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DECIDING THE CASE: RECOLLECTIONS

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The legal answer in the *Lands* case was not difficult.[40] It required the application of well settled principles governing judicial review of the proposed exercise of statutory powers of decision by shareholding Ministers in state-owned enterprises under section 23 of the State-Owned Enterprises Act 1986. That is why in the first paragraph of my judgment I said that in the context in which the matters for decision arose, that is, the state-owned enterprise legislation itself, the legal and factual questions necessary for the determination of the case could be readily identified.

The difficulties in the case reflected the need for us to gain a sufficient understanding of the complexities surrounding the Treaty of Waitangi, which was crucial in assessing the statutory background. And, in our judgments we had to provide a factual base to explain the legal answer in that case. We also had to provide some guidance for those concerned with the range of cases which could be expected to follow under the legislation. In that regard we knew that within the previous six months the responses to the introduction of the State-Owned Enterprise Bill had already doubled the number of claims lodged with the Waitangi Tribunal.

The foreseen tide of claims has continued and has led to many discussions of the 1987 judgments in subsequent decisions of the courts

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

and in numerous scholarly books and articles, as well as in the media and elsewhere in the public arena. As I saw it, much of the popular discussion of the Treaty seemed to assume that answers to Treaty questions should be simple and straightforward. The reality was quite different. The wide-ranging arguments in the case reflected many basic differences and absence of common ground in crucial areas.

Just to illustrate the last point, there was no agreement as to whether the Treaty was properly viewed as a domestic law contract; or as an international treaty, as Mr Baragwanath for the New Zealand Māori Council submitted; or as a basic constitutional document evolving in its application to changing circumstances over the years.[41] In the absence of an Agreed Statement of the Parties, that led me to say: "Much still remains in order to develop a full understanding of the constitutional, political and social significance of the Treaty in contemporary terms and our responsibilities as New Zealanders under it."[42] And:

> The way ahead calls for careful research, for rational positive dialogue and, above all, for a generosity of spirit. Perhaps too much has at times been made of some of these differences and too little emphasis given to the positive and enduring role of the Treaty. Whatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.[43]

In the time available I want to take up five points. The first expands on the closing words of that citation. Contrasting the signing of the Treaty in 1840 and our 1987 world, I put it in this way:

> Turning then to 1840 there can be no doubt that there were various motives, concerns and aspirations on the part of those involved on both sides. No doubt there were differences in the understanding of the participants as to what the Treaty and its different provisions meant – both for the immediate future and in the longer term. And in 1840 no one could have foreseen the changed New Zealand of the 1980s in the changed world of the 1980s. New Zealand is vastly different from the New Zealand

[41] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 671.
[42] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 672.
[43] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 673.

> of 1840 or the New Zealand that could reasonably have been in contemplation at that time – economically, socially, politically and even in some respects physically. Against that background the identification and application of the principles of the Treaty in today's world have to take account of the nation we have become and of the gains as well as the disadvantages that have accrued to all of us over the last 147 years.[44]

The second point concerns the basis for the Crown's claim to British sovereignty over the South Island. As a matter of history there were separate claims to the North Island and the South Island by the Crown in 1840, first by Captain Hobson and then in London: the North Island was expressly based on cession, ie the Treaty of Waitangi, and the South Island on Cook's discoveries. I noted that it seemed

> ...widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.[45]

But, our legal and social history showed that the lands of Ngāi Tahu were always treated as coming under the Treaty – indeed the first of the three illustrative cases in the *Lands* case itself concerned the lands of Ngāi Tahu at Otakou. And, having been dispatched by Hobson to do so, Major Bunbury collected signatures to the Treaty around the South Island. Scholars differ as to the actual legal basis for British sovereignty in 1840 and no Government could try to turn around in the 1980s and deny Ngāi Tahu Treaty of Waitangi claim status. But I expected scholars would, at least, explore the international law or other legal basis involved in treating sovereignty over the South Island as now based on the Treaty, not Cook's discoveries.

The third concerns the use of the terms "partner" and "partnership" in relation to the Treaty. In the judgments the expressions were used perhaps a little loosely. My judgment used the expressions "compact" and "Treaty partner" and, describing "the core concept of the reciprocal obligations of the Treaty partners",[46] I said:

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[44] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 680.
[45] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 671.
[46] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682.

> In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand, and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi.[47]

Regrettably, in some quarters more was drawn from references in the judgments to "partners" and "partnership" as extending somehow to equal sharing, than was ever intended by the Judges. That misapprehension led the Court sitting in 1989 with the same judges and in a judgment delivered by Cooke P to say:

> In the judgments in 1987 this Court stressed the concept of partnership. ... Partnership certainly does not mean that every asset or resource in which Māori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Māori have some fair claim other initiatives have still made the greater contribution.[48]

The message had not got home when we heard the arguments in the *Coal* case a few months later where Cooke P made two points. First, he stressed that the principles of the Treaty "are of limited scope and do not require a social revolution."[49] The second was that

> As regards those Crown assets to which the principles do apply, this Court has already said in the forests case that partnership certainly does not mean that every asset or resource in which Māori have some justifiable claim to share must be divided equally.[50]

The fourth point concerns consultation. In the *Lands* case I rejected both the wider consultation advocated for the New Zealand Māori Council and the narrow consultation proposed by the Crown and

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[47] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682.
[48] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142, 152.
[49] *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513, 527.
[50] *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513, 527.

concluded:

> I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.[51]

I added:

> In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.[52]

I should add that in the *Forests* case the Court confined the duty on both parties to consult the other party to "truly major issues."[53] Whether or not the passage of time has tended to elevate almost all Treaty matters into "truly major issues" I leave others to judge. Finally on this point, it is a duty to consult. It is not a duty to reach agreement with the other Treaty partner before acting within one's own sphere of responsibility. As a good faith obligation, and consistently with the principles of equity and partnership on which the Court relied, neither Treaty partner has a veto over decisions vested in the other partner.[54]

The fifth point takes me back to where I began this morning. The legal answer in 1987 required the orthodox application of well-settled principles governing judicial review of the exercise of statutory powers of decision by Cabinet Ministers. I have had the benefit of studying Baragwanath J's perspective as counsel in the case. I am perplexed by his focus on the common law role and responsibility of judges "as protectors of the rights of those whose minority position makes them vulnerable"; and by his conclusion that New Zealand experienced the

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[51] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 683.
[52] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 683.
[53] [1989] 2 NZLR 513, 521.
[54] See the extensive discussion of "consultation" in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.

phenomenon seen in cases in other jurisdictions where judges "saw a great injustice and used their authority to meet it." As I read our 1987 judgments they were all founded squarely on a standard application of the interpretation of legislation in its statutory background.

Finally on this point, understandably many of those present in court clearly felt the emotions of the occasion and the long history of the Treaty of Waitangi. But, the extended discussions we had amongst ourselves during and after the hearing were directed to the clarification of factual matters in the mountain of material we had to consider and to the objective assessment of that material in reaching the conclusions we expressed in our judgments.

What I do also remember clearly is that, unlike the usual pattern at the time, for several weeks we met at regular intervals to discuss progress in our reading and thinking before drafting our separate judgments. I can't recall a single discussion of the applicable legal tests going beyond standard statutory interpretation and well-settled principles of judicial review.