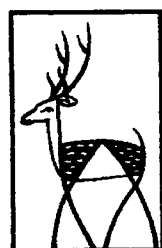


The Permanent New Zealand Court of Appeal

Essays on the First 50 Years

Edited by
Rick Bigwood



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*The Court of Appeal and Indigenous Rights: From Ninety-Mile Beach to Ngati Apa**

RP BOAST

INTRODUCTION

THE COURT OF Appeal's engagement with what—for lack of a better term—we might call 'indigenous rights' or (perhaps better) simply 'Maori' cases¹ in the period from the early 1960s until 2003 forms not only an important chapter in the long history of the encounter between Maori people and state institutions, but also in the even longer evolution of the common law relating to indigenous issues and native title. The cases I shall be discussing certainly have attracted interest beyond these shores, which is hardly surprising given that there clearly is a developed common law tradition in this area with some claim to universality, even if it is a tradition that is marked at the moment by some important regional variations.

The broader common law tradition, and the position of New Zealand common law within it, has recently been explored in a magisterial fashion by Dr McHugh² and there remains little more that can usefully be said on the subject. My focus here, therefore, is more on what the Court of

* This article reflects the law as at circa mid-2007.

¹ New Zealand lacks an equivalent to the expression 'Indian Law' or 'Federal Indian Law' as used in the United States. There is no such subject as 'Maori Law', or, rather, 'Maori' law in New Zealand tends to mean Maori customary law rather than that part of the official legal system's engagement with Maori issues. Courses on 'Maori Land Law'—meaning the current statute and case law relating to Maori freehold and Maori customary land—and 'Maori Customary Law' are certainly taught at New Zealand universities, but there are no courses on 'Maori Law' per se.

² PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford, Oxford University Press, 2004). See also M Belgrave, M Kawharu and D Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne, Oxford University Press, 2005); L Benton, *Law in Colonial Cultures* (Cambridge, Cambridge University Press, 2001); and D Kirkby and C Colebourne (eds), *Law, History, Colonialism: The Reach of Empire* (Manchester, Manchester University Press, 2001).

Appeal's recent history in this field reveals about New Zealand's own *particular* legal and constitutional traditions. This in turn may throw some light on the special place of the Court of Appeal itself within the New Zealand constitutional and legal framework. I do not intend to focus very much on the development of legal doctrine, and I suppose my jurisprudential stance is a mildly Legal Realist one, at least to the extent of emphasising that who wins and who loses cases is often as important as the legal reasons why they did. That is a reality that all lawyers, judges and—obviously—litigants know, but which academic commentators can sometimes forget. It follows that my focus on the cases is primarily that of a legal historian, with a priority on 'historian' rather than 'legal'.

The period under discussion has, of course, also seen an evolution of the Court of Appeal itself. One imagines that being a judge of the Court of Appeal in 1963 and being a judge of it today are somewhat different experiences. I am only guessing, but it seems likely that Gresson P's Court was by today's standards something of a hermetically sealed and rather intimate world dominated by a firmly positivist legal culture. In fact, and here I can speak from personal experience, New Zealand as a whole was fairly hermetically sealed in the early 1960s, at least until The Beatles got here: actually, it seems startling to consider that the Court of Appeal's judgment in *Re the Ninety-Mile Beach*³ predated the arrival of The Beatles on these shores by only about a year.⁴ The Court of Appeal today is a much larger body than it was in 1963, and is equipped with far better resources in terms of access to legal materials and research staff. Today's judges have been exposed to quite different systems of legal education⁵ than, say, Gresson P and North J would have known, and the bar itself has changed in all sorts of ways as well, including a rapid growth of Maori representation at all levels of the profession.⁶ The contribution of academic commentators, and in particular the work of Dr Paul McHugh, also played a vital role in the consciousness-shifting that took place in the 1970s, 1980s and 1990s.⁷ These developments will no doubt have impacted on

³ [1963] NZLR 461.

⁴ The Beatles toured New Zealand in June 1964. The Court of Appeal judgment in *Ninety-Mile Beach* was delivered on 6 March 1963. The opinions of Gresson P and North and TA Gresson JJ on The Beatles are unknown, but perhaps might be guessed at.

⁵ Different in two ways: many of the present judges of the Court of Appeal have studied overseas, and some of them hold degrees from US universities; and New Zealand's own system of legal education has both expanded and changed dramatically since the 1960s.

⁶ Including at the level of the judiciary itself. The first Maori judges were judges of the Maori Land Court, but more recently there have been appointments to the ordinary courts as well, including the Court of Appeal.

⁷ I cannot do justice to Dr McHugh's contribution or provide a full bibliography in a note; suffice it to say that his contribution has been of decisive importance. See especially his two books, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland, Oxford University Press, 1991) and *Aboriginal Societies and the Common Law* (Oxford, Oxford University Press, 2004). McHugh's work, which has itself been evolving and

the general historical transformations that I shall attempt to describe in this chapter.

THE MAIN TRENDS

Introduction

The legal history of the law relating to Maori issues—in particular, in the interconnected areas of land, aboriginal title and the status of the Treaty of Waitangi—has moved, in my view, through three main phases in the last 50 years.⁸ These are, successively, the final phases of the era of the supposedly ‘downstream’ consequences of title investigation in the Maori Land Court (early 1960s); the sudden and dramatic explosion—by Court of Appeal standards—of case law dealing with statutory references to the Treaty of Waitangi (from 1987 to circa 1993); and, finally, the latest phase. What the nature of this latest phase actually is, however, is hard to discern. In some respects, the Court of Appeal has withdrawn from the active, even supervisory, role that it assumed in the years around 1990. On the other hand, it has issued a vitally important judgment in the *Ngati Apa* decision,⁹ which led to something of a major political crisis, once again exposing the structural tensions at the heart of the New Zealand polity—and also demonstrating the remarkable ability of that polity to paper over the cracks.¹⁰ Perhaps, following archaeological terminology, we could call these phases Formative, Classic and Post-Classic, although maybe others

developing, contributed very significantly to the change in the legal *Zeitgeist* that took place in the 1980s and 1990s. That change was a process that operated at many levels—political, historiographical and legal. Judges and lawyers are well-read people, and many of them have Arts degrees, so shifts in New Zealand historiography are also likely to have had a significant, if less direct, impact. Key texts here include: Michael King’s remarkable biography of Te Puea Herangi (M King, *Te Puea* (Auckland, Hodder & Stoughton, 1977)), which was for me, as for many other people, a real eye-opener; Judith Binney’s biography of Te Kooti (J Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland, Auckland University Press/Bridget Williams Books, 1995); and Anne Salmond’s studies of early interactions between Maori and Europeans (A Salmond, *Two Worlds: First Meetings between Maori and Europeans 1642–1772* (Auckland, Viking, 1991) and *Between Worlds: Early European Exchanges between Maori and Europeans 1773–1815* (Auckland, Viking, 1997)). However, the changing temper of the times was not, of course, only intellectual, but also political, reflecting growing Maori political confidence and assertiveness.

⁸ The New Zealand legal system has a long history of engagement with Maori and Maori legal issues. This chapter is concerned, therefore, with the latest phases only. For a conspectus of the full history, which also includes many earlier decisions of the Court of Appeal, see generally P Spiller, J Finn and R Boast, *A New Zealand Legal History*, 2nd edn (Wellington, Brookers, 2003).

⁹ *Ngati Apa v Att-Gen* [2003] 3 NZLR 643.

¹⁰ On the Foreshore and Seabed Act 2004 and the events leading up to it, see RP Boast, *Foreshore and Seabed* (Wellington, LexisNexis, 2005).

might prefer terminology drawn from the history of Western music (Early, Renaissance and Baroque).

The *Ninety-Mile Beach* Era: 'Downstream' Consequences of Title Investigations

Beginning our survey, then, with the Court of Appeal's decision in *Re the Ninety-Mile Beach*, decided in 1963,¹¹ it can be seen that this case belongs with a family of decisions that attach peculiar significance to the 'downstream' or consequential effects on Maori property rights of title investigation in the Maori/Native Land Court. This might seem an obscure or unhelpful way to classify the case law, but on close examination this becomes, I would argue, really important—and also representative of continuities in the case law to which I shall subsequently return. The New Zealand courts developed the notion that once a parcel of land had been investigated by the Land Court, and subsequently Crown-granted, the Maori grantees received only what came within the four walls of the Court title (or grant) and nothing else. The following passage in North J's judgment in *Ninety-Mile Beach* illustrates this way of thinking very clearly:

I am of opinion that once an application for investigation of title to land having the sea as one of its boundaries was terminated, the Maori customary title was then wholly extinguished. If the Court made a freehold order or its equivalent fixing the boundary as low water mark and the Crown accepted that recommendation, then without doubt the individuals in whose favour the order was made or their successors gained a title to low water mark. If on the other hand the Court thought it right to fix the boundary at high water mark, then the ownership of the land between high water mark and low water mark likewise *remained* with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained within the Treaty of Waitangi.¹²

Apart from the key word 'remained'—a real giveaway—there is the clear assumption here that the promises contained 'within the Treaty of Waitangi' could only be given effect to in statute. TA Gresson J observed in the same case that after 1840:

... all titles had to be derived from the Crown, and it was for the Crown to determine the nature and incidents of the title it would confer.¹³

¹¹ [1963] NZLR 461.

¹² *Ibid*, at 473 (North J) (emphasis added). See also *ibid*, at 478–9 (TA Gresson J). TA Gresson J notes in addition the effect of the Crown Grants Act 1908, which would confine a Crown grant of coastal land to the land inland of high-water mark.

¹³ *Ibid*, at 475.

Thus, the Treaty itself and the statute law allegedly implementing it (the Native Lands Acts are not actually an obvious candidate for this, as it happens¹⁴) are the sole and only route by which Maori title to anything can be recognised, the ordinary common law of native title having vanished from the Court's purview.

In a way, then, the cases were about extinguishment of native title by means of a judicial process carried out by a specialised tribunal set up by statute. The courts concluded that such investigation would extinguish proprietary rights to river beds (the Wanganui River cases, which included two separate decisions of the Court of Appeal¹⁵), the foreshore (*Ninety-Mile Beach*) and usufructuary rights to take fish (*Keepa v Inspector of Fisheries*),¹⁶ for which the Court of Appeal cannot be blamed). Lakebeds, interestingly, followed a different trajectory following the much earlier decision of the Court of Appeal in *Tamihana Korokai v Solicitor-General*,¹⁷ leading to the perhaps illogical result that while Maori can claim customary title to lakebeds, they cannot do so to river beds. This

¹⁴ There is now a wealth of commentary and analysis on the Native Lands Acts and the Native Land Court. None of it, it is fair to say, would back up the somewhat roseate view of the legislation put forward by the judges of the Court of Appeal in *Ninety-Mile Beach* (ie that the legislation was a statutory recognition of the Crown's obligations under the Treaty of Waitangi; if anything, most would say that the Native Lands Acts and the Court in one way or another were a *breach* of the principles of the Treaty of Waitangi). See, generally, RP Boast, *Buying the Land, Selling the Land: Governments and Maori Land on the North Island Frontier 1865-1921* (Wellington, Victoria University Press, 2008) 41-99; DV Williams, 'Te Kooti Tango Whenua: The Native Land Court 1864-1909' (Wellington, Huia, 1999); and Waitangi Tribunal, 'The Native Land Court and the New Native Title', *Turanga Tangata, Turanga Whenua* (Gisborne Report) (Wai 814, 2004) 295-471.

¹⁵ *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA). This case was the end-point of a very lengthy process of inquiry and litigation. See *The King v Morison* [1950] NZLR 247; *Report of the Royal Commission on Claims made in respect of the Wanganui River* (1950) AJHR G-2; and *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA). In its 1962 decision, the Court of Appeal found that there was no separate tribal title to the river bed and that investigation of title by the Maori Land Court to riparian blocks extinguished the customary title *ad medium filum aquae*. These decisions did not, of course, put to an end the controversy over the river. The Wanganui River has formed the subject of a lengthy Waitangi Tribunal Report released in 1999 (Waitangi Tribunal, 'The Whanganui River Report' (Wai 167, 1999)). The claim is still being negotiated. Land issues in the Wanganui region are now the subject of a separate Waitangi Tribunal regional inquiry, hearings of which began in the second half of 2007 and which will continue into 2009.

¹⁶ [1965] NZLR 322; see also *Inspector of Fisheries v Weepu* [1956] NZLR 322; cf *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 920.

¹⁷ (1912) 32 NZLR 321; 15 GLR 95 (CA). This case arose out of an investigation of title to the beds of the Rotorua lakes pending at that time in the Native Land Court. The Court of Appeal held that lakebeds have no special status in New Zealand law and are thus open for investigation by the Maori Land Court. For commentary, see Boast, above n 10, 22-8; also see, generally, B White, *Inland Waterways* (Rangahaua Whanui Special Theme Q, Waitangi Tribunal, 1998; also Wai 894 [Urewera] Doc#A113; Wai 1200 [Central North Island] Doc#A55). The Rotorua lakes issue was in the end settled by statute (Native Land Amendment and Native Land Claims Adjustment Act 1922, s 27). A new settlement has recently been negotiated between Te Arawa and the Crown.

seemingly rock-solid judicial edifice, which ended Maori title claims in the ordinary courts for a quarter of a century, has now been two-thirds demolished—the issue remaining unexamined being title to river beds. Sooner or later, it seems safe to say, that question will return to the Court of Appeal, too, the outcome of which could allow the nation to enjoy a re-run of the foreshore and seabed crisis of 2003 to 2004: but I digress.¹⁸

The Apogee: 1987 to Circa 1995

The next phase, of course, occurred in the late 1980s and early 1990s, when, following some interesting developments at High Court level,¹⁹ the Court of Appeal issued its famous judgment in *Maori Council v Att-Gen*: the 'Lands' case,²⁰ so-called, although it was less about land than about the safeguards attached to a statutory process of the transfer of government assets to newly formed public corporations. The decision is rightly seen as highly significant, although the nature of its significance needs some careful consideration. *Maori Council* was at one level a case about statutory interpretation, in which the Court of Appeal had to construe certain references to the Treaty of Waitangi in the State-Owned Enterprises Act 1986. The really remarkable step, the decisive turning-point, was not the Court of Appeal's decision, but rather the sudden willingness of Parliament—which is, of course, shorthand for 'politicians'—to place such references into statute to start with, something that they had shown no particular interest in doing before. As McHugh nicely puts it:

Parliament not only generated its own institutional restraint, but, encouraged by the Waitangi Tribunal, poured the Treaty into pockets of the public realm.²¹

The fourth Labour Government (1984 to 1990) really does deserve credit for this, as well as for its efforts to reach a fair fisheries settlement with

¹⁸ A complication with river beds is the effect of s 261 of the Coal Mines Act 1979, based originally on s 14 of the Coal Mines Amendment Act 1903 and the effect of which has been preserved by s 354 of the Resource Management Act 1991. This provision vests the beds of 'navigable' rivers in the Crown, but the meaning of 'navigable' is uncertain and thus the scope of the provision is problematic. For contrasting views at Court of Appeal level, see *Te Runanga o Te Ika Whenua v Attorney-General* [1994] 2 NZLR 20 at 25 (Cooke P); and *Ngati Apa v Att-Gen* [2003] 3 NZLR 643 at [61] (Keith and Anderson JJ). There is apparently litigation over title to the bed of the Waikato River now proceeding in the High Court, but I am unaware of the details. My understanding is that the application of the *ad medium filum aquae* rule and the 'navigability' of the upper Waikato River are in issue.

¹⁹ Especially *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 920; and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

²⁰ *New Zealand Maori Council v Att-Gen* [1987] 1 NZLR 641 (CA). See, generally, J Ruru (ed), *'In Good Faith': Symposium Proceedings Marking the Twentieth Anniversary of the Lands Case* (Wellington and Dunedin, New Zealand Law Foundation and Faculty of Law, University of Otago, 2008).

²¹ McHugh, above n 2, 417.

Maori and for its expansion of the jurisdiction of the Waitangi Tribunal in 1985. McHugh has rightly noted the government's 'sense of a new constitutional (as well as economic) direction'.²²

Taking a long-term, 'Legal Realist' stance, one obvious aspect—so obvious that it is easily forgotten—of the significance of the 1987 *Maori Council* decision was simply that the Maori plaintiffs won and the Crown lost. Before then, the two most recent leading Court of Appeal decisions dealing with Maori issues—*Re the Bed of Wanganui River* in 1962²³ and *Ninety-Mile Beach* in 1963—had been significant Maori defeats. So it is not misleading to see the New Zealand Maori Council's victory in 1987 as an important power shift. Before 1987, it had been a standard government strategy to move key cases from the Maori Land Court into the ordinary courts where, it seems, the government felt that it could count on an acceptable result.²⁴ After 1987, this was no longer so. Moreover, in the years immediately following *Maori Council*, the government of the day went on losing in the Court of Appeal and Maori went on winning.²⁵ This reality was probably more important at the time than the actual doctrinal content of the cases, which arguably did not change the legal fundamentals relating to the status of the Treaty of Waitangi all that much. (More recently in the area of settlements and redress, Maori have been faring less successfully.²⁶)

The practical issue in *Maori Council* was the government of the day's 'corporatisation' programme, which involved the identification of certain state assets and their transfer to new state-owned commercial companies. The plaintiffs feared that this process of transfer made redress for historic claims more difficult by placing many key assets effectively beyond reach. In the end, the main issue in the case turned out to be narrower still: whether, in setting up its process of asset transfer, the Crown had put an

²² *Ibid*, 418. For a more critical reading of the events of these years, see J Kelsey, *A Question of Honour? Labour and the Treaty* (Auckland, Allen & Unwin, 1990).

²³ See above n 15.

²⁴ In 1935, for instance, in response to an application for an investigation of title in the Native Land Court to an area of foreshore and seabed, Crown counsel noted that the Crown's case was 'weak', and that Crown Law 'would prefer that the matter, if possible, be removed from the jurisdiction of the Native Land Court' and dealt with in the ordinary courts. See the correspondence of Crown Solicitor to Solicitor-General dated 30 August 1935, found in Lands and Survey Department Box file relating to the *Ninety-Mile Beach* case. A copy of the memorandum can be found in RP Boast, *Annexures to Evidence Regarding Ninety-Mile Beach* (Wai 45 Doc#C3A) Annexure 16. This was basically the strategy later followed with the *Ninety-Mile Beach* litigation itself.

²⁵ Apart from *Maori Council* itself, perhaps the most important Maori victory was the Court of Appeal decision in *Tainui Maori Trust Board v Att-Gen* [1989] 2 NZLR 513, relating to the transfer of certain mineral rights to the newly formed Coal Corporation.

²⁶ *New Zealand Maori Council v Att-Gen* (HC Wellington, CIV-2007-485-95, 4 May 2007). The High Court decision was upheld by the Court of Appeal. The matter is now under appeal to the Supreme Court.

effective *system* in place for monitoring whether the transfer of any particular asset might amount to a breach of the principles of the Treaty of Waitangi. On the evidence, it had not done so. In fact, the Crown admitted as much in an interrogatory. The most important piece of evidence in the case—notwithstanding the doctoral dissertations and so forth attached to the affidavits—was the word ‘No’. The principles of the Treaty of Waitangi had to be complied with simply because section 9 of the relevant legislation, the State-Owned Enterprises Act 1987, stipulated that they did. This is shown by the actual remedy granted by the Court of Appeal, this being a declaration that:

[T]he transfer of assets to State enterprises without establishing *any system* to consider in relation to particular assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.²⁷

‘Unlawful’, that is, with respect to the State-Owned Enterprises Act itself.

The response of the government of the day was, very creditably, to pass legislation establishing just such a system. This was the Treaty of Waitangi (State-Owned Enterprises Act) 1988.²⁸ A separate system relating to state forests was set up in 1989 following similar litigation,²⁹ followed by a separate round of negotiation with Maori over the sale of forestry assets (Crown Forests Assets Act 1989).³⁰ These legislative responses reflect very well on the government of the day. (Unfortunately, questions relating to protection mechanism and redress continue to be a problem at present, which is an issue that it is unnecessary to pursue here.³¹) At the same time as the SOE/redress cases, there was substantial litigation over fisheries, although in the end as the result of a generous statutory settlement it

²⁷ [1987] 1 NZLR 641 at 666 (Cooke P) (emphasis added).

²⁸ The Treaty of Waitangi (State-Owned Enterprises) Act 1988 was to ‘give effect to the agreement entered into between the [New Zealand Maori Council] and the Crown’. The Act did a number of things, the most important of which included the granting of the power *binding* recommendations to the Waitangi Tribunal in respect of any land transferred to a state-owned enterprise (‘SOE’). In order to ensure that land remained available for settlements, even where held by an SOE or third party—what are now known as ‘section 27B memorials’—allowed for any such land to be resumed.

²⁹ *New Zealand Maori Council v Att-Gen* [1989] 2 NZLR 142 (CA) held that the Court of Appeal remained available to hear new developments in the original *Lands* case, including the sale of forestry assets. This grant of the right to proceed spurred the Crown into action and led to an out-of-court settlement of the issues at stake.

³⁰ The Crown Forestry Assets Act 1989 provided that the Crown may not sell or dispose of any Crown forestry land and established a Crown Forestry Licence system whereby commercial forestry licences could be granted over the trees while the assets themselves were preserved for future Treaty settlements. The Act also established the Crown Forestry Rental Trust, which was to hold all Crown forestry licence rentals to be distributed to the relevant claimants when the Waitangi Tribunal makes a recommendation (again *binding*, as with SOE land) with respect to particular forestry land.

³¹ RP Boast and DA Edmunds, ‘The Legacy of the *Lands* Case and the Struggle for Redress: Perspectives from Practice’ in Ruru, above n 20, 69–84.

became unnecessary to know the answer to the question as to what exactly the nature of a Maori customary title to marine fish was. As part of the settlement, the substantive litigation then pending in the High Court was terminated by statutory *fiat*.³² Attempts by some Maori groupings to challenge the settlement failed both in the Waitangi Tribunal and in the Court of Appeal.³³

Of course, the 1987 *Maori Council* decision is also known for the way in which the Court of Appeal gave some content to the amorphous notion of 'the principles of the Treaty'—the statutory language—through the concepts of 'partnership' and 'active protection'. Where the concept of 'partnership' came from I am not sure: I have heard anecdotally that it came from the contemporary discourse of the Anglican Church, a point that those better informed than I may feel able to comment on. Cooke P observed that:

[t]he Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found ... In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith, which is the characteristic obligation of partnership.³⁴

This language possibly presaged an elaboration of Treaty principles based on fiduciary doctrines, which, however, failed to occur, perhaps because the right sort of case never came before the Court. Partnership is a reciprocal relationship. As a prominent Argentinian legal historian has put it, relationships between indigenous peoples and governments were never uni-directional, but rather bi-directional.³⁵ The concept of partnership reflects this bi-directionality very suitably. But the other Treaty principle articulated by the Court, 'active protection', was one imposed squarely on

³² There have been two statutory settlements, implemented successively by the Maori Fisheries Act 1989—an interim settlement only—and by means of a final settlement implemented by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The second, or 'Sealords' settlement, was predicated on the withdrawal of the civil proceedings then pending against the Crown relating to marine fisheries brought by a consortium of Maori plaintiffs. See, generally, RP Boast, 'Maori Fisheries 1986–1998: A Reflection' (1999) 30 *Victoria University of Wellington Law Review* 111.

³³ *Te Runanga o Wharekauri Rekohu Inc v Att-Gen* [1993] 2 NZLR 301; and Waitangi Tribunal, 'The Fisheries Settlement Report' (Wai 307, 1992).

³⁴ *New Zealand Maori Council v Att-Gen* [1987] 1 NZLR 641 at 664.

³⁵ A Levaggi, *Paz en la Frontera: Historia de las relaciones Diplomáticas con las Comunidades Indígenas en la Argentina* (Buenos Aires, Universidad del Museo Social Argentino, 2000) 27: 'In reality, relations with indigenous nations were not uni-directional, but bi-directional' ('Las relaciones con las naciones indígenas, en realidad, no fueron unidireccionales sino bidireccionales').

the Crown.³⁶ Partnership is a relationship of equals; active protection is one of unequals. Maybe there is an analytical contradiction here, or perhaps—this is my view, at least—these two contrasting concepts reflect the complex reality of things in New Zealand very well. The Court continued to develop and refine these ideas in some of the subsequent cases.³⁷ Interestingly, the Privy Council, in the one recent case in which it has had occasion to consider the status and content of the Treaty of Waitangi, did not actually use the ‘partnership’ and ‘active protection’ discourse, although it did use terminology that is arguably somewhat similar.³⁸ In any event, the ‘partnership’ and ‘active protection’ concepts are used now very frequently in the Waitangi Tribunal—and they form a very useful set of ideas around which to write closing submissions in the large Tribunal regional inquiries, as I can testify.

The Latest Phase: Settlements and the Foreshore

The 1992 ‘Sealords’ fisheries settlement led on to the main development of the latest phase, which could also be called the ‘settlement era’. Litigation against the Crown in the ordinary courts has receded into the background as both government and Maori focus their energies on direct negotiations and the crafting of deeds of settlement. Attempts to challenge these settlements in the Court of Appeal and in the High Court have invariably been unsuccessful. An era in which litigation and judicial determinations played a central role in Crown–Maori relations has in many respects come to an end. Even the hearing of historic claims in the Waitangi Tribunal is drawing to a close, given that most of the regional inquiries have now been done and it seems very likely that much of the remaining sections of the North Island will be dealt with by negotiated settlements. Very possibly the inquiries currently at the planning stages for the East Coast, the King Country and Northland may well not take place, or, if they do, will do so only in a truncated format. The principal zone of engagement between Maori and the government is not in the courtroom, but rather across the

³⁶ [1987] 1 NZLR 641 at 664 (Cooke P) (emphasis added): ‘Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive, but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable.’

³⁷ See, eg *Tainui Maori Trust Board v Att-Gen* [1989] 2 NZLR 513 (CA) (coal); *Te Runanga o Muriwhenua Inc v Att-Gen* [1990] 2 NZLR 641 (CA); *Att-Gen v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) (Radio Frequencies No 1); *Att-Gen v New Zealand Maori Council* [1991] 2 NZLR 147 (CA) (Radio Frequencies No 2); *New Zealand Maori Council v Att-Gen* [1992] 2 NZLR 576 (CA) (Broadcasting); *New Zealand Maori Council v Att-Gen* [1994] 1 NZLR 513 (CA) (Broadcasting assets); and *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) (whale-watching).

³⁸ *New Zealand Maori Council v Att-Gen* [1994] 1 NZLR 513 (PC).

negotiating table, as it has been for most of New Zealand's history as it happens. Of course, the negotiations are not between equals—the resources and power of the Crown are far superior to those possessed by iwi (tribes)—but the negotiations are at least less unequal than they were in the past, something for which the nation has the Court of Appeal, along with the Waitangi Tribunal, to thank.

While there have been attempts to challenge the settlement deeds, these have encountered the problem that the whole process is a non-statutory one. The courts have concluded as a result that the area fits within the realm of 'policy' and is not amenable to review. As Goddard J put it in the High Court in *Pouwhare* in 2002:

Therefore, not only is the event which the plaintiffs seek to review a future event which has not yet come to pass, it is an event which is subject to its own processes and to Parliamentary scrutiny. The negotiated settlement process and the development of policy in relation to that is not by its nature amenable to supervision by the Courts. The settlement of Treaty grievances involves the exercise of prerogative power and the enactment of legislation and for those reasons is the provision of parliamentary sovereignty. There is ample authority relating to similar attempts to challenge what can only be categorised as a highly political process.³⁹

To this general acquiescence and judicial withdrawal, which can be explained by both a lack of suitable cases and the non-existence of a statutory framework applying to the negotiation and settlement process, there has of course been one somewhat major and glaring exception, namely, the litigation over the foreshore and seabed, culminating in the Court of Appeal's *Ngati Apa* decision in 2003.⁴⁰ (The litigation very nearly did not end there, as it happens, as one of the respondents did in fact appeal the decision to the Privy Council, an appeal that was withdrawn at the last minute.) That case was basically jurisdictional—once again the issue being in form about the extent of the Maori Land Court's statutory jurisdiction, although in substance it was about the extent of native title—and was essentially a re-run on its facts of *Ninety-Mile Beach*, albeit concerned with a different part of the country. The Court of Appeal overruled itself, although not quite unanimously.⁴¹ Like any appellate tribunal, the Court of Appeal is usually reluctant to overturn itself. But the judges felt they had little option. According to Tipping J:

³⁹ *Pouwhare and Pryor v Att-Gen, Minister in Charge of Treaty Negotiations and Te Runanga o Ngati Awa* (HC Wellington, CP78/02, 20 August 2002) at [42]. An appeal to the Court of Appeal was unsuccessful. Whether attempts to challenge deeds of settlement need be rejected in such broad terms is admittedly debatable.

⁴⁰ [2003] 3 NZLR 643. For commentary, see Boast, above n 10; and A Erueti and C Charters (eds), *Maori Property Rights and the Foreshore and Seabed* (Wellington, Victoria University Press, 2007).

⁴¹ [2003] 3 NZLR 643 at 666–7 (Gault P).

The decision in *Ninety-Mile Beach* has stood for 40 years. Furthermore, it must have been regarded as correctly stating the law by those responsible for subsequent legislation. Hence a cautious approach should be taken to the suggestion that the case was wrongly decided. That said, I am driven to the conclusion that it was. While the reasoning in the two principal judgments has internal logic and consistency, the problem is that they do not appropriately recognise the starting point, namely that Maori customary title, and the associated status in respect of the land involved, became part of the common law of New Zealand from the start.⁴²

The Court was now prepared to accept an extensive jurisdiction of the Maori Land Court over the foreshore and seabed, at the same time greatly widening the scope of the application of native title in this country.

The response of the government, notoriously, was the Foreshore and Seabed Act 2004, which did not so much reverse the decision of the Court of Appeal as bury the whole foreshore and seabed issue under a mountain of legislative sludge—a strategy that seems so far to have proved remarkably successful.⁴³ Aspects of the Court of Appeal's judgments in *Ngati Apa* go much further than the narrow question of foreshore and seabed in any case. I shall return to what I think is the true significance of the case below.

CONTINUITIES

The context in which the *Maori Council* sequence of cases arose can now be seen clearly to be a somewhat unusual one, that is to say, the transfer of certain state assets to government-owned corporations. That process has been completed, and unless further steps are taken along the same lines to similarly transfer assets out of the public domain into either private hands or the hands of government-owned commercial businesses, the experience is unlikely to be repeated. The litigation over fisheries was somewhat similar, involving in that instance not so much the transfer of property rights as the creation and then allocation of private property rights in a formerly 'commons' resource (fish). Should a future government have a rush of blood to the head and try to do the same thing with regard to, say, water or geothermal resources, the situation could perhaps repeat itself. Privatisation of water rights seems to me to be simply asking for trouble.

⁴² *Ibid.*, at 699.

⁴³ For an attempt to make the Act comprehensible, see Boast, above n 10. Some of the provisions of the Act, especially s 32, which deals with the meaning of a customary rights order, defy understanding. (A customary rights order is a new statute-based order and process available from the High Court to replace the Court's former ordinary jurisdiction to recognised native title in the foreshore and seabed.) See also FM Brookfield, 'The Sea Land Controversy and the Foreshore and Seabed Act' [2005] *New Zealand Law Journal* 362.

Generally speaking, however, the point remains that much of the litigation that arose in the 1987 to 1993 period arose in a special historical context. Doctrinally, the law on the 'status' of the Treaty of Waitangi has not really changed all that much. The basic rule that the Treaty is unenforceable of itself unless incorporated into statute remains intact, although it has been chipped away at a little, both by the Court of Appeal itself and in the High Court. The Privy Council has said expressly that the law as earlier stated—by itself in *Hoani Te Heu Heu Tukino* in 1941⁴⁴—remains intact. I do not mean to point the finger or to take it upon myself to lament that the Court of Appeal could have done more. Politicians have certainly made no move to enact legislation to make the Treaty of Waitangi a general constitutional standard, no doubt because of a well-founded suspicion on the part of our political leaders that any political support that such a step might generate—among Maori and among some constitutional lawyers—would be more than offset by displeasure from elsewhere.

Another continuity, less obvious but still significant, is that the extent of the Maori Land Court's jurisdiction continues to be a really significant question. That is because where the Maori Land Court does have jurisdiction to investigate titles to a particular category of land, it can convert those areas to privately owned land held under the Land Transfer Act.⁴⁵ That is one of the reasons why the government felt that it had to overrule the Court of Appeal's *Ngati Apa* decision by statute in 2004. Both *Ninety-Mile Beach* and *Ngati Apa* were concerned not with the powers of the ordinary courts to issue declarations as to native title—which is how native title cases usually arise in other countries, as in *Mabo* for example—but rather with the jurisdiction of the Maori Land Court. The extent of that jurisdiction has long been one of the thorniest and most controversial questions arising within the New Zealand system, and seen in this way neither *Ninety-Mile Beach* nor *Ngati Apa* were about anything new. *Ngati Apa* was in fact one of a number of recent Court of Appeal decisions dealing with the Court's jurisdiction, to some extent testing the parameters of the new statutory definitions of the Court's jurisdiction in *Te Ture Whenua/Maori Land Act 1993* (TTWM/MLA).⁴⁶ In general, the Court of

⁴⁴ *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

⁴⁵ *Te Ture Whenua/Maori Land Act 1993*, s 139 (vesting orders in Maori Land Court to be entered in the provisional register and become subject to the Land Transfer Act). See Boast, above n 10, 96–7. These powers are now subject to the *Foreshore and Seabed Act 2004*, s 12.

⁴⁶ The other two cases, which have been somewhat neglected by commentators, are *Att-Gen v Maori Land Court* [1999] 1 NZLR (CA) (extent of TTWM/MLA 1993, s 18(1)(i), in particular whether the Maori Land Court's power to issue declarations that any land is held in a fiduciary capacity extends to Crown land and general land—to which the Court of Appeal's answer, surely—with respect—correctly, was 'No'); and *McGuire v Hastings DC* [2000] 1 NZLR 679 (CA); [2002] 2 NZLR 577 (PC) (extent of Maori Land Court's jurisdiction to issue injunctions under TTWM/MLA, s 19, in particular whether the Court had power to issue an injunction restraining a designation of Maori freehold land by a council

Appeal has shown itself resistant to any suggestion that the 1993 Act gave the Maori Land Court new powers over Crown land and general land, and in a sense *Ngati Apa* is not inconsistent with this, as the category of land in issue was neither general land nor Crown land, but was rather Maori customary land or something resembling it.⁴⁷ Admittedly, the Crown *believed* the foreshore and seabed to be Crown land held in *dominium* to which the Maori customary title had been extinguished: that belief just happened to be without legal foundation.

Another continuity, so obvious that it hardly requires comment—but which like a lot of obvious, but important, things is sometimes easy to overlook—is the continued centrality of statute in the area of Crown–Maori relations. The Maori Land Court is a creature of statute—in fact, it is the country's oldest and most important specialist statutory tribunal. Determining what the Court can and cannot do is principally an exercise in statutory interpretation. And the same goes for the law relating to the status of the Treaty of Waitangi. *Maori Council* (the 1987 Lands case) was less a case about the status of the Treaty than about ascertaining the meaning of somewhat complicated references to the Treaty in statute that Parliament had already put there. In a different way, recent cases that attempt to challenge certain Crown–Maori agreements—the challenges being brought by other Maori groups unhappy with what is being proposed—have foundered because the current settlement process happens to operate in a non-statutory context and the courts not surprisingly feel that their ability to intervene is highly circumscribed. This, too, is to demonstrate the central place of statute. A characteristic of the New Zealand political/constitutional system is the centrality of parliamentary sovereignty, and indeed of parliamentary legitimacy. It seems to be accepted by all parties, for example, that it is highly right and proper for a deed of settlement to be given its final and legal form by being legislated into place by Parliament—a political reflex that might not be so readily accepted in some other states.

Native Title: Laying a Ghost to Rest

The Court of Appeal's 'Treaty' decisions would be seen by most commentators as the Court's most important contribution to the area we are considering, and I do not want to minimise their importance, but this

exercising statutory powers under the Resource Management Act 1999). For a brief analysis of these cases and their legal context, see Boast, above n 10, 72–4.

⁴⁷ On the legal status of the foreshore and seabed following *Ngati Apa*, but before the enactment of the Foreshore and Seabed Act 2004, see RP Boast, 'Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*' (2004) 21 *New Zealand Universities Law Review* 1.

seems to be a good opportunity to draw attention to a much less heralded, but in many ways equally important, legal development. In 2003, in its *Ngati Apa* decision, the Court of Appeal laid to rest a very long controversy over the extent of native title in New Zealand. Sir John Salmond many years ago put forward the claim that New Zealand happened to be a colony where the Crown obtained a full proprietary title to the entirety of the country on the acquisition of British sovereignty. In Appendix II to his classic text *Jurisprudence*, Salmond observed:

When New Zealand became a British possession, it became not merely the Crown's territory, but also the Crown's property, *imperium* and *dominium* being held concurrently.⁴⁸

This was no mere isolated or throwaway line, but was rather a carefully considered remark that is entirely consistent with Salmond's views as put forward in official opinions he crafted as Solicitor-General and in legal argument he put forward on behalf of the New Zealand Government in the Rotorua lakes and other cases before he was appointed to the bench. I have argued elsewhere that this was not a simple statement of orthodoxy, but was rather a controversial position that other members of the legal profession—most especially the judges of the Native/Maori Land Court and Appellate Court—strongly disputed.⁴⁹ As a kind of fall-back position, Salmond also contended that 'native title' was only partial and not comprehensive: while it could be asserted in some areas, perhaps, there were others where it could not be—as, for example, with respect to the beds of large inland navigable lakes, such as Lakes Rotorua or Waikaremoana, or the foreshore and seabed.

It follows from Salmond's view that such property rights as Maori could assert in the ordinary courts had to derive from Crown grant, or at least from some other act of formal recognition by the Crown, and there can be no doubt that this kind of analysis structures—in perhaps a rather confused way—the Court of Appeal's judgments in *Ninety-Mile Beach*. In that case, both the Supreme Court and the Court of Appeal agreed that with the enactment of the Native Lands Acts of 1862 to 1965 and the establishment of the Native Land Court, a process was set in place—by means of statute, of course—that formed essentially the only available

⁴⁸ JW Salmond, *Jurisprudence*, 7th edn (London, Stevens & Haynes, 1924) App II, 'The Territory of the State', 554, cited in A Frame, *Southern Jurist* (Wellington, Victoria University Press, 1995) 125. It is intriguing that when Brennan J in *Mabo* cited Salmond's brilliantly clear analysis of the distinction between *imperium* (sovereignty title) and *dominium* (full Crown beneficial ownership), this sentence was not quoted, no doubt for very good reasons (1992) LLR 1, 44.

⁴⁹ RP Boast, 'Sir John Salmond and Maori Land Tenure' (2008) 38 *Victoria University of Wellington Law Review* 831; and, for a much fuller exposition of Salmond and native title issues, M Hickford, 'John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920' (2008) 38 *Victoria University of Wellington Law Review* 853.

mechanism by which Maori titles could be asserted against the Crown. Thus, to show a title to the foreshore, any individual Maori plaintiff would have to point to an express grant in the Court-derived title or in the Crown grant. This is definitely a 'Salmondian' position, as it accepts implicitly that as at the acquisition of sovereignty the Crown would have obtained a complete proprietary title to the whole country, although the case was only a partial success for the Crown because *also* implicit in the Court's view is the view that the Maori Land Court *did* have power to grant proprietary titles to the foreshore. Whether it did or did not, however, did not touch on fundamental questions, but was once again a mere matter of statutory interpretation.

The opposite view was that put forward by the Maori Appellate Court in a number of cases, a view that has turned out to be the contemporary position: Maori had native title to the entirety of the soil unless that title had been extinguished somehow according to the 'clear and plain' test. Something like this also characterised the view of the Privy Council in a number of earlier New Zealand appeals, as well as appeals from Africa and elsewhere—it was not as if the Maori Appellate Court's position was lacking respectable support. The decision in *Ninety-Mile Beach* was certainly seen as a decisive step (a retrograde step in the eyes of some members of the bar) and resulted in lawyers advising their clients that certain long-standing proprietary rights that everyone had assumed to be valid now had to be regarded as non-existent. One example is provided by certain long-standing rights of fishery held by Ngati Toa in Porirua Harbour. Shortly after the decision in *Ninety-Mile Beach*, the tribe's solicitors advised Ngati Toa, to the consternation of the latter, that the long-standing fisheries protection orders must now be deemed to have been made without jurisdiction and had no validity. Some overseas commentators found the reasoning in *Ninety-Mile Beach* more than a little startling, and I have been informed—anecdotally—that within some sections of the New Zealand legal profession there was a firm view that the case had been wrongly decided. (I have been told, for example, that within the firm of Morison Spratt Taylor & Co, there existed a strong tradition that the case had been wrongly decided.⁵⁰)

A quite different understanding of the extent of native title now emerges from the Court's decision in *Ngati Apa*, and if Salmond's views ever did represent 'orthodoxy'—which is debatable—that orthodoxy has now been finally and comprehensively exploded. Interestingly, it is the Maori Land Court that has remained constant on the point, Judge Hingston's views in

⁵⁰ My thanks in particular to Dr George Barton QC for this point. It was Gordon Morison of that firm who became Chief Judge of the Maori Land Court and who gave the judgment at first instance in *Ninety-Mile Beach*. The firm also acted for the plaintiffs in the Whanganui River litigation (see above n 15).

*Ngati Apa*⁵¹ being entirely at one with those of Chief Judge Morison in *Ninety-Mile Beach*⁵² or the Maori Appellate Court in *Lake Waikaremoana* in 1948.⁵³ It is the Court of Appeal that has shifted ground. In *Ngati Apa*, Elias CJ was clearly troubled by suggestions made by Turner J in the Supreme Court, and by North and TA Gresson JJ in the Court of Appeal, in *Ninety-Mile Beach*, that all titles to land, including Maori customary title, derived from the Crown. That proposition now seemed simply untenable, if it ever had been, and now doubly so in the wake of key overseas decisions on native title,⁵⁴ as well as cases at High Court level at home.⁵⁵

Elias CJ noted that Sir Kenneth Roberts-Wray, in his classic 1966 text *Commonwealth and Colonial Law*, had described the Court of Appeal's earlier approach in *Ninety-Mile Beach* as espousing 'extreme views' and as 'revolutionary doctrine'.⁵⁶ Sir Kenneth Roberts-Wray was the former legal adviser to the Dominion and Colonial Offices, and his book is regarded as a classic text. Presumably the reason why Elias CJ cited him is to underscore the point that the Court of Appeal saw itself as returning New Zealand law to the common law mainstream, which it has certainly done—although the High Court had already taken some very important earlier strides in the same direction. In so doing, it has been necessary to confine a great deal of earlier New Zealand authority to the dustbin of legal history (where, I would say, it belongs, although others may disagree). In Her Honour's words:

The reasoning in *Re the Ninety-Mile Beach* was based on that accepted in *Wi Parata*. So, too, was the reasoning in *Waipapakura v Hempton*, a case suggested to be of 'dubious authority' by this Court in *Te Runanga o Muriwhenua v Attorney-General* at p 654. The approach adopted in the judgment under appeal in starting with the expectations of the settlers based on English common law

⁵¹ *Ngati Apa* decision (1997) 22A Nelson MB. Judge Hingston's decision is reprinted in Boast, above n 10, 195–202.

⁵² (1957) 85 Northern MB 126–7. The Chief Judge found (*ibid*, at 127): 'The Court is of opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these tribes, according to their customs and usages.'

⁵³ (1944) 8 Wellington ACMB 30 (GP Shepherd, Chief Judge, and Judges Carr, Harvey and Whitehead).

⁵⁴ Especially *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA); *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 194 (SSC); and *Commonwealth v Yarmirr* [2001] 208 CLR 1 (HCA).

⁵⁵ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC: Williamson J); and *Faulkner v Tauranga DC* [1996] 1 NZLR 357 (HC: Blanchard J). Here, Blanchard J made the significant observation that inconsistent Crown grant is not a valid method of extinction of native title in New Zealand, which makes New Zealand law quite different from Australia.

⁵⁶ [2003] 3 NZLR 643 at 667–8 (Elias CJ).

and expressing a preference for 'full and absolute dominion' in the Crown pending Crown grant ... is also the approach of *Wi Parata*. Similarly, the reliance by Turner J [ie, in the Supreme Court decision in *Ninety-Mile Beach*, later upheld by the Court of Appeal] upon English common law presumptions relating to ownership of the foreshore and seabed ... is misplaced. The common law as received in New Zealand was modified by recognised Maori customary property rights. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption drawn from English common law. The common law of New Zealand is different.⁵⁷

As I have sought to argue, the Court of Appeal's decision in *Ngati Apa* should not be seen only as a return to orthodoxy, but also as the latest development in a long conversation that has gone on in New Zealand law over the extent and nature of Maori customary title. Recognising that the range of opinion among New Zealand lawyers and judges was less monolithic than a fixation on earlier Court of Appeal opinions might seem does not serve to downplay the significance of the decision in *Ngati Apa*. The views of the Native Appellate Court in the 1940s do show that there was a certain amount of debate and diversity of opinion, but theirs was a minority standpoint and they were specialists in a field that was not seen as very significant or interesting by most lawyers and judges. Following *Ngati Apa*, it is clear that native title is recognised in New Zealand common law, and that is of universal application. But not only that, the decision also reflects a shift in stance, attitude, legal style and legal culture that may be less susceptible of clear analysis than doctrinal change, but which is of no less importance in the long run. There has been a massive change in the legal, social and intellectual *Zeitgeist*, and *Ngati Apa* reflects this. The judges of the Court of Appeal are now, after all, products of post-Beatles New Zealand.

WHERE WE ARE NOW

The dominant New Zealand political tradition, when it comes to relations between Maori and the state, is one that I have labelled elsewhere as statutory pragmatism—or, more accurately, pragmatic statute-ism—the doing of their deals and then enshrining them in statute. Parliamentary sovereignty is the New Zealand *grundnorm* in reality, not the Treaty of Waitangi, a reality that all seem to accept and that the renaissance of Maori parliamentary politics with the emergence of the New Zealand Maori party has only strengthened. New Zealand is not only a thriving democracy, it is a thriving *parliamentary* democracy.

⁵⁷ *Ibid*, at 668 (para [86]).

Yet within this overarching structure, the courts do have a really significant role, and perhaps the most important 'partnership' of all is the one between the courts (in the broadest sense) and the legislature. Litigation in the courts is a means of channelling and restraining social conflicts by forcing them into a rhetoric of civility, utilising formalised legal forms of documentation and presentation before a neutral authority. In the period 1987 to circa 1993, while still accepting that eventually deals would have to be struck and legitimised through the political-parliamentary process, Maori could feel that the courts were able and willing to monitor Crown-Maori relations and subject the government to restraints and constraints through the forms of law. This could happen because, as has been noted by McHugh and others, the government of the day was willing to allow it to happen.

Today, the situation has changed, and certain cracks are beginning to appear that are starting to put under some strain the structure that holds New Zealand together so effectively. If Maori no longer feel that the courts are able to play the same kind of role that they did in the 1987 to 1993 era, there are real risks, although I do not wish to over-dramatise. The New Zealand politico-constitutional system is very adaptable and resilient. Politicians are nevertheless unwise to weaken the structure of which they themselves are a part by undermining the legitimacy and effectiveness of the courts, and in some ways this is exactly what has happened recently.

One problem is that the examination of historic grievances through a judicial process (in the Waitangi Tribunal⁵⁸) and their settlement by means of a negotiated political process (by negotiations and settlements managed by the Office of Treaty Settlements) have become desynchronised. The tribunal carries on hearing claims, elaborate historical evidence is prepared and tested, and lengthy and scholarly reports are crafted. But the government is not usually prepared to wait for a report, does not always accept what it says and is certainly prepared to settle claims in the absence of such a report being completed, or even without an inquiry being commenced. This has made the Waitangi Tribunal process seem pointless (in terms of the historical inquiries, it is nearing the end of its life in any event).⁵⁹ But this chapter is meant to address issues confronting the Court of Appeal, not the Waitangi Tribunal.

In that respect, two points need to be made. One is that the government certainly strained Crown-Maori relations by in effect legislatively overturning the *Ngati Apa* decision. It was not only Maori who were opposed

⁵⁸ On the Waitangi Tribunal, see, generally, J Hayward and N Wheen (eds), *The Waitangi Tribunal* (Wellington, Bridget Williams Books, 2004).

⁵⁹ The Waitangi Tribunal, it has to be said, sometimes does not help matters by taking so long to prepare its reports—up to two to three years sometimes. This is a probably a product in its turn of the under-resourcing of the tribunal by the government.

to that. The Fisheries and Other Sea-Related Legislation Select Committee at Parliament received no fewer than 3,946 submissions on the Bill, 94 per cent of which were opposed. Well-known wreckers of the constitution such as the New Zealand Business Roundtable, Dr Alex Frame, and the Human Rights Commission were resolutely opposed, and the Waitangi Tribunal had dissected the government's proposed policy at length and found it wanting.⁶⁰ The government's actions have also tarnished our generally good reputation internationally.⁶¹ Yet it pressed on, in the process flinging some rather unfortunate comments in the direction of the Maori Land Court when the latter felt that it had no option but to continue processing foreshore and seabed cases along the lines of the principles laid down in *Ngati Apa*.⁶² All of this may have served to create the impression that should the government be confronted with an outcome in the ordinary courts that is judged to be unpalatable, it will simply be legislated away. Surely that is not a healthy perception to be abroad in the body politic.

The second point relates to a matter of omission rather than commission. It relates to the inability of Maori to challenge the current settlement process in the courts. There have been challenges, but they have foundered on the problem that the settlement process is non-statutory. Settlements are of course *implemented* in statute,⁶³ but the process itself is founded on a set of basic policy determinations that the Office of Treaty Settlements has collected together and which form its, and claimants', basic working manual (known to all as the 'Red Book'⁶⁴). This is not even delegated legislation or a set of Cabinet rules; rather, it is something between a guideline and a policy discussion paper and has no obvious legal status of any kind. How to analyse and classify texts of this kind, which seem to be increasingly widely employed, is a new analytical task for public lawyers. In this area, governments want quick and rapid settlements with a minimum of legal impediments, and this explains both the willingness to sidestep the tribunal and the non-existence of a Treaty Claims Settlement Act that would form a framework for judicial review.

Until recently—in fact, until the Honourable Dr Michael Cullen, the Deputy Prime Minister, took control of the process in late 2007—there was

⁶⁰ Waitangi Tribunal, 'Report in the Crown's Foreshore and Seabed Policy' (Wai 1071, 2004).

⁶¹ The UN Committee on the Elimination of Racial Discrimination at Geneva issued a critical—although not unfriendly—report in March 2005, after the Foreshore and Seabed Bill had already become law. See generally Boast, above n 10, 110–11.

⁶² Boast, *ibid*, 122–3.

⁶³ eg the Waikato Raupatu Claims Settlement Act 1995; Ngai Tahu Claims Settlement Act 1998; Pouakani Claims Settlement Act 2000; and Te Uri o Hau Claims Settlement Act 2002. Twelve such Acts have been enacted to date.

⁶⁴ Its proper name is *Ka Tika a muri: ka tika a mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, 2002).

widespread dissatisfaction with the current process. The dissatisfaction was not so much with the level of the settlements (although of course that can be an issue), most Maori groups being willing to accept that *restitutio in integrum* is not possible, as with processual issues: the 'who, how and what' of administrative law. (That is to say, who the government negotiates with, often the most important question of all; how it is done, and in particular how issues relating to overlapping claims are dealt with; and the actual content and types of redress in the settlement deeds.) The ordinary courts have retired from the field, or, more accurately perhaps, having been deprived of the means by which they might play a role, have had to retire from it. This has meant that the task of administrative law tribunal has by way of default been assumed by the Waitangi Tribunal, in many ways very effectively and also cheaply.⁶⁵ But while the tribunal can inquire into settlements, ensure that documents are produced and see to it that officials are available for cross-examination, it remains, of course, a recommendatory body only. *Certiorari* and *mandamus* cannot be obtained in the Waitangi Tribunal, as all parties are aware. That requires the participation of the ordinary courts. And that in turn requires a political willingness for the ordinary courts to have that role, although it may come at a price.

Has the long process of the engagement of the superior courts with Maori issues come to an end? That is impossible to believe. Such engagement has been a feature of New Zealand's legal history from the beginning, and it will inevitably continue. The precise forms of that future engagement are at present hard to predict. One way or another, the Court of Appeal will continue to play an important role.

⁶⁵ There are now a substantial number of Waitangi Tribunal reports that deal in various ways with the claims settlement process. These inquiries are usually heard under the tribunal's urgency jurisdiction. Examples are: 'The Pakakohi and Tangahoe Settlement Claims Report' (Wai 758/142, 2000); 'The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report' (Wai 788/800, 2001); 'The Ngati Awa Settlement Cross-Claims Report' (Wai 958, 2002); 'Ngati Tuwharetoa ki Kawerau Settlement Cross-Claims Report' (Wai 996, 2003); 'The Te Arawa Mandate Report' (Wai 1150, 2004); 'The Te Arawa Mandate Report: Te Wahanga Tuarua' (Wai 1150, 2004); and 'Tamaki Makaurau Settlement Process Report' (Wai 1362, 2007).