MAORI IN THE NEW ZEALAND COURT OF APPEAL UNDER LORD COOKE

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It is almost ten years to the day since the decision of the High Court in the first of the great *Maori Council*[1] cases. Among other things, the High Court ordered that the substantive proceedings be removed into the Court of Appeal to be dealt with in that Court. Over the period since then there has been an epic series of Court of Appeal decisions on matters Maori. Those decisions have grappled with Maori claims to such fundamental issues as lands, rivers, forests, coal, fisheries, and language - all rightly regarded by Maori as taonga (treasures or things to be valued). The main reported judgments total ten in number and include -

New Zealand Maori Council v. Attorney-General[1] (lands);

New Zealand Maori Council v. Attorney-General[2] (forestry assets);

Tainui Maori Trust Board v. Attorney-General[3] (coal mining rights);

Environmental Defence Society v. Mangonui County Council[4] (planning and resourcemanagement);

Te Runanga o Muriwhenua v. Attorney-General[5] (fisheries);

New Zealand Maori Council v. Attorney-General[6] (broadcasting and Maori languagerights);

Te Rununga o Wharekauri Rekohu v. Attorney-General[7] (Maori fishing rights);

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1 [1987] 1 NZLR 641

2 [1989] 2 NZLR 142

3 [1989] 2 NZLR 513

4 [1989] 3 NZLR 257

5 [1990] 2 NZLR 641

6 [1992] 2 NZLR 376

Te Runanganui o Te Ika Whenua v. Attorney-General[8] (rivers and water rights);

Ngai Tahu Maori Trust Board v. Director-General of Conservation[9] (fisheries);

Te Runanga o Muriwhenua & Ors v. Treaty of Waitangi Fisheries Commission & Ors[10] (fisheries)

These cases are some of the most important cases in recent New Zealand history. There was only one Judge who sat in all ten cases at the Court of Appeal level - and that was the then President of the Court - Lord Cooke.

As something of a late arrival in this area (not making my first appearance in the superior courts on Maori related issues until 1991, when I appeared for the intended respondent in an unsuccessful application for special leave to appeal to the Privy Council in a Maori tribal boundary dispute) my experience in this area is of necessity far more limited than that of other counsel who have appeared in this area since 1987 and earlier.[11] Nevertheless, and having lodged that caveat, my opinion is that Lord Cooke has dominated the Court of Appeal thinking in this area. Without in any way wishing to detract from the efforts of the other Judges in these cases[12], I suspect that if someone else other than Cooke had been President of the Court of Appeal over that nine or ten year period, society would

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7 [1993] 2 NZLR 301

8 [1994] 2 NZLR 20

9 [1995] 3 NZLR 353

10 [1996] 3 NZLR 10

11 I pay tribute here to David Baragwanath QC and Sian Elias QC, now Elias and Baragwanath JJ

12 (in particular, the crucial writings of Richardson, Casey and Hardie Boys JJ)

not have achieved the results that I feel it has. In other words, he was the right presiding Judge in the right place at the right time.[13]

At this point, a touch of history may be appropriate. The launching pad for this quite remarkable series of cases and the positive changes in favour of Maori rights and interests which they have wrought was I think the establishment of the Waitangi Tribunal in 1975 by the Treaty of Waitangi Act of that year. Imperfect though it may have been, it was that Act which was the starting point. It provided in its long title as follows:

> *"An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."*

The Treaty of Waitangi had been made in 1840 between the Crown and numerous Maori chiefs. It is a deceptively simple document, and contains only three articles. There are conflicting English and Maori versions of the treaty. Under the English version, Maori chiefs ceded sovereignty to the Crown, but under the Maori version it was kawanatanga (governance) which they ceded, reserving to themselves te tino rangatiratanga (chieftainship) over their lands and all their other resources. Two points may be noted. First, there is a clear tension I think between the concepts of kawanatanga given away and tino rangatiratanga reserved. Secondly, kawanatanga is something less than sovereignty. The concept of sovereignty as understood in English law was unknown to Maori in 1840.

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[13] I note in passing that in most (6 out of the 10 cases of the Court I have listed), it was Cooke P who delivered the unanimous judgment of the Court - in 1989, 1990, 1992, 1993, 1995 and 1996. The 4 cases where individual judgments were delivered were in 1987, 1989 (2) and in 1992.

Initially, it might be noted, the Tribunal was restricted in its jurisdiction and had comparatively limited powers of inquiry. It was not until the passing of the Treaty of Waitangi Amendment Act in 1985 when the jurisdiction of the Tribunal was extended that the Tribunal really came into its own. It was only then that it was allowed to consider historic grievances and examine enactments, policy or practice or conduct by or on behalf of the Crown at any time back as far as 6 February 1840 (when the first signatures to the Treaty were collected). Over the years since 1985, the Tribunal has exerted considerable influence on political and public attitudes to historic Maori grievances, and on the meaning, intent and spirit of the Treaty itself.[14]

Even though the Treaty lacks entrenchment and has not been incorporated into New Zealand municipal law, there is now a sizeable body of legislation which specifically refers to it in various fields - including fishing, conservation, the environment, resource management and, of course, state owned enterprises. All of this legislation (other than the Treaty of Waitangi Act 1975 itself) has been passed from the 1980s onwards. Various statutory formulae have been used in reference to the Treaty or Treaty principles.

Perhaps the most demanding in terms of Treaty obligations placed on the Crown is found in s.9 of the State-Owned Enterprises Act 1986. That reads as follows:

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

Only slightly less demanding, if at all, in my view, is s.4 of the Conservation Act 1987 which reads as follows:

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[14] It is, however, important to note that the Treaty of Waitangi Act 1975 does not in terms adopt any part of the Treaty into domestic law. Added to which, of course, the powers of the Tribunal are in the main recommendatory only, with power to recommend to the Crown what steps should be taken to remedy or redress wrongs where a claim before the Tribunal is upheld.

> *"This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi."*

Over more recent times there seems to have been something of a Parliamentary retreat from the use of such language. Section 8 of the Resource Management Act 1991 may be regarded as typical of more recent legislative formulae used where the principles of the Treaty are referred to. Section 8 of that Act provides as follows:

> *"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."*

What the legislators meant by the phrase *"the principles of the Treaty"* was never defined. Perhaps they did not know. In any event, it was left to the Courts to say what it covered. And it has provided fertile legislative fields for the Court of Appeal to plough. Most of the cases I have mentioned have dealt with its meaning and application.

The first of those cases is, of course, the *New Zealand Maori Council* case of 1987[1]. That case had its genesis in s.9 of the State-Owned Enterprises Act 1986. In one sense it involved a matter of ordinary statutory interpretation as to what was the effect of s.9 on the Crown's obligations when disposing of state owned enterprises. Yet despite that, Lord Cooke confidently (and correctly, I suggest) proclaimed the case:

> *"as important for the future of our country as any that has come before a New Zealand Court."*[15]

The judgment of the President of the Court is vintage Cooke. It reflects his drive for simplicity, his acute "feel" for the interests of those who will be affected by the actions of the Crown, an awareness of the need not to go further in his decision than the occasion warrants, coupled with a lucidity of reasoning and language which we should all strive to emulate.

Lord Cooke used strong language, and gave the issues an expansive treatment. He said that the Act should not be approached with the austerity of tabulated legalism. A broad, unquibbling and practical interpretation was demanded. He accepted that the

> *"Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty."*[16]

In a bold move he said that

> *"The differences between the texts and shades of meaning do not matter for the purposes of the case. What matters is the spirit."*[17]

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15 ibid; at 651

16 ibid; at 656

17 ibid; at 663

From there he went on to describe the Treaty as signifying *"a partnership between races"*[18] (I should interpolate that that description of the Treaty caught the imagination of New Zealand society perhaps more than any other phrase in any of the five judgments which were delivered in that case. His description has been used time and time again in other cases since.)

Lord Cooke then developed the notion of a partnership between races as requiring the Crown to act reasonably and *"with the utmost good faith"*[19] with *"the duty of the Crown being not merely passive but extending to active protection of Maori people in their use of their lands and waters to the fullest extent practicable"*[19]. Perhaps expressing the concept slightly differently, he accepted the submission that the relationship between the Treaty partners created *"responsibilities analogous to fiduciary duties"*[19].

Interestingly, Lord Cooke in 1987 did not see any duty of general consultation with Maori as part of the Crown's obligations under the Treaty. He said that:

> *"In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty."*[20]

Yet, over the years since then, one of the major complaints of Maori in subsequent litigation (used quite effectively I think) has been an allegation of failure by the

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18 ibid; at 664

19 ibid; at 664

20 ibid; at 665

Crown to consult properly with Maori interests. The tendency now is for the Crown to go to inordinate lengths to show that it has consulted (although whether it has done so properly in any given case can still be a matter of debate).

I am sure that once the consultation proposition is redefined with more specificity, the concerns of Lord Cooke could be allayed. In any event, it is difficult to see how the principles of the Treaty can be applied without (very often, broad based) consultation.

(A point worth noting was the recognition by Lord Cooke in the 1987 *Maori Council* case of the great value of the work of the Waitangi Tribunal[21], a message which the Court was to come back to and endorse in *Te Runanga o Muriwhenua* in 1990.[22])

The two concepts of partnership and fiduciary duty identified by Lord Cooke in the Treaty in that first *New Zealand Maori Council* case were to provide the building blocks for much of the subsequent Maori driven litigation in the Court of Appeal during Lord Cooke's time as President. For that reason, I have taken some little time to note what I regard as the key features of his judgment in that case.

Unfortunately I do not have time to analyse all the Court of Appeal decisions which I have cited. There is, however, one further decision of the Court of Appeal which I do mention in a little more detail because it represents something of a high water mark so far as the Court of Appeal's consideration of Maori issues was concerned. The decision is, of course, *Ngai Tahu Maori Trust Board v. Director-General of Conservation*[23]. A company owned by Ngai Tahu interests had since

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21 ibid; at 661-662

22 [1990] 2 NZLR 641 at 652 and 654

23 See fn.9

1988 held a permit granted by the Director-General of Conservation to engage in whale watching off the coast of Kaikoura in the South Island of New Zealand. Subsequently the Director-General indicated that he proposed to issue a permit for the same purpose to another company. Ngai Tahu interests claimed that they were entitled to protection from competition at least for a period of years on the basis of the principles of the Treaty. Ngai Tahu were largely unsuccessful in their case before the High Court. An appeal was made to the Court of Appeal and in a unanimous judgment of the Court delivered by Lord Cooke the appeal was allowed. The Court of Appeal noted that commercial whale watching was a very recent enterprise founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the Treaty. It did, however, acknowledge that

> *"A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests ... although a commercial whale-watching business is not taonga or the enjoyment of a fishery within the contemplation of the Treaty, certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise the Treaty principles are relevant. Such issues are not to be approached narrowly ... a residual factor of weight must be the Treaty duty to recognise the special interests that Ngai Tahu have developed in the use of these coastal waters. A period of complete protection sufficient to justify the development expenditure incurred by Ngai Tahu may be part-and-parcel of this. In altogether rejecting protection of Ngai Tahu interests as a relevant factor, and in confining Treaty principles to an empty obligation to consult, the argument for the Director-General goes too far ..."*[24]

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[24] ibid; at 560

In the result, the Court ordered that the Director-General of Conservation should take into account, among the factors relevant to whether or not he should grant any further permit for commercial whale watching off the Kaikoura coast, the

> *"... protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles ..."*[25]

This case illustrates in a striking way the effect of these decisions of the Court of Appeal in Maori based cases - particularly in the context of sea fisheries. Once the Treaty is accepted as a living instrument, it has to be applied in a way which takes into account the realities of life in New Zealand today. Quite apart from the Ngai Tahu Whale Watch decision, the other decisions of the Court of Appeal in connection with sea fisheries under the presidency of Lord Cooke have obliged the Government to provide for Maori a reasonable share of our national fishing resources. And in the very recent and controversial Whanganui fisheries case (*Taranaki Fish & Game Council v. McRitchie*, Wanganui District Court, decision dated 27 February 1997) Becroft DCJ relied heavily on dicta of Cooke P from these cases in reaching the decision that he did (namely, that Maori fishing rights included species introduced after the Treaty was signed). A proposition which (to this commentator at least) seems unremarkable now, but 10 to 15 years ago would have seemed complete heresy.

An analysis of these judgments of Lord Cooke suggests (I respectfully submit):

A striking consistency of approach.

A reluctance to analyse or even try to analyse the precise legal nature of the Treaty in domestic law in the absence of its recognition by statute.

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[25] ibid; at 561

A recognition that the Treaty is a living concept to be broadly interpreted and applied, and able to adapt and apply to current conditions by analogy from well established concepts.

A revitalisation of the common law concept of aboriginal title and its recognition where appropriate in New Zealand, even in the 1980s and 1990s.

A recognition that there are profound jurisprudential questions relating to the Treaty which the Courts have not yet needed to answer (and which hopefully they never will).

A recognition of the good work done in connection with Treaty based issues by the Waitangi Tribunal.

I predict that as a result of these Court of Appeal decisions, before too long the Courts generally will accept that where Maori values are involved in litigation, any relevant legislation is to be interpreted having regard to the principles of the Treaty, so that those principles will always be taken into account, unless Parliament legislates to the contrary. (And surely it would never venture to do so - such would be contrary to the honour of the Crown.) In that way, even if not part of the domestic law, and not directly enforceable except to the extent it is made so by statute, the Treaty's position as our founding document would be enhanced. Few have ever seriously suggested the Crown was not under an obligation to have regard to the Treaty, even though that duty may not have been justiciable.[26] In the present climate, and having regard to the way matters have developed in the last ten years or so, what I predict is not a difficult step to take[27].

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26 Even Prendergast CJ in *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 did not go that far. Note, e.g. at 78-79 of his judgment

27 Chilwell J in *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188 has already

It would be one part only of a profound constitutional readjustment and re-orientation between Crown and Maori which in my view is currently under way.

And in all of this it has been Lord Cooke who has been at the forefront. At the end of the day, I think that of his many contributions to the law, his most significant may well be seen as his enormous contribution to Maori and Treaty based cases. Some years ago a common Maori catch cry was that the Treaty was a fraud. We no longer hear that call any more. The call by Maori these days is to honour the Treaty. Although there are obviously other important contributors to that change of perception, including the Legislature and the Waitangi Tribunal, undoubtedly the Court of Appeal under the presidency of Lord Cooke has been at the forefront of the shift.

It may be of some significance that when he retired from the presidency of the Court of Appeal in 1996, Lord Cooke gave a piece of sculpture to the Court. That sculpture depicts, I understand, two hands (one European and the other in the traditional stylised Maori three-finger form - ringa whakairo) with their fingertips meeting together as if in prayer over a representation of the Treaty.

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led the way.

In that case (which predated the series of Court of Appeal decision under discussion in this paper) Chilwell J held (at 210/23-42) that although the Treaty did not give rights enforceable in the courts by virtue of the Treaty itself:

> *"There can be no doubt the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges on its principles is to be interpreted ..."*

As a result, he held that Maori values were relevant considerations under the Water and Soil Conservation Act 1967, despite their not being mentioned in the statute.