THE HARKNESS HENRY LECTURE:

THE CHALLENGE OF TREATY OF WAITANGI JURISPRUDENCE

BY THE RT HON SIR ROBIN COOKE*

Tena koutou, tena koutou, tena koutou katoa.

The privilege of delivering a Harkness Henry lecture has been awaiting for some years. Harkness Henry and Co and the Law School are both to be congratulated on the fact that these lectures have become an established element in the New Zealand legal scene. This is a year in which I am particularly glad to speak because it is a pivotal year in the development of the University and the Law School. The regretted retirement of the Vice-Chancellor, Professor Wilfred Malcolm, is to be matched by the welcome advent of a distinguished New Zealander and Oxford law don, Mr Bryan Gould. The regretted retirement as Dean of Professor Margaret Wilson is to be matched by the welcome advent of the retiring Chief Human Rights Commissioner, Margaret Mulgan. Professor Peter Spiller assumes a Chair, as in my view is fitting for one who is becoming *inter alia* the historian of the New Zealand Court of Appeal. And the first degrees in law have been conferred by the University.

My brother Gault gave the inaugural Harkness Henry lecture in 1992, taking as his theme "The Development of a New Zealand Jurisprudence", which was appropriate for a Court of Appeal judge, particularly for one who had just joined the Court. He told me that he was received with lively interest and was asked many questions not arising out of his address. I cannot tell what unexpected questions may be asked this evening; indeed, if I could, they would of course not be unexpected. Last year Sir Thomas Eichelbaum gave the lecture, speaking on "The New Zealand Court Structure, Past, Present and Future", which was appropriate for the Chief Justice. When accepting this year's invitation it seemed manifest, in the light of this University's special devotion to biculturalism, that the appropriate subject was Treaty of Waitangi jurisprudence.

At overseas legal conferences, and sometimes in New Zealand itself, I have found that persons interested in the rights of indigenous peoples have

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wished to have copies of the decisions of the Court of Appeal in recent years relating to the Treaty and legislation concerning it. This led me to arrange to be compiled a booklet containing full copies of the complete line of the Court of Appeal judgments, both reported and unreported, up to December 1993. Hoping that members of this University may find some advantage in access to a convenient compilation, and trusting that no infringement of copyright is being committed, I will present a copy to your Library, with such licence as I can give to reproduce it if desired. My plan this evening is mainly to take you on a sort of guided tour of the cases from the point of view of a participant, and to end with some reflections about the future.

There are few nineteenth and early twentieth century New Zealand judicial decisions of enduring interest. Such as there are fall mainly in the field of the Treaty and legislation bearing on settler-Māori-Crown issues.

The judgments of H S Chapman J and Martin CJ in *The Queen v Symonds*[1] in 1847 remain exemplars of an approach scholarly and by no means illiberal to the extinguishment of native title. They still repay careful reading. Their subject must have been among those primarily in the thoughts of those pioneer judges, as they walked sometimes weary miles. The quality of their work attracts our admiration, even while we know that vastly more complicated issues, of which they could have had no prescience, now face New Zealand judges. Indeed, in the commercial, criminal and civil spheres, such issues are standard exercises for one court or another.

The pioneering Symonds judgment was followed, sometimes in the temporal sense only, by others such as (to give only a few examples) *Wi Parata v Bishop of Wellington*[2] in 1877, with its unfortunate observation that in a sense the Treaty was a simple nullity; *Nireaha Tamaki v Baker*[3] in 1901; *Wallis v Solicitor-General for New Zealand*[4] in 1903; *Manu Kapua v Para Haimona*[5] in 1913; and *Waipapakura v Hempton*[6] in 1914. From the Māori point of view the Judicial Committee of the Privy Council come well out of the case law of that era, but their Lordships were very distant. It can be easier to be right in principle at a distance. It would be disrespectful to suggest that the present Judicial Committee is less right

1 NZPCC 387.

2 (1877) 3 NZ Jur (NS) SC 72, 78.

3 NZPCC 371.

4 [1903] AC 173; NZPCC 308. For the repercussions, see NZPCC 730.

5 NZPCC 413.

6 33 NZLR 1065.

(see *New Zealand Māori Council v Attorney-General*[7] in 1993) but the shrinking of the world and the rapidity of modern media communications may produce a greater sense of the impact of decisions; and a heightened sensitivity to impact can produce less robust conclusions.

The period between the two world wars was not marked by major New Zealand case law in this field. The next major case was *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*[8] in 1941. The Privy Council there held that a claim could not be rested on the Treaty without some statutory recognition of the Treaty, and that the New Zealand legislature had not recognised and adopted the Treaty as part of the municipal law. Whether that remains the position after the Treaty of Waitangi Act 1975 and other more modern legislation is an expected question on which, however, an answer cannot be expected this evening. In *Portrait of a Profession*, the Centennial Book of the New Zealand Law Society (1969), it seemed reasonable to write that the prevailing or orthodox view was that the Treaty was not law.[9] Not for the first time, it is a relief not to have expressed a more dogmatic opinion.

In my time at the Bar, Treaty issues scarcely arose. I had a few cases about Māori land, but these related to proceedings of the Māori Land Court in relation to sales and partitions.[10] It is agreeable to record that in one of these the Court of Appeal, reversing the Chief Justice of the day, accepted that an alleged indirect benefit to Māori was not enough to justify the setting aside of Māori land for a recreation reserve.[11] My own very limited exposure to Treaty issues was typical of the Bar generally at that time. The Wanganui river, an impressive albeit polluted mass of flowing water, had been an ever-present accompaniment of my secondary school days. But the extraordinarily prolonged litigation over the ownership of the bed[12] was generally dismissed by the profession and the public as arcane and irrelevant to day-to-day New Zealand life and values. In hindsight the litigation was perhaps unsatisfactory, by reason of the failure of the claimants to argue for a Māori conception of the river as an entity. A big leap in constructive legal thinking would have been needed. The climate was not right. Even so, differently constituted Courts of Appeal

7 [1994] 1 NZLR 513.

8 [1941] AC 308.

9 At 20-22.

10 *Kuratau Land Co Ltd v Kahu te Kuru* [1966] NZLR 544 (useful more generally for the proposition that "on" can mean "within a reasonable time after"); and *Hereaka v Prichard* [1965] NZLR 302; [1967] NZLR 18.

11 *Hereaka v Prichard* [1967] NZLR 18.

12 *In re the Bed of the Wanganui River* [1955] NZLR 419, and [1962] NZLR 600.

struggled long over the case, the final judgment being marked by an interval between arguments and delivery of judgment of more than eighteen months, which I hope and believe to be still a New Zealand appellate record.[13]

So too in my earlier years on the Bench Treaty issues were not something with which one had to wrestle. The nearest approach in my experience was perhaps *Regional Fisheries Officer v Tukapua*,[14] an understandably unreported case of 1975, where it was held that the beds of Lake Horowhenua and the Hokio Stream belonged to Māori and that the fishing rights of the Māori owners were not subject to the general fisheries controls. The Latin tag *generalia specialibus non derogant* was used to solve a Polynesian problem, but the case turned on the interpretation of special legislation. Otherwise the cases with a Māori dimension in which I sat related to statutes not seeming to call for any Treaty-orientated approach. However, *Murray v Scott,*[15] also in 1975, perhaps justifies passing mention for its decision that, although an option to purchase Māori land did not require confirmation by the Māori Land Court, an exercise of the option would create a contract requiring confirmation, so that the price would be subject to the Court's approval.

But all this time Māori evidently continued to see in the Treaty guarantees which in their view should give it a form of primacy over at least some parts of the general law of New Zealand - a law which they saw as having been allowed to develop by the Treaty, and, in some sense, not perhaps entirely easy to define, subject to the Treaty. Discontents symbolised by the Māori land march led to the enlightened Parliamentary step of the Treaty of Waitangi Act 1975, constituting the Waitangi Tribunal, amended in 1985 to extend to legislation and policies at any time since 6 February 1840 which are alleged by any Māori claimant to be "inconsistent with the principles of the Treaty". The phrase "the principles of the Treaty" was in the original Act. At no stage has the legislature attempted to define it. Of necessity therefore the courts and the Tribunal had to accept the responsibility of giving it life.

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[13] Australian and Canadian appellate courts have taken longer. The English tradition is for speedier judgments, often reflecting decisions taken, even at the highest level, immediately after the conclusion of the arguments.

[14] Supreme Court, Palmerston North, 13 June 1975 (M 33/75).

[15] [1976] 1 NZLR 643. Other cases of this period included *Parininihi Proprietors v Viking Mining Co Ltd* [1983] NZLR 405 (grant of right to ironsand concentrates) and *Atihau-Wanganui Proprietors v Malpas* [1979] 2 NZLR 545; [1980] 1 NZLR 1; [1985] 2 NZLR 468 (long drawn-out litigation concerning the effect of clearing native timber in assessing unimproved value).

Initially indeed the responsibility fell on the Tribunal alone; and for the purposes of the 1975 Act the Tribunal has exclusive authority by section 5(2) to determine the meaning and effect of the Treaty as embodied in the two scheduled texts, English and Māori, and to decide issues raised by the differences between them. But the national assets disposal and privatisation policies which have marked the last decade were inaugurated by other legislation into which Parliament inserted the phrase. The simple and uncompromising words of section 9 of the State-Owned Enterprises Act 1986 are "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". The ordinary courts thus had placed upon them a task certainly never faced by our predecessors, perhaps never faced by any other court in world history: that of defining the *principles* of a treaty made between representatives of an indigenous people and a colonising power.

Section 9 was inserted in the legislation in response to representations made to the government by the Tribunal and Māori leaders. Plainly it was meant as some form of protection or guarantee. But when the section was put to the test in the initial and basic case brought by the Māori Council, known as the lands case,[16] the Crown (that is to say, the government) sought to minimise the section. The Solicitor-General of the day had an unenviable task. There was much force in his argument that, if the section were accepted to mean what it said, the process of creating state enterprises to take over state assets, with the ability to dispose of them, could be significantly impeded. That might be seen to frustrate the object of the Act to the extent that it contemplated the on-sale of assets. Expressions such as "in limbo", "unpredictable time", and a "withered and crippled way" were not unnaturally used.

The difficulty with the argument was that it emasculated the section. Yet the section had been inserted in the part of the Act dealing with principles; surely it must have been meant to have some practical significance? Surely no one would dare to use a nineteenth century description referring to "a praiseworthy device"; I refrain from completing the obnoxious remainder. To the credit of the Crown, I do not recollect that the argument of ultimate cynicism was advanced that the Crown was already legally free to act inconsistently with the Treaty, so that the Act did not need to give permission.

The argument for the Crown was not so blatantly cynical but it did give very little practical effect to section 9 and, as is history now, unanimously in a court of five it was not accepted. As I expect leading counsel who

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[16] [1987] 1 NZLR 641.

argued the Māori case would confirm from the questions which he had to field, for my own part I was not readily led to that result; but in the end it would have seemed an abdication of judicial responsibility to decide otherwise. There is not much point in accepting judicial office unless one tries to accept the unwelcome or disturbing, but crucially independent, responsibilities that go with it.

To the President of the day it was gratifying and strengthening that our court was of the calibre where five independently-minded judges, not necessarily usually of the same mind in issues touching the relationship of the legislative and administrative arms of government and the courts, were able to reach the same conclusion. With naturally varying emphases and language, the judgments unite in defining Treaty principles in phrases such as partnership, fiduciary duty, active protection, full spirit, the honour of the Crown, fair and reasonable recompense for wrong, fundamental concepts, and satisfactory recompense. Of course these are generalisations, as was the Treaty itself. In the event the court left it to the Treaty partners to work out a practical solution in the light of the principles. A solution was worked out on the broad basis that, if land is transferred to a state enterprise but the Waitangi Tribunal later recommend that it be returned to Māori ownership, that return will be compulsory.[17] This is an exception to the general principle that the Tribunal's functions are recommendatory only, a principle wholeheartedly supported by the Tribunal itself. I will return to that aspect.

An Australian barrister and legal journalist put to me, in the process of compiling a book,[18] that the lands case was an instance of "a government passing legislation on the basis of its parliamentary supremacy and the courts then delivering a decision which the government of the day might have had real cause to complain about".[19] Referring to the answer that he received, the authors say in the opening chapter:

> the Court of Appeal maintained that it was giving effect to the will of the legislature. This represents a point of fine distinction in many democratic systems, including New Zealand's.[20]

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17 Treaty of Waitangi (State Enterprises) Act 1988.

18 Sturgess, G and Chubb, P *Judging the World: Law and Politics in the World's Leading Courts* (1988). This book is a compendium of international judicial views and information, in which New Zealand naturally plays only a small part. It is an invaluable and lively adjunct to perspective for those interested in constitutional and human rights issues.

19 Ibid, 379 to 384.

20 Ibid, 12.

The present audience will not be surprised if I now retort that the distinction is anything but a fine one. We all know that the government of the day has been normally able to secure the passage of legislation that it desires. There is no principle, however, that its subsequent contention establishes the meaning of the legislation. Otherwise the authority of Parliament could be easily eroded. If a government, for what appeal to it as wise or expedient political reasons, decides to incorporate in legislation an apparently strong safeguard, it is hard to see what authority the courts have to give the safeguard an extremely limited effect contrary to the plain meaning of the words. There was nothing recondite about the decision in the lands case.

In the first Māori Council case, leave had been reserved to apply to the Court should anything unforeseen arise. Before long something unforeseen did arise in the shape of a newly-announced policy to sell, not state-owned commercial forest lands, but only the timber on the lands. There did not appear to have been consultation with Māori before this change of policy. The Court of Appeal had little hesitation in holding that the leave to apply could be invoked.[21] A settlement was reached subsequently.

Then came the great *Tainui* case.[22] It stretched the public seating and other space in the Court of Appeal building in Molesworth Street to the limit, and beyond. It gave us beautifully sung waiata, which are preserved on tape. This case raised the question whether coal-mining rights in Raupatu lands, confiscated in assumed breach of the Treaty, could be transferred without the safeguard of the clawback provisions of the 1988 legislation passed as a result of the 1987 decision. There were contentions that, despite a Treasury letter indicating the contrary, clawback had nothing to do with coal-mining rights. It was said that these were not "interests in land" within the meaning of the relevant legislation. This was an argument based on refinements of English real property law and sat uneasily with the broad concept of Treaty partnership. It was rejected, a court of five being again unanimous in the result. At the highest level of government, objection seemed to be taken to the sentences in my own judgment,[23] which were only stating the obvious in the light of the absence of any statutory definition of "the principles of the Treaty":

> In the end no doubt only the Courts can finally rule on whether or not a particular solution accords with Treaty principles. But in this kind of issue judicial

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21 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142.

22 *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513.

23 Ibid, 529.

> resolution should be very much a last resort. It is a test of good faith and responsibility on both sides.

Possibly the following was also seen as provocative:

> It is obvious that, from the point of view of the future of our country, non-Māori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Māori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers of racial prejudice and token acknowledgments that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured. On the Māori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Māori must recognise that it flowed from the Treaty and that both the history and economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world.
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> Quite apart from the suggestions already made, what is clear in my opinion is that the attempt to shut out in advance any Tainui claim to be awarded some interest in the coal and surplus lands in issue in this case is not consistent with the Treaty. Unchallenged violations of the principles of the Treaty cannot be ignored. Available means of redress cannot be foreclosed without agreement.[24]

The decision did represent a success for Tainui, however, if only in preserving the *status quo* - my dictionary does not disclose the appropriate Māori phrase, but perhaps the audience will be able to help.[25] The way to effective negotiation lay ahead.

Then began the line of fisheries cases. Up to this point the Treaty litigation had been almost wholly fought out in the Court of Appeal, through the case removed procedure; but now the High Court became more actively involved and I acknowledge the valuable help we received from several High Court judgments. All along of course the Waitangi Tribunal's reports have been of great benefit to us, not only for the views and recommendations of the Tribunal but also because of their assembly of evidence and information garnered on marae and elsewhere, often in less formal ways than are available to courts. In the first of our fisheries judgments[26] we affirmed the right of the courts to make evidential use of

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[24] Ibid, 530.

[25] The response to this appeal, provided at the end of the lecture, was waiho noa iho.

[26] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

the Tribunal's reports: they fall within section 42 of the Evidence Act 1908, for they are books of authority in matters of public history and social science.

The fisheries litigation concerned the quota management regime for offshore commercial fishing, out to 200 nautical miles from the coastal base line, introduced by legislation of 1986. The Fisheries Act 1983 had carried forward a longstanding statutory provision, the precise wording of which has varied from time to time. The 1983 version, section 88(2), was "Nothing in this Act shall affect any Māori fishing rights". Like section 9 of the State-Owned Enterprises Act, it was short and simple. It could even be called cryptic. It was of comparable importance.

In the High Court Greig J accepted on the evidence placed before him that there was a strong case that before 1840 Māori had a highly developed fishery over the whole coast of New Zealand, at least where they were living, and that hapu and iwi had a form of rangatiratanga over their fisheries. In the High Court proceeding attacking the quota management scheme as allegedly in breach of tribal rights, certain preliminary rulings were carried to appeal. The Court of Appeal was thus not called upon at that stage to make any final pronouncement on the main issue; and that was advantageous. It enabled us to make suggestions rather than binding rulings, suggestions which it was hoped might lead to negotiated settlements. Throughout the Treaty cases the Court has constantly kept in mind that settlements by agreement at the political level are the way in which the partnership should work.

Some of the suggestions made in the first Muriwhenua case were these. North American cases on Indian fishing rights under treaties, including decisions of the Supreme Court of Canada outlining the concept that the Crown owes fiduciary duties to aboriginal peoples, might prove of major help in New Zealand. It might be that Māori fishing rights were a form of indigenous customary title that had never been extinguished and was indeed expressly preserved by section 88(2). Moreover this provision might be seen as a legislative embodiment of the guarantee in the Treaty of Waitangi of "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties", to use the language of the English version. The Māori Fisheries Act 1989 left section 88(2) standing. It provided for the progressive transfer by the Crown to the Māori Fisheries Commission of ten per cent of the total allowable catches. This

was a significant advance but might be seen as an interim measure, not an ultimate solution. These suggestions did seem to bear some fruit.[27]

The fruit is to be found in the 1992 case *Te Runanga o Wharekauri Rekohu Inc v Attorney-General.*[28] It may be summed up in the word Sealord. Māori negotiators and the Crown, to the credit of both sides, had hammered out a settlement with the effect of securing for Māori more than twenty-three per cent of the total fishing quota and twenty per cent of any new quota. Some Māori remained unsatisfied and brought proceedings challenging the deed. They were struck out as having no realistic prospect of success. The judgment spoke of the now substantial body of Commonwealth case law pointing to a fiduciary duty, but its essence was as follows:

> Parliament is free to enact legislation on the lines envisaged in the Deed or otherwise. Whether or not it would be wise to do so and whether there is a sufficient 'mandate' for any such legislation are political questions for political judgment. The Court is not concerned with such questions. Nor are we concerned with whether more direct steps should be taken at the present stage to ensure that Māori participate actively in the fishing industry in addition to such participation as already occurs through leasing of quota and employment. No issue under the New Zealand Bill of Rights Act 1990 arises now.
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> Should any legislation be enacted in this field, there could be little point in bringing the matter again before the Courts until at least some years of experience have been gained, and perhaps not even then. No more than Parliament itself can we bind our successors. All that can be said now is that a responsible and major step forward has been taken.[29]

I can only pass briefly over the other cases in the booklet, which is perhaps as well, because they include what this audience might see as less happy phases of the history of the litigation to date. In the television case, the Māori language was recognised to be taonga, but it was ultimately held that the transfer of broadcasting assets would not affect the Crown's ability

27 The first Muriwhenua judgment also led to an exchange rather out of the ordinary. In her Waitangi Day speech in 1990 Her Majesty the Queen had quoted some words from the first Māori Council case about partnership and the utmost good faith. She built on these words in a way referred to in the Muriwhenua judgment (ibid, 655), and there was some consequent correspondence.

28 [1993] 2 NZLR 301.

29 Ibid, 309.

to protect the language;[30] and the fact remains that one of the declared official languages of New Zealand is scarcely heard in prime time.

In the hydro-electric dams case,[31] not as well-known as some of the others of which I have spoken, there was further discussion of customary title. It was suggested that to extinguish it by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty of the colonising power. Compulsory acquisition might be essential, but proper compensation would always have to be paid. The concept of a river as taonga was outlined. The case itself failed on the short ground that rights to or in the dams themselves are not held by Māori, yet Māori claims to remedies not extending to ownership of the dams would not be affected by transfers to the new energy companies. Near the end of the judgment it was noted that:

> The legal system is not powerless to provide remedies for racial injustice in appropriate cases, and decisions of the Courts in this field have assisted the parties to achieve voluntary settlements.[32]

I hope that this excursion may have helped to show that Māori claims to remedies are not totally unfounded. The challenge of Treaty of Waitangi jurisprudence has been two-fold: to define the principles of the Treaty and to do what the courts can to ensure that they are given practical effect. We have not achieved everything one could have wished. But at least in the fields of lands, forests and fisheries, some tangible results can be seen. They have been achieved by an interaction of three forces: first, some enlightened leadership on both the Crown and Māori sides; secondly, the inquiries and reports of the Waitangi Tribunal, the concept of which as an essentially investigatory and recommendatory body may well find some counterpart in the new South Africa; thirdly, the traditional courts and in some of their judgments an increased willingness to take into account the Treaty and the fiduciary concept. The responsibility of judicial decision is quite different from that of Tribunal recommendation. The functions are complementary. All three forces are probably essential to further progress.

30 Supra note 7, at 520. Taonga is a word used in the second article of the Māori version of the Treaty of Waitangi. It has been translated as treasures. The Waitangi Tribunal has stated that taonga "means more than objects of tangible value. A river may be a taonga as a valuable resource. Its 'mauri' or 'life-force' is another taonga" (see *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188, 204).

31 *Te Ruanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

32 At 27.