KO NGĀ TAKE TURE MĀORI

Our Significantly Indigenous Administrative Law: the Treaty of Waitangi and Judicial Review†

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The place of the Treaty of Waitangi in New Zealand's constitutional arrangements continues to be a vexed legal and political issue. This article advances the proposition that New Zealand courts should presume that Parliament intends to legislate consistently with the principles of the Treaty. Such an interpretive presumption, would act as a restraint on the power of New Zealand's executive. Judicial review would lie for executive action which is determined to be inconsistent with the principles of the Treaty, and injunctive relief would be available from the High Court. This approach would recognise the fundamental political and legal significance of the Treaty of Waitangi, while reinforcing New Zealand's commitment to the rule of law — the central normative underpinning of judicial review.

I INTRODUCTION

> This case is perhaps as important for the future of our country as any that has come before a New Zealand Court.
> ...
>
> The wording of s 9 is plain and unqualified. In its ordinary and natural sense the section has the impact of a constitutional guarantee within the field covered by the State-Owned Enterprises Act.
>
> Cooke P in 1987.[1]

> I would point out that section 9 is largely symbolic. It's been the law since it was established in 1986, but the Government can't find an example of where it's been used.
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> Rt Hon John Key in 2012.[2]

Thirty years ago, in an infamous New Zealand appeal, the Privy Council remarked that the extension of judicial control over the administrative

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1 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 651 and 658 [*Lands*].

2 Patrick Gower "Key, Māori Party square off over asset sales" (video, 31 January 2012) 3 News <www.3news.co.nz> at 1:19.

process had been "the most striking feature of the development of the common law" in the preceding thirty years.[3] Lord Diplock held that while similar, "the machinery and practices by which governmental power, central or local, is exercised to control or otherwise to affect the activities of private citizens in [New Zealand and England] are not identical".[4] His Lordship left to us the development of our own ways to control "particular indigenous kinds of administrative action".[5]

Barely two years passed before Cooke J remarked, "[t]he time has probably come to emphasise that New Zealand administrative law is significantly indigenous".[6]

This article advances the proposition that a fundamental plank of our constitution, the Treaty of Waitangi, has not been given appropriate recognition as part of our indigenous administrative law. It advocates the adoption of what should be an uncontroversial principle of statutory interpretation: where Parliament legislates, it is taken to have intended that legislation to be interpreted in a manner consistent with the principles of the Treaty of Waitangi. According to that principle, empowering provisions in statute should be read to only allow the executive to act consistently with the principles of the Treaty of Waitangi, unless there is explicit parliamentary authorisation to the contrary.

The case in favour of the principle will first involve documenting the latest *New Zealand Maori Council v Attorney-General* (*Water Rights*) decision.[7] The unanimous judgment in that case marks the first entry of the New Zealand Supreme Court into the long history of the place of the Treaty of Waitangi in our law of judicial review.

II THE *WATER RIGHTS* CASE

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.
>
> State-Owned Enterprises Act 1986, s 9.

Background to the Case

One week before Waitangi Day 2012, the Māori Party threatened to walk out on its Relationship Accord and Confidence and Supply Agreement with the National Party.[8] The Māori Party's threat was occasioned by a press release

3 *Mahon v Air New Zealand Ltd* [1984] AC 808 (PC) at 816.

4 At 817.

5 At 817.

6 *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) at 418.

7 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Water Rights*].

8 Claire Trevett and Amelia Romanos "PM confident Māori Party will stay" *The New Zealand Herald* (online ed, Auckland, 31 January 2012).

by the Hon Tony Ryall MP,[9] who suggested that s 9 of the State-Owned Enterprises Act 1986 was "under review" as part of consultation with iwi concerning the sale of state assets.[10] In a succession of difficult media appearances, the Prime Minister attempted to downplay the Māori Party's reaction with the statement quoted beneath this article's title, a sentiment he subsequently retracted, stating that an official in a meeting had misled him.[11]

Two days later, the Government accidentally released a draft of the consultation document that listed a number of changes made since the overwhelmingly negative Māori response.[12] That list revealed that the Treasury had originally favoured no Treaty clause at all in any new legislation, fearing that such a section would "create uncertainty".[13] The document contradicted prior statements of the Prime Minister that specific Treaty clauses were "likely".[14]

Following the Government's consultation programme, Mr Ryall announced the Government intended "to include a provision in the new legislation reflecting the concepts of the existing section 9 of the [State-Owned Enterprises Act 1986]".[15] The Māori Party's threat had preserved the status quo.

The Government pushed ahead with its original, unaltered plan, following failed consultation with Māori regarding an urgent Waitangi Tribunal report on the sale of the shares. Legal action was inevitable. The New Zealand Māori Council filed an application for judicial review in Wellington, and its case was heard before Ronald Young J on 26 November 2012.[16] Section 9 again fell for judicial consideration, but this time was of no assistance to the Council. The Māori Council filed an urgent application seeking leave to appeal directly to the Supreme Court. This was granted to facilitate the Government's expedited share sale plan.

The Supreme Court's Decision

The Supreme Court's decision created a media sensation, with early news reports indicating a variety of different results for the Council. Nevertheless, the decision is forthright in recognising its own limitations. As early as paragraph five of the decision, the Court noted:[17]

> [5] The appeal from the High Court is brought directly to this Court

9 Bill English and Tony Ryall "Iwi consultation for partial SOE share floats" (press release, 27 January 2012); and Claire Trevett "Treaty clause complicates asset sales" *The New Zealand Herald* (online ed, Auckland, 31 January 2012).

10 Trevett and Romanos, above n 8.

11 Editorial "Key Government relationship put to the test" *Nelson Mail* (online ed, Nelson, 4 February 2012).

12 Claire Trevett "Asset sale draft plan internet blunder" *The New Zealand Herald* (online ed, Auckland, 2 February 2012).

13 Trevett, above n 12.

14 Trevett, above n 12.

15 Bill English and Tony Ryall "Government completes Māori consultation" (press release, 23 February 2012).

16 *New Zealand Maori Council v Attorney-General* [2012] NZHC 3338.

17 *Lands*, above n 1, at [5] (footnotes omitted).

> at the request of the Crown to meet the time constraints it has in finalising the IPO and realising up to 49 per cent of the value of Mighty River Power for important government purposes. Counsel have cooperated in preparing for and fully arguing the appeal to meet a tight timetable. The Court has however been deprived of the assistance of an intermediate appellate judgment. That circumstance and the fact that some of the arguments touch on fundamental elements of the New Zealand legal order prompt caution in straying beyond matters essential to disposition of the appeal.

The Supreme Court did not touch on how that approach sits with one of the stated purposes of the Supreme Court Act 2003, namely, the Act's purpose "to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions".[18] Though it does not amount to a duty to resolve matters relating to the Treaty, that purpose would seem to act as a bastion against any undue hesitance to enter into questions of constitutional significance concerning the Treaty.

The passage foreshadows the approach taken by the Court, which was entirely consistent with precedent. The decision in *Water Rights* went no further than the court had already gone in the 1987 decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* (*Lands*) decision.[19] In the *Lands* case the Court held that the newly introduced s 45Q of the Public Finance Act 1989 continued the effect of s 9, such that Crown action under both Acts was reviewable for consistency with the principles of the Treaty of Waitangi.[20] The Court rejected as "technical" the argument, advanced by the Attorney-General, that the sale of shares was the exercise of a common law power unreviewable for consistency with public law principles. Instead, the Court adopted an approach that "does justice to the provision's heritage".[21]

What is this heritage? And should it be extended? This article will argue that judicial supervision of executive action for consistency with the principles of the Treaty of Waitangi should not be dismissed out of fear of commercial uncertainty.[22] Instead, it will be argued that judicial review should be available in respect of any action under statute — not just those under the State-Owned Enterprises Act 1986 or the Public Finance Act 1989 — that can be shown to be inconsistent with the principles of the Treaty of Waitangi.[23] Such review, it is suggested, should occur though judicial recognition of a principle of statutory interpretation akin to the principle

18 Supreme Court Act 2003, s 3(1)(a)(ii).

19 *Lands*, above n 1.

20 At [51]–[68].

21 At [63].

22 This article is not concerned with the challenge of defining the principles of the Treaty of Waitangi. Instead, it focuses on whether those principles should act as limitations on the exercise of executive power.

23 For other academic discussion of this principle, see E W Thomas "The Treaty of Waitangi" [2009] NZLJ 277.

of legality for human rights[24] and the presumption of consistency for international law.[25]

The role of the courts in hearing applications for judicial review will first be considered, with a view to justifying an extension of that role. The existing doctrine of judicial review for consistency with the principles of the Treaty of Waitangi will then be examined. It will be shown that where the courts have been given a legislative mandate to require executive consistency with the Treaty, they have been bold and principled, but that judges have been hesitant to restrain the executive without such legislative imprimatur. The various legislative approaches to the use of Treaty clauses and their political standing will be discussed, culminating in the stand-off between the Māori and National parties.

III JUDICIAL REVIEW AND ITS CONSTITUTIONAL FOUNDATIONS

The Role of Judicial Review

The constitutional role of the New Zealand courts in supervising executive powers manifests itself through judicial review. Parliament's ability to supervise acts of the executive diminished with the rising predominance of party politics and as administrators increasingly gained powers to make regulations and adjudicate on matters affecting the state's citizens.[26] By the mid-20th Century the courts sought "to fill this accountability deficit by requiring ... that the executive exercises its power fairly, reasonably and consistently with the scheme which Parliament ... prescribed in the enabling legislation".[27] Speaking in 1974, Lord Diplock offered a normative justification for the active stance of the judiciary in developing the new administrative law by noting:[28]

> In a society which acknowledges the rule of law, the right of the citizen to those services with which the State under the enacted law assumes the responsibility to provide him cannot be left to the uncurbed discretion of the executive branch of government. There must be rules to govern his entitlement to these services and to define the limits of executive control over his other dealings and his property.

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24 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA); and *Regina v Lord Chancellor, ex parte Witham* [1998] QB 575. See also Hanna Wilberg "Judicial Remedies for the Original Breach?" [2007] NZ L Rev 713 at 723–724.

25 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289. See also Wilberg, above n 24, at 721–722.

26 Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 24.

27 Mark Elliott *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 1–2.

28 Lord Diplock "Administrative Law: Judicial Review Reviewed" (1974) 33 CLJ 233 at 236.

Lord Mustill explained the aim of the judiciary in addressing the constitutional accountability deficit by observing that:[29]

> To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago.

The Heads of Review and their Constitutional Legitimacy

The three grounds that define the limits of executive action have come to be known as the "heads" of review as enunciated in *Council of Civil Service Unions v Minister for Civil Service*: "'illegality'", "'irrationality'" and "'procedural impropriety'".[30] This tripartite structure of judicial review has been described as the "firmly" recognised formulation of the grounds of review in New Zealand.[31] It is the head of illegality with which this article is concerned.

A party may apply for judicial review under the head of illegality where a decision-maker has allegedly acted beyond his or her powers.[32] A finding of illegality will depend entirely upon the statute that gives rise to the power. If the statute provides criteria for consideration, whether explicitly or by implication, decision-makers must observe those criteria.[33] Decision-makers must consider those matters that they are bound to consider under the statute and must exclude considerations that are irrelevant.[34]

Traditionally, the constitutional justification for the judiciary's role in observing the head of illegality was that this gave effect to Parliament's intention:[35]

> ... when a court reviews an exercise of statutory power, this entails nothing more than judicial enforcement of the express and implied limits which Parliament attaches to grants of such power.

In doing so, the court fulfils its traditional constitutional role of merely giving effect to the laws Parliament creates. Mark Elliott, among others, has stringently criticised this conceptualisation of ultra vires theory as artificial, "torturous and unconvincing".[36] In echoing Lord Woolf's accusation of the court's "fondness for fairy tales",[37] Elliott argues that to derive the sophisticated controls placed upon decision-makers by the courts from

29 *Regina v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) at 567.

30 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410–411.

31 *Powerco Ltd v Commerce Commission* HC Wellington CIV-2005-485-1066, 9 June 2006 at [21].

32 *Lands*, above n 1, at 678.

33 At 678.

34 At 678.

35 Elliott, above n 27, at 3.

36 At 4, 27.

37 Lord Woolf "Droit Public — English Style" [1995] PL 57 at 66.

unwritten parliamentary intention is to misrepresent the active role of the judiciary in supervising the actions of government.[38]

Concerned as he is for the constitutional underpinnings of judicial review, Elliott instead grounds its normative justification in observance of the rule of law. Invoking Lord Diplock's 1974 speech, Elliott notes that the rule of law:[39]

> ... demands that governmental action should be formally justified by reference to enabling legislation; it also directs that the powers so conferred should not be exercised abusively. More specifically, this means that public power must be exercised in a manner which is fair and reasonable in order that citizens are protected from capricious and arbitrary governmental action.

Having so found, he concludes that the attempt to develop the law of judicial review is constitutionally justified, given that it is concerned with "the implementation of the rule of law rather than the effectuation of unwritten parliamentary intention".[40] The rule of law is described as a "pervasive constitutional principle" that gives rise to a presumption in favour of Parliament legislating consistently with its observance.[41] Accordingly, members of the executive who act inconsistently with the rule of law without explicit statutory authorisation face the prospect of their decision-making being reviewed by a court.

IV ESTABLISHING CONSISTENCY WITH THE TREATY OF WAITANGI AS AN APPROPRIATE GROUND FOR JUDICIAL REVIEW

Given that normative justification for the development of the traditional heads of review lies in the constitutional principle of the rule of law, similar justification must be found for judicial review for consistency with the principles of the Treaty of Waitangi. If not, the role of the courts in supervising the executive will not be constitutionally appropriate. Regardless of whether that role is developed by the courts themselves or established by legislative enactment, it must be shown that the Treaty of Waitangi has significance such that to allow the executive to act inconsistently with its principles would create a constitutional "vacuum" of the type described by Lord Mustill. It will be argued that while not strictly "constitutive", the Treaty of Waitangi symbolises the historical process through which "the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty".[42] This legitimacy is not to be confused with legal authority. Nevertheless, to

38 Elliott, above n 27, at 28.
39 At 100.
40 At 107.
41 At 111.
42 *Lands*, above n 1, at 673 per Richardson J.

allow executive action inconsistent with the principles of that legitimating agreement would undermine the continuing partnership between the Crown and Māori — a central tenet of the New Zealand constitution.

The Legal Status of the Treaty

The leading authority on the legal status of the Treaty of Waitangi remains *Te Heuheu Tukino v Aotea District Maori Land Board* (*Tukino*), a decision of the Privy Council in 1941.[43] The Board held that the Treaty was unenforceable so long as it remained unrecognised in municipal law. The decision has gathered support amongst judges as and legal commentators. The finding was affirmed in *Huakina Development Trust v Waikato Valley Authority* (*Huakina*), where the Court noted "the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the courts by virtue of the Treaty itself".[44]

In the *Lands* case of the same year, Cooke P considered that *Tukino* was "the leading case on the Treaty of Waitangi" by "past standards" and that it "represented wholly orthodox legal thinking, at any rate from a 1941 standpoint".[45] Writing extrajudicially, Elias CJ noted that while the decision of the Privy Council has not been explicitly departed from, "it is accepted in recent cases that the Treaty of Waitangi cannot be regarded as just another Treaty".[46] Given the emphasis in the Supreme Court Act 2003 on the Treaty,[47] it remains possible that a forward-looking bench could radically reassess the enforceability of legal rights arising under the Treaty.

One commentator has described this ascendant regard for the Treaty of Waitangi within our constitutional arrangements as a "celebration".[48] Again writing extrajudicially, the Chief Justice described the Treaty as "the foundation of New Zealand. No less worthy of veneration or less relevant to New Zealand conditions than *Magna Carta* and the 1689 *Bill of Rights*".[49] Lord Woolf, speaking for the Privy Council in 1994, described the Treaty as "of the greatest constitutional importance to New Zealand".[50] Within the executive, Te Puni Kōkiri has characterised the Treaty as "an integral part of our constitutional framework".[51] The Cabinet Manual has listed the Treaty of Waitangi as one of the "other major sources of the constitution",[52] and requires Ministers, when submitting bids for a Bill to be included in the legislative programme, to draw the Cabinet Legislation Committee's attention to any

43 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) [*Tukino*].

44 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 [*Huakina*].

45 *Lands*, above n 1, at 667.

46 Sian Elias "Māori and the New Zealand Legal System" (2002) 76 ALJ 620 at 625.

47 Supreme Court Act, ss 3(1)(a)(ii) and 13(3).

48 Philip A Joseph "The Treaty of Waitangi: A Text for the Performance of Nation" (2004) 4 OUCLJ 1 at 14.

49 Elias, above n 49, at 625 (emphasis in the original).

50 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516 [*Broadcasting*].

51 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 8.

52 Cabinet Office *Cabinet Manual 2008* at 2.

provision that has implications for the principles of the Treaty of Waitangi.[53]

These statements and policies demonstrate the extra-legal yet constitutional significance of the Treaty of Waitangi in the minds of central constitutional actors. The Treaty is seen as "a key source of the New Zealand Government's moral and political claim to legitimacy in governing".[54] Legitimate governance is only possible insofar as it gives force to the relationship embodied by the Treaty. As such, recognition of the principles of the Treaty through the supervision of executive action for consistency with those principles forms a stable and legitimate constitutional underpinning. The courts are the guardians of our constitutional framework through their traditional role in observing the limits of executive power by enforcement of the rule of law. Despite its legal, yet unenforceable status, the Treaty forms part of the ineluctable, legitimising base for continuing New Zealand governance. As a matter of constitutional necessity, where the wording a statutory provision leaves room for an interpretation consistent with the principles of the Treaty of Waitangi, the courts ought to find executive action under statute that impinges upon Treaty principles ultra vires that statute.

V THE DEVELOPMENT OF JUDICIAL REVIEW FOR CONSISTENCY WITH THE PRINCIPLES OF THE TREATY IN NEW ZEALAND

Introduction

Having shed light on the constitutional underpinnings of judicial review of executive action inconsistent with the principles of the Treaty of Waitangi, this article will now examine the development of that doctrine among the three branches of government. A detailed examination of the *Water Rights*, *Lands* and *Ngai Tahu Maori Trust Board v Director-General of Conservation* (*Whale-watch*) decisions is particularly important in this context.[55] This is because the application in those cases of clauses incorporating the Treaty supports a broader interpretive principle of consistency.

The political standing of Treaty clauses will then be examined, first, as expressed in the findings of the 2005 Constitutional Arrangements Committee and second, through assessment of the statements of members of Parliament in the years preceding the 2012 s 9 controversy. That controversy will then be discussed with the conclusion drawn that the prevailing political reasoning supports the extension of s 9, rather than its minimisation or deletion.

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53 At [7.60].

54 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 346.

55 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [*Whale-watch*].

The Approach of the Courts

1 Express-reference review

The *Lands* case opened the door to judicial review of executive action for inconsistency with the principles of the Treaty of Waitangi.[56] The State-Owned Enterprises Act 1986 empowered the Minister of Finance to transfer assets previously held by the Crown to newly established "State enterprise[s]".[57] The assets to be transferred included an estimated 10 million hectares of land. Should land subject to a Waitangi Tribunal claim be alienated from the Crown to private ownership, the Tribunal would be unable to recommend its return.[58] Prior to the legislation being passed, an interim report was published by the Waitangi Tribunal published an interim report, prior to the legislation being passed, stating that current claimants before the Tribunal were "likely to be prejudicially affected" by the Bill in its present form.[59] When passed, the Act included the following clause: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[60] This clause had untold consequences for Māori aspirations for the enforcement of the Treaty of Waitangi. The availability of judicial review for a failure to observe statutory provisions such as s 9 has come to be described as "express-reference review",[61] enabling the courts, "for the first time, to test the actions of the Crown against the principles of the Treaty".[62]

Further, in response to the interim Tribunal report, a number of provisions relating to Māori land were included in the Act.[63] These provisions placed restrictions on transfers of land subject to Tribunal claims. The New Zealand Māori Council, however, submitted that s 27 did not cover the circumstance where land not subject to a Tribunal claim had been transferred to a state enterprise and subsequently sold. This, it was alleged, would amount to a breach of s 9.

While the findings of the Court of Appeal were unanimous, two different strands of reasoning can be identified between the judgments of Cooke P and Richardson J. The President favoured an interpretive approach by asking whether s 27 represented a codification of the requirements pertaining to Māori land under s 9, or whether there were residuary protections under s 9 that required the Crown to take further steps to prevent inconsistency with the Treaty. Cooke P found that s 9 represented a "constitutional guarantee

56 The decision was first cited and discussed in the Supreme Court in *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53.

57 State-Owned Enterprises Act 1986, s 23(1).

58 Treaty of Waitangi Act 1975, s 6(4A).

59 Waitangi Tribunal *Interim Report to the Minister of Māori Affairs on State-Owned Enterprises Bill* (Wai 22, 1986) at 2.

60 State-Owned Enterprises Act, s 9.

61 Philip A Joseph "Constitutional Review Now" [1998] NZ L Rev 85 at 93.

62 Tariana Turia "Open letter to NZ" *The New Zealand Herald* (online ed, Auckland, 6 February 2012).

63 *Lands*, above n 1, at 645.

[to Māori] within the field of the State-Owned Enterprises Act".[64] Under that guarantee, the "Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty".[65] Of central importance to this article was his Honour's finding concerning the interpretation of the Treaty and its applicability to statutes generally:[66]

> ... the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty. But the State-Owned Enterprises Act itself virtually says as much in its own field. The questions in this case are basically about the practical application of the approach in the administration of this Act.

The availability of judicial review for inconsistency with Treaty principles was only made possible through Parliament's enactment of s 9: "[i]f the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity".[67]

Richardson J favoured an approach drawn directly from administrative law. After considering the powers conferred upon Ministers by s 23(1), his Honour concluded:[68]

> In deciding what course to follow the Ministers must always obey s 9. On its face it applies in all circumstances and so to any class of asset to which the principles of the Treaty of Waitangi apply.

The Court held that the substantive restraint on Crown action inconsistent with the principles of the Treaty of Waitangi was based upon explicit criteria for the exercise of power in the Act: s 9. While the subject matter was constitutional, the availability of review of the exercise of power was based on traditional doctrine.

The *Whale-watch* case of 1995 involved an innovative application of express-reference review. While the case has been described as the "high-water mark" of what will be described as "contextual review", the decision also indicates the pervasive influence of Treaty clauses in legislation.[69] The case concerned a challenge to the decision to issue whale-watching permits off the coast of Kaikoura. Permits were issued under the Marine Mammals Protection Act 1978, which was listed in sch 2 of the Conservation Act 1987. The Conservation Act contained two sections of note: s 4 required that the "Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi" and s 6 defined the functions of the Department

64 At 658.
65 At 660.
66 At 656.
67 At 668.
68 At 678.
69 Wilberg, above n 24, at 730–731.

of Conservation as to administer the Act and the enactments specified in its first schedule. The Department of Conservation has maintained an overarching policy of consistency with the Treaty of Waitangi.[70] The Court held that any decision made in issuing permits under the Marine Mammals Protection Act must, in accordance with the parent act, be made consistently with the Treaty principles.

Ngāi Tahu pioneered commercial whale-watching tours in the area.[71] For this reason, and because whale-watching is a taonga, the Court held that Ngāi Tahu were entitled to a "reasonable degree of preference" in the Director-General's decision regarding whether to grant permits that would allow competition with Ngāi Tahu.[72] It has been argued that according "mandatory weight" to a consideration that makes up part of a decision-maker's discretion may, arguably, amount to the "substantive protection" of a Māori interest under the Treaty of Waitangi.[73]

These two decisions demonstrate the extent to which the Court of Appeal has been willing to restrain executive action inconsistent with statutory incorporation within the empowering act of the principles of the Treaty of Waitangi. In the *Lands* case, statutory incorporation enabled the Court to substantively assess government action and to judge its impact as potentially inconsistent with the Treaty principles. In the *Whale-watch* case, the decision of the Director-General was constitutionally weighted in favour of Ngāi Tahu by the Treaty clause in the parent act. These cases would guide courts in applying a new principle of interpretation requiring any statute to be given meaning consistent with the principles of the Treaty. The decisions do not signify activism on the part of the courts. Rather, they simply reflect the active approach of the courts in protecting the constitutionally significant principles of the Treaty where statute has mandated such an attitude.

2 Contextual review

There have been limited instances where courts have gone further in holding executive action must be influenced, but is not restrained, by the principles of the Treaty of Waitangi. This form of supervision has been described as "contextual review", and is "avowedly 'constitutional'".[74] The availability of review on this ground was established in Huakina.[75] Justice Chilwell considered the case "of some constitutional importance",[76] the case concerned a planning tribunal decision to grant a right to discharge treated dairy shed water and waste into the Kopuera Stream and the Waikato River.

70 New Zealand Conservation Authority *General Policy for National Parks* (Department of Conservation, April 2005) at 15.

71 *Whale-watch*, above n 55, at 556.

72 At 562.

73 Wilberg, above n 24, at 730.

74 Joseph, above n 61, at 93.

75 *Huakina*, above n 44.

76 At 202.

The grant was made under the Water and Soil Conservation Act 1967, which gave no express criteria for the exercise of the discretion. The Court was required to decide was whether it was appropriate for the planning tribunal to exclude the Treaty of Waitangi as "not a proper matter to be considered".[77] Chilwell J ruled that:[78]

> There can be no doubt that 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 upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Accordingly, the planning tribunal had misdirected itself in law by holding the Treaty and other evidence of Māori cultural and spiritual connection to the land as inadmissible. The decision in Huakina reflects the limitations on the courts in applying Treaty principles in statutory contexts without express reference to the Treaty. In the absence of a Treaty clause, the Court held that the Treaty of Waitangi was merely one factor to be taken into account in the balancing act required under the Water and Soil Conservation Act. While entirely consistent with the traditional administrative law approach,[79] implying the Treaty of Waitangi as a mandatory consideration still leaves the decision-maker able to act contrary to the Treaty, provided that the decision-maker has given full consideration to it. As such, the restraint placed upon the decision-maker is merely procedural, rather than substantively restraining the decision from impinging upon Treaty principles.[80] As has been argued, the Treaty of Waitangi "cannot be regarded as just another Treaty".[81] To treat its principles as mere boxes to be ticked off is to vastly understate its significance.

While the decision did not involve application for judicial review, the *Barton-Prescott v Director-General of Social Welfare* case sheds further light on the applicability of the Treaty of Waitangi to statutory decision-making outside of the express-reference context. In determining a custody application, the Court held:[82]

> ... that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute.

Despite that, "colouring" concepts arising from the application of Treaty

77 At 193.

78 At 210.

79 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL); and *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

80 Wilberg, above n 24, at 725.

81 Elias, above n 46, at 625.

82 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

principles in the custody context were found to be "subsumed within the concept of the welfare of the child, which provides the ultimate standard under all of the statutory provisions concerned".[83]

Courts have been cautious in approving contextual review. Hardie Boys J made an early call for careful examination in *Attorney-General v New Zealand Maori Council (Radio Frequencies)*:[84]

> It is not an obligation expressly imposed by the statute. ... [Instead] it is ... one that arose by virtue of the statutory context in which the Radiocommunications Act lies. ... [This] renders it unnecessary to explore further for some wider basis, of perhaps more general application, upon which the Treaty's principles may be relevant to the exercise of statutory powers. In this sensitive area, I think it better to take one step at a time.

In *New Zealand Maori Council v Attorney-General (Te Arawa Cross Claim)*, the decisions in *Huakina* and *Barton-Prescott* were cited as authority for the proposition that Treaty principles have a "direct impact in judicial review cases or in cases involving statutory interpretation".[85] Writing extrajudicially, Elias CJ suggested that no difference exists between applicability of Treaty principles to administrative decision-making in express-reference or contextual review situations:[86]

> Perhaps most importantly, the Treaty impacts upon the exercise of discretions conferred as a matter of statute or prerogative. It is here that a real revolution in attitude to the Treaty can be seen. The Treaty is part of the context in which New Zealand legislation such as the Resource Management Act 1991 (NZ) — with its explicit references to the Treaty — and other legislation with no such reference, as well as the common law, is to be interpreted.

The case law reflects that the difference lies in the assertiveness of approach the court will take in that interpretation. Express review is premised upon Parliamentary authorising the court to substantively restrict executive action for Treaty principle inconsistency. With that approval, the Court of Appeal has acted boldly. Contextual review, in divining the applicability of Treaty principles from its status as part of the fabric of our society, has been limited to procedural restrictions on executive action. It has now been shown that substantive restriction of executive action for consistency with Treaty principles enjoys constitutional coherence as well as judicial willingness, where Parliamentary approval exists. The courts remain open to arguments in respect of the Treaty's overarching relevance to good administration. The view of the government with respect to these jurisprudential developments will now be examined, leading up to the controversy over s 9 in early 2012.

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83 At 189.

84 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 144 per Hardie Boys J (dissenting).

85 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [72].

86 Elias, above n 46, at 626 (emphasis in the original).

The Approach of the Government

1 Political consideration of Treaty clauses

The constitutional significance of Treaty clauses was noted by the report of the Constitutional Arrangements Committee in 2005. The Committee characterised the history of constitutional change in New Zealand as a "'pragmatic evolution'", and described the apparent constitutional tendency of "New Zealanders ... to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme".[87] The Committee contended this approach can lead to inadvertent alteration of the "'big picture'" by incremental changes, leading to disruption in "the overall balance between the branches of government in a way that is not necessarily foreseen or intended".[88] An example of this was given as:[89]

> ... the postulation of 'principles of the Treaty of Waitangi' in legislation and the judges' role in elucidating them in the course of interpreting the phrase in the context of the particular statute ....

The Committee went on to note that it is unclear what effect "vague and general" legislative references to the Treaty of Waitangi and its principles have had on the way Parliament and the executive carry out their functions.[90] It also criticised the enactment of provisions such as s 9 of the State-Owned Enterprises Act 1986:[91]

> We note that the more recent tendency of Parliament to describe the specific implications of the Treaty for a particular policy area seems preferable to the previous practice of making generic references to the principles of the Treaty in legislation.

How it "seems preferable" is unclear. The report of the Committee, replete with references to the "academic elite" and implied accusations of judicial activism, must be taken with a grain of salt. It does, however, usefully illustrate the growing ambivalence towards generic Treaty clauses in New Zealand government. In 2007, the Attorney-General, the Hon Dr Michael Cullen, noted that references to the Treaty of Waitangi increasingly took the approach of addressing "'the particular issues that arise in the context of that legislation'".[92] The current Government has not, as at the time of writing, passed a single act containing the phrase "the principles of the Treaty of Waitangi".

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87 Constitutional Arrangements Committee *Inquiry to review New Zealand's existing constitutional arrangements* (August 2005) at 12.

88 At 12.

89 At 12.

90 At 19.

91 At 19.

92 J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 514.

The Government has instead preferred to recognise the Crown's commitment to the Treaty of Waitangi itself and to set out the measures taken under the legislation to maintain that commitment. For example, s 4(b) of the Environmental Protection Authority Act 2011 requires the Environmental Protection Authority to "comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under that Act". This requirement is said to "recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi". In the third reading of the Bill, Rahui Katene MP described s 4 as a "Treaty clause", analogous to clauses such as those found in the Conservation Act 1987 and Resource Management Act 1991.[93] Even this approach has only been used three times in the period 2008–2011.[94] The use of the word "principles" has even been omitted from Waitangi Tribunal claim settlement acts since 2008, suggesting that Treaty principle discourse has been completely discarded from drafting practices.

Despite this apparent unease, there has been no attempt to repeal existing legislative references to Treaty principles or redefine the work of the courts since *Lands* under the current Government, as occurred under the previous Labour Government.[95] As with the legal status of the Treaty of Waitangi itself, broad Treaty principle clauses now reside in an uncomfortable middle ground: persistent in application in a number of important Acts — the Resource Management Act 1991, the Conservation Act 1987 and the State-Owned Enterprises Act 1986 in particular — but out of current political favour.

As discussed, however, the National Government's attempts to diminish the reach of the courts under s 9 of the State-Owned Enterprises Act 1989 provoked a controversy that almost brought an end to the cooperation between the Māori and National parties. It will be argued that this controversy — brought about by fear of commercial uncertainty on the one hand, and fear of further breach of the Treaty of Waitangi on the other — lends further support the recognition of a general principle of consistency, instead of the deletion and disuse.

2 The s 9 Controversy

The Government's proposed review of s 9 to the suggested "mixed-ownership model" was met with hysterical public reaction. Misinformation concerning the meaning and effect of s 9 was rife. The Prime Minister's error, discussed above, was repeated in an editorial in *The New Zealand Herald*:[96]

93 (11 May 2011) 672 NZPD 18585–18586.

94 Marine and Coastal Area (Takutai Moana) Act 2011, s 7; Environmental Protection Authority Act 2011, s 4; and New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008, s 6.

95 Treaty of Waitangi (Principles) Bill 2006 (10-1); and Principles of the Treaty of Waitangi Deletion Bill 2007 (66-1).

96 Editorial "Treaty tie in hardly takes shine off gilt" *The New Zealand Herald* (online ed, Auckland, 2 February 2012).

> There appears to have been no case law on the subject since the Court of Appeal's 1987 ruling that the "principles of the Treaty" meant an obligation on the partners to deal with each in good faith, particularly where land transfers are concerned.

Andrew Geddis[97] and Mai Chen[98] were the first commentators to present a balanced analysis of the issue. Most media comment, however, was shrill. Predictably, reductionism was rife, the Treaty of Waitangi being described as the realm of "Māori activists and Pakeha sympathisers".[99] The late Sir Paul Holmes subsequently capitalised on tensions at Waitangi Day celebrations with a dismal display of misunderstanding.[100]

The prevailing objection to the extension of s 9 to the Government's mixed-ownership model assets was that it would cause commercial uncertainty. It was claimed that s 9 would "not be well understood" by institutional investors and would have "a negative effect on investment".[101] That lack of understanding would be accompanied by a fear of "legal challenges to the partial sales".[102]

The premise that a section described as having "constitutional significance" by the Court of Appeal should be dislodged by a fear of lost profits begs a simple question: where is the proof? The ritual incantation of "commercial uncertainty" might find safe ground in contract law claims, but every body governed by statute is ultimately subject to the supervisory jurisdiction of the High Court, including state-owned enterprises.[103] Unless it could be demonstrated that investors would turn their heels and forgo the prospect of investing in the face of the tyranny of judicial review, prudence would surely dictate that objections to provisions of constitutional significance should be restricted to those grounded in empirical reality.

Ultimately, however, the controversy shows the community's need for clarification on the issue of Treaty clauses. It is clear from the rapid retreat of the Government from its preferred policy position and the community's support for the status quo, that the National Government considered that the majority of New Zealanders view the privatisation of state assets as appropriately governed by the principles of the Treaty, in the absence of legislation to the contrary. There is a "strong consensus among Māori" in support of the continued existence and relevance of s 9.[104]

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97 Andrew Geddis "If it's just a symbol, why do you care?" (31 January 2012) Pundit <www.pundit.co.nz >.

98 Mai Chen "Section 9: Why it matters for asset sales" *The New Zealand Herald* (online ed, Auckland, 2 February 2012). In the name of full disclosure, it should be noted that the author was involved with the preparation of this article.

99 Brian McDonnell "Treaty exaltation has gone too far" *The New Zealand Herald* (online ed, Auckland, 14 February 2012).

100 Paul Holmes "Waitangi Day a complete waste" *The New Zealand Herald* (online ed, Auckland, 11 February 2012).

101 Trevett, above n 12.

102 Trevett, above n 12.

103 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

104 Claire Trevett "Govt 'gets the message' on Treaty clause" *The New Zealand Herald* (online ed, Auckland, 16 February 2012).

There has been no clearer signal that change is needed to effectively recognise the role of the Treaty of Waitangi in limiting executive action. An overarching Treaty clause would address Māori concerns regarding executive disregard for Treaty principles. The existing body of precedent would assuage fears of the business community — real or unreal — concerning commercial certainty. So, the answer is not to repeal and forget, but to confront and address.

VI A SUGGESTION FOR CHANGE

Introduction

Judicial review of executive action for inconsistency with Treaty principles is best founded in the recognition of an overarching principle of interpretation providing that wherever an enactment can be given a meaning that is consistent with the principles of the Treaty of Waitangi, that meaning shall be preferred to any other meaning. This principle would require courts, when considering any power granted to an executive decision-maker under statute, to read the empowering provision as only granting that decision-maker power to act consistently with the principles of the Treaty.

The operation of the principle would mirror the approach of the courts in the express-reference cases, as well as the prevailing trend towards the requirement of consistency with human rights and international law. Practically speaking, the principle would have a significant pragmatic and clarifying effect on the operation of New Zealand government. This article will now explore the possibility of such a principle, with a focus on where it would fit within a broader review of the place of the Treaty of Waitangi within our constitution.

Practical Application

An interpretive rule that requires statutes to be given meaning consistent with Treaty principles would substantively restrict the powers granted to executive actors. In effect, its application would constitute an overarching application of the restriction placed upon the Crown under s 9 of the State-Owned Enterprises Act 1986: that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". It is time to recognise what President Cooke, writing extrajudicially, termed a "constitutional presumption that decisions entered in breach of Treaty principles will be reviewable":[105]

105 Robin Cooke "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 CLB 1326 at 1328–1329 (footnotes omitted).

> In the view of some judges the Treaty is of such basic importance that it should be presumed to apply in the exercise of statutory discretions whether or not it is expressly mentioned in the statute.

If an empowering provision can be interpreted consistently with the Treaty of Waitangi, and this interpretation does not plainly defy Parliament's intention, an empowered actor who acts contrary to the principles would be acting illegally. Aggrieved parties could seek judicial review of that executive action.

Two sources of authority may guide the application of the new interpretive principle: the approach of the Court of Appeal since the *Lands* case in applying general Treaty clauses in specific statutory contexts and the general common law developments concerning interpretive presumptions of consistency with fundamental common law rights and international obligations.[106] The *Lands* case, which involved the interpretation of s 9 and "the practical application of the [requirement of consistency] approach in the administration of [the] Act", would serve as the starting point for a consideration of the court's role in applying the principle.[107] Applying the principles to particular statutory contexts would continue to require a "broad, unquibbling and practical" approach.[108] Furthermore, a continuing focus on the principles would maintain the relevance of the Treaty itself. 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."[109] Lord Woolf's holding in *New Zealand Maori Council v Attorney-General* (the *Broadcasting* case) would also guide the application of the interpretation principle:[110]

> While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

This holding would relate to the new interpretive principle as s 5 of the New Zealand Bill of Rights Act 1990 (NZBORA) relates to s 6: namely, that consistency with Treaty principles does not require perfection, just as consistency with rights under the NZBORA allows for justified limitations on those rights. Characterising the Treaty of Waitangi as creating a continuing partnership between Māori and the Crown supports this approach. The Crown should be afforded breathing space in developing Māori Development policy, with circumstances such as the state of the economy or the vulnerability of the particular taonga in question would remain central to the consistency of the executive action under review.[111]

The standard of consistency required would also be guided by the

106 Wilberg, above n 24, at 720.

107 *Lands*, above n 1, at 656.

108 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 518.

109 At 530.

110 *Broadcasting*, above n 50, at 517.

111 At 517.

varying levels of "assertiveness" applied at common law to similar principles of interpretation. The common law has long afforded certain values priority such that in order for Parliament to abrogate their effect through legislation it must do so with clear explicit and clear wording. The varying effects of such dominant values can be seen through a variety of interpretive results:[112]

> Sometimes they can lead to a most artificial construction of the text of an Act; sometimes to a narrow construction of general words; sometimes to the reading in of an implied qualification to an apparently absolute statutory provision; [and] sometimes to a narrow interpretation of empowering provisions in an Act ... .

The recognition of this interpretive rule would encourage the courts to make use of what has been described as an "assertive presumption of consistency":[113]

> Courts could require all public powers to be exercised consistently with the Treaty, except where empowering legislation makes it clear beyond doubt that relevant Treaty rights and obligations are to be abrogated.

This approach would find symmetry with the statutorily mandated approach to human rights issues under s 6 of the NZBORA. The operation of s 6 has been described as a "valid constitutional impediment" to executive action inconsistent with the NZBORA.[114] The Court of Appeal adopted a similar approach in respect of New Zealand's international obligations.[115]

Were the courts to recognise the proposed interpretive principle, they would have the long history of the common law available to them in applying interpretive presumptions to the interpretation of statutes. The substantive nature of the restriction placed upon executive actors would find similar support. The courts have been willing to give effect to Treaty clauses that measure consistency with the Treaty of Waitangi by substantive policy outcomes. Furthermore, merely procedural Treaty clauses have been the subject of withering criticism. Section 8 of the Resource Management Act 1991 is one such clause. It requires:

> 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).

This provision amounts to a merely procedural requirement to "take into account" the principles. In considering that legislation in the *Ngāwhā*

112 Burrows and Carter, above n 101, at 326 (footnotes omitted).

113 Wilberg, above n 24, at 720 (footnotes omitted).

114 Janet McLean, Paul Rishworth and Michael Taggart, "The Impact of the New Zealand Bill of Rights on Administrative Law" in David M Paciocco and others *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) at 69.

115 *Sellers v Maritime Safety Inspector*, above n 25.

Geothermal Resource Report, the Waitangi Tribunal held:[116]

> It is difficult to escape the conclusion that the Crown in promoting this legislation has been at pains to ensure that decision-makers are not required to act in conformity with, and apply, relevant Treaty principles. They may do so, but they are not obliged to do so. In this respect the legislation is fatally flawed.

Similarly, the use of Treaty principles as merely mandatory relevant considerations has been criticised above. The failure of the courts to recognise the general application of the principles of the Treaty of Waitangi has already resulted in a lack of institutional understanding among members of the executive as to their obligations at law. Anything less than full recognition of the substantive effect of the principles of the Treaty as restricting inconsistent government action — in line with prevailing judicial approaches to the observance of human rights and international obligations — would amount to another failed opportunity to recognise the Treaty's constitutional significance.

Virtues and Flaws

As has been discussed, there has been a concerted movement by government away from the practice of including general Treaty clauses in legislation. Instead, the preferred approach has been for government to work out precisely how it wants a particular legislative scheme to provide for and protect Māori interests.[117] A possible argument against a general principle requiring interpretation consistent with Treaty principles is that this would detract from the "modernisation" of Treaty clauses suggested by Dr Cullen: "[s]ome statutory references, particularly in some of the old statutes, ... could do with more particular contextual reference to make it clear what the principles are in that particular case".[118] The better view is that an overarching requirement of consistency would clarify the continuing obligation of executive actors to act within the bounds of New Zealand's constitution. The continuing efforts of government to better realise what the Treaty principles mean within particular statutory contexts is *itself* a fulfilment of that underlying obligation.

Furthermore, the courts ought to retain a residual supervisory role to ensure that the obligations created by the Treaty of Waitangi are, in fact, fulfilled by the particular measures to meet those obligations under statute. As Matthew Palmer, notes, "there will be a point at which very narrowly drawn specific provisions lose their credibility with a court as ways of 'recognising and respecting' the Treaty".[119] This was the case the situation in the *Lands*

116 Waitangi Tribunal *Ngawha Geothermal Resource Report* (Wai 304, 1993) at 145.

117 Burrows and Carter, above n 92, at 513.

118 At 514.

119 Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 184.

decision. There, the machinery provisions of s 27 were held not to codify the obligations of the Crown under s 9 with regard to Māori land. Instead, the "plain and unqualified" wording of the section acted as a "constitutional guarantee" within the field covered by the Act.[120] If Parliament were to enact the suggested provision, machinery provisions would continue to serve two significant purposes in observing Treaty principles: first, to guide the executive in observing the obligations created by the new interpretive amendment and second, to strongly indicate Parliament's intention within the relevant statute regarding how best to fulfil those obligations and maintain consistency with the Treaty of Waitangi. The more detailed the machinery provisions, the more hesitant the courts would be to imply further obligations on the executive under the statute. Nonetheless, the court would maintain an overarching role in requiring consistency.

The suggested principle finds its historical origins in the White Paper for the NZBORA tabled in Parliament in 1985. The proposed Bill of Rights would have contained even weightier affirmation of Treaty principles, including protecting Māori rights under the Treaty of Waitangi from abrogation by statute. The White Paper advocated affording the Treaty of Waitangi "a superior status to general legislation", which would prevail over inconsistent acts under the interpretive rule that became s 6 of the NZBORA.[121] It was said that a bill of rights that ignored the status of the Treaty in the continuing legitimacy of governance in New Zealand "would be at best an incomplete document".[122] McHugh has described the Māori discontent with the White Paper as resulting in the loss of "an important opportunity" to give the "principles a clear application throughout the public sector".[123] Further, McHugh notes that a "Treaty principles clause in the BORA would have confirmed [the executive's] sense that the constitutional renewal spoken of by the Court of Appeal was also required at law".[124]

VII CONCLUSION

The controversy of early 2012 demonstrates the importance Māori accord to the protection s 9 offers to Māori interests under the State-Owned Enterprises Act 1986. In the days after the news broke, Tariana Turia MP wrote:[125]

> Section nine. One sentence of law that changed, forever, the landscape of the Treaty debate that shapes our nation. Those words provided the basis for placing the Treaty at the heart of our ongoing growth as a nation.

120 *Lands*, above n 1, at 658.

121 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.39].

122 At [5.5].

123 PG McHugh "'Treaty Principles': Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39 VUWLR 39 at 67.

124 At 68.

125 Turia, above n 62.

...

> There are times when you know that the essence of all you believe in will be undermined by a particular action — and you have to make a stand. This is one of those times. We have no option but to stand strong on this matter; to take other New Zealanders along with us; to have faith in our foundations as a nation.

While such rhetoric must be balanced against political reality — the s 9 controversy came a few short months after a damning electoral result for the Māori Party, largely attributable to its close ties to the National party — the expressiveness of Mrs Turia's open letter persists. But, as has been argued, the maintenance of the status quo is insufficient. Judicial unwillingness to restrain executive action without a governing Treaty clause, ongoing administrative unease with the operation of individual Treaty clauses and political turmoil concerning the creation of new Treaty clauses (and the abolition of old ones) all point towards an unavoidable conclusion: change is vital.

This article has suggested a potential solution. The recognition of the interpretive principle of consistency would represent an overarching constitutional guarantee to Māori that the executive could never act inconsistently with the principles of the Treaty without explicit and direct legislative authority. The uncertainty surrounding the application of the principles of the Treaty to executive action would subside, replaced by an overriding obligation upon all decision-makers empowered under statute to act consistently with a fundamental aspect of the New Zealand constitution.

The section that spawned the case "perhaps as important for the future of our country as any that has come before a New Zealand Court" has survived its closest encounter with the red pencil of the draftsmen.[126] Parliament is likely to continue to have the final say on matters relating to the Treaty of Waitangi. It is hoped that the populace, the Parliament and the Prime Minister learn the history of s 9 before next considering its demise.

126 *Lands*, above n 1, at 651.