THE CONTEMPORARY SOCIAL RAMIFICATIONS OF THE LANDS CASE AND THEIR IMPACT ON THE FORESHORE AND SEABED DEBATE

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Introduction

The Court of Appeal's historic judgment in *New Zealand Maori Council v Attorney-General*[1] (the Lands Case) has had widespread ramifications for New Zealand society.

This case raised the profile of the Treaty of Waitangi (the Treaty) in legal, political and constitutional fields, so much so that the Treaty has within the space of a generation evolved constitutionally "…from a colonial footnote to a solemn pact between founding partners".[2] The Court articulated a set of principles that have developed over the last twenty years and have become incorporated in Government agencies' practices,[3] entrenched in the charters of institutions,[4] and even incorporated into the operations of charitible organisations.[5] The Lands Case described the Treaty in terms of a contract, enabling a clear definition of Crown breaches and acknowledging a Māori right of

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1 [1987] 1 NZLR 641.

2 Augie Fleras and Paul Spoonley, *Recalling Aotearoa: Indigenous Politics and Ethnic Relations in New Zealand* (Auckland, 1999) p. 14. For many Māori the Treaty has always had this constitutional importance. (See discussion later in this article and generally Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End,* (2nd edn.) (Auckland, 2004) p. 265).

3 Such as the Department of Conservation, the Department of the Controller and Auditor General and the Department of the Prime Minister and Cabinet.

4 Including schools and universities. (Maureen Molloy, 'Imaging (the) Difference: Gender, Ethnicity, and Metaphors of Nation' (1995) *Feminist Review* 94, pp. 94-105).

5 Such as the Auckland War Memorial Museum, the Anglican Church, the Methodist Church and Rape Crisis, despite not being agencies of the Crown and therefore not a Treaty partner. (Merata Kawharu, 'Rangatiratanga and Social Policy' in Michael Belgrave, Merata Kawharu and David Williams (eds.) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, (Auckland, 2005) p. 106).

reparation.[6] The case was at the forefront of Treaty jurisprudence and helped establish the Treaty dialogue which facilitated negotiations with iwi and helped established a process through which Treaty settlements could take place.[7] In addition, the Lands Case established the meaning of the principles of the Treaty as a way to measure contemporary Crown conduct towards Māori.[8]

The focus of this article will be on the social ramifications of the Lands Case, those that are perhaps not as widely publicised, but have just as real a consequence in today's society. This article is intended to highlight the different understandings of what the Lands Case articulated, and how these different understandings play out in the practical implementation of the Treaty partnership. Lastly, this article will showcase the consequences of these ramifications in the foreshore and seabed debate which arose following the Court of Appeal's decision in *Ngati Apa v Attorney-General*[9] (*Ngati Apa*). To achieve this, this article will compare the Lands Case and what it stood for against what happened post *Ngati Apa*, in particular late 2003 and 2004.[10]

This article is structured in three layers: the different understandings of partnership; the outcome of the Court settling the issue of sovereignty; and the consequences of finding in favour of Māori.

A. The ramifications of the different understandings of the Principle of Partnership

The Court of Appeal was unanimous in its view that the central Treaty principle was one of partnership,[11] with each partner, Māori and the Crown, having to act towards each other in the spirit of reasonableness

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[6] See generally Paul McHugh, 'Constitutional Voices' (1996) 26 VUWLR 499.

[7] See generally ibid.

[8] McHugh, 'A History of Crown Sovereignty in New Zealand' in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past-A New Zealand Commentary* (Wellington, 2001) p. 205.

[9] [2003] 3 NZLR 643.

[10] This article is not intended to be a close critique of *Ngati Apa*. Instead it will focus on the fall out from *Ngati Apa* as a indicator of race relations in New Zealand today, and to measure this against the Lands case and what it potentially stood for in 1987.

[11] The Lands Case, supra n. 1, p. 664 per Cooke P.

and good faith.[12] This partnership created fiduciary duties, which for the Crown extend to active protection of Māori in the use of their lands.[13] Subsequently, Māori owe duties of loyalty to the Queen, full acceptance of the Government and to reasonably co-operate with its policies.[14]

A major ramification of the Lands Case is that the term 'partnership' has been accepted as the definitive model of the Crown/Māori relationship. The concept of a 'partnership' has been adopted in copious government publications and policies,[15] followed in numerous Waitangi Tribunal Reports,[16] entrenched in institutional charters ,[17] and spoken about in Parliament, on marae and on the streets of New Zealand. Interestingly, so ingrained is the term 'partnership' in Treaty discourse that some Māori even use it to describe what their ancestors were striving for in signing the Treaty, and what Māori have aimed to maintain in their interaction with the Crown since 1840.[18]

In mainstream New Zealand, the term 'partner' invokes the well-established progressive, or politically correct, reference to the two people in an intimate relationship. Metaphorically, the Treaty partnership has come to signal a caring partnership reflective of New Zealand's bicultural beginnings.[19] At the same time the term

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[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Eddie Durie, 'The New Zealand Maori and the Waitangi Tribunal' in William Renwick (ed) (Wellington, 1991) p. 4. See for example Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual 2001,* (Wellington, 2001) p. 69; Ministry of Fisheries, *Statement of Intent: for the period July 2007 to June 2012,* (Wellington, 2007) p. 23.

[16] See for example Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, (Wellington, 1987) p. 255; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (Wellington, 2004) p. 130

[17] See for example *University of Otago Charter*, p. 13 <http://www.otago.ac.nz/about/offical_documents.html>. Also see generally Kawharu 'Rangatiratanga and Social Policy' supra n. 5; Fleras and Spoonley *Recalling Aotearoa: Indigenous Politics and Ethnic Relations in New Zealand*, supra n. 2, pp. 13-14; Molloy 'Imagining (the) Difference: Gender, Ethnicity, and Metaphors of Nation' supra n. 4.

[18] See for example Apirana Mahuika, 'Whakapapa is the Heart' in Ken Coates, and Paul McHugh, *Living Relationships, kākiri ngatai: the Treaty of Waitangi in the New Millennium* (Wellington, 1998) p. 216 (Commentary), who argues that since 1840 Māori have been dominant in their pursuit of equal partnership and rangatiratanga.

[19] Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation*

'partnership' invokes legal and business partnerships. The common assumption is that such partnerships are 'equal'. In the Crown/Māori partnership, this assumption operates to mask the sedimentation of inequality between the Crown and Māori as the result of colonisation.[20]

Over the last twenty years this partnership has been played out in a number of forums. For example, Gerald Lanning argues that the basic elements of a fiduciary relationship appear to exist in Crown interaction with Māori.[21] However, this fiduciary relationship is on a tenuous footing and difficulties arise when defining obligations.[22]

Often Māori feel that the Crown should be doing more to fulfil its fiduciary duties. Thus the last two decades have been beset with several court cases and Waitangi Tribunal claims regarding Māori concerns about the Crown's action towards them and the Crown's failure to adequately meet their obligations.[23] As Sir Tipene O'Regan claims, what is actually happening is the antithesis to partnership as described by the Court of Appeal.[24]

O'Regan's observation clearly shows that Māori expectations of partnership are not being meet. Māori follow an 'equal partner' approach. For many Māori the term signalled parity with non-Māori,[25]

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from Aotearoa New Zealand (Aldershot, Hants, England, 2006) pp. 81-82.

[20] Ibid.

[21] Gerald Lanning, 'The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship' (1997) 8 Auckland U. L. Rev. 445, p. 471. For more information on the current fiduciary duty in New Zealand and how it compares to Canada see Alex Frame 'The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?' (2005) 13 Waikato L. Rev. 70.

[22] Ibid.

[23] For example the State-Owned Enterprises cases, such as *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) (the Broadcasting Assets Case) and the Fisheries cases, such as *Ngāi Tahu Maori Trust Board v Attorney-General* CP614/87 (HC).

[24] Sir Tipene O'Regan, 'A Ngai Tahu Perspective on Some Treaty Questions' (1995) *25 VUWLR* 178, p. 185. O'Regan is explaining how he sees the Crown/Māori relationship. To him, the partnership envisioned by the Court of Appeal cannot exist while Māori are forced to negotiate for percentages of state funding and are unable to exercise tino rangatiratanga. He metaphorically describes the resulting partnership as a marriage, where one spouse, the Māori Partner, is reduced to a mere chattel, and the marriage can only function at the dictate of one party.

[25] Walker, 'Immigration Policy and the Political Economy of New Zealand', in Greif and Stewart (eds), *Controlling Interests: Business, the State and Society in New Zealand,* (Palmerston

or a version of a bicultural society that could encompass law and policy developments such as parallel legal systems.[26] As Chief Judge Eddie Durie (as he then was) saw it, the Court characterised partnership as denoting the joining of distinct persons in a common enterprise for mutual benefit.[27] This idea of partnership is "…closer to the Maori view of the Treaty as an alliance".[28]

However, Gerald Lanning contends that the fiduciary relationship defined by the Court of Appeal is, and will necessarily be, an unequal one.[29] Paul McHugh supports this contention, stating that a partnership with fiduciary duties is incompatible, contradictory and unequal; the common law principle of partnership supposes equality, yet fiduciary duties do not.[30]

In the Lands Case, the Justices emphasised that nothing can fetter the right of a duly elected parliament to govern.[31] Accordingly, when the Crown subsequently issued its own statement of Treaty principles, it adopted the principle of kāwanatanga as its primary principle.[32] In this principle the Crown clearly states that the government's right to govern surpasses any rights of Māori. Consequently, any partnership established with Māori must be unequal, as Māori can never achieve equality with the Crown.

In numerous interactions with Māori since the Lands Case the Crown has indicated that the concept of partnership it alludes to is this unequal one.[33] This interpretation has been supported through later decisions of

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North, 1995) pp. 282-302.

[26] Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand*, supra n. 19, p. 81.

[27] Durie, 'The New Zealand Maori and the Waitangi Tribunal' supra n. 15, p. 3.

[28] Ibid. Walker goes one step further, explaining that in describing the Crown/Māori relationship as one of partnership the Court of Appeal helped New Zealand on the path of decolonisation in the sense of dismantling the hegemonic domination of Māori. (Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, supra n. 2, p. 265).

[29] Ibid.

[30] McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8.

[31] The Lands Case, supra n. 1, p. 665 per Cooke P.

[32] Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Wellington, 1989).

[33] For example, it is this article's contention that, in the foreshore and seabed debate, the limit of time placed on oral submissions before the Fisheries and other Sea-Related

the Court of Appeal[34] which, although refraining from detailing the precise partnership, has commented that the relationship between Māori and the Crown remains unequal.[35]

These differing understandings of the partnership expressed by the Court of Appeal had major ramifications in the foreshore and seabed debate. It is obvious that the Government felt that the Crown had exhausted all its obligations of partnership through its consultation hui.[36] Conversely, Māori felt that the Crown was acting unreasonably in dismissing the alternative solutions Māori proposed.[37] To many Māori, in legislating for Crown ownership of the foreshore and seabed and denying Māori the right to go to court to have their rights defined, the Crown was not acting in good faith towards its Treaty partner.[38] In fact, many Māori saw the Government's actions as discriminatory.[39]

Another serious ramification of the Lands Case discourse on partnership for the foreshore and seabed debate flows from the fact that the Court of Appeal recognised fiduciary-like duties arising out of the Treaty partnership as incumbent on the Crown in its dealings with Māori, but gave no indication of the aboriginal fiduciary doctrine in its own right.[40] The Court of Appeal's silence allows for the Crown to

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Legislation Select Committee and the restriction on who could present shows the Crown's unwillingness to consider the cultural importance of these oral submissions, and thus they are not treating their Māori partner as equals.

[34] See for example *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, p. 152 per Cooke P, where the Court of Appeal stated that "Partnership certainly does not mean that every asset in which Maori have some justifiable claim to share must be divided equally". This was followed later in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, p. 528.

[35] See generally Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of Waitangi as expressed by the Waitangi Tribunal and the Courts*, (Wellington, 2001) p. 77.

[36] See for example The New Zealand Government, *The Foreshore and Seabed of New Zealand, Government Proposals for Consultation,* (Policy Document, 17 December 2003), Appendix C where the Government outlines their consultation process.

[37] See generally Abby Suszko 'Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study' Honours Dissertation, (University of Otago, 2005) p. 26.

[38] See generally ibid.

[39] See generally ibid, p. 29

[40] McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, (Auckland, 1991) p. 250.

bypass its potential fiduciary duties in situations where the Treaty is not directly in issue.

The outcome of the foreshore and seabed debate is a dramatic example of this. Under urgency the Government enacted the Foreshore and Seabed Act 2004 despite Māori protest and the Waitangi Tribunal's finding that the Government's policy breached the principles of partnership and active protection.[41] As former Prime Minister Sir Geoffrey Palmer strenuously pointed out in 2005, the Crown was justified in its actions towards Māori because the foreshore and seabed debate was about the doctrine of aboriginal title and not the Treaty.[42] Thus, it appears that the Crown can be selective as to when it adheres to the Court's principle of partnership, and the duties arising from it, while interacting with Māori in aboriginal and customary title and rights issues.[43]

B. Ramifications of settling the issue of sovereignty

A major ramification of the Lands Case, one that was missed in the media[44] during the hype and excitement surrounding the case, and consequently has never really been articulated publicly, is that the Court of Appeal essentially settled the question of sovereignty.

Prior to the Court of Appeal's ruling, Māori had grown vocal in their objection to government practices concerning things Māori. During

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[41] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* supra n. 16, pp. 128, 131, 132. The Foreshore and Sebed Act removed the Māori Land Court's jurisdiction to grant customary title in the foreshore and seabed to Māori. (Foreshore and Seabed Act s 46) Thus, the Act removed the right of Māori to go to court to prove the nature and extent of their property rights in the foreshore and seabed.

[42] Sir Geoffrey Palmer, 'The New Zealand Constitution in 2005' in Jack Hodder, Geoffrey Palmer, and Ivor Richardson, *New Zealand's Constitutional Arrangements: where are we heading?* (New Zealand Law Society Seminar, May 2005) p. 15

[43] As McHugh concludes, the Treaty is an acknowledgement of Māori and their prior land occupation. It is more than an affirmation of existing rights; and is not intended to merely fossilise the status quo but to provide a direction for further growth and development. (McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, supra n. 40 pp. 4-5).

[44] For example, Claudia Orange explains that the media coverage at the time stressed the liberal nature of the Land Case judgment, but what was not so evident was that at the time Māori were accepting that sovereignty was held indisputably by the Crown. (Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, (2nd edn.) (Wellington, 2004) p. 166)

this time, Māori began to question the government's right to rule and the Crown's claim that Māori had ceded sovereignty.[45] These questions were put to one side as it became clear that Māori had won a historic 'victory',[46] gaining judicial recognition and legitimisation of the Treaty and Māori claims of redress for Treaty breaches.[47] As Ranginui Walker explains, the Lands Case vindicated Māori faith in the Treaty after more than a century of recourse to it as their Magna Carta.[48]

However, the Court also stressed that the principles do not act as a limit on the power of a duly elected parliament, [49] and that Māori have undertaken a duty of loyalty,[50] reinforcing the orthodox legal view. This highlights that New Zealand has inherited a constitution from Britain, and along with that comes parliamentary sovereignty.[51]

Therefore, the Court left the doctrine of incorporation expressed in *Hoani Te Heuheu Tukino v Aotea Maori Trust Board* firmly in place,[52] and the status of the Treaty remains the same at law today as it did in 1941. The Treaty is still not a fetter on parliamentary sovereignty or a direct source of rights and obligations and does not have supremacy over

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[45] See generally McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8, p. 200.

[46] The Lands Case, supra n. 1, p. 661 per Cooke P.

[47] Ibid, pp. 664-665. See generally Thomas Geuther, *Public Law,* (Butterworths questions and answers series, Wellington, 2002) p. 141; Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of Waitangi as expressed by the Waitangi Tribunal and the Courts*, supra n. 35, p. 100.

[48] Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, supra n. 2, p. 265.

[49] The Lands Case, supra n. 1, p. 665 per Cooke P.

[50] Ibid, p. 664.

[51] Andrew Sharp, *Justice and the Māori: The Philosophy and Practice Māori Claims in New Zealand since the 1970s*, (2nd edn.) (Auckland, 1997) p. 303.

[52] *Hoani Te Heuheu Tukino v Aotea Maori Trust Board* [1941] AC 308 (PC). (*Te Heuheu*) Cooke P followed the doctrine in his judgment, stating that it was only because the legislature had incorporated the phrase 'principles of the Treaty' into section 9 of the State Owned Enterprises Act 1986 that the Court was able to come to its decision. (The Lands Case, supra n.1, p. 668). Richardson J went one step further, stating that he is of the opinion that *Te Heuheu* correctly sets out the law. (The Lands Case, supra n. 1, p. 691) For more information on the doctrine articulated in *Te Heuheu*, its contemporary status and its possible future see Alex Frame 'Hoani Te Heuheu's case in London 1940-1941: An Explosive Story' (2006) 22 NZULR 148.

legislation. It remains reliant on the will of parliament to incorporate its principles in legislation to influence legal proceedings.[53]

Thus, in one judicial sweep the Court dismissed Māori claims in the courts that they maintained a localised form of sovereignty, tino rangatiratanga, and that this rangatiratanga acted as a fetter on parliamentary sovereignty.[54] Instead tino rangatiratanga was brought under kāwanatanga, and subsequently defined as 'self-development'[55] or 'self-management'.[56] As Claudia Orange notes, the struggle for tino rangatiratanga was to be abandoned on a constitutional level and was to be played out in other forums.[57]

Parliament's decision to insert section 9 into the State-Owned Enterprises Act 1986, and the Court of Appeal's subsequent interpretation of the principles of the Treaty, further negated the standing of the two texts of the Treaty, and in particular the standing of rangatiratanga. As Michael Belgrave explains, "The principles of the Treaty of Waitangi had walked into the modern treaty."[58] Mereata Kawharu agrees, stating the "…principles have become the dominant way of considering Treaty issues."[59]

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[53] As McHugh contends, "…if Māori rights are to be protected from legislative curtailment and given overriding status, some entrenchment by Parliament will be necessary". (McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, supra n. 40).

[54] In the *Motunui-Waitara Report*, the Waitangi Tribunal defined tino rangatiratanga as sovereignty. (Waitangi Tribunal, *Motunui-Waitara Report*, (Wellington, 1983) pp. 50-51). Interestingly, following the Lands Case, the Waitangi Tribunal has refrained from using this definition, instead opting for 'self-development'. (See Waitangi Tribunal, *Taranaki Report, Kaupapa Tuatahi*, (Wellington, 1996) p. 5).

[55] See ibid., p. 5.

[56] See generally F. M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law & Legitimation*, Auckland, 1999) p. 171.

[57] See generally Orange, *An Illustrated History of the Treaty of Waitangi*, supra n. 44. Other forums include post-settlement Iwi Governance Structures and Corporations such as Te Runanga o Ngāi Tahu, and also in the educational field through Kōhanga Reo and Kura Kaupapa Māori.

[58] Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories*, (Auckland, 2005) p. 81.

[59] Kawharu, 'Rangatiratanga and Social Policy' supra n. 5.

This definition shift has had a range of ramifications. In many instances, the principles have assumed a higher position than rangatiratanga.[60] As a result, government policies have been free to operate in denial of tino rangatiratanga.[61] Many Māori are dissatisfied with this.[62]

This has created a situation in some instances where Māori and the Crown tend to have different understandings of rangatiratanga. These different understandings impact on the application of partnership, as "…some Māori still find the meaningful application of partnership hampered by a limited appreciation of the various dimensions of rangatiratanga".[63]

Consequently these outcomes became particularly prominent in the foreshore and seabed debate where Māori talked in terms of rangatiratanga as well as the principles of the Treaty. For Manawhenua,[64] the foreshore and seabed had always been under the jurisdiction of iwi and hapu, and decision-making over it rested with hapu and whānau. They were, and still are, adamant that the foreshore and seabed belonged to them and that they were guaranteed rights over it under the tino rangatiratanga in Article Two.[65]

Thus, Māori and the Crown continued to talk past each other. This is especially evident when some Māori chose to express tino rangatiratanga as sovereignty.[66] It also highlights that almost twenty years after the Court of Appeal articulated the orthodox doctrine that

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[60] See generally ibid, pp. 105-122.

[61] Jane Kelsey, *A Question of Honour: Labour and the Treaty, 1984-1989*, (Wellington, 1990) pp. 236-7.

[62] Kawharu, 'Rangatiratanga and Social Policy' supra n. 5, p. 107.

[63] Ibid, p. 105.

[64] The people who exercise kaitiakitanga (stewardship, guardianship) and possess mana (power, prestiege) over land in a geo-political area.

[65] The Paeroa Declaration, resolution one; see also Richard Ogden, 'The foreshore and seabed issue' [2004] NZLJ 14, p. 15.

[66] See generally Paul Cavanagh, 'The Foreshore and Seabed Controversy' [2003] NZLJ 428, p. 429. It should be noted here that in following the precedent set down in the Lands Case, the Court of Appeal in *Ngati Apa*, explicitly stated that sovereignty rested with the Crown. However, the Court found that with this Crown sovereignty goes radical title, but not beneficial title. Thus a court could legally grant beneficial title to others before customary rights are extinguished. (*Ngati Apa*, supra n. 9, p. 653, per Elias CJ).

sovereignty sat with the Crown, many Māori still do not realise, or choose not to acknowledge, that in law the issue of sovereignty has been settled.[67]

Additionally, throughout the foreshore and seabed debate many Māori felt the Government was redefining tino rangatiratanga as a minority interest.[68] This is an acute illustration of a ramification of Parliament's emphasis on, and the Court's subsequent application of, the principles ahead of the terms of the Treaty; one which creates tension and misunderstandings between Treaty partners.

C. Ramifications of ruling in favour of the Māori claimants

The Lands Case brought Māori claims into the justiciable realm of the courts. As McHugh notes, "The *Wi Parata* consignment of those relations to a non-justiciable zone of the prerogative no-longer held".[69]

One major outcome is that subsequent courts have applied President Sir Robin Cooke's "…broad, unquibbling and practical interpretation…"[70] to the Treaty. Consequently, over the last twenty years, the courts have tended to interpret statutes pertaining to Māori rights in the way most favourable to the Māori claimants.[71]

Another ramification is that the Lands Case decision enhanced Māori expectations and increased their confidence in the courts.[72] Accordingly, over the decade following the Lands Case, the courts

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[67] Interestingly, despite the status of rangatiratanga being reduced in law, for Māori the legal status of the Treaty and tino rangatiratanga is secondary to how they view it. (Noel Cox, 'The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand' (2002-2003) 28 Brook. J. Int'l L. 123, p. 149).

[68] See Moana Jackson, 'Like a Beached Whale': A Consideration of Proposed Crown Actions over Maori Foreshore' in International Research Institute for Maori and Indigenous Education (IRI), *Te Takutai Moana*, Economics, Politics and Colonisation, Series 2003. vol. 5, 2nd edn, (New Zealand, 2003) p. 14; Annette Sykes, personal comment in Hikoi: Inside out [Video Recording] (New Zealand, 21 July 2004) at 5mins, 40secs.

[69] McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8, p. 205.

[70] The Lands Case, supra n. 1, p. 655 per Cooke P.

[71] Carrie Wainwright, 'The Legal Status of the Treaty' in *Treaty of Waitangi*, (New Zealand Law Society Seminar, August 2002) p. 1.

[72] Jane Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Wellington, 1993) p. 255.

became the first stop for Māori seeking to restrain the government breaches of the Treaty of Waitangi. Māori won most of these cases, prompting conservative Māori to herald the coming of a new constitutional order.[73]

This confidence in the courts was carried through to 1997, where Te Tau Ihu[74] began legal proceedings in the Māori Land Court, seeking a declaration of their customary rights to the seabed around the Marlborough Sounds.[75] The legal proceedings eventually lead to the Court of Appeal's ruling in *Ngati Apa*.

However, one dramatic outcome of finding favourably for Māori is the public backlash against Māori claims. As Judge Carrie Wainwright acknowledges:

> The prominence of the SOE cases, and their political impact, lead to the widespread (but incorrect) view that Maori have only to turn up to court with the Treaty in hand to extract from a judge the decision which will prevent the Government from proceeding with policies that adversely affect Maori.[76]

Widespread adverse public reaction has followed every major Crown/Māori interaction over the last two decades, especially the later State-Owned Enterprises and Fisheries cases.[77] Fuelled by media hype and politicians pushing their own agendas, these reactions served to create an atmosphere of separatism; the exact opposite of the partnership that the Court of Appeal envisioned.

During the 1990s some major settlements with Māori were made,[78] and it seemed that New Zealand was progressing into post-colonialism.

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[73] Ibid, p. 281.

[74] The collective name for the top of the South Island iwi: Ngāti Apa, Ngāi Kōata, Ngāti Kuia, Ngāi Rārua, Ngāti Tama, Ngāti Toa and Rāngitāne.

[75] Re Marlborough Sounds (1997) 22A Nelson Minute Book 2 (MLC).

[76] Carrie Wainwright, 'The SOE Cases' in *Treaty of Waitangi*, (New Zealand Law Society Seminar, August 2002) p. 3.

[77] See generally Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (Dunedin, 1992) pp. 91-92.

[78] For example the Ngāi Tahu and Tainui settlements, and the allocation of fisheries quota.

However, as mentioned above, there was continued adverse reactions to these settlements. These reactions encapsulated a build up of tension that was set to explode, and did so in the public backlash against Māori in the foreshore and seabed debate.

So it was on the back of this growing resentment that the Court of Appeal delivered its *Ngati Apa* decision. Within two weeks non-Māori were marching in Nelson[79], carrying slogans proclaiming 'Whites have rights too' and asserting Māori privilege. Just as Judge Wainwright stated happened with the State-Owned Enterprises cases, many people believed because Māori turned up to court, they would receive a judgment in their favour. Just as with the Lands Case, little was published in the media about the legal substance of the judgment.[80] Instead the media widely perpetuated the belief that Māori would restrict access and veto development.[81]

This clearly illustrates a dramatic social ramification of the Lands Case. Due to the many emotions associated with court cases surrounding Māori rights, the legal significance of the cases will be lost in the public debate and consequently history is set to repeat itself through the maintenance of the misrepresentation of Māori claims.

Conclusion

The social ramifications of the Lands case are far reaching. They highlight the differences in understandings between Māori and the Crown as to what the Court of Appeal established, as well as the public's misunderstandings of the legal significance of the case.

As shown in this article, these differing understandings have a serious effect on the practical application of partnership. Consequently both Māori and the Crown have different perspectives as to what

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[79] On 28 June 2003, 500 people rallied in Nelson against Māori having ownership of the foreshore and seabed.

[80] It has to be noted that the court did not find that Māori had ownership in the foreshore and seabed. The Court of Appeal in *Ngati Apa* simply found that the Māori Land Court had the jurisdiction to investigate Māori claims to customary title in the foreshore and seabed. (*Ngati Apa*, supra n 9, p. 670 per Elias CJ).

[81] See Tom Bennion, Malcolm Birdling and Rebecca Paton, *Making Sense of the Foreshore and Seabed*, (Wellington, 2004) p. 4.

partnership entails, and what the fiduciary obligations encompassed in partnership require. Māori tend to see the Treaty partnership as between equals, whereas the Crown views it as an unequal partnership. The court cases that pepper the last two decades underscore these different perceptions, with Māori often claiming the Crown should be doing more to fulfil their fiduciary obligations.

These differing views of partnership had major ramifications for the foreshore and seabed debate, where Māori felt the Crown failed to act reasonably and in good faith and should have done more to fulfil its fiduciary obligations.

A second, and far-reaching ramification, is that because the foreshore and seabed debate centred on the doctrine of aboriginal title, the Crown was able to bypass its fiduciary obligations by distinguishing this situation from Treaty situations where its fiduciary duties to actively protect Māori interests applies.

Another ramification exposed in this article is that the Lands Case settled sovereignty with the Crown. Essentially the Court of Appeal adopted the orthodox legal doctrine of parliamentary sovereignty, stating unequivocally that none of the principles can act as a fetter on the power of a duly elected parliament. Thus, even though the Court raised the profile of the Treaty, the Treaty itself remains dependant on the will of Parliament to incorporate its principles into legislation to have any effect.

Consequently the Court located tino rangatiratanga below kāwanatanga, and it has come to mean 'self-development'. Additionally, Parliament's emphasis on the principles, and their subsequent interpretation through the courts, has resulted in a situation where the principles have assumed a higher position than rangatiratanga. This has had an adverse affect on the practical application of partnership as many Māori feel true partnership is limited by little appreciation of the different dimensions of tino rangatiratanga.

These different perceptions of rangatiratanga had a major effect on the outcome of the foreshore and seabed debate, and served to increase tensions and misunderstandings between the Treaty partners. Māori felt the Crown was acting to reduce and define rangatiratanga as a minority

interest, whereas the Crown was alarmed at Māori representations of rangatiratanga as sovereignty. Consequently, these different understandings meant that Māori and the Crown continued to talk past each other.

Lastly, this article revealed perhaps the most regrettable ramification of the Lands Case: the adverse public backlash towards Māori claims. The Lands Case positively increased Māori expectations and confidence in the legal system. Consequently, Māori followed up the Lands Case with a number of court cases. Unfortunately, these court cases prompted public outcry.

Thus this article has revealed another social ramification of the Lands Case: the misrepresentation of Māori claims. It became a widespread belief that Māori only had to show up to court to get a judgment in their favour. Calls of Māori privilege are commonplace, and Māori are wrongly represented as obstructing government policies and New Zealand's progress.

This ramification was never more evident than during the foreshore and seabed debate. The public backlash against Māori witnessed in the debate will have a lasting effect on New Zealand society and creates race relations in stark contrast to that envisioned in the Lands Case.