies (Vol 1)* (London: Routledge & Kegan Paul, 1966), 111.

same right as others to the protection of the law. And by doing so the New Zealand courts showed that they had come of age.

There is reason to hope that the *Lands* case has marked a turning point. Since 1987 we have been mercifully free of the angry reactions to injustice seen in other colonising and post-colonial societies, including the USA, France, Canada and Australia. On the contrary, what may perhaps be the best evidence of increased Māori confidence in the rule of law is the advice from Chief Judge Williams of the massively increased number of choices by Māori to register as such on the electoral roll.

That increased confidence, and the example by the judges of our superior courts to others in authority in New Zealand of how they can and should respond to the challenge of human difference; mark in my view the real importance of the *Lands* case.

But we have a long way still to go. The rote repetition of the phrase "principles of the Treaty" in contexts where it made no sense demeaned the Treaty and has led to an unjustifiable overreaction against it. Wise and systematic education as to the meaning of the Treaty is essential.

What is needed is an understanding that the tangibles of the English language version of Article 2 do not capture the whole of the treaty promises: Article 2's protection of Māori taonga, not least what it means to be Māori, coupled with Article 3's full recognition as British, now New Zealand citizens. Likewise the preamble contemplated the arrival of the *tangata tiriti* and their becoming full New Zealanders.

Yet our title as *tangata tiriti* was not conferred once and for all. Whatever the legal position, our moral entitlement to be here is conditioned upon performance of the Crown's obligations to Māori. So long as Māori are marked out from other New Zealanders by adverse social statistics, the Crown, which is best seen as a useful metaphor for our system of government, will continue in breach of its obligations and its sovereignty, in Professor Brookfield's vivid term, will continue to limp.

The symptoms of the continuing breach are seen in the courts, the health systems and elsewhere - above all in education where the need for change can be articulated and actual change can most readily be made. The responsibility for dealing with it lies with all of us.[109] That you have chosen to locate this event in the heart of our education system is the best of omens for the future of the *Lands* case.

As to the future, the attitudes that informed the *Lands* decision may

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[109] In an address "Ngakia Kia Puawai: The Treaty and the Police" (Nelson 8 November 2005) I tried to identify the reasons for the continuing blight of Māori disadvantage and its concomitant adverse social statistics, and possible remedies.

serve as a marker for a greater initiative. In his address upon receiving the *Alliance of Civilisations* report Kofi Annan spoke of another treaty – concluded between the Indo-European Hittite and the Egyptian empires after the bloody battle of Kadesh in 1279 BC:

> Ending decades of mistrust and warfare, this treaty was a milestone of its era. It reached far beyond mere cessation of hostilities, committing both sides to mutual assistance and co-operation. It was, in fact, the literal embodiment of an alliance between two great civilisations....I hope we can all be inspired by this ancient pact to build our own Alliance between civilisations, cultures, faiths and communities.[110]

As our international peacekeepers, many of them Māori, know so well, we are confronted not only with our local problems but those of a troubled world. An example of steady, sensitive, fair and decent treatment of our own indigenous people may be the greatest contribution we can make to bridging international divides of culture and of race.

[110] *Address upon receiving Alliance of Civilisations Report*, Istanbul 13 November 2006 www.unaoc.org *Le Monde Diplomatique* Février 2007, 32.