

SOVEREIGNTY AND THE TREATY OF WAITANGI

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PREFACE- Notes on Sovereignty and the Treaty

In forming a government at the last election the National Party needed, and received the support of the Maori Party on matters of confidence and supply. Part of the price of that support was the establishment of a committee to examine, and make recommendations to the Government on various aspects of the New Zealand Constitution. Included among the matters to be enquired into is the place of the Treaty of Waitangi (the Treaty) in any proposed changes to the existing, largely unwritten, constitution.

My purpose in writing this paper is to review what I take to be the current legal status of the Treaty to ensure that any suggested changes to the current constitutional arrangements proceed from the law as it is, and not from notions of

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the law as some would like it to be. In particular whether or not the Treaty has any residual constitutional significance which could lead to it being incorporated into a written Constitution such that it might form the basis of some form of shared sovereignty.²

In the paper which resulted from that interest I make it plain that the law has recognised the moral force of the Treaty and on a number of occasions both in the domestic Courts, and The Privy Council, has required the Government of the day to honour promises which were made by the Crown to Maori leading up to the signing of the Treaty. Parliament has also passed the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal with jurisdiction to examine whether or not the Crown has since 1840 failed to honour any of those promises. In the event that breaches are established the Tribunal has the right to recommend what should be the response of the Government to remedy such breaches. This is all well understood and both major political parties have embraced the process greatly enhancing the mana, and financial standing of Maori. No doubt this process will continue until all of the tenable claims have been settled.

What is of more enduring concern is whether or not the Treaty is capable of forming a platform for some form of shared sovereignty involving the Crown and Maori. After reviewing the relevant law and something of the history of the Treaty I have come to the view that:

1. Maori did not exercise any collective sovereignty over New Zealand in 1840 as that concept was then understood at International law.
2. The Treaty did not confer sovereignty on the Crown. Sovereignty was acquired by the willing concession of the Chiefs who signed the treaty that Queen Victoria would become the sovereign of New Zealand, and possibly in the case of The South Island the acquisition of sovereignty by British occupation.
3. In return for the acceptance of British sovereignty Maori acquired the benefit of the guarantees contained in the Treaty, and the promises made by the British government in the instructions given to Captain Hobson which formed the basis of the treaty negotiations.
4. There is no legal or Constitutional basis on which it could be said that the Treaty contains within it the residual potential to confer some form of joint sovereignty on Maori.
5. The “principles of the Treaty” referred to in the Treaty of Waitangi Act are to be found expressed in the instructions of the British government to Captain Hobson. The Treaty itself does not express any “principles”. It is simply a bargain between the Crown and the Chiefs who signed the document which provided that, in return for recognising Queen Victoria as their Sovereign, the Chiefs would acquire British citizenship and enjoy the protections referred to in the document.

² In an earlier paper (annexed as a appendix to this paper) I expressed the view that there is no legal authority for the proposition that Maori enjoy some form of partnership status with the Crown. What they do have is the benefit of the right to have honoured the promises which led to the making of the Treaty.

PART 1: Introduction

This paper is concerned solely with the question of whether or not there is anything in the Treaty of Waitangi (Treaty) that requires it to be incorporated into a written constitution, and having the effect of conferring sovereignty in and over New Zealand on twenty first century Maori.

"Honour the Treaty" has been a commonly heard cry from Maori since the document was signed by the Northern Chiefs on the 6th February, 1840. It is this repeated refrain that has probably led to the present initiative before the Constitutional Review Committee to enshrine the Treaty within a written New Zealand constitution.

That the Treaty has from time to time been ignored by Governments in formulating legislative policy is clear from the earliest cases in the New Zealand Courts including the Judicial Committee of the Privy Council (The Privy Council). Although these breaches have in the main been rectified, either by Court action or in the legislative process, some elements in the community apparently consider that the Treaty is of such fundamental importance to the history and future of New Zealand that it acts as a specie of Magna Carta and as such needs to become part of our formal constitutional arrangements affecting how the country is governed.³

PART 2: The Legal Status of the Treaty

The two relevant principles relating to treaties are:

- a. To have any lawful effect a treaty can only be made between sovereign states; and
- b. A treaty has no force of law in the signature countries unless it is expressly adopted into the law of those countries according to the constitutional usages of the parties to the treaty; in this case by Act of Parliament by the Governments of New Zealand and the United Kingdom.

a. The first requirement

Whether or not the first requirement is satisfied is fraught with confusion beginning with the instructions given by the British Government to Captain Hobson in 1839 as expressed by Lord Normanby. On the one hand it is stated that:

I have already stated that we acknowledge New Zealand as a sovereign and independent state.

But only:

In so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes who possess few

³ This article is not concerned with "Treaty Settlements." That is a political process which successive governments have thought it necessary and desirable to embark on, actuated by whatever notions of fair play are thought current and necessary to compensate Maori for loss of their lands and economic base in a contemporary world. I am concerned solely with examining what constitutional promises were exchanged between Maori and the British Crown as recorded in the Treaty, and how those promises fared in the courts. See the conclusions on the sovereignty question below.

*political relations to each other and are incompetent to act or even deliberate in concert.*⁴

And throughout the instructions doubt is cast upon whether or not Maori society did recognise any central government capable of exercising sovereignty as that concept was known to European law.

Whatever was intended by the instructions to Hobson on this point the view taken by the New Zealand Courts from the earliest time was that Maori had no sovereignty to cede to the Crown. One of the earliest cases to rule on the matter was *R v Symonds*.⁵ The judgment of Chapman J. in this case has been frequently referred to, approved and applied by later Courts. Chapman J said generally of the acquisition of title to new lands:

*The Crown's right is that it enjoys the exclusive right of acquiring newly found or conquered territory and of extinguishing the rights any aboriginal inhabitants to be found thereon.*⁶

By 1878 the view of the Courts as to the place and constitutional significance of the Treaty and whether Maori tribes enjoyed sovereignty in New Zealand had hardened, and in *Wi Parata v the Bishop of Wellington and the Attorney General*; Chief Justice Prendergast held:⁷

The existence of a pact known as the Treaty of Waitangi entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands and adhered to by some other natives of the Northern Island so far as the instrument purported to cede sovereigntyit must be regarded as a simple nullity no body politic existed capable of making cession of sovereignty nor could the thing itself exist.

The Chief Justice held that the title to the lands of New Zealand were:

acquired by discovery and priority of occupation,

saying:

*The sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishment of native title assumes on the other hand the correlative duty as protector of aborigines of securing them of any infringement of their right of occupancy..... The Maori tribes are exactly on the footing foreigners secured by treaty stipulations to which the entire British nation is pledged in the person of the sovereign representative.*⁸

⁴ Although the instructions to Hobson were prepared in Lord Normanby's name, he had nothing to do with their compilation. They were first prepared by Mr James Stephen, Permanent Under Secretary to the Colonial department for the purposes of Lord Glenelg when in the 1838 that Minister was contemplating sending a Consular Agent to New Zealand. Normanby did however make substantial amendments to the text. See Buick, *The Treaty of Waitangi*, Capper Press, 1914, pg 70.

⁵ NZPCC, 1840-1932, 387 SC

⁶ *R v Symonds*, 388

⁷ NZ Jurist, 1878, Vol. 3 NS at pg 387

⁸ *Ibid*, pg.79

Although later courts differed on the question of whether there was any such legal notion of “native title”⁹ and came out against the views of Prendergast CJ on that matter, the view that the Treaty did not cede Maori sovereignty, or confer any legally enforceable rights on the indigenous population has been repeatedly upheld by the Courts for example in *Hoani v Te Heu Heu Tukina v Aotea District Maori Land Board*,¹⁰ their Lordships said:

If in a treaty it is stipulated that certain inhabitants should enjoy certain rights that does not give title to those inhabitants to enforce those stipulations in the municipal courts.

This proposition has never been doubted and remains the law of New Zealand in relation to the Treaty.¹¹ In *Te Heu Heu* their Lordships administered the additional warning that:

As regards the appellants argument that the New Zealand Legislature has recognised and adopted the Treaty of Waitangi as part of the municipal law of New Zealand it is true that there have been references to the Treaty in the statutes but even the incorporation of the Treaty into the municipal law would not deprive the legislature of the power to alter or amend such a statute by later enactments.

The decision of the Privy Council was affirmed by the New Zealand Court of Appeal in *New Zealand Maori Council v Attorney General*,¹² and expressly reaffirmed again by the Court of Appeal in *New Zealand Maori Council and Ors. v Attorney General and Ors.*¹³

From the forgoing it seems impossible to argue that Maori society in 1840 recognised any notion of sovereignty as was understood by the International Law of the day, and therefore in that sense had none to cede to the British Crown. It seems clear from the speeches of the Chiefs for and against the signing of the Treaty that they accepted (or expressly rejected in some cases) that from the date of the signing of the Treaty the Queen would become the sovereign of New Zealand subject to the guarantees contained in the Treaty, in return for which Maori would become British citizens enjoying the protection of the Crown from each other, and from settler groups which were established in the colony before the Treaty. For a more detailed discussion of the events surrounding the signing of the Treaty see the discussion on the Treaty of Waitangi Act 1975 below.

[b. The second requirement](#)

As to the second crucial requirement of the law relating to treaties; that they have no force or effect unless legislated into municipal law. This ingredient, in so far as it affected the land tenure of Maori existing at the date of the signing of the Treaty,

⁹ See *Hoani v Te Heu Heu Tukina v Aotea District Maori Land Board*, 1941, AC 308.

¹⁰ *Ibid*, 324

¹¹ *New Zealand Maori Council v Attorney General*, 1994, NZLR, PC 513, 515

¹² NZLR, 1987, 1, 641

¹³ NZCA, 2007, 269

which is clearly the crucial relationship between the protection of native land ownership rights and the acquisition of sovereignty by the Crown was expressed by Martin CJ in *R v Symonds* in this way:¹⁴

The right of the Crown and its British subjects is not derived from the Treaty of Waitangi nor could that Treaty alter it.....To the state shall belong the management and responsibility for (sic, land) distribution. In general it asserts nothing as to the course which shall be taken for the guidance of colonisation but only that there shall be one guiding power.

And quoting from the instruction to Captain Hobson¹⁵

*It is not however to the mere recognition of the sovereign authority of the Queen that your endeavours should be confined or your negotiations directed but also to land purchases.*¹⁶

About which the Judge commented:

*These instructions were carried out first by the Treaty of Waitangi and afterwards by the Land Claims Ordinance*¹⁷

And specifically of the acquisition of title to New Zealand lands, subject to the guarantees contained in the Treaty the Judge said:

*The Governor in New Zealand derives his authority partly from his commission and partly from the Royal Charter of The Colony.*¹⁸

The background to this assertion was that shortly before Hobson left Sydney for New Zealand in January 1840, Governor Gipps of New South Wales had issued three proclamations relating to New Zealand, one of which extended the boundaries of New South Wales to include such of New Zealand "as might be acquired in sovereignty." This was ratified on the 16 June 1840 by the Legislative Council of New South Wales which passed an Act extending the laws of New South Wales to New Zealand.

The Royal Charter referred to in the judgment of Chapman J. came after the signing of the Treaty and was a claim to sovereignty over all of New Zealand; the North Island by cession pursuant to the Treaty, and over the South Island by "right of discovery." The Charter¹⁹ empowered the Governor to form a Legislative Council to enact laws not repugnant to English law for the "peace order and good governance of New Zealand", but not so as to...

affect the rights of any aboriginal natives of the said colony of New Zealand to the actual occupation or enjoyment in their own persons or in the person of

¹⁴ *R v Symonds*, 1847, Pg. 395

¹⁵ United Kingdom Parliamentary Papers, 1840, pg. 38

¹⁶ In his instructions to Hobson Lord Normanby was at pains to emphasise that "all dealings with the natives for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of her Majesty's sovereignty in the islands.

¹⁷ *Ibid*, Pg 397

¹⁸ United Kingdom Parliamentary Papers, May 11 1841, pg 31

¹⁹ New Zealand Government Act 1840, 3&4, Victoria, chapter 1

their descendants of any lands in the said Colony now actually occupied or enjoyed by such natives.

In 1841 the Legislative Council enacted the Land Claims Ordinance²⁰ (later confirmed in the Charter of 1852),²¹ which expressly recognised native title and conferred on the Crown the sole pre-emptive right to purchase any land which a native land owner wished to sell. The purpose of conferring this pre-emptive right was solely to protect the native land owners from exploitation. Chapman J said in *R v Symonds*²²:

In solemnly guaranteeing native title and in securing what is called the Queen's pre-emptive right the Treaty of Waitangi confirmed by the Charter of the Colony is that only the Queen can extinguish the native title (at least in times of peace) otherwise than by free consent.

The reference to "times of peace" no doubt reflects the fact that in 1863 when the Maori land wars were underway Parliament legislated that the Crown have the right to seize the lands...

of any native tribe or any considerable number thereof since the first of January 1863 being engaged in rebellion against Her Majesty's authority.

The status of the holders of native lands was further strengthened in 1862 with the passing of the Native Lands Act which set up a Native Land Court to enquire into and decide on competing claims to native land, and this protection enures down to the present time.

[Conclusions about the current legal status of the Treaty.](#)

- a. It has no force in New Zealand municipal law, and confers no rights which are capable of enforcement in a New Zealand Court.
- b. The stipulations in the Treaty relating to native title to land have been incorporated into New Zealand municipal law and have been enforceable by and against Maori and non-Maori land owners since the earliest time of colonisation.
- c. Sovereignty to New Zealand was acquired by the willingness of the chiefs who signed the Treaty, to recognise Queen Victoria as their sovereign, and possibly in the case of the South Island by discovery and occupation. All of which was subject to the solemn obligating of the sovereign to safeguard the existing rights and property of the indigenous occupants. The Treaty does no more than recognise that "real politic" reality. It was the later legislation discussed above which conferred on Maori the rights expressed in the Treaty not the Treaty itself.
- d. The Promises made in the Treaty were solemnly made and remain binding on the conscience of the Crown.²³

PART 3: The Treaty of Waitangi Act 1975

²⁰ New Zealand Legislative Council 1841,, Sessions 1and 2

²¹ New Zealand Constitution Act 1852

²² Ibid, Pg. 390

²³ New Zealand Maori Council v Attorney General [1987] NZLR 641

Parliament has had 173 years (at the time of writing) to give legislative effect to the Treaty and incorporate it into the municipal law of New Zealand, but it has declined to do so. The reason must have been obvious to successive governments; there is nothing left of the words of the Treaty to incorporate. The safeguards promised to Maori relating to their land (until recently the overwhelming concern of Maori) have been comprehensively legislated for, and are part of the municipal law of the country protected by the Courts and the Bill of Rights²⁴. There is nothing left of the Treaty document relating to this matter which could be legislated for.

As to sovereignty this passed to Britain in 1840 either by discovery and occupation, or contrary to Chief Justice Prendergast's view by cession pursuant to the Treaty.

However one views it, either from a purist constitutional lawyer's point of view or from that of the lay person, the New Zealand Parliament as successor to the British Crown, has been the de facto and de jure²⁵ sovereign of New Zealand since at least 1840. This being so there is no element of the passing of sovereignty which is capable of enactment into some municipal statute.

All doubt about this matter was removed when Parliament enacted the Treaty of Waitangi Act 1975. If there had been any suggestion that some unlegislated for elements of the Treaty needed to find a home in New Zealand municipal this was the ideal opportunity. Not so, all the Act does is to create the Waitangi Tribunal as a body charged with the jurisdiction conferred by s 6:

6 Jurisdiction of Tribunal to consider claims

(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

(a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or

(b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or

(c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

*and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, **was or is inconsistent with the principles of the Treaty**, he or she may submit that claim to the Tribunal under this section. (My emphasis)*

²⁴ New Zealand Statutes, 1990

²⁵ In fact and in law

The jurisdiction is to investigate claims for any of the matters referred to in (a) to (d) above. The only matter of possible historic interest in this collection of matters likely to cause any Maori prejudice is (d) which refers to acts done or omitted since 6 February 1840, and it is that sub section which is the foundation of the Treaty settlement claims process. That said although nothing in the Act makes any provision for the incorporation of the Treaty into New Zealand domestic law, the preamble to the Act promises more it says:

Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand:

And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language:

And whereas it is desirable that a Tribunal be established to make the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

Preambles to legislation are not an operative part of document, but three things are apparent from this wording; first the Treaty was not between the British Government and all Maori, it was between the Queen and number of Maori Chiefs. As far as is known the Treaty has not been ratified by the British Parliament.

Second it is clear by necessary inference that there is nothing left of the literal substance of the Treaty which requires enactment into municipal law and all that is left is for Parliament to determine what is the "practical application of the principles of the Treaty".

Thirdly nowhere does the Act state what are the principles of the Treaty which are to be "practically applied". In the ordinary way in which lawyers and lay people construe documents, the principles which inform a bargain (which is what the Treaty is) are those which are clear from the wording chosen by the parties, or if the wording of the document is unclear then by recourse to necessary implication in order to make sense of the bargain. In the case of the Treaty the wording is clear beyond any doubt, and recourse to matters of inference from the surrounding circumstances is unnecessary. It cannot be any other way or there would be endless confusion and re-inventing of the bargain. Nowhere in the Treaty document are any principles enunciated. It is a simple transaction whereby Maori gave up whatever status they claimed over the lands of New Zealand and recognised the Queen as sovereign of New Zealand. In return they received the protection of the British Crown and a guarantee that:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

Like all such documents it must be construed against the background of the times and not as contemporary commentators would wish it to have been.²⁶ In terms of what the Crown guaranteed what must have been crucial to Maori were the practical benefits of security of existing land holding, access to food, access to forests for hunting and wood supply, and access to rivers as a means of transport and livelihood. What the Crown secured in return was sovereignty over the lands of New Zealand without the necessity (at that time) of an expensive and unpopular war.

There was also the altruistic motive spelt out in the preamble to the Treaty:

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects.

It is clear beyond doubt that the parties to the Treaty acquiesced in this world view or it would not be in the document, and it mirrors what Prendergast CJ was getting at in *Wi Parata* (above).

A view often heard expressed is that the Maori did not understand the content and effect of the Treaty in so far as it ceded sovereignty to the Crown. Apart from being an insult to the intelligence of the chiefs who participated, Hobson was required by his instructions to be clear beyond any doubt that the parties understood the effect of the bargain. In his instructions from Lord Normanby he was enjoined to ensure that...

the natives must not be permitted to enter into any contracts in which they might be ignorant and unintentional authors of injuries to themselves.

The principal accounts as to what took place at the signing of the treaty (for example: Williams, Colenso and Felton) confirm that Hobson did all he could to ensure that the chiefs understood what they were signing, as did the officials charged with obtaining signatures of Chiefs who were not at the Waitangi signing.²⁷ It is also clear from the speeches of the principal chiefs that they were aware of what they were being asked to give up and what they would receive in return²⁸ which was:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

It is easy to dismiss this as an empty concession of little practical value to Maori in 1840. Nothing could be further from the truth. In fact, as well as the guarantee of its lands etc., the protection of the Crown accompanied by a promise of British

²⁶ In 1839 when Lord Normanby's instructions to Hobson were being considered the British parliament was much concerned at the interest being shown in New Zealand by the French government. It was demanding rights of settlement and denied the sovereignty of Britain over the islands of New Zealand. There was also the earlier incident in 1814 when the Frenchman Baron De Thierray, leading a confederation of Maori Chiefs proclaimed himself sovereign of New Zealand. See also the negative role allegedly played by the Roman Catholic Bishop Pompellier at the signing of the Treaty by encouraging some of his protégé Chiefs to oppose the signing.

²⁷ See below for the views of some of the chiefs.

²⁸ See below.

citizenship, were probably the holy grail sought by the more astute Maori Chiefs. Indigenous society in 1840 was in a parlous state; beset by inter tribal warring (aggravated by the arrival of fire arms)²⁹, bereft of any central authority capable of governing and pacifying the peoples, (as the preamble records), beset by unscrupulous settlers and with food supplies at risk.

The prospect of sharing in the prosperity of the most extensive world power of the day must have presented to Maori a unique opportunity to become part of that empire, and so it proved to be. It is also well documented that the Maori was a natural trader, and the prospect of becoming part of the greatest trading block the world had ever known must have been appealing.

In the middle of the nineteenth century the British Empire was at its apogee. Its dominions extended from the English Channel to the Tasman Sea. More disparate peoples were governed from one capital city (London) than at any time in history. Maori could not have become citizens and subjects of a more extensive or powerful global enterprise. Being the naturally intelligent, and in their past adventurous seafaring people, and traders they were, they must have realised the enduring benefits of this part of the bargain; particularly as they were not giving up anything in the way of collective sovereignty, and were receiving the guarantees contained in Article Two.

It is equally true that the bargain must have appealed to the British as experienced and shrewd colonisers primarily focused on trade and not conquest for its own sake. As Lindsay Buick writing in 1914 says in the preface to his first edition on the Treaty of Waitangi:

When we consider what Britain would have lost in material wealth, in loyalty, in strategic advantage; when we reflect what it would have cost to have conquered the country by force of arms then it is that we can see in clearer perspective the wisdom of Lord Normanby's policy, the breadth of his statesmanship, and we are better able to appreciate the triumph in diplomacy that the Treaty represents³⁰

PART 4: The Principles of the Treaty

Given there are no "principles" enunciated in the Treaty of Waitangi Act, there are only two possible conclusions as to what Parliament intended in referring to them. Either the preamble to the Act is a piece of empty rhetoric, or the meaning of the phrase must lie elsewhere. It is a well understood tenet of statutory interpretation

²⁹ In a letter dated the 16th November 1831 to King William IV, thirteen of the Chiefs in New Zealand sought the protection of the Crown against neighbouring tribes and British subjects residing in the islands. On the 14th of June 1832, the British government despatched Mr. Busby to New Zealand seeking to remind the Chiefs of the benefits of friendship with New Zealand and promising protection against the depredations of the settlers. It is clear at this time that Britain had no wish to annex the country. Although Governor Gipps and the Legislative Council of New South Wales issued three proclamations: extending the boundaries of that colony to include New Zealand and appointing Captain Hobson Lieutenant-governor over all of the territory of New Zealand that he may later acquire, and putting an end to land speculation in the colony.

³⁰ The Treaty Of Waitangi, Capper Press, 1914

that an Act of Parliament is always speaking. Parliament does not legislate for a nullity; therefore it is necessary to enquire what it was the New Zealand Parliament had in mind in referring to "Treaty Principles". In the writer's view it can only be intended to refer to those considerations which were present in the minds of the Ministers of the Crown who were responsible for proposing and concluding a treaty with Maori as set out in the instructions to Captain Hobson.

The timing of the decision to enter into a treaty with Maori is significant. By the time of the acquisition of New Zealand as a colony the British appetite for colonial expansion was on the wane. Indeed it is doubtful, by the eighteen forties, that Britain would have looked to colonise much beyond Australia had it not been for the fact that there was a sizeable body of British settlement already existing in New Zealand comprising; missionaries, and what seems to have been an unsavoury collection of whalers, traders, land speculators, and worse.

Coincident with this in Britain was the growing philanthropic and moral lobby of humanitarian (mostly Anglican) evangelicals which probably had its genesis in the movement for the abolition of the slave trade. The condition of society at that time gave this lobby plenty of other social ills to tackle; child labour in mines and factories, industrial safety, poverty, drunkenness, and widespread exploitation of the working classes. William Wilberforce, so instrumental in the abolition of the slave trade, had died only seven years before the Treaty was contemplated and his powerful influence remained. It was the time of the conscience raising writing of Charles Dickens.³¹ David Livingstone³² was embarked on his missionary exploits in Africa. Lord Shaftsbury³³ was crusading for the relief of child labour, and the reform of the lunacy laws of the day, and the advent of the suffragette movement was around the corner.

It was into this social ferment that Lord Normanby³⁴ (author of the instructions to Captain Hobson) was born and which influenced his career, rising as he did in 1839 to become Secretary of State for the Colonies. Although the instructions were probably drafted for his predecessor Lord Glenelg,³⁵ from the substantial changes which Normanby made to the early draft there can be no doubt that they had his imprimatur. It would also not have been lost on Normanby that Glenelg had been severely criticised in Parliament for his handling of the Canadian rebellion which broke out in 1837 in both upper and lower Canada, involving the use of widespread force against the insurgents. It is clear that Normanby wished to avoid the injustices, trouble and expense which accompanied a violent usurpation of a newly discovered land and this is reflected in his instructions to Hobson. They are comprised in a lengthy document which is a blend of real politic and lofty humanitarian aspirations. Thus it begins with the acknowledgement that New Zealand is possessed of "great natural resources", and occupies:

³¹ Born 1812, died 1870

³² Born 1813, died 1873

³³ Born 1801, died 1885

³⁴ Born 1797, died 1863

³⁵ Born 1778, died 1866

a geographical position in seasons either of peace or war which in the hands of civilised men to exercise a paramount influence in that quarter of the globe

concluding that:

There is probably no part of the earth in which colonisation can be effected with greater or surer prospect of national advantage

The national advantage was of course that of Britain not of New Zealand. Having stated the pragmatic geo-political reasons for colonisation New Zealand the instructions immediately record that there are: "higher motives for the enterprise". These proceed from a recognition that:

an increase of wealth and power consequent on any colonisation would be "inadequate compensation for the injury which must be inflicted on this kingdom by itself by embarking on a measure essentially unjust and but too certainly fraught with calamity to a numerous and inoffensive people whose title to the soil and to the sovereignty of New Zealand is undisputed and has been solemnly recognised by the British Government.

This is an extraordinarily humane approach to colonisation and illustrates how the senior statesmen of the day had come to realise that as a Colonial power Britain was dealing with an established society with its own history, concerns and ambitions which could not be violently trampled underfoot.

The instructions continued with the recognition of what Normanby considered to be settlers being:

persons of bad and doubtful character -convicts who had fled from our penal settlements and seamen who had deserted their ships.

and that such people were:

unrestrained by any law and amenable to no tribunals were alternately the authors and victims of every specie of crime and outrage.

Certainly Normanby had no illusions that the early settlers of the day were in any way more civilised than the Maori inhabitants.

He was also concerned about the amount of land that had been alienated by Maori to European settlers and conscious that much more would follow if the Crown did not intervene to ensure that:

unless protected and restrained by necessary laws and institutions they (sic the settlers) will repeat unchecked in that quarter of the globe the same process of war and spoliation under which uncivilised tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom.

It was as to mitigate these evils that the instructions recorded that Britain had decided to:

*adopt the most effective measures for establishing amongst them a settled form of civil government. **To accomplish this design is the principal object of your mission.***

Normanby then turned to the crucial question of sovereignty saying:

I have already stated that we acknowledge New Zealand as a sovereign and independent state so far at least it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes who possess few political relations to each other and are incompetent to act or even deliberate in concert. But the admission of their rights though inevitably qualified by this consideration is binding on the faith of the British Crown.

The instructions then eschew any intention by the Crown to seize the lands of New Zealand by force but will only govern them:

with the free intelligent consent of the natives.

recognising that this requires :

the surrender to Her Majesty of a right so precarious and little more than nominal and persuaded that the benefits of British protection and laws administered by British judges would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain".

Normanby was conscious that even the terms of such a treaty would probably be alien to Maori and that this:

might enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning or the probable results.

The instruction was to overcome these difficulties with:

the exercise on your part of mildness, justice and perfect sincerity,

but recognising that Maori could not be protected from the possible depredations of the settlers and of :

the impossibility of Her Majesty extending to them any effectual protection unless the Queen be acknowledged as sovereign of their country"

Accompanying this was the future promise that only the Queen would be able to purchase land from any indigenous owner who wished to sell, thereby making all such transactions open to the scrutiny of the responsible officials which would ensure that any such sales were:

made with at least some kind of system with some degree of responsibility, subject to some conditions and recorded for general information.

This came with the promise that if the Queen's sovereignty became recognised by Maori then no other form of land sale and purchase would be recognised.

Finally on the matter of the aspirations of the Crown the instructions conclude:

There are yet other duties owing to the aborigines of New Zealand which may all be comprised in the comprehensive expression of promoting their civilisation, understanding by that term whatever relates to the religious intellectual and social advancement of mankind... the establishment of schools for the education of the aborigines in the elements of literature will be

another object of your solicitude;³⁶ and until they can be brought within the pale of civilised life , and rained to the adoption of its habits they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals

The balance of the instruction to Hobson was concerned with the mechanics of Government, the Administration and the Courts.

How was the proposed Treaty received by the Chiefs who were called on to sign it?

This paper does not in any sense purport to be a history of the signing of the Treaty, but in saying something about how the chiefs regarded the Treaty gives a clue to the principles which they understood it to espouse.

At Waitangi Hobson, Busby and their officials received a mixed reception from the Chiefs. As Hobson was in the course of assuring the Chiefs that the Crown would carry out its promises in relation to Maori land holding and any future sales, Te Kemara chief of the Ngati-Kawa tribe, and a recognised Maori orator, interrupted telling Hobson (in translation);

I am not pleased towards thee. I will not consent to thy remaining in this country....were all to be on an equality then perhaps Te Kemara would say yes...you English a re not kind to us like other foreigners you do not give us good things. I say go back, go back governor we do not want the here in this country .

Rewa chief of Ngai-Tawake, Moka chief of Patukeha, and Hakiro a great chief of the Ngati-Rehia tribe expressed similar sentiments, particularly concerning lands which the missionaries had acquired from Maori. In this he was supported by Kawiti, of Ngati-Hine. The tenor of opposition was interrupted by Tamati Pukututu a Chief of the Te-Uri-o-te-hawata tribe who is recorded as saying:

Remain Governor, remain for me. Remain here as father for us. These Chiefs say don't stay because they have sold all their possessions and are filled with foreign property and they have no more to sell. But I say what of that? Remain governor remain.

³⁶ The role of the missionaries was forefront in the realisation of these aims. In the long running court litigation of *Wallis v The Solicitor General*, 1903, AC 173 concerning the gift on 16th August 1848 of 500 acres of land at Porirua by among other chiefs Te Rauparaha, for the purposes of establishing a school similar to St John's already existing in Auckland, Lord Macnaghten in giving the judgment of the Privy Council overturning the New Zealand Court of Appeal, which declared the gift invalid and that the land to revert to the Crown, recorded his view of the interaction between Maori and the church leader of the day in this way. Speaking of Bishop Selwyn to whom the gift was made:

The Bishop as is well known acquired an extraordinary influence in New Zealand. His striking personality, his devotion to his Masters service and his zeal for the welfare of the Maori race had produced a profound impression on the native mind. Pg 17.

The gift of land in question was regarded by Lieutenant Governor Eyre as recorded in the Privy Council judgment as:

Such laudable and generous conduct will be made known in England and cannot fail of ensuring the commendation of all good men and the Queen will rejoice in seeing her Maori subjects setting so good an example to the Europeans.

In this he was supported by Matiu, a Chief of the Uri-o-Ngongo tribe, saying:

Do not go back but stay here a governor, stay remain with us. You are as one with the missionaries a Governor for us. Do not go back but stay here, a Governor, a father for us, that good may increase, become large for us.

But it was Wai, a chief of the Ngati-Awake tribe who brought the debate back to a discussion of the practicalities of land holding including; the return to Maori of any lands of which they had been unfairly dispossessed by the settlers. He also drew attention to the disparities in terms of trade between Europeans and, between Europeans and Maori.

To this point the weight of oratory had been against the signing of the Treaty, and it was then that Hone Hika (who later rose in rebellion against the Crown) delivered powerful support for the signing of the Treaty, saying:

Thou go away, no, no, no, for then the French people and the rum sellers will have us natives. Remain remain stay thou here; you with the missionaries all as one.

This was followed by the late arrival of Tamati-Waaka Nene, and his elder brother Patuone of Ngati-Hao. In his history of the Treaty, Buick³⁷ says of Nene:

To this chief with his great mental powers, his keen perception, his capacity to read the signs of the times it had long been apparent that the advent of the Pakeha was inevitable and that The Maori system was incapable of developing the principles of stable government. To enter now upon a campaign of hostility to the whites would he believed certainly result in the destruction of his own race. It was too late. Yet to govern themselves was manifestly impossible.

These observations are well born out by the extracts from Nene's oration recorded in Buick,³⁸ and was thought by the Reverend Clarke in his Notes on early life in New Zealand, to be the turning point of the debate. He was followed and supported by his elder brother Patuone, regarded as one of the fathers of Nga-Puhi.

Of course not all of the North Island Chiefs were present or represented at Waitangi, and following the signing there the Treaty document was taken on tour of the other great Chiefs. At Kaitiia probably the most powerful of all the affirmations of The Threat was delivered by Nopera Panakareao. In the course of a powerful oration he said:

My desire is that we should all be of one heartI am at you head. I wish you all to have The Governor. We are saved by this. Let everyone say yes as I do. We now have someone to look up to.

The expressions of opposition were an entirely understandable. However eloquently it was expressed by Hobson and Busby there was a genuine fear among some Maori that they were losing something of value with no tangible benefits in return, or at least no promises on which they could rely. What is extraordinary is the foresight

³⁷ The Treaty of Waitangi *ibid*, Pg 141

³⁸ *Ibid*,Pg 142

and wisdom of those speaking in favour. They must have known that they were embarking on a voyage into the unknown but they were prepared to trust the word of the missionaries and Hobson that the promises made in the Treaty would be honoured.

[Conclusions on the Treaty of Waitangi Act.](#)

If it is correct to view of what is meant by the "principles" referred to in the Act as being a statutory recognition of the aspirations and putative promises of the British Government in instructing Hobson to attempt to effect a treaty with Maori, then the Act fulfils its purpose of setting up a mechanism for enquiring into whether or not those promises have been kept. Viewed in that way, the Treaty settlement process created by the Act is entirely consistent with the terms of the instructions to Hobson. It may be that some of the claims of breach have become a little far-fetched, but it is not the intention of this paper to examine that question. The important point in the writer's view is that the Treaty of Waitangi Act does not purport to enact into New Zealand law the Treaty of Waitangi, and does not do so. What it does do is to recognise the principles which informed the Treaty, and provides a means of enquiring whether the principles have been adhered to.

PART 5: Conclusions on the Sovereignty question, and the honouring of the Treaty

It is apparent from the foregoing that considerable confusion surrounds the passing of Sovereignty over New Zealand to the British Crown, and the instructions to Hobson are themselves unclear on this crucial question. On the one hand they refer to the Maori inhabitants as having sovereignty over New Zealand, and on the other of doubting whether in the social circumstances of the time Maori exercised sovereignty at all as it was understood in international law of the day. Indeed Normanby was doubtful whether they were capable of understanding such a concept given the fact that no one person or institution exercised power over more than localised parts of the country³⁹. Then there is the added difficulty of whether or not the treaty was intended to relate to the South Island, or whether as the Court in *Wi Parata* considered, this was terra nullius and annexed to the British Crown by discovery and occupation.

The Treaty itself does little to clear up this confusion. Article one of the English version states:

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

³⁹ See the judgment of Prendergast CJ in *Wi Parata*, *ibid*

Clearly this was intended to be a cession of sovereignty which the individual chiefs possessed, over the areas of the country which they actually exercised unchallenged control, or as was best known at the time, appeared to do so. That is a far cry from the exercise of sovereignty over a whole country as was then recognised as a necessity at international law. In the annals of the major acquisitions which became the British Empire, sovereignty was acquired either by occupation for example as in the American thirteen founding Colonies,⁴⁰ and Australia, or by conquest as in the West Indies⁴¹, India,⁴² the African colonies, and later Canada following the rebellion of 1837. It is true that treaties were concluded in many cases with the native inhabitants, but these were often imposed on the defeated inhabitants, and in no way similar to the ideals of just dealing and fair play which inspired the Treaty of Waitangi, and which makes the Treaty unique in the history of British colonisation.

The most likely answer to the sovereignty conundrum is that those chiefs who enjoyed exclusive dominion over lands in New Zealand ceded sovereignty over those lands to the Crown. Where there was no effective de facto dominion over the land it was simply acquired by discovery and occupation, both well recognised at international law. Chief Justice Prendergast's description of what took place although expressed in harsh terms is an accurate statement of the law of the day.⁴³

It follows that the Treaty has no continuing constitutional relevance to the governance of New Zealand other than as a platform for the Treaty of Waitangi Act and the resolution of any past breaches by the Sovereign. There is therefore no basis in law by which it should become part of any written constitution if one were to be contemplated. All of the important promises contained in the Treaty have been honoured. Maori land ownership was preserved to the original owners, and they were protected by the Crown's assertion of the right of pre-emption, British citizenship was conferred on all Maori, Maori have complete political equality (indeed unequal if one considers the Maori seats). Maori have completely equal access to educational opportunities and health care. They share in the benefits of the infrastructure introduced by the Europeans. They have equality before the law and have full access to the courts which from the earliest time they have exercised and continue to do so generally with much profit. Notwithstanding these enviable benefits (denied to many of the world's citizens) Maori enjoy in addition the court sanctioned benefit of having the spirit of the Treaty live on as it is embodied in the instructions to Hobson and the terms of the Treaty itself, and the Treaty of Waitangi Act, leaving it to the governments of the day to decide what are and what are not Treaty breaches. It is difficult to see how more comprehensively this transaction could have been honoured, or more completely it can be said that we are one people.

⁴⁰ Originally established in the seventeenth century by chartered companies which were subordinate to the Crown, and leading to the war of independence in the mid eighteenth century when the colonists attempted to assert independence from the crown on matters relating to taxation.

⁴¹ Ceded to The British Crown for the trading purposes of the South Seas company by the Treaty of Utrecht in 1713 with no regard for the native inhabitants.

⁴² Originally a trading destination founded by the East India Company which held a Charter from the Crown, and later the subject of prolonged and successful wars against the native rulers.

⁴³ See footnotes 13 and 14, *ibid*

APPENDIX 1

SUBMISSIONS ON CONSTITUTIONAL REVIEW

Anthony Willy LLM

June 2013

My submissions concerning possible constitutional changes in New Zealand are under the following headings:

1. Status quo
2. Social implications of change
3. Political implications of change
4. Economic considerations
5. Legal considerations

1. Status Quo

It is understood that the Constitutional Review Committee has been established as part of the political process by which The Maori Party agreed to support the National Party on matters of confidence and supply following the 2112 general election. The terms of reference make it clear that the committee's remit is wide ranging.

I comment generally under the above headings.

The status quo is that New Zealand has a unicameral Parliament elected pursuant to the Mixed Member Proportional system (MMP). This means that the party winning the most electorates does not necessarily govern. It is the party with the most list votes which carries the day.

Since the inception of MMP this has resulted in coalition governments comprising more than one party. The perceived advantages of MMP are that it provides for a wider spread of opinion in The Parliament and allows minor parties the opportunity of a real voice in government. This in turn reflects the overall unity of New Zealand society within a system which allows for a wider variety of opinion and input into the political process.

The MMP system is the only political check on the exercise of political power by any single group within the process. Specifically New Zealand lacks the oversight provided for by a second chamber, neither does it enjoy the checks and balances afforded by a Federal system of government which requires constant balancing of the rights and powers of states with those of the Nationally elected government.

2 Social Implications of departure from existing constitutional conventions

In my view the necessary protections of fundamental human rights and enforcement of obligations, rests heavily on the collective tolerance and common sense of the electors. To date this has delivered stable and effective government.

Any constitutional change which has the potential to erode this tolerance and common sense is not only unnecessary it is positively harmful. In that sense the present constitutional arrangements are not "broken and do not need fixing".

The elephant in the room in any New Zealand constitutional debate is always the status and rights of the indigenous people, and presumably that is why The National Party was persuaded by its coalition partner to set up the present review committee. I focus on this group because there does not appear to be any agitation by more recent immigrant groups or the descendents of the early European settlers for added, or amended constitutional rights.

It seems clear that Maori are not content with their status within the present constitutional arrangements but seek political influence disproportionate to the size of their voting population. This is apparently based on the dubious notion that they are the "first people of the land" and has in turn been encouraged by the pattern of Treaty Settlements, and the legal significance given by the Courts in more recent years to the Treaty of Waitangi. These added rights are pursued against the background of absolute political equality currently enjoyed by Maori people, including the unique privilege of race based seats in Parliament enjoyed by no other group of electors and therefore any change can only alter the present balance of political equality currently enjoyed by all New Zealand citizens.

By definition if added political rights are given to Maori than then that will diminish the political rights enjoyed by all other New Zealand citizens. The constitutional cake is finite and to cut it more generously in favour of one group is to leave less for all of the others. That will without doubt erode the collective tolerance and commonsense upon which the present constitutional arrangements rest and which is crucial to the government of a society by means of an unwritten constitution.

It has been demonstrated repeatedly in other countries which do not enjoy a truly representative system of government⁴⁴ that this will lead to widespread resentment and given the necessary spark will lead to civil unrest. This is particularly so of New Zealand which historically has presented as a truly egalitarian society having its settler roots in rebellion against unrepresentative ingrained privilege.

The problem for the committee is compounded by the fact that Maori society has no such tradition. Left to itself it is historically more akin to a feudal society in which the power and the wealth is shared unequally among members of the group. There is no reason that any additional constitutional rights acquired as a result of the

⁴⁴ For example South Africa under the apartheid rule, and any of the numerous theocracies and one party dictatorships which currently exist around the world. We do not wish to ever see a "New Zealand Spring" or the need for "Velvet or Orange Revolutions" in New Zealand.

recommendations of the committee will be shared in any other way. Indeed if it were to be supposed that Maori would exercise any newly created privileges in some way more compatible with the existing arrangements than they would not need them, because they already enjoy complete political equality.

3. Political implications

A central tenet of the Maori agitation for increased constitutional rights is the enshrining of the Treaty of Waitangi as a document having constitutional significance. The implications of this are as unknowable. Of necessity the significance of such a constitutional change will be left to the Courts to decide and as in the case of some earlier judgments of our higher Courts this will depend on the political and social predilections of individual judges.⁴⁵

In the way in which these matters come before our courts it will take many years before the altered constitutional arrangements are bedded in, and when finally revealed they will represent not the democratic views of the voters but the views of a small and unrepresentative group of Judges.

In addition there will, of necessity occur a prolonged period of political uncertainty which will damage the economy and result in a loss of public confidence in the government of the day.

Before the Committee considers the place of the Treaty in the present day New Zealand constitutional arrangements it needs to do two things:

(a) Be satisfied to the highest standard of proof precisely which iteration of the Treaty is the valid original. There is respectable body of literature to suggest that the document included as a schedule to the Treaty of Waitangi Act 1975 is a modern revision which contains material crucial to the current debate which is not found in the original document signed by the Chiefs⁴⁶. On a matter of such enduring political significance Parliament has a duty to all New Zealand citizens to review this matter afresh and not be caught up in revisionist history no matter how well intentioned it was at the time of writing.

(b) The committee should look afresh at the legal status of the Treaty in the light of the validity of the pronouncements of various courts over the years since the Treaty was signed, and having regard to the social conditions which existed at the time of signing. There is much talk of the "principles of The Treaty" but beyond a vague association with a notion of "partnership" these have never been enunciated. Even a cursory reading of the text of the original document is sufficient to demonstrate that there are no "principles" enshrined in the treaty. It was a pragmatic Victorian political document which simply evidenced an exchange of the Sovereign rights enjoyed by the Maori signatories, for the protection of the British Crown; and a

⁴⁵ See below

⁴⁶ See essay by Bruce Moon- Real treaty , False Treaty Tross Publishing 2013

guarantee that lands and rights currently enjoyed by some of those Maoris⁴⁷ would be respected by the Crown.

There is a great deal of published material on both of these matters, much of which does not accord with the thinking current in some political quarters. Parliament is the highest court in the land and it has the power, indeed the obligation to revisit these matters before making any far reaching constitutional changes which may affect the peace and good governance of New Zealand. It is to be hoped that the work of the committee will confront these issues before making any recommendations to Parliament.

4. Economic considerations

The New Zealand economy rests on a narrow base largely dependant on its primary industries to pay its way in the world. Any constitutional change which makes it more complicated for business to function profitably will have an immediate impact on our terms of trade, and therefore our standard of living.

If the constitution is changed in such a way that any minority group is allowed what may well become vetoes on economic growth (as is very likely under the new Seabed and Foreshore arrangements) business competitiveness and individual wealth of New Zealanders will suffer. It matters not that this comes about by a moratorium on development imposed by the minority, or by "rent" extracted by that minority as the price of development the result is the same; unwarranted costs and less competitiveness. To allow this sort of economic privilege will also give rise to social resentment in the majority.

5. Legal considerations

As mentioned above much of the current debate about the place of Maori people in the constitutional arrangements of New Zealand arises not from determinations of the elected representatives of the people but from judgments of the courts. It is therefore crucially necessary that the committee revisit the more important of these judgments and decide for itself whether they represent conclusions which are relevant to a debate about the Constitution of New Zealand in the twenty first century.

In doing so the Committee should satisfy itself firstly: Whether the views of the various judges are simply that, personal views of individual judges, or represent the law developed having regard to the doctrine of precedent (binding on all judges); and secondly against the background of doctrine of the separation of powers enjoyed by the judiciary on the one hand and Parliament on the other.

⁴⁷ Clearly not the great proportion of Maoris because of the feudal nature of the society, in which ownership and tribal power was vested in the few. There is also the problem of whether or not Maori society ever practiced or understood ownership of property in the way which was common in the British Legal system of the day

The source of the current debate about the place of the Treaty of Waitangi as a constitutional instrument with a place in New Zealand law is The decision of the Court of Appeal in *New Zealand Maori Council v Attorney General*.⁴⁸ The decision in the case was in a sense a foregone conclusion because s 9 of The State Owned Enterprises Act 1986 required the Crown to have regard to the principles of the Treaty of Waitangi, and the Court both at first instance and on appeal so ruled.

What is more contentious and for which there was no prior authority is the exposition by the Court of what comprises the principles of The Treaty. They are referred to in the long title to the Treaty of Waitangi Act⁴⁹ above but no attempt is made in the Act to define what the principles are.

It is against this uncertain background that the Court of Appeal essayed its own definitions of those principles. Cook P said at pg. 663 that:

differences between the texts (sic The Treaty) and the shades of meaning do not matter for the purpose of this case. What matters is the spirit...the Treaty needs to be seen as an embryo rather than a fully developed and integrated set of ideas.

His Honour then went on to make the crucial determination that the:

*treaty signified a partnership between races and it is in this context that the answer to the present case is to be found.*⁵⁰

From this analogy Cook P then extrapolated the well understood common law requirement that partners must act toward each other:

with the utmost good faith which is a characteristic obligation of partnership.

Richardson J defined the Treaty as:

a solemn compact between two identified parties The Crown and The Maori....that basis of the compact requires the Crown to act reasonably and in good faith....an obligation of honour,

and:

There is one paramount principle...that the compact between the Crown and the Maori called for the protection by the crown of both Maori interests and British interests and rested on the premise that each party would act reasonably and in good faith towards the other within their respective spheres. That is I think reflected both in the nature of the treaty and its terms

⁴⁸ [1987] 1 NZLR 641

⁴⁹ See also at the time of the judgment: The Environment Act 1986 and the Conservation Act 1987

⁵⁰ Pg. 664

... if the treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards the other

Somers J adopted the dicta of an earlier Court⁵¹:

The Crown is bound both by the common law of England and by its own solemn engagements to a full recognition of native proprietary right

His Honour considered that the principles of the Treaty:

*must be the same today as they were when it was signed in 1840*⁵²

and referred with approval to the instructions of Lord Normanby for the drawing up of the Treaty that:

all dealings with the aboriginals must be conducted ...on the principles of sincerity justice and good faith

And crucially

Each party owed the other a duty of good faith. It is the kind of duty which in civil law partners owe to each other

Casey J and Bisson J expressed similar views. The important point which emerges from the Courts careful analysis of what are the principles of the Treaty relevant to both the time it was signed and in 1986 is that the parties owed and continue to owe each other obligations of sincerity, justice and good faith. By way of analogy these are similar to the duties which partners in a commercial venture owe each other.⁵³

On any careful reading of the Maori Council case the Court did not decide as has become commonly supposed that Maori and non Maori were in partnership with each other, a partnership created by the Treaty, merely that the Crown and Maori owe each other duties which are akin to those owed by partners to a commercial transaction. In the context of a constitutional debate and in particular whether the Treaty is a constitutional document the distinction is fundamental.

In the result Maori and the Crown are not partners in any sense of the word. Indeed it is constitutionally impossible for the Crown to enter into a partnership with any of its subjects⁵⁴. The true position is that the Crown is sovereign but owes duties of justice and good faith to the Maori descendants of those who signed the treaty.

⁵¹ Nireaha Tamaki v Baker (1894)12 NZLR 483

⁵² Pg. 692

⁵³ But not exclusively so under The partnership act 1908 the also includes the obligation to act justly and faithfully to each other.

⁵⁴ Ministers of the crown and senior Government official regularly enter into joint undertakings with outside entities but they do so as servants of the crown and not qua The Crown.

Once this distinction is understood there can be no question of the sovereignty of the Crown in New Zealand represented by the Governor General and The New Zealand Parliament, being shared with any other person or entity. It is one and indivisible.

The Treaty has served its constitutional purpose in transferring sovereignty in New Zealand to the British Crown. That sovereignty has been exercised for the last 173 years both de jure and de facto. It may be that various Maori groups can establish some historic breaches of the Crown obligation to act towards them in good faith but that says nothing about the Treaty as a constitutional document.

Summary:

1. The collective common sense and tolerance of the majority is a crucial ingredient in the current constitutional mix. To endanger that unspoken tenet of New Zealand's unwritten constitutional arrangements will have unknowable social consequences none of them benign, and possible resulting in widespread social dislocation.
2. The Constitutional cake is finite. To increase the power of one group will diminish the rights of all other groups.
3. The creation of one privileged minority group with either powers of veto, or to extract rent from necessary economic developments will damage New Zealand international competitiveness, suppress wealth creation, and give rise to widespread social resentment.
4. In a constitutional context The Treaty has served its purpose by transferring Sovereignty over New Zealand to the British Crown. that is a fait accompli, and therefore that element of the treaty has expired and has no continuing force. The obligation of the Crown to act toward Maori with justice and good faith remains.
5. There is not, and never has been a constitutional partnership between the Crown and Maori people. The judgment in the Maori Council case has been misinterpreted. The point which all of their Honours were making in that case was that the Crown has ongoing duties to act justly and in good faith towards Maori people in ensuring that they are not dispossessed of any of the class of assets owned by them mentioned in the original treaty document. That is the overriding principle to be extracted from the wording of the treaty