

WAIKATO LAW REVIEW

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EDITOR'S INTRODUCTION

I am pleased to present the eighth edition of the *Waikato Law Review*. I thank the referees to whom articles were sent and the members of the editorial committee for their assistance.

The *Review* is proud to publish the Harkness Henry Lecture of the Right Honourable Justice Thomas. His lecture on "The Conscience of the Law" was eagerly awaited in the light of his Court of Appeal judgments and was very well received by a large audience.

The *Review* is also honoured to publish speeches by the Honourable Justice Penlington, on the occasion of the admission of graduates of the Waikato Law School (and others) to the bar, and Chief Judge Williams, at the graduation of students of the Law School. Their speeches testify to the growing reputation and support for the Law School amongst the New Zealand judiciary.

The success of the Waikato Law School is also reflected in the numbers of its graduates who are taking their place in the legal community in New Zealand. Two of these graduates, Kevin Glover and Shadia Rahman, have contributed articles on developments in New Zealand law. The *Review* is also pleased to publish the presentation of a current student, Tanya Peterson. She is this year's winner of the annual student advocacy contest kindly sponsored by the Hamilton firm McCaw Lewis Chapman.

The other publications in the *Review* are written by staff of the Law School and staff in other departments at the University of Waikato. Notable here is the article by Dame Evelyn Stokes, Professor of Geography at the University of Waikato. Her article reflects the work she has done on treaty-making with First Nations in British Columbia, which has parallels and lessons for New Zealand.

Taken together, the contributions in this year's *Review* canvass a wide range of legal topics. They reflect the role of the academic lawyer as the conscience and critic of society, and also exemplify the Waikato Law School's commitment to professionalism, biculturalism and law in context.

Professor Peter Spiller,
Editor, *Waikato Law Review*.

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THE HARKNESS HENRY LECTURE

THE CONSCIENCE OF THE LAW

BY THE RIGHT HONOURABLE JUSTICE E W THOMAS*

Justice is the right of the weaker**

I. INTRODUCTION

I am fully conscious of the honour of being invited to give the Harkness Henry Lecture. I am also alert to the fact that this lecture is the first Harkness Henry Lecture of the new millennium. In an attempt to do justice to the occasion, I have decided to take a cherished quotation which has accompanied me for much of my life, and which I have been intending to develop and write about for some time, and speak to it tonight.

The quotation is from Joseph Joubert, an 18th century philosopher, moralist and writer. It appears at the head of this lecture. It is simple enough, and bears repeating: “Justice is the right of the weaker”. It was with that quotation in mind that I concluded an address last year with this rhetorical musing:

It may well be that the law has no higher calling than to defend the poor against the mighty, the powerless against the powerful, and the weak against the strong.¹

Tonight, I set out to answer that question, and I answer it in the affirmative. I refer, of course, to the common law; to judge-made law.²

At once, the notion that the law might be founded on an altruistic premise must cope with our perception of the judges who administer that law. By and large, they are perceived as a conservative, middle to upper class, frequently second or third generational privileged elite.³ Irrespective of their professed

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** Joseph Joubert (1754–1824).

¹ “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31(1) VUWLR 5, 36.

² I do not refer to statutory law, which carries its own dynamics.

³ See Lord Justice Scrutton in an address to the University of Cambridge Law Society on 18 November 1920: “The Work of the Commercial Courts” (1923) 1 Camb LJ 6, 8. See also Richardson “The Role of the Appellate Judge” (1981) 15 VUWLR 46, 51.

judicial neutrality, judges, it is thought, mirror the attitudes, beliefs and prejudices of that elite. Professor Griffith concluded that judges are, like the rest of us, “not all of a piece”.⁴ They are liable to be swayed by emotional prejudices. Their “inarticulate major premises” are not only inarticulated but are also sometimes unknown to themselves. Yet, those inarticulated and at times unknown premises may be strongly, if not passionately, felt.⁵

Justice Benjamin Cardozo made much the same point, although more benignly. He wrote that, throughout all their lives, forces which judges do not recognise and cannot name have been tugging at them – inherited instincts, traditional beliefs, and acquired convictions. The result is an outlook on life and a conception of social needs which, when reasons are nicely balanced, must determine where the judge’s choice will fall.⁶

Carried to an extreme, such views relegate judges to the status of marionettes administering a law at the deft hands of the dominant sector of the community. Did not Karl Marx take such a view? He portrayed the law as a set of rules and sanctions by which class relations are mediated in favour of the ruling class and which, ultimately, confirm and consolidate class power. Hence, the rule of law becomes a mask for the rule of a class.⁷

While we may reject this extreme, we can accept that judges tend to reflect their relatively privileged background, education, and social and economic grouping. They lean to the traditional, the conventional and the conforming view; they are concerned to preserve and protect the existing order; and they manifest, to a greater degree, perhaps, than is commonly recognised, the prejudices and emotional responses prevalent in the more advantaged and entrenched sections of the community from which they come. To suggest that such judges are imbued with the perception that “justice is the right of the weaker” would condemn us to oxymoronic oblivion - and therefore we will make no such suggestion.

⁴ Griffith, J A G *The Politics of the Judiciary* (1st ed, 1977) 180.

⁵ *Ibid.*

⁶ Cardozo, “The Nature of the Judicial Process” (1921) in Hall, M (ed) *Selected Writings of Benjamin Nathan Cardozo* (1947) 109-110; also cited in Henry, “Pinochet: In Search of the Perfect Judge” (1999) 21 Sydney LR 667, 673.

⁷ Thompson, E P *Whigs and Hunters* (1975) 259, cited in Griffith, *supra* note 4, at 204-205.

II. THE PRECEPT OF NON-EXPLOITATION

Our quest is more profound. We do not look for a moral shibboleth grandly espoused by judges in carrying out their judicial task. Our search is for an imperative embedded in the law, greater than the temporal responses of mere judges, which can justify the claim to be the “conscience” of the law.

The thesis of this address is that there is such an imperative. A compunction underlies the whole spectrum of the common law which can be fittingly termed its conscience. It is the law’s ultimate abhorrence of exploitation: no person may exploit another in the sense of taking or obtaining an unfair advantage at the other’s expense. The law insists upon a conception of equality which precludes such exploitation. (I use and will continue to use the word “exploitation” in a sense which assumes that the advantage taken or obtained is unjust or unfair). A substantive part of our discourse tonight will reveal the deep and entrenched prevalence in all branches of the law of what we can call “the precept of non-exploitation”.⁸

The thesis is an extension of Aristotle’s conception of corrective justice. Corrective justice may be truly described as a function of conscience. It is concerned with the interactions of and between persons (what Aristotle calls “transactions”), and is limited to the parties to the interaction. Such persons are, for the purpose of the interaction, considered equal, no matter how unequal they may be in terms of their capability, capacity or any other comparative criterion. Thus, corrective justice involves a presumed equality of entitlement to the parties’ respective positions prior to the interaction.⁹ If any interaction results in an unjust benefit for one or an unjust burden to the other, corrective justice requires that the pre-existing equality be restored. Either the benefit must be disgorged or the loss flowing from the burden must be compensated. Unjust gains or losses are thereby corrected.¹⁰

⁸ Exploitation commonly connotes an oppressive form of taking advantage of another for one’s own ends. I use the phrase more broadly. The focus is on unfairly taking or obtaining an advantage at another’s expense.

⁹ See Wright, “Right, Justice and Tort Law”, in Owen, David G (ed) *Philosophical Foundations of Tort Law* (1995) 166-174; and “Substantive Corrective Justice” (1992) 77 Iowa LR 624, 691.

¹⁰ “Corrective justice” is to be distinguished from “distributive justice”. The former applies to individual transactions and requires that the effects of such interactions on the interacting parties’ resources be consistent with each party’s “equal negative freedom”. Distributive justice focuses more broadly on a person’s status as a member of the political community and requires that the community’s resources be distributed to

This presumption of the equality of entitlement in the interactions or interpersonal relationships of individuals is fundamental to the precept of non-exploitation. The law presumes an equality of deservedness. No-one may exploit or unfairly take advantage of another so as to vitiate that equal entitlement.

The precept does not necessarily require a deliberate intention or positive act on the part of one party to obtain an advantage at another's expense. It is sufficient that the vulnerable party may suffer an unfair deprivation which, if uncorrected, will benefit the other. A marked example of such "passive exploitation" is unjust enrichment, where one party would obtain an unexpected windfall if the parties were not restored, as best the law can do, to their respective positions prior to their interaction.¹¹

But is there a "conscience"? Notwithstanding or, perhaps, because of, its moral overtones, the use of the term conscience in relation to the law is not a misnomer. In holding that exploitation is "wrong", the law reflects the expectations of the community as to what is fundamentally required of the law. It becomes an internal acknowledgement of the law's essential function. The law has been made, moulded and adapted to give effect to the precept until it is so deeply embedded and entrenched in the corpus of the law that it is as much a part of the law as our own conscience is a part of us.

Of course, as with our own consciences, the law's conscience will not impinge upon every situation. Cases arise requiring resolution which do not involve any element of exploitation but which nevertheless require regulation in an ordered society. But the existence of these situations does not mean that the law lacks a conscience or that this conscience is not the motivating and moral force in achieving justice according to law.

Further, just as the dictates of one's conscience may be the unspoken premise of one's actions, so, too, the conscience of the law may be an inarticulated premise of a legal rule or principle. When applying the rule or principle, individual judges will unconsciously or unwittingly, or even mechanically, give effect to the conscience of the law. In this sense, the precept of non-exploitation is ultimately larger than individual judges. They may be insensitive or indifferent to its command or they may at times spoil or prejudice its delivery, but they cannot destroy it any less than the

promote the equal positive freedom of each person in the community. See Owen, Foreword to *Philosophical Foundations of Tort Law*, supra note 9, at 12.

¹¹ See also below pp 14ff as to the basis of the law relating to contractual capacity.

occasional lapse in our personal behaviour banishes our troublesome conscience from contention.¹²

Let us, then, set about the quest to discover the law's conscience. The quest must begin with a brief description of the society which the law is constrained to serve. It can be a harsh and ruthless place.

III. LIBERAL INDIVIDUALISM

The transcendent drive in western industrial society is the desire for freedom of choice and freedom of action. It reached its philosophical zenith in the 19th century but remained a powerful and resurgent force in the 20th century.¹³ Freedom of choice and action has been proclaimed as the ideal by philosophers and political pundits alike. Thus, the dignity of the individual, on the one hand, and democracy, on the other, are perceived to be diminished to the extent that this freedom is curtailed.¹⁴ Liberal individualism becomes the distinct ideology.

Under such an ideology the individual is afforded primacy over social or collective goals. Not being subordinate to society, each individual is autonomous and independent, enjoying equality of autonomy and an equal right to freedom from interference by other persons in the exercise of that autonomy.¹⁵ Constraints on the freedom of the individual are antithetical to this prevalent and enduring creed.¹⁶

Liberal individualism therefore demands a political system which empowers the individual. Democracy serves this function. But the commitment to

¹² There are, perhaps, shades of Ronald Dworkin's soundest theory of law in the assertion of a moral premise larger than individual judges. But I would reject the suggestion. See my criticism of Dworkin in *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (1993) VUW Law Review Monograph 5, 36-51.

¹³ Seddon, "Compulsion in Commercial Dealings", in Finn, P D (ed) *Essays on Restitution* (1990) 139-142. See generally Atiyah, P S *The Rise and Fall of Freedom of Contract* (1979).

¹⁴ Seddon, *ibid*, 139-142.

¹⁵ Rosenfeld, "Contract and Justice: The Relationship Between Classical Contract Law and Social Contract Theory" (1985) 70 Iowa LR 769, 778, cited in Bigwood, "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions" (2000) 6 NZBLQ 1, 20.

¹⁶ This creed is, as I have stated, the ideal of a western industrial society. It is not the only, or necessarily the best, ideal. Compare for instance traditional Māori society which was based on concepts of unity, community, solidarity and hapu or tribal identity.

democracy cannot avert the imposition of the coercive power of the state. To the sturdy individual, the majority emerging in the political process may present a tyrannical presence and the machinery of government an overwhelming and intimidating bearing. The libertarian ideal also spawns an economic regime in which freedom of choice is endemic. Capitalism becomes the inevitable economic order. From the *laissez faire* economies of the 19th century, through the regulated or mixed economies of the mid-20th century, to the free market and global economies of today, freedom from interference has been and remains a fundamental premise. Market forces and competition, it is avowed, require freedom of choice and freedom from interference. But, if unrestrained, this freedom means that the strong and powerful will necessarily prevail over the weak and vulnerable. As Mason CJ and Wilson J have said, “competition by its very nature is deliberate and ruthless”.¹⁷ The market place is not an accommodating place for the insecure and frangible.

And so the cult of individualism pervades our lives. Of course, the necessity of collective existence imposes many constraints. Freedom of choice and freedom from interference cannot go unrestrained in a civilised society. The plunderings of highwaymen are beyond the pale. But the underlying philosophy remains rooted in liberal individualism and the freedom and independence which it seeks to accord the individual.

At the same time, we all know that it is futile to ask “for whom the bell tolls”. We accept that we are all “involved in mankind”, and that the bell tolls for each of us.¹⁸ It is a truism that individuals, however free and independent their aspirations, necessarily interact with one another at all levels; in the family, in social and community affairs, in commercial dealings and business relationships, and in political life and governmental activity. Interaction with others is part of the daily grist. It is equally a truism that in these interpersonal relationships there is both the potential for and reality of inequality. Individuals are not equal. A variety of factors, from the chance make-up of one’s genes to luckless ill-fortune, result in marked and, at times, gross disparities between the capacity and capabilities of people. In rank, capital, wealth and other material resources, disparities are self-evident. So, too, in wisdom, judgment, knowledge, personal skills, will-power,

¹⁷ *Queensland Wine Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 63 ALJR 181, 186.

¹⁸ “No man is an island, entire of itself, every man is a piece of the continent, a part of the Main... Any man’s death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; It tolls for thee” (John Donne (1571-1631), “For Whom the Bell Tolls”).

discipline, perception, common-sense and a host of other acknowledged personal attributes, some persons will be superior and some will be inferior. These disparities lead to an imbalance of power in the interaction and interpersonal relationships of individuals. Some will be in a position to assert power over others; yet others will be vulnerable to the assertion of that power.

So we arrive at a key point. By virtue of these discrepancies in interpersonal power, one person is or may be in a position to take unfair advantage of another. That other is in a position where he or she may be taken advantage of. The power may take many forms: it may be the coercive power of the state, it may be political power, it may be economic or commercial power, it may be the power of communication and persuasion, or it may simply be the power which any significant advantage invariably confers. But whatever form the power may take, it involves the potential for exploitation. It is here that the law takes a stand. It will call a halt to the pursuit of individual freedom, where that pursuit results in one person exploiting or taking unfair advantage of another as a result of an imbalance of power in their interpersonal relationship. The conscience of the law will not countenance the excesses of a social, political and economic order committed to liberal individualism. To the law, the weak and vulnerable as well as the strong and powerful are individuals having an equal entitlement to the freedom and autonomy innate to that ideology.

Obviously, it is now necessary to establish that this stand does in fact permeate the law. Equally obviously, we must begin with equity.

IV. EQUITY

Equity can readily be equated with “conscience”. Conscience is the underlying principle.¹⁹ The old Court of Chancery was a Court of conscience, and the standards imported into and developed in the law reflect standards of conscience, fairness and equality in interpersonal relationships. Equitable intervention in dealings between people is principally based on requirements of conscientious conduct. Equitable intervention arises where there is something in the conduct of the one which is exploitative of the other, or in the position of the other which is vulnerable to exploitation. Broad language to give effect to this conscience is favoured by equity and

¹⁹ Halliwell, *Margaret Equity & Good Conscience in a Contemporary Context* (1977) 1.

has so far resisted the attempts to suppress its flexibility with defined and definite rules.²⁰

But the use of words or phrases such as “conscience”, “unconscionability”, “inequitable”, “unconscientious conduct”, “unfair and oppressive”, “fair dealing”, “good faith”, and the like, and the flexibility which they import, should not be permitted to obscure the fact that the common feature which these words or phrases share is equity’s concern to protect the weaker and more vulnerable from the exploitative actions of the stronger and more powerful. The historic basis of equity’s focus on fraud illustrates this point. At common law, fraud represented an act of wilful deceit by one to gain an advantage over another, but even that broad formula did not protect all those who were harmed as a result of another’s breach of an obligation which, as Viscount Haldane said, “is the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience”.²¹ The concept of constructive “fraud” or “equitable fraud” emerged to embrace those who failed to take sufficient care to ensure that their actions did not unfairly take advantage of another.

The conscience of equity is expressed in a range of different doctrines. Patrick Parkinson says that it is possible to discern five broad categories, at times overlapping, into which these doctrines may be placed. They are:

- the exploitation of vulnerability or weakness;
- the abuse of positions of trust or confidence;
- the insistence upon rights in circumstances which makes such an insistence harsh or oppressive;
- the inequitable denial of obligations; and
- the unjust retention of property.²²

Thus, the exploitation of a person’s special vulnerability is regularly treated as unconscionable conduct. The same principle underlies the doctrines of unconscionable dealing and undue influence. Relief against unconscionable bargains is granted where in all the circumstances a transaction is so unconscionable that it cannot be allowed to stand. In respect of such dealings Sir Edward Somers’ description of equity is apt: “It is a jurisdiction

²⁰ Not that the attempt has not been made. See eg, Meagher, R P, Gummow, W M C and Lehane, J R F *Equity Doctrines and Remedies* (3rd ed, 1992) for a comprehensive endeavour to reduce equity to a set of concrete rules.

²¹ *Nocton v Lord Ashburton* [1914] AC 932, 954.

²² Parkinson “The Conscience of Equity”, in Parkinson, Patrick (ed) *The Principles of Equity* (1996) 34.

protecting those under a disadvantage from those who take advantage of that fact...".²³

So, too, with undue influence. Undue influence represents the illicit pressure of one person over another. The oppressor benefits at the expense of the victim. Protection of the vulnerable from victimisation is the object of the doctrine.²⁴

The fiduciary relationship, of course, has been equity's main means of preventing persons abusing a position of dominance or influence. Fiduciaries are required to act in the best interests of their beneficiaries. They are not permitted to place themselves in a situation where their interests conflict with that duty; nor are they allowed to profit from the opportunities gained in the course of their fiduciary task; and nor are they able to use or disclose confidential information acquired as a fiduciary. The common element underlying these obligations is the imbalance of power between the fiduciary and the beneficiary. A fiduciary is in a position to exploit the relationship, and the beneficiary is vulnerable to the fiduciary's departure from his or her obligation of loyalty. In the fiduciary relationship, the beneficiary is uniquely susceptible to being unfairly disadvantaged.

A further illustration of this principle is equity's treatment of agents, attorneys and company directors. Standing in a position of trust with regard to their principal, such persons are held liable to account for any abuse of their position. They cannot exploit their appointed capacity to the detriment of their principal.²⁵

Similarly, a power given to one person to affect another person's property must be exercised honestly and for the purposes it was given. Otherwise, it is a fraud on a power and is void. Equity will not countenance the exploitation of the power.²⁶

Equity also requires a person to forego the strict application of his or her legal rights where insistence on those rights would be harsh or oppressive to

²³ *Nichols v Jessop* [1986] 1 NZLR 226, 235.

²⁴ *Allcard v Skinner* (1887) 36 Ch D 145, 182-183. See also the cases cited in *Wilkinson v ASB Bank* [1998] 1 NZLR 674, and especially the comments of Tipping J at 694-695. See generally Birks and Yin, "On the Nature of Undue Influence", in Beatson, J and Friedmann, D (eds) *Good Faith and Fault in Contract Law* (1995).

²⁵ Pearce, R and Stevens, J *The Law of Trusts and Equitable Obligations* (1995) 118; and Friedman, G *Law of Agency* (1996) 174-188.

²⁶ *Laws NZ*, "Powers", para 101.

the weaker party. Estoppel, for example, precludes such insistence on legal rights where in the circumstances it would be exploitative for the possessor of those rights to enforce them. By his or her words or conduct, they will have led the other party to rely upon their non-enforcement. The possessor of the rights is not then permitted to take advantage of his or her rights at the expense of the person who has acted upon that forbearance.²⁷

Promissory estoppel falls into the same broad category. The maker of a voluntary promise cannot exploit the promisee by reneging on the assumption which he or she has created that the promise will be fulfilled, thereby disregarding the promise to the promisee's detriment.²⁸ Such other concepts as equitable set-off and the prevention of reliance upon rights in relation to stipulations of time can be explained in the same way. Equitable set-off is motivated by equity's concern to prevent the harsh exercise of rights. A set-off is permitted where it would be unconscionable to allow the plaintiff to proceed to judgment when a countervailing claim seriously diminishes the merits of the plaintiff's claim without being a substantive defence to that claim. So, too, a plaintiff may not unfairly insist upon his or her rights in relation to a stipulation as to time in a contract where time has not been made of the essence. To allow the plaintiff to succeed would be to allow him or her to obtain an unconscionable advantage.²⁹

The repudiation of obligations also attracts relief in equity. Thus, the Statute of Frauds cannot be used as an instrument to shield fraud. The fields in which this general approach has been adopted include the doctrine of part performance; the rule that parol evidence is admissible to show that an absolute conveyance was in truth by way of security only; the principle that oral evidence can establish that a person has taken a transfer of property as trustee or agent for another; and the principle whereby equity will compel beneficiaries who have agreed to accept their interests under communicated

²⁷ See *Jorden v Money* (1854) 5 HLC 185; *NB Hunt & Sons Ltd v Māori Trustee* [1986] 2 NZLR 641, 655-657; and *Thompson v Palmer* (1933) 49 CLR 507, 547. These cases relate to estoppel by conduct. For an authority on estoppel by deed, see *McCathie v McCathie* [1971] NZLR 58, 59. See generally Lindgren, "Estoppel in Contract (1989) 12 NSWLJ 153, 155-156.

²⁸ See *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; and *Gilles v Keogh* [1989] 2 NZLR 327.

²⁹ See Parkinson, *supra* note 22, at 40.

trusts to perform those trusts.³⁰ In all these situations equity will not permit a person in a position of relative power to exploit that power to the disadvantage of the other person involved in the interaction.

Finally, equity will not permit a person to retain property in circumstances in which it was not intended that he or she should have the benefit of it. A constructive trust may be imposed on the property on the basis that the acquisitive holder should be required to share the benefit of it with another having a less formal but nonetheless meritorious claim. Constructive trusts and, possibly, to an even greater extent the courts' proud invention, the remedial trust, are the means by which equity prevents a person exploiting another person's inferior title or interest.

Closely related to the underlying justification of a constructive trust is the concept of unjust enrichment and its consequential product, restitution. Juristic attempts to redefine "conscience" in terms of an independent principle of unjust enrichment can, at least for present purposes, be disregarded. The element which makes the enrichment of one at the expense of another "unjust" invariably reflects the fact that to allow the enrichment to stand would be to permit the defendant to obtain unfairly a benefit at the expense of the plaintiff. This perception is so whether one takes the English approach of presupposing, one, an enrichment of the defendant; two, that the enrichment is at the expense of the plaintiff; and, three, that the enrichment is unjust;³¹ or the broader Canadian formulation of, one, an enrichment of the defendant; two, a corresponding deprivation on the part of the plaintiff; and, three, an absence of juristic reason for the enrichment.³²

All the above doctrines represent different applications of equity's conscience. All have in common a situation in which one person is in a position of relative strength or power and the other is in a position of relevant weakness or vulnerability. It is the conscience of the law which prevents the one exploiting or taking unfair advantage of the other.

³⁰ *Last v Rosenfeld* [1972] 2 NSWLR 923, 927-928. See generally *Rochevoucaud v Boustead* [1897] 1 Ch 196, 206, and Dal Pont, G E and Chalmers, D R C *Equity and Trusts in Australia and New Zealand* (1996) 329-330.

³¹ Goff, Lord R and Jones, G *The Law of Restitution* (4th ed, 1993) 16; and Grantham, R B and Rickett, C E F *Enrichment and Restitution in New Zealand* (2000) 9-10.

³² *Pettkus v Becker* (1980) 117 DLR (3d) 257, 254; and *Sorochan v Sorochan* [1986] 2 SCR 38.

V. THE COMMON LAW

Establishing that the principle of non-exploitation is the basic scruple underlying equity's many excursions in the law is not difficult. But it is an essential plank of the thesis we are pursuing that the precept of non-exploitation also permeates the common law. Indeed, a number of causes of action have a basis in both common law and equity. Actual fraud, breach of confidence and waiver are in this category.

Actual fraud can be pursued at common law in deceit, and also in equity. The same is true of fraudulent misrepresentation, which is both a common law and an equitable wrong.

In like fashion, the uncertain antecedents of breach of confidence straddle both common law and equity. At common law, the cause of action has been analysed by some as being based on either a property right in the confidential information or an implied contractual term.³³ Others have preferred to view breach of confidence as an equitable doctrine arising out of breach of trust.³⁴ But, for present purposes, the point is that the underlying objective of the cause of action, whether resting in the common law or equity, is to prevent the person who possesses the ability to appropriate confidential information from doing so at the expense of the person who is exposed to the risk of having his or her confidence abused.

Again, views as to the status of waiver differ. Some commentators argue that waiver is not an independent doctrine but a diffuse concept used in different senses to mean either a variation by contractual novation at common law, or an estoppel in both common law and equity, or an election in equity only.³⁵ Other writers contend that waiver is a distinct concept which operates in equity.³⁶ But whether waiver is viewed as a doctrine common to both common law and equity,³⁷ or as a distinct equitable concept,³⁸ its foundation is essentially the same: to prevent one person taking advantage of another by seeking to enforce a right which he or she has earlier released.

³³ *Linda Chih Ling Koo v Lam Tai Hing* (1992) 23 IPR 607, 633.

³⁴ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302. See generally *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14; and *Dal Pont and Chalmers*, supra note 30, at 80-81.

³⁵ See Meagher, Gummow and Lehane, supra note 20, at 433-435.

³⁶ See *Dal Pont and Chalmers*, supra n 30, at 567-570.

³⁷ See Cheshire, G C, Fifoot, C H S and Furmston, M P *Law of Contract* (12th ed, 1991) 562-565.

³⁸ See *Dal Pont and Chalmers*, supra n 30, at 567-570.

In other areas equitable doctrines can be said to have a common law counterpart or genesis. Thus, at common law, a cause of action for interference with a property right is extended by equity to cover interference with an equitable interest, such as an equitable lease.³⁹ Estoppel by conduct in common law is expanded by proprietary estoppel and promissory estoppel in equity. Then, duress at common law may amount to undue influence in equity. Yet, again, the precept of non-exploitation is the unifying theme.

Common mistake at common law is extended to other types of mistake in equity, including mutual mistake and unilateral mistake where the other party is aware of the mistake.⁴⁰ Unilateral mistake may be understood as a doctrine which seeks to correct the unconscionable exploitation of another's position of weakness. In such cases, the vulnerability arises from one's own mistake. With common and mutual mistake, both parties are vulnerable as a result of the mistake or mistakes, but one party will in the circumstances obtain an unfair advantage at the expense of the other party if the contract is allowed to stand.

Although supported by equity, agency and powers of attorney are common law concepts.⁴¹ If an agent acts other than in accordance with the terms of his or her authority or in breach of the duty of loyalty or care owed to his or her principal, he or she will be liable for any loss. In some cases, a third party suffering a loss will also have a right of redress against the agent by way of damages for breach of an implied warranty of authority.⁴² In either case, the agent cannot trespass beyond the boundaries of the power conferred on him or her at the expense of another.

A prime example of related causes of action in common law and equity which are clearly founded on the precept of non-exploitation are actions for money had and received at common law and actions for unjust enrichment in equity. Neither will permit the fortuitous recipient to retain the windfall at the expense of the rightful owner.

Finally, reference may be made to legal and equitable set-off. The former, which is statutory in origin, provides a right to set off liquidated mutual

³⁹ *Walsh v Lonsdale* (1882) 21 ChD 9.

⁴⁰ Seddon, N C and Ellinghaus, M P *Cheshire and Fifoot's Law of Contract* (7th ed, 1997) 471.

⁴¹ Pearce and Stevens, *supra* note 25, at 118; Friedman, *supra* note 25, at 174; and *Laws NZ*, "Agency", paras 7 and 34.

⁴² Friedman, *supra* note 25, at 233-234; and *Laws NZ*, *ibid*, para 140.

debts.⁴³ The latter is much broader.⁴⁴ There is no strict need for mutuality, and unliquidated amounts may be claimed.

In all these cases, while the protection of the common law may not be as potent as that provided by equity, the common law causes of action reflect the same compunction which moved equity to protect the weak and vulnerable from the predations of the strong and powerful.

In pursuing our examination of the common law further, we can usefully focus on contract, tort and administrative law. Criminal law and property law have been largely overtaken and codified by statute. But it is not difficult to discern the precept of non-exploitation in the common law which preceded legislation. The criminal law always subjected a wide variety of activity to penal sanctions where one person exploited or sought to exploit another's person or property. In property, the common law protected the owner's property rights from being diminished by anyone who did not possess or share those rights. Detailed land rights were one of the main legacies of the Norman conquest. The property rights granted under the sophisticated system of tenure were zealously protected so as to prevent one person exploiting the ownership of another, first by customs as applied in local feudal jurisdictions, and later by a common body of principles and a centralised justice system.⁴⁵

1. Contract

Greater attention can be directed to contract for it is the law of contract which has the greatest impact on interactions where freedom of choice and action and freedom from interference are most coveted.

⁴³ See the Statutes of Set-Off, comprising the Insolvent Debtors Relief Act 1728 (Imp) and the Set-off Act 1734 (Imp), in force in New Zealand by virtue of s 3(1) of the Imperial Laws Application Act 1988. The principles in these statutes have long since been absorbed into the common law. See eg *Felt and Textiles of New Zealand Ltd v R Hubric Ltd (in receivership)* [1968] NZLR 716, 713-718.

⁴⁴ See *Rawson v Samuel* (1841) Cr & Ph 161, and *Grant v NZMC Ltd* [1988] 1 NZLR 8, 11-13.

⁴⁵ The Statute Quia Emptores, refining the rights of tenants and sub-tenants, was passed in 1290. Actions in seisin and right, and writs of entry and novel disseisin - legal mechanisms supporting the system of tenure - were available from relatively early times in both the lords' and the king's courts. See generally Milsom, S F C *Historical Foundations of the Common Law* (2nd ed, 1981) 99-150; and Van Caenegam, R C *The Birth of the English Common Law* (2nd ed, 1988) chapter 2.

Adams and Brownsword have stated that contract law in the modern world prescribes good faith and conscionable dealing, confining the parties' freedom to take unfair advantage of one another.⁴⁶ That freedom is apparent in the interaction between persons when negotiating a deal. Indeed, the bargaining process is the primary example of interpersonal activity which can give rise to an inequality of power or advantage as between the parties. The conscience of the law prohibits the unfair exploitation of that inequality.

We must quickly clarify, of course, that it is not every bargain which might be said to be "unfair" which the law declines to enforce. Self-interest in contract is a fact of life. The law cannot seek to correct all the inequalities that inevitably affect contracting parties according to their circumstances. Its conscience does not seek to assist those who enter into an imprudent or improvident deal. Paternalism is eschewed and forms no part in the law's prescription of contract law. The law is not, to quote Lord Radcliffe, "a panacea for adjusting any contract between persons when it shows a rough edge to one side or the other".⁴⁷

This rejection of paternalism is consonant with the autonomy of the individual. As Rick Bigwood has said:

if we are to take autonomy seriously, we must respect the bad bargains that people make as well as the good ones, since to interfere with bad bargains entered into voluntarily is to deny someone the right to self-determination, and hence to deny that person's absolute and equal status as a 'freely choosing, rationally valuing, specially efficacious moral personality'.⁴⁸

For this reason, of course, the great majority of contracts will never be challenged. As between the parties, the bargaining power or negotiating strength will be equal, or roughly equal, or will even out. The parties will have entered into the contract with their eyes open. Indeed, some eminent jurists have referred to the position between bargaining parties as involving mutual "coercion". Hale argues that scarce resources necessitate bargaining, which in turn requires parties to give up some legal rights in exchange for others. He points out that a bargain, once struck, obtains the force of law.⁴⁹

⁴⁶ Adams, J N and Brownsword, R *Key Issues in Contract* (1995) 355.

⁴⁷ *Bridge v Campbell Discount Co Ltd* [1962] AC 600, 626.

⁴⁸ Bigwood, *supra* note 15, at 21. See also the comments of Salmon J in *Brusewitz v Brown* [1923] NZLR 1106, 1109. Bigwood makes an outstanding contribution to legal theory in elaborating the law's antithesis to exploitation in contract law. See also notes 50 and 51.

⁴⁹ "Bargaining, Duress and Economic Liberty" 43 *Colum LR* 603, 604.

Philips observes that “coerced” agreements are “an inevitability of our social life”.⁵⁰

Consequently, to attract the attention of the law’s conscience the vulnerability of the disadvantaged party must be of a particular kind. It must bear on the parties’ capacity to consent genuinely and voluntarily to the agreement.

A binding contract is grounded in the notion of consent. Doctrines such as *non est factum* and *consensus ad idem* testify to this rudimentary requirement. It is through this requirement that the precept of non-exploitation principally makes itself felt in contract. For, just as liberal individualism requires that people be permitted to enter into binding agreements, it also demands that binding agreements reflect their free and voluntary choices.⁵¹ Thus, the various rules and principles which govern the formation of contracts are essentially designed to deter one party from failing to obtain the other party’s genuine and voluntary consent. Such a failure may result in an injustice against the latter party which warrants annulment in the form of corrective justice.⁵² So it is that the law sets limits on what constitutes a contract, on when a contract is formed, and on the implication of terms in a contract, all of which leaves without contractual force or redress a significant range of interaction by and between parties purporting to deal consensually with each other.⁵³

Voluntariness may be defective in a number of ways. Genuine and voluntary consent is absent where one party induces the other to enter into the contract by fraud, force, or economic duress. In each of these cases the offending party has sought to exploit a position of power or advantage over the other party who, if that party is to succumb, is vulnerable to that fraud, force or duress.

⁵⁰ “Are Coerced Agreements Involuntary?” (1984) 3 Law and Phil 133, 134. See also the comments to like effect in Bigwood, “Coercion in Contract: the Theoretical Constructs of Duress” (1996) 46 U Tor LJ 201, 201-203; Farnsworth, “Coercion in Contract Law” (1982) U Ark at Little Rock LJ 329, 332-333; and Atiyah, *supra* note 13, at 734-735.

⁵¹ Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?” (1996) 16 OJLS 503, 505.

⁵² Bigwood, *supra* note 15, at 45.

⁵³ Finn, “Unconscionable Conduct” (1994) 8 Jnl of Contract Law 37, 40. Note particularly in this regard the courts’ special approach to the interpretation of exemption clauses in standard form contracts: as to this see Treitel, G H *The Law of Contract* (1999) chapter 7.

Yet, in other cases, the apparent voluntariness of a party is belied by his or her ignorance, mistake, incapacity, drunkenness, or need.⁵⁴ In such cases, the stronger party may not intend to take advantage of the defect in the other party's capacity, but the element of exploitation is present and complete should the contract be enforced. The stronger party, for example, obtains an advantage at the expense of the other party whether or not he or she knows of that party's particular incapacity. To permit the contract to be enforced in such circumstances would be to give effect to the passive exploitation inherent in the weaker party's vulnerability. As Bigwood has said, that the defendant should be identified as an "exploiter" relative to the plaintiff is the only publicly convincing way of bringing coherency to the plaintiff-defendant relationship consistent with the major features and true purposes of the liberal conception of contract.⁵⁵

A special category of contract in which the precept of non-exploitation is conspicuously present is the contract of employment. Employment situations are, perhaps, the archtypical example of human interactions where the relatively powerful, be it the employer or the employee's organisation, may exploit or take advantage of the other. Because of the potential for exploitation, the common law has recognised the special nature of the relationship between the employer and the employee. It is a relationship under which the employer and the employee have mutual obligations of confidence, trust and fair dealing.⁵⁶ Lord Browne Wilkinson, when Vice Chancellor, called this implied term "the implied obligation of good faith".⁵⁷ Thus, the unequal power of the employer and the employee is mitigated by the law's insistence that each demonstrate good faith to the other.⁵⁸

Let Professor Kronman have the last say. Speaking of cases where *one* party claims that his or her promise was not voluntarily given, he stated:

the promisee enjoys an advantage of some sort which he has attempted to exploit for his own benefit. The advantage may consist in his superior information, intellect, or

⁵⁴ Bigwood, *supra* note 51, at 507.

⁵⁵ Bigwood, *supra* note 15, at 14.

⁵⁶ *Telecom South Ltd v Post Office Union* (1992) 1 ERNZ 711, 722, and *Lowe Walker Paeroa Ltd v Bennett* (1998) 2 ERNZ 558, 582.

⁵⁷ *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* (1991) 2 All ER 596, 606. For a recent application, see *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (HL).

⁵⁸ The implied term suffered a statutory eclipse during the period that the Employment Contracts Act 1991 was in force. A novel counterpart has been reinstated by s 4 of the Employment Relations Act 2000.

judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift or deception. In each of these cases, the fundamental question is whether the promisee should be permitted to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive that other party of the freedom that is necessary, from a libertarian point of view, to make his promise truly voluntary and therefore binding.⁵⁹

2. Tort

Many jurists would have it that no single normative basis can be attributed to tort law. A plurality of competing norms, such as loss spreading, efficient deterrence, retribution, corrective justice, distributive justice, autonomy and community may be invoked to explain or justify the law.⁶⁰ Having regard to the diversity of torts, there can be no easy answer. Nonetheless, we can again assert that the precept of non-exploitation provides the law of torts with a universal conscience.

In many cases, of course, the law's core concern to prevent and deter exploitation is openly apparent. Thus, one person may not use his or her power to harm another by physically assailing that person; a person may not take advantage of the gullibility of another by perpetuating a deliberate deceit; a person may not trespass on another's land to the detriment of the owner's property rights; a person with special skills may not make a careless representation likely to be relied upon by another person to that person's detriment;⁶¹ and a publisher may not utilise the advantage possessed by the disseminator of information to publish a defamatory comment at the expense of a person's reputation. But the concrete situations in which these torts arise do not always disclose exploitation in the sense that an apparently stronger party has taken unjust advantage of another. On occasion, indeed, the wrongdoer may appear to be the weaker party as, for example, where a needy person steals from a relatively well-off person.⁶²

It is necessary for us to dig deeper into the foundation of tort liability to uncover the precept of non-exploitation. Tort law protects the individual against actual or threatened injury to one's person or property by condemning in damages or other relief the person who exerts his or her freedom at the expense of the freedom of the injured party. The parties possess an equality of entitlement regardless of their relative wealth, merit or

⁵⁹ Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 473, 480.

⁶⁰ Wright, *supra* note 9, at 159-160. See also my observations in *Daniels v Thompson* [1998] 3 NZLR 22, 68.

⁶¹ *Hedley Byrne & Co v Heller and Partners Ltd* [1964] AC 465.

⁶² To sanction this as "fair" is, however, to revert to distributive justice.

need. Hence, if one person affects or threatens to affect the person or resources of another by means of an interaction which is inconsistent with that equality, the latter will have a claim for the correction or prevention of that adverse effect.⁶³ In short, the exploitation lies in the wrongdoer asserting his or her autonomous freedom at the expense of the autonomy and freedom of the other party to the interaction, thereby causing him or her loss.⁶⁴

This abstract perception may be given concrete meaning by referring to the pervasive tortious concept of neighbourhood. One person to the interaction will assert his or her autonomy in a way which interferes with the autonomy of another. Where the power of one or the vulnerability of another in that interaction is such that the one has the capacity to cause harm to the other (which in tort is almost invariably economic harm), the law will impose a “duty of care” on the possessor of the power to avert or refrain from inflicting that harm.⁶⁵ The possessor of the power must respect, and thereby refrain from exploiting, the freedom of other autonomous individuals to be “free” from such interference.

3. *Public and administrative law*

The concept that the law is essentially concerned to prevent abuse of power is also clearly evident in administrative law. As is frequently proclaimed, no area of the law has developed so magnificently as administrative law in the 20th century. Lord Diplock’s famous statement that the progress made towards developing a comprehensive system of administrative law was the greatest achievement of the English courts in his lifetime is invariably quoted.⁶⁶ It has been served well by the principle of *ultra vires*.⁶⁷ There are clear signs, however, that a substantive principle of common law is evolving to take the place of the *ultra vires* principle which is essentially an adjunct of statutory interpretation.⁶⁸ But, however the framework of administrative law

⁶³ Wright, *supra* note 9, at 167.

⁶⁴ Wright uses the language of each party’s “equal negative freedom” to explain the outcome.

⁶⁵ Finn, *supra* note 53, at 42.

⁶⁶ *Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, 104. This sentiment applies equally to New Zealand.

⁶⁷ Thomas, “Administrative Law and the Rule of Law” (1987) NZ Law Conference Papers 172.

⁶⁸ *Ibid*; Thomas, *supra* note 1, at 13-14; and Craig, “Ultra Vires and the Foundations of Judicial Review” (1998) 57 Camb LJ 63.

is viewed, its essential function is to protect the citizen from the abuse or misuse of governmental or coercive power.⁶⁹

In that relationship, whether described as the interaction between the state and the individual or the government and the citizen, the state or government official is self-evidently in a position of power and able to assert that power. The conscience of the law is therefore at the heart of a system of administrative law designed to prevent or curb the exploitation of power over citizens, many or most of whom are relatively powerless within the political process.⁷⁰

VI. JUSTICE AND FAIRNESS

Have we in our lightning survey unearthed the answer to the perennial question of what is fair or unfair? The answer is both yes and no.

The question, “but what is fair?” is repeatedly posed by those who perceive the notion of fairness as notoriously vague and imprecise. Judicial expressions of “fair dealing”, “reasonableness”, “good faith”, “unconscionable and unconscientious conduct”, “unfair and oppressive conduct”, “reasonable and legitimate expectations”, “unjust enrichment”, and so on, evoke the same response.⁷¹ These critics, whom we may without mordancy describe as legal fundamentalists, yearn for an impersonal law. They are acutely uncomfortable with and distrustful of the discretion any notion of fairness vests in the judges. The problem which they perceive is essentially one of translation. How is the sense of fairness immanent in the community to be discerned by a judge and, if it is discerned, how can his or her fidelity to that evaluation be assured?⁷²

We need not canvass this issue tonight.⁷³ It must suffice simply to point to the reality of judicial reasoning, and to query what credibility these commentators would obtain if they framed their question in terms of “what is justice?” Yet, how can fairness be differentiated from justice itself? Law exists to do justice. Justice is its primary goal. Judges are sworn to do justice

⁶⁹ See eg *R v North and East Devon Health Authority, Ex parte Coughlan* [2000] 2 WLR 622.

⁷⁰ Thomas, *supra* note 1, at 12-13.

⁷¹ See Bigwood, *supra* note 15, at 4.

⁷² Thomas, “Fairness and Certainty in Adjudication: Formalism v Substantialism” (1999) 9 *Otago LR* 459, 470.

⁷³ But see Thomas, *supra* note 12; Thomas, *supra*, note 71; and “The ‘Invisible Hand’ Prompts a Response” [1999] *NZ Law Rev* 227.

according to law.⁷⁴ The community expects justice to be done in the courts and is vocal in its criticism if it considers justice is not done.⁷⁵ By the simple artifice of substituting the word “fairness” for “justice”, these critics obtain an audience which would otherwise be quickly dismissive of their claims.

But accepting that the notion of fairness is a reality in judicial decision-making does not mean that efforts to reduce its apparent vagueness should be neglected. The search remains vital to the essential function of the law to serve the community of which it is part. Identifying the moral sentiment which is universal to all branches of the law must therefore make a worthwhile contribution to that objective. The law’s underlying antagonism to the exploitation by one person of another becomes the key prescription in discerning what is fair or unfair in any particular context. In this way the precept of non-exploitation provides the framework within which the question, or any question, of fairness may be resolved. It reduces the perceived abstractness of the question and assists to channel argumentation and reason into a principled frame of reference.

That perception, then, is the affirmative part of the answer to the question, “what is fair?” But, of course, within the framework provided, a subjective element remains. It is inherent in the question whether the advantage taken or obtained by the one person over the other in a particular case is unfair or not. An assessment of the circumstances, including the strength and power of the defendant, the weakness and vulnerability of the plaintiff, and the relative position of the two must be made. Eventually, a value judgment is required.⁷⁶

But this qualification is largely to miss the point of our quest. Except where the issue involves an equitable test giving overt and substantive expression to the precept of non-exploitation, the judge does not ask whether in the particular case the exploitation is unacceptable or whether one person has used his or her superior strength or power unfairly to obtain an advantage at the expense of another. The question before the court may be whether a contract has been part performed, or whether an agent has acted within the

⁷⁴ Thomas, *supra* note 71, at 468; that is, to “do right to all manner of people after the laws and usages of the realm...”.

⁷⁵ I am familiar with the theoretical discourse as to whether justice can be distinguished from fairness. See Thomas, *supra* note 71, at 468; and *supra* note 72, at 230. Any such distinction would be futile in the present context.

⁷⁶ Richardson, “Changing Needs for Judicial Decision-making” (1991) 1 JJA 61, 64. See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 316, per Richardson J.

scope of his or her authority, or whether the defendant is estopped from asserting his or her rights or has waived those rights, or it may be any one of the myriad of other questions which come before the courts. Those questions will be determined in accordance with the relevant body of law. The law's compunction against exploitation underlies these particular questions but does not comprise the particular question itself.

In this way justice, or the concept of fairness, is given effect in accordance with conventional legal methodology. The judge in deciding that a contract is unenforceable, or that liability exists in tort, or that a governmental agency has acted *ultra vires*, will do so having regard to accepted rules, principles and precedent. It is the accepted rules, principles and precedent which manifest the law's underlying aversion to exploitation.

Are we not confirmed in our earlier view? There is a sense in which the law's conscience is larger than the judges. It is embedded in the law which they are called upon to administer in accordance with a self-perpetuating legal methodology and a self-imposed judicial discipline.⁷⁷ Of course, the law which reflects this conscience is judge-made, much of it having been made by the judges of old who placed principles before precedent. Equally certain is the inevitability of change and development in the law. But there is no mystery as to how the law was made, or how it is developed, so as to reflect the underlying precept that a person may not use his or her superior strength or power to take or obtain an unfair advantage at another's expense. Judges reflect this sense of fairness which is immanent in the community.⁷⁸

While liberal individualism may hold sway, our society is sufficiently homogeneous to be underpinned by some common mores and enduring values, and the precept of non-exploitation is an integral part of those mores and values. Fuller has made the point in these terms:

[In] a sufficiently homogenous society certain 'values' will develop automatically and without anyone intending or directing their development. In such a society it is assumed that the legal rules developed and enforced by courts will reflect those prevailing 'values'.⁷⁹

⁷⁷ Thomas, *supra* note 12. See also Feeney, M and Rubin, E *Judicial Policy Making and the Modern State* (1998) 246.

⁷⁸ Thomas, *supra* note 12, at 56-58; *supra* note 71, at 470-473; and "Judging in the Twenty-First Century" [2000] NZLJ 228, 230.

⁷⁹ Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353, 378.

It is for this reason that the notion of an altruistic premise underlying the law cannot be debunked. It stems from the community itself. The tension inherent in liberal individualism between the freedom and autonomy of the individual to pursue his or her own ends without interference, on the one hand, and the fact that in the pursuit of his or her own ends the individual must interact with other individuals who also seek to assert their freedom and autonomy, on the other, cannot be resolved by reference to a morally neutral criteria. A balance must be struck between the two and, unless the arbitrary will of the stronger and more powerful is to prevail, the balance can only be struck by resorting to a premise which will meet the community's sense of what is just and fair. The precept of non-exploitation serves that purpose. The law intervenes when in the course of an interaction between two people the interference amounts to the exploitation by one of the other. Determining when the advantage taken or obtained is unfair requires a judgement, but it is a judgement which, as we have seen above, the law itself has already made. The judges implement that judgement in applying the legal rules and principles which make up the law.

Of course, the application of the legal rules and principles will vary at the hands of individual judges. But the precept of exploitation remains a constant principle and restricts the scope for judicial diversion or distortion. A progressive or enlightened judge may seek to develop the law in accord with its dictates. But even a conservative or indifferent judge, who rigorously utilises the doctrine of precedent and adheres to the "logic" of formalism, simply reinforces and strengthens this longstanding bias in favour of the weak and vulnerable embedded in the law. It is a voice which cannot be stilled in the service of justice according to law.

VII. CONCLUSION

This, then, is the conscience of the law. As we have seen, it infuses and informs all fields of judge-made law. It is now so deeply entrenched in the law as to be intractable. It vests the law with an irreversible altruistic premise.

If we accept, as surely we must, that the law is not an end in itself but exists to serve the needs of society, the conscious or unconscious implementation of the law's conscience becomes part of the judicial function. The law as administered by judges gives effect to the precept of non-exploitation. This design forms part of the expectations of the community and becomes the community's mandate to the judges. That mandate and the judicial function therefore merge at the core of the law's stretch to render to all the justice that is their due.

In this task it is the conscience of the law, larger and more enduring than its dedicated servants, which condemns the inequities of exploitation in all its forms. It will, as I forecast at the outset, defend the poor against the mighty, the powerless against the powerful, and the weak against the strong.

Justice, after all, is the right of the weaker.

**SEVERING THE TIES THAT BIND?
THE DEVELOPMENT OF A DISTINCTIVE
NEW ZEALAND JURISPRUDENCE**

BY KEVIN GLOVER *

1. INTRODUCTION

New Zealand's Court of Appeal is now operating as a de facto final appellate court for New Zealand. The Court carries out functions similar to those which the Privy Council previously performed in the New Zealand legal system, such as making major policy decisions. In particular, the Court is responsible for developing this country's common law in a consistent and coherent manner.

Since its reconstitution in 1958 as a permanent and separate body, the Court of Appeal has gradually become less dependent on English precedent and more willing to develop a distinctive New Zealand jurisprudence. One clear signal indicating this trend has been the treatment of House of Lords' decisions in the New Zealand Court of Appeal. In particular, the Court has become more willing to treat House of Lords' decisions as truly persuasive, rather than binding in all but formal terms.

This trend coincides with a growing willingness of the Privy Council to allow the New Zealand Court more latitude in developing distinctive New Zealand solutions to legal issues. The growing realisation in both England and New Zealand is that the New Zealand Court of Appeal is both willing and able to come to different conclusions to English courts and that, notwithstanding the respective legal systems' common point of origin, the New Zealand Court provides a more appropriate means of determining matters of policy in New Zealand cases and for New Zealanders.

This article traces the development of a distinctive New Zealand jurisprudence through selected recent judgments of the House of Lords, the Privy Council, and the New Zealand Court of Appeal.¹ The article follows

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¹ For the purpose of this article, the cases are necessarily selective, and do not, for example, cover areas such as the unique interaction of the Privy Council and the Court of Appeal in respect of Māori, Treaty and aboriginal rights.

with an evaluation of the extent to which the Court of Appeal is likely to, and should, develop a distinctive New Zealand jurisprudence.

II. HOUSE OF LORDS' JUDGMENTS IN NEW ZEALAND

The broad approach to House of Lords' decisions, which the Court of Appeal had followed since the early 1970s, was reflected in North P's judgment in *Bognuda v Upton & Shearer*:²

In my opinion, while judgments of the House of Lords without question, are entitled to the greatest respect, technically we are not bound by the judgments of that august body. Our master is the Judicial Committee of the Privy Council, not the House of Lords, and there is no decision of the Privy Council which stands in the way of this Court following the line which has found favour in America.³

I shall now analyse two recent judgments of the Court of Appeal, and attempt to discern the extent to which the *Bognuda* approach remains in place.

1. *Pacific Coilcoaters Ltd v Interpress Associates Ltd*

In *Pacific Coilcoaters Ltd v Interpress Associates Ltd*,⁴ the majority of the Court (Richardson P, Henry and Tipping JJ) indicated the "greatest respect" which House of Lords judgments continue to enjoy in New Zealand. The majority followed the House of Lords' judgment in *Sevcon Ltd v Lucas CAV Ltd*,⁵ despite the strong criticism which it had received in England.

However, Keith J dissented and suggested an alternative approach, while Thomas J dissented on the basis that *Sevcon* had been wrongly decided:

I would not challenge the correctness of a decision of the House of Lords lightly... A decision of the House of Lords, although highly persuasive, is not binding on this Court... This Court remains free to examine the merits of the *Sevcon* decision and to depart from it if it thinks it was wrongly decided.⁶

² [1972] NZLR 741 (CA). According to Cooke J in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, 473, "the case ... may be regarded as perhaps finally establishing that this Court is not bound by the House of Lords".

³ At 757. This approach was followed in eg *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 (CA).

⁴ [1998] 2 NZLR 19 (CA).

⁵ [1986] 2 All ER 104 (HL).

⁶ At 32.

Thomas J also recognised the practical difficulties resulting from an appeal to the Privy Council:

The parties have a right of appeal to the Privy Council and I cannot imagine that Their Lordships on the Board, while approaching the question with impeccable open-mindedness, would wish to review *Sevcon* or decline to follow it, certainly in the absence of a unanimous decision by this Court in declining to adopt it.⁷

2. *Morrison and Van Dorsten v KPMG Peat Marwick*

The issue in *Morrison and Van Dorsten v KPMG Peat Marwick*⁸ was whether the first respondent, KPMG, as a concurrent tortfeasor, could obtain the benefit of a compromise entered into between the appellants (Morrison and Van Dorsten) and the second respondent, Holman Construction. The House of Lords delivered its judgment in *Jameson v Central Electricity Generating Board*⁹ during the hearing of the case.¹⁰ Their Lordships held, by a four to one majority, that settlement by a concurrent tortfeasor extinguishes a claim against another concurrent tortfeasor.

The New Zealand Court of Appeal refused to apply *Jameson* in *Morrison's* case. Thomas J felt able to distinguish *Jameson* on its facts, but also found their Lordships reasoning in *Jameson* to be unconvincing and listed several reasons why the case should not be followed, in the event that it could not be distinguished.

Thomas J held that applying *Jameson* would be contrary to established principle; it would normally produce results contrary to “common notions of justice”; it would be inconsistent with general Parliamentary developments in the area; the decision was not based on trade or commerce needs; it did not match with the reasonable expectations of the community; as a so-called “hard case”, it would lead to much more litigation in attempts to search for the boundaries of the rule; and the decision was unlikely to be followed overseas.¹¹ The general tone of these criticisms is that it would have been inappropriate to apply the case in New Zealand, as many of the reasons related to Thomas J’s perceptions of the policy needs of New Zealand

⁷ At 33.

⁸ Unreported, Court of Appeal, CA 146/98, 17 December 1999, Thomas, Keith and Tipping JJ.

⁹ [1999] 1 All ER 193 (HL).

¹⁰ The Court gave counsel the opportunity to file written submissions relating to the decision and its bearing on the case (at 2-3).

¹¹ At 52.

society. Thomas J cited Lord Steyn for the proposition that the issue was largely one of policy:

In a less formalistic age, [Steyn LJ] said, it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue.¹²

The corollary of this point is that the New Zealand Court should be free to differ from the House of Lords' conclusions on the matter.¹³

Keith J delivered a short concurring judgment, finding that the Court would be departing from principle if it were to follow *Jameson*.¹⁴ Tipping J reached similar conclusions, favouring Lord Lloyd's dissenting judgment from *Jameson*.¹⁵ His Honour concluded that the approach "seems to me to accord better with principle and with justice".¹⁶

While it is dangerous to try to elicit definitive trends from a limited number of cases, it is interesting to remember that both Thomas and Keith JJ dissented in *Pacific Coilcoaters*. Equally, however, Tipping J refused to depart from the House of Lords' decision in the same case, but undertook a thorough review of *Jameson* in *Morrison's* case.

By virtue of its position in the English judicial system, the House of Lords is not concerned with the effects of its decisions upon New Zealand law.¹⁷ As such, it would be inappropriate for New Zealand courts to apply House of Lords decisions without careful analysis of the merits of each individual case, coupled with an analysis of the extent to which the cases reflect or are influenced by circumstances peculiar to England. Thomas J's dissent in *Pacific Coilcoaters* and the judgments in *Morrison and Van Dorsten v KPMG* represent a shift towards analysing the merits of House of Lords cases, and such decisions being genuinely treated as persuasive precedent only. This provides greater options for the Court in developing New Zealand's common law, and coincides with a move away from considering Britain to be "home".¹⁸ The fact that New Zealand judges felt constrained by

¹² At 50.

¹³ See *Australian Consolidated Press v Uren* [1967] 3 All ER 523 (PC).

¹⁴ At 56.

¹⁵ For Tipping J's analysis of the case, see 57-64.

¹⁶ At 62.

¹⁷ Furthermore, the House of Lords is not bound by Privy Council decisions: *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 (PC).

¹⁸ Sinclair, *K A Destiny Apart: New Zealand's Search for National Identity* (1986) 94-108.

decisions of courts from a different judicial hierarchy was not conducive to the judiciary focusing on New Zealand conditions and particular needs arising as a result. The revised approach of New Zealand judges to House of Lords' judgments is related to the need for development of a distinctive New Zealand jurisprudence.

III. PRIVY COUNCIL JUDGMENTS IN NEW ZEALAND

Undoubtedly the greatest formal check on the New Zealand Court of Appeal's ability to develop a distinctive New Zealand jurisprudence is the Privy Council. As an institution, it has the potential to veto any initiatives taken by the New Zealand appeal court. However, despite the formal power of the body, the reality is that costs preclude all but a handful of litigants from appealing to the Judicial Committee.¹⁹ This section will examine the extent to which the Privy Council has impeded or permitted distinctive New Zealand approaches, with reference to three cases decided in the past decade.

1. Attorney-General for Hong Kong v Reid

The issue in *Attorney-General for Hong Kong v Reid*²⁰ was whether the plaintiff had a caveatable interest in property purchased by Reid using money from bribes obtained during the course of his employment by the Hong Kong Government. The Court of Appeal held, as did the High Court, that it should follow the English Court of Appeal decision *Lister & Co v Stubbs*.²¹ This meant that the relationship was one of creditor/debtor rather than constructive trustee/beneficiary, and caveat extensions were refused.

Richardson J, delivering the judgment of the Court,²² held that *Lister & Co v Stubbs* remained part of English law, "although subject to much academic criticism".²³ His Honour then addressed the issue of whether the case should be applied in New Zealand:

It was not suggested by Mr Kos [for the appellant] that there were any local conditions calling for a different approach in New Zealand from that taken in England: whatever is decided in this case must be regarded as having general

¹⁹ See Eichelbaum, Rt Hon Sir T *Report of the New Zealand Judiciary* (1998) 92, and Collins, "The Case against Retaining the Privy Council", *Council Brief*, July 2000, 6.

²⁰ [1992] 2 NZLR 385 (CA).

²¹ (1890) 45 ChD 1 (CA).

²² A three-judge division heard the appeal, comprising Richardson, Hardie Boys and Gault JJ.

²³ At 392.

application throughout all jurisdictions based on the common law which are subject to final appeal to the House of Lords or the Judicial Committee of the Privy Council.²⁴

The Court of Appeal appeared to be unduly inhibited by the spectre of the Privy Council and dutifully followed the English decision. Richardson J stated:

[O]ur duty as an intermediate appellate Court has been expressed very clearly by Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank*.²⁵ He explained that the Judicial Committee had reversed this Court's decision in *O'Connor v Hart*²⁶ as to the contractual capacity of a mentally disabled person "holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was a settled principle of that law". If *Lister & Co v Stubbs* is not to be applied in this case, that decision is for the Judicial Committee, not for this Court.²⁷

The phrase "duty as an intermediate appellate Court" conflicts with dicta proclaiming the Court of Appeal to be the *de facto* final appellate Court for New Zealand.²⁸

The Court's decision appears to be wrong both in substance and in its approach to English Court of Appeal decisions, and the case was successfully appealed to the Privy Council.²⁹ The then Chief Justice of New Zealand, Sir Thomas Eichelbaum, sat on the Board and Lord Templeman delivered the unanimous decision. Lord Templeman made the following observation on the New Zealand Court's treatment of the English decision:

The reasoning of the Court of Appeal, as Their Lordships understand it, was rather that in the absence of differentiating local circumstances the Court should follow a decision representing contemporary English law, leaving its correctness for consideration by this Board. Without in any way criticising that approach in the circumstances of this case, where the decision in question was of such long standing, Their Lordships wish to add that nevertheless the New Zealand Court of Appeal must

²⁴ Ibid.

²⁵ Supra note 17, at 108.

²⁶ [1985] 1 NZLR 159 (PC).

²⁷ At 392.

²⁸ See *Collector of Customs v Lawrence Publishing* [1986] 1 NZLR 404, 414 (CA), and *R v Hines* [1997] 3 NZLR 529, 587 (CA).

²⁹ [1994] 1 NZLR 1 (PC).

be free to review an English Court of Appeal authority on its merits and to depart from it if the authority is considered to be wrong.³⁰

The New Zealand decision was in fact founded upon the misapprehension that the Privy Council would have applied *Lister & Co v Stubbs* on appeal, rather than any evaluation of the merits of the English case. Lord Templeman flagged the fact that the Privy Council will consider New Zealand judicial attitudes when deciding on New Zealand appeals:

In any case where the New Zealand Court of Appeal has to decide whether to follow an English authority, its own views on the issue, untrammelled by authority, will always be of great assistance to the Board.³¹

The Privy Council was willing to afford the Court of Appeal greater freedom to develop New Zealand's law. A more realistic approach would have enabled the New Zealand Court to reach the same conclusion as the Privy Council, and the parties would not have had to take an appeal to London.³²

2. *Invercargill City Council v Hamlin*

*Invercargill City Council v Hamlin*³³ concerned a council's liability in negligence for the acts and omissions of a building inspector in carrying out an inspection of houses under construction. The Court of Appeal held that it should follow the line of New Zealand cases that had emerged over the previous 20 years, despite this approach being at odds with England. The line of cases was originally founded upon the House of Lords case, *Anns v Merton London Borough Council*.³⁴ The House of Lords had subsequently rejected the *Anns* two-stage test,³⁵ but the New Zealand courts continued to follow that approach.³⁶

Cooke P stressed the New Zealand Court's freedom to develop the area for itself:

³⁰ At 9.

³¹ At 10.

³² See also criticism of the case in Thomas, Hon E W A *Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (1993) 70-71.

³³ [1994] 3 NZLR 513 (CA).

³⁴ [1978] AC 728 (HL).

³⁵ See *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568 (HL), and *Murphy v Brentwood District Council* [1991] AC 398; [1990] 2 All ER 908 (HL).

³⁶ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 (CA).

While the disharmony [with other jurisdictions] may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point. The ideal of a uniform common law has proved ... unattainable. ... What of course is both desirable and feasible, within the limits of judicial and professional time, is to take account and learn from decisions in other jurisdictions. It behoves us in New Zealand to be assiduous in that respect.³⁷

Cooke P recognised several decisive points in defending the New Zealand approach. Cooke P noted that the New Zealand approach had not been “developed by processes of faulty reasoning” or “founded upon misconceptions”.³⁸ Furthermore, the outcome was necessitated by “the dictates of the particular New Zealand social and historical context”. Richardson J focused upon this point, observing at the outset:

Legislation must be seen in its social setting and the common law of New Zealand should reflect the kind of society we are and meet the needs of our society.³⁹

Richardson J was careful to emphasise the distinctive character of New Zealand conditions throughout the judgment, and also doubted the applicability of the English cases:

Decisions of the House of Lords although afforded great respect are not binding on this Court. Ultimately we have to follow the course which in our judgment best meets the needs of this society. Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care to home-owners in issuing building permits and inspecting houses under construction for compliance with the bylaws.⁴⁰

Lord Lloyd delivered the Board’s unanimous decision.⁴¹ The Privy Council indicated that it would allow the local appellate court to determine matters of policy:

[T]he Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand (nor the Board from affirming their decisions) by the

³⁷ At 523.

³⁸ *Ibid.*

³⁹ At 524.

⁴⁰ At 527-528.

⁴¹ A New Zealand judge, Sir Michael Hardie Boys, was a member of the Board to hear the case.

consideration that the House of Lords ... have not regarded an identical development as appropriate in the English setting.⁴²

The Privy Council also analysed the particular circumstances of the case, noting that “the particular branch of the law of negligence with which the present appeal is concerned is especially unsuited for the imposition of a single monolithic solution”.⁴³

Lord Lloyd acknowledged the “marked divergence”⁴⁴ between common law approaches to the area and conceded that “in this branch of law more than one view is possible: there is no single correct answer”.⁴⁵ The Privy Council took the New Zealand Court’s statement of the preceding case and surrounding circumstances as authoritative on the matter:

Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception. Both Richardson J and McKay J in their judgment in the Court below stress that to change New Zealand law so as to make it comply with *Murphy’s* case would have “significant community implications” and would require a “major attitudinal shift”. It would be rash for the Board to ignore those views.⁴⁶

The Privy Council’s willingness to allow the New Zealand Court to develop the law according to New Zealand conditions results partly from the unique facts of the case, and the difference in conditions between New Zealand and England. It is uncertain, however, whether the Board would have acknowledged such differentiating circumstances if the New Zealand approach had not stood for a number of years, or been followed in subsequent cases without any problems.

3. Lange v Atkinson

*Lange v Atkinson*⁴⁷ is the leading New Zealand case on the common law defence of qualified privilege regarding defamation of political figures. Former Prime Minister David Lange sued Joe Atkinson and Australian Consolidated Press over allegedly defamatory comments made in a 1995 magazine article. In the High Court, Elias J held that the defence of qualified privilege encompassed “discussion which bears upon the function of electors

⁴² *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, 520 (PC).

⁴³ At 520.

⁴⁴ *Ibid.*

⁴⁵ At 521.

⁴⁶ *Ibid.*

⁴⁷ [1998] 3 NZLR 424 (CA).

in a representative democracy by developing and encouraging views upon government".⁴⁸

While noting the importance of legislation,⁴⁹ Elias J emphasised that the "realities of New Zealand society",⁵⁰ and the importance of representative democracy to the "New Zealand social and legal order",⁵¹ also prompted the reassessment. The Court of Appeal upheld this decision.⁵² The litigation is still proceeding.

The same issue fell for decision in the English case *Reynolds v Times Newspapers Ltd*.⁵³ The *Reynolds* and *Lange* appeals were heard in the House of Lords and Privy Council concurrently. In *Reynolds*, both the English Court of Appeal and the House of Lords differed from the Privy Council judgment in *Lange* in significant respects. In the Privy Council judgment in *Lange*, it was held that a defendant who claims common law qualified privilege for discussion related to the suitability of Members of Parliament for public office need not prove that they took reasonable care in the circumstances, while the House of Lords found that there was such an obligation.⁵⁴ The Privy Council in *Lange* stated:⁵⁵

[O]ne feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. In their Lordships' view ... this feature is determinative of the present appeal.⁵⁶

⁴⁸ *Lange v Atkinson* [1997] 2 NZLR 22, 46 (HC). The plaintiff attempted to strike out the defendants' statement of defence, which had pleaded a common law defence of "political comment" analogous to that recognised by the High Court of Australia in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96. Elias J held that the statement of defence should be changed to qualified privilege, which was wide enough to include such matters.

⁴⁹ Including the Defamation Act 1992, New Zealand Bill of Rights Act 1991, Official Information Act 1982, and Electoral Act 1993.

⁵⁰ At 46.

⁵¹ *Ibid*.

⁵² *Supra* note 47.

⁵³ [1998] 3 All ER 961 (CA).

⁵⁴ *Ibid*; [1999] 3 WLR 1010 (HL).

⁵⁵ *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

⁵⁶ At 261-262.

The Privy Council also recognised the limits of its ability to determine the present case by virtue of the changing nature of its position in New Zealand's legal system. The Privy Council indicated an appreciation of its narrower role and the corresponding importance of New Zealand courts, remarking:

For some years Their Lordships' Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy ... The Courts of New Zealand are much better placed to assess the requirements of the public interest than Their Lordships' Board.⁵⁷

The Privy Council's deference to the New Zealand's courts is a striking feature of the case. The Board did not overturn the New Zealand decision, despite its divergence from English law on the matter, which had been stated by a similarly composed House of Lords. The Judicial Committee merely allowed the appeal so that the New Zealand Court could reconsider the case in light of the developments in English defamation law in *Reynolds*.⁵⁸

In the judgment delivered by the New Zealand Court of Appeal following the rehearing of *Lange*,⁵⁹ the Court restated its position in the earlier judgment and added some comments about its earlier judgment that were generally explanatory rather than qualifying in nature. The Court referred to the importance of New Zealand's constitutional structure and statute law, including the statutes referred to by Elias J.⁶⁰ The Court once again underlined the particular circumstances of the case, noting that "[s]ome of the constitutional and legal differences touched on in the previous judgment reflect our different, newer, smaller, closer, if increasingly diverse, society".⁶¹

The Court of Appeal further demonstrated the importance of knowing the social backdrop to litigation before it, noting that "while the role of the State has undergone substantial reassessment and alteration over the intervening 20 years, its role ... is still extensive".⁶² The Privy Council is heavily reliant on counsel to glean such knowledge that may be pertinent to appeals heard in London.

⁵⁷ At 262.

⁵⁸ At 263.

⁵⁹ *Lange v Atkinson*, unreported, Court of Appeal, CA 52/97, 21 June 2000, Richardson P, Henry, Keith, Blanchard and Tipping JJ.

⁶⁰ *Ibid*, 3-16, and *supra* note 49.

⁶¹ At 16.

⁶² At 17.

The June 2000 Court of Appeal judgment in *Lange v Atkinson* also distinguished between the realities of news reporting in New Zealand and in the United Kingdom. The Court intimated that the Privy Council may have proceeded under the mistaken assumption that the two were closely aligned when noting that “it is possible to say that New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids”.⁶³

The Court was more explicit on such fundamental differences later in the judgment when stating:

[T]here are significant differences between the constitutional and political context in New Zealand and in the United Kingdom in which this body of law operates. They reflect societal differences.⁶⁴

IV. EVALUATION

The above surveys of House of Lords and Privy Council cases have indicated two themes. First, the modern New Zealand Court of Appeal has generally treated House of Lords judgments as persuasive precedent rather than *de facto* binding authority. Secondly, the Privy Council has developed a greater willingness to allow the New Zealand Court of Appeal to develop distinctive New Zealand solutions according to local circumstances. Both themes reflect a growing confidence in the New Zealand Court of Appeal, and the move towards a New Zealand legal identity distinct from that of England.

It would be a mistake to conceptualise a distinctive New Zealand jurisprudence as a fixed body of law, pertinent to every New Zealander’s needs and conforming to each New Zealander’s individual expectations of a legal system. A system of law with a distinctive national identity has proved elusive throughout the world. However, I submit that a more flexible legal system, that is able to adapt to genuine changes in societal attitudes and beliefs, is required in light of New Zealand’s growing independence.⁶⁵ The need for flexibility is reflective of the nature of the change:

⁶³ Ibid.

⁶⁴ At 20.

⁶⁵ For discussion of the growth of a New Zealand national legal identity, see Gault, Hon T Harkness *Henry Lecture: Development of a New Zealand Jurisprudence* (1992); Baldwin, “New Zealand’s National Legal Identity” (1989) 4 *Canterbury Law Review* 173; Cooke, “The New Zealand National Legal Identity” (1987) 3 *Canterbury Law Review* 171; Cooke, “Divergences – England, Australia and New Zealand” [1983] *NZLJ*

A national identity is not a permanent and static possession; rather, the nation has from time to time to be reinvented. Indeed, the idea of the nation is changing all the time.⁶⁶

By contrast, the need for uniform development of a Commonwealth common law is of waning importance. The authors of *Precedent in English Law* note:

The desirability of having the same common law throughout the Commonwealth is not as self-evident as it is sometimes made to appear. Much depends on the branch of law concerned.⁶⁷

While acknowledging that “there is much to be said for uniformity” in commercial matters, “the demand for uniformity in other spheres may militate against useful developments”.⁶⁸ With the increased role of international law in domestic legal affairs,⁶⁹ international agreements may enhance uniformity where required. These agreements achieve uniformity more effectively than is possible via the common law, since this necessarily develops on an incremental basis, reliant upon having the right case at the right time to drive such harmonisation.⁷⁰ Uniformity in the common law is now less of an imperative for the New Zealand courts to be cognisant of in adjudication.

In New Zealand, the Court of Appeal may be willing to develop certain areas of law more readily than others. In *Jorgensen v News Media (Auckland) Ltd*,⁷¹ the Court was explicit in indicating that the law of evidence is an area in which the judiciary will take an active role in developing the common law to correspond more closely with the needs of the New Zealand legal system, within the limits of any legislation enacted by Parliament.⁷² As noted by McCarthy J:

297; Eichelbaum, “Brooding Inhibition - Or Guiding Hand? Reflections on the Privy Council Appeal” in Joseph, P (ed) *Essays on the Constitution* (1995) 112.

⁶⁶ Sinclair, supra note 18, at 257.

⁶⁷ Cross, R and Harris, J *Precedent in English Law* (4th ed, 1991) 24.

⁶⁸ Ibid.

⁶⁹ Keith, “Harkness Henry Lecture: The Impact of International Law on New Zealand Law” (1998) 6 *Waikato Law Review* 1.

⁷⁰ Spiller, “Litigation” in Spiller, P (ed) *Dispute Resolution in New Zealand* (1999) 131, 135-136: “[A]djudication is essentially geared to resolving the particular factual dispute or predicament in which the parties are involved. ... The court cannot be expected to adjudicate upon abstract issues which are not the subject of dispute between parties”.

⁷¹ [1969] NZLR 961 (CA).

⁷² At 979 (per North P) and 990-991 (per McCarthy J).

In my respectful view, if the Court of Appeal, the superior Court in this country, after weighty consideration, reaches the viewpoint that in the interests of justice and to meet the particular conditions of the times, it is desirable to create a new exception to these particular rules of evidence, and that is not obstructed in so doing by a compelling or highly persuasive authority to the contrary, it should take that step.⁷³

In *Breuer v Wright*,⁷⁴ Woodhouse P asserted the importance of interpreting New Zealand legislation in the light of local conditions:

[I]f it were thought that the Family Protection Act as a piece of New Zealand legislation might need to be interpreted in a way that reflected local social aspirations or any general consensus that could be detected concerning the local development of this part of the law one would expect it to be found in conclusions reached not in London by their Lordships but by the New Zealand Court of Appeal.⁷⁵

As New Zealand society gradually becomes more distinct from that of England, there will be growing areas of law in which the New Zealand courts may assert dominion on the basis that New Zealand conditions are different enough to justify divergence. Aside from distinctive features of New Zealand law, such as the Treaty of Waitangi and the New Zealand Bill of Rights, it may be appropriate for New Zealand courts to develop new approaches to administrative law and judicial review in light of the public sector reforms of the 1980's. Familiarity with New Zealand social conditions is essential if judges are to make relevant, fair and just decisions. New Zealand judges are best placed to view the law in its social context and make decisions accordingly. Joseph noted that Bill of Rights' cases require judges to make a "utilitarian calculation"⁷⁶ to balance competing rights:

This question [of balancing rights under s 5 of the Act] will enjoin courts to take account of the sociology of New Zealand. ... [F]or these socio-legal functions, judicial expertise is no substitute for an intimate knowledge of New Zealand's economic and social structures and a sense of position in the world. This knowledge their Lordships manifestly lack.⁷⁷

⁷³ At 993.

⁷⁴ [1982] 2 NZLR 77, 83 (CA).

⁷⁵ See also *Collector of Customs v Lawrence Publishing* [1986] 1 NZLR 404, 411, 414 (CA).

⁷⁶ Smellie, "The Draft Bill of Rights: Meaningful Safeguards or mere Window-Dressing?" [1985] NZLJ 276, 278, cited in Joseph, "Towards Abolition of Privy Council Appeals" (1985) 2 Canterbury Law Review 272, 282.

⁷⁷ *Ibid*, 282.

Joseph, in stressing the importance of New Zealand judges determining Bill of Rights issues, referred to “that indefinable part of a judge’s qualification which is his intimate knowledge of the society in which he presides and upon those whose members and institutions he sits in judgment”.⁷⁸

In the short term, there are practical advantages to be gained from the New Zealand Court specifying that it has chosen to develop a distinctive line of cases in response to differences in New Zealand conditions, such that the English approach is no longer applicable in New Zealand. In simple terms, it makes it less likely for such a decision to be successfully appealed in the Privy Council, based on the principles of *Lange v Atkinson*.⁷⁹ Ultimately, however, this merely avoids the issue and perpetuates a mindset that implies inferiority of New Zealand law. The New Zealand Court of Appeal should be free to determine that, if two equally valid paths emerge for developing the common law, it need not be presumed that New Zealand will follow the same path as England. New Zealand’s Court should not be fettered in this way in future cases, especially if the Privy Council appeal is abandoned and the Court of Appeal formally becomes New Zealand’s final appellate court. The Court would become free to examine all authority on merit, including its own decisions. This would naturally take into account the extent to which a decision had been followed and relied upon, as various judges have intimated already occurs.⁸⁰ Such a move was perhaps foreshadowed by Cooke P in *Dahya v Dahya*, in noting:

In my respectful view it is important, especially for a small country such as New Zealand, that the national appellate Court should hold itself free to take account of and benefit from decisions elsewhere in the English-speaking world ... [W]e should not foreclose our options.⁸¹

Whilst remembering that the law lords have amongst their number some of the world’s greatest living legal minds, there is no monopoly on good legal reasoning.⁸² New Zealand judges should be free to draw upon the wisdom

⁷⁸ Ibid, 296. See also Cameron, “Appeals to the Privy Council – New Zealand” (1970) 2 Otago Law Review 172, 180: in response to the contention that the Privy Council is independent of “local pressures”, Cameron noted that “[i]f ... it merely means that [Court of Appeal judges] are influenced by a New Zealand ethos and sense of values, then so they should be”.

⁷⁹ Supra note 55.

⁸⁰ See eg *S & M Property Holdings Ltd v Waterloo Investments* [1999] NZLR 189, 210 (CA), and *R v Hines* [1997] 3 NZLR 529, 553.

⁸¹ [1991] 2 NZLR 150, 156 (CA).

⁸² Joseph, supra note 76, at 287.

from other common law countries. Canadian and Australian judges may advance other equally compelling reasons for following alternative paths in developing the common law which, while not based upon distinctive New Zealand conditions, may solve the legal issues in a manner more consonant with New Zealanders' perspectives on the world. The approach advocated in this article would not encourage departure from English precedent for its own sake, rather it would grant the Court of Appeal a freer hand in seeking to ensure that the common law of New Zealand has a genuine relevance to New Zealanders and the New Zealand way of life.

Choices made by New Zealand judges may be influenced by New Zealanders' innate ideas about fairness and justice and their application in practical situations. These relate to the unstated premises underlying judgments rather than any specific New Zealand conditions that are distinctive in a tangible, concrete sense. Since New Zealanders are still differentiating themselves from England, the process has been necessarily slow. This is due in part to the fact that many of those active in New Zealand's legal profession in earlier years were born or educated in England.⁸³

New Zealand's Court of Appeal must be free to make its own decisions when developing the common law for New Zealand. This should be in the interests of the New Zealand public, but need not be reliant upon obvious differences from England to justify a divergence from English law. It is time for the nation's supreme appellate court to reject the concept of a heavy presumption in favour of following English law. Such a departure seems more likely in light of the burgeoning growth in New Zealand's identity as a separate Pacific nation and resulting attitudinal changes of the public, the legal profession and judiciary, ultimately translating through to decisions of the courts.

⁸³ See generally Spiller, P *A New Zealand Legal History* (1995), and Cooke, R (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (1969).

COMPETITION, COLLABORATION OR CONTROL: COMPETITION LAW AND TERTIARY EDUCATION IN NEW ZEALAND

BY ANNA KINGSBURY*

I. INTRODUCTION

New Zealand's tertiary education law and policy are undergoing a conceptual shift. During 1990-1999, policy was focused on the creation of an increasingly competitive environment for tertiary education provision. Tertiary providers, both public and private, were encouraged to compete for resources and for students. Government regulation was light-handed, and market disciplines were employed to encourage efficiencies. The Education Act 1989, as amended by the Education Amendment Act 1990, provided for the establishment and disestablishment of public institutions, and for their systems of governance. Provision was also made for private providers.¹ Competition law and policy was applied to the sector by the action of the Commerce Act 1986, and the Commerce Commission played a regulatory role accordingly.

However, since the end of 1999, the government has signalled a shift away from the competitive model. The government is seeking an agreed nationwide plan for tertiary education provision, and an environment in which providers collaborate rather than compete. The tertiary education sector has welcomed this shift cautiously until more detail is known. Work is continuing on how the policy should be implemented.²

To date, there has been little debate about the future role of competition law and policy within the new tertiary education environment. However, the reforms raise significant questions about the future application of the Commerce Act 1986 in the tertiary education sector, and about the future role of the Commerce Commission as regulator.

This article examines the application of the Commerce Act 1986 to tertiary education in New Zealand, focusing particularly on the significant potential application of the Commerce Act provisions to collaborative arrangements between tertiary providers. The article argues that there is a conceptual and

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¹ Education Act 1989, Part XVIII: Private Training Establishments.

² Tertiary Education Advisory Commission: Te Ako Pae Tawhiti, *Shaping a Shared Vision: Initial Report of the Tertiary Education Advisory Commission* (July 2000).

practical incompatibility between existing competition law and policy and the government's new tertiary education policy, and concludes by proposing possible alternative approaches.

II. THE CONTEXT: TERTIARY EDUCATION LAW AND POLICY IN NEW ZEALAND

The Education Amendment Act 1990 created a new environment for tertiary institutions and providers.³ New Zealand's reforms were broadly similar to those undertaken throughout the OECD after 1985,⁴ through which "higher education systems were structured as quasi-markets guided by government".⁵ Commonly, these reforms remodelled tertiary education institutions using a corporate structure, headed by a chief executive, and with professional, partly entrepreneurial, managers. The government provided a framework within which relatively autonomous institutions could interact and compete. The government's regulatory approach was light-handed, using various mechanisms to shape both institutional management and the nature of institutional outputs.

In New Zealand, Part XIV of the Education Act 1989 as amended created a new regulatory regime for the sector, with the stated object of giving institutions:

...as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.⁶

The Act's provisions aimed to balance the dual goals of institutional autonomy and efficient use of national resources through a regime that combined central control with decentralised authority.

³ Before 1990, tertiary institutions were regulated through a variety of statutes and agencies. Each university had its own statute, and the University Grants Committee was responsible for funding decisions. Polytechnics and other providers were regulated by the Department of Education, which controlled courses and funding.

⁴ For a useful discussion of the role and function of markets in education, see Marginson, *S Markets in Education* (1997), especially chapter 2, "A Political Economy of Education Markets".

⁵ *Ibid*, 222.

⁶ Education Act 1989, s 160.

The Act's provisions provide for the establishment and disestablishment of four categories of tertiary institution, being colleges of education, polytechnics, universities, and wananga. They provide that each institution is established as a body corporate,⁷ governed by a Council that appoints a chief executive, prepares a charter and statement of objectives (in negotiation with the Secretary of Education), and ensures that the institution is managed accordingly.⁸

Provision is also made for private providers, establishing a process whereby these providers can apply to the New Zealand Qualifications Authority for registration, and become eligible for government funding.⁹

Institutions also operate within a broader legislative framework aimed at achieving accountability and efficiency. Thus, institutions are subject to the Public Finance Act 1989; and the Commerce Act 1986, with its goal of economic efficiency, applies.

In allocating funding to tertiary institutions, the government has used an increasingly competitive model. Institutions compete for students and accompanying government funding for teaching, and from 2000 private providers compete for students, and accompanying funding, on generally equal terms with public institutions.¹⁰ Institutions also compete for research funding from both public and private sources.

Thus, New Zealand's tertiary education sector has been redesigned, and to an extent competition has been used in an effort to improve allocative and productive efficiency and increase customer focus and responsiveness to student needs. Institutions compete for students on the basis of the quality of their educational services and prices charged. The government funds courses according to student demand, rather than according to what the government perceives to be the needs of the nation and employers.

The reforms have had a considerable effect in the sector. Providers have taken a more competitive approach to student recruitment, running expensive promotional campaigns. New providers have emerged. Three wananga have

⁷ Education Act 1989, s 166.

⁸ Education Act 1989, s 180.

⁹ Education Act 1989, Part XVIII.

¹⁰ The clearest representation of the competitive funding model was presented in the Ministry of Education, *White Paper: Tertiary Education Policy Directions for the 21st Century* (1998) (which was never implemented in full). For further reference, see http://www.minedu.govt.nz/web/document/document_page.cfm?id=4715.

been established as institutions.¹¹ Existing institutions have extended their activities into new markets, for example polytechnics have offered a range of degrees, and universities have extended their activities into subjects not traditionally associated with universities, such as tourism and leisure studies. Many universities, polytechnics, and other institutions have entered new geographical markets. Institutions have become increasingly entrepreneurial, and there has been a level of innovation, particularly among non-university institutions, that would not have been possible under the former regulatory framework.

However, there are questions about the effectiveness of the competitive model in achieving its objectives of productive and allocative efficiency. There is evidence that tertiary education markets are imperfect. There are information failures in the tertiary education market which market mechanisms are unlikely to resolve.¹² Prospective students are not well positioned to assess the quality of a course before they commence. Further, tertiary education tends to be a one-off purchase so that the purchaser cannot make a better-informed decision next time around.¹³ Because of the high search costs involved, students are more likely to choose an institution with an established reputation or brand, such as one of the older universities, irrespective of quality. As a result, demand is greater at the established institutions, and newer institutions face a high barrier to entry with considerable sunk costs associated with establishing a reputation. The established institutions, and especially the universities, have benefited from the new competitive model. Their existing reputations, capital and resources have allowed them to dominate the quasi-markets for degree students. And the established universities have also been more successful in attracting research funding.

The regulatory protection of the title “university” has also been a considerable benefit to those institutions carrying it, and its absence has been a considerable disadvantage to those institutions without it.¹⁴ Regulatory

¹¹ Te Wananga o Raukawa, Te Wananga o Aotearoa, and Te Wananga o Awanuiarangi.

¹² Information failures were acknowledged in the Ministry of Education, *White Paper* supra note 10, at 1.2: “There is a recognised need for improved information so that students can make the judgement about which course and institution is best for the qualifications that they seek”.

¹³ For a fuller discussion of these issues, see Cave, Dodsworth and Thompson, “Regulatory Reform in Higher Education in the UK: Incentives for Efficiency and Product Quality”, in Bishop, M et al (eds) *The Regulatory Challenge* (1995) 85.

¹⁴ The title “university” is protected under the Education Act 1989, ss 264 and 292(4). Providers may use the term only with New Zealand Qualifications Authority approval,

protection of the title operates as an insurmountable barrier to entry for potential competitors at the elite end of the market.

There is also some evidence that competition has reduced diversity, as institutions have each responded to the same incentive structure and tended to compete in the same range of courses, where barriers to entry are low (for example, where professional accreditation is not required) and sunk costs are minimal (for example, in expensive equipment and library material). Thus, there has been exponential growth in the number of business courses being offered, by both universities and polytechnics.¹⁵ Business courses (other than accounting) do not require professional accreditation (compared, for example, with law), and sunk costs in the form of equipment and library material are less than in some fields, such as engineering. Such growth is, of course, also a response to student demand, as the perceived individual positional benefits of business courses are high, relative to the costs and time involved. Such growth achieves allocative efficiency in response to student demand, but without reference to demand by employers.

Thus, while the existing policy and legislative framework for the tertiary sector has made some progress toward the Education Act's goal of efficiency in use of national resources, it is also arguable that better use could be made of those resources.

and institutions require Ministerial approval to become universities. Auckland Institute of Technology was successful in its request for conferral of university status in 1999. (See Auckland University of Technology (Establishment) Order 1999 (SR 1999/332) in force 1 January 2000). UNITEC also requested conferral of university status but in May 2000 the government stopped the process of consideration of UNITEC's request, and placed a moratorium on further universities. On 15 May 2000, the Associate Education Minister (Tertiary Education) introduced the Education (Limiting Number of Universities) Amendment Bill restricting the number of public universities in New Zealand to eight. The Bill is still with the Select Committee. The Bill does not affect overseas universities offering education services within New Zealand.

¹⁵ In 1996 there were 27 Bachelors' and 24 Masters' courses offered in Business, Commerce, Information Systems and Management. By 2000 there were 38 Bachelors' and 35 Masters' courses in the same subjects. See the New Zealand Qualifications Authority and New Zealand Vice-Chancellors Committee, *Degree Qualifications in New Zealand: A User's Guide* (1996) and (2000). This proliferation of course offerings has also been dominated by the universities, which use their established reputations and university status to distinguish them from the potentially confusing plethora of competitors.

In recent statements, the Associate Minister of Education (Tertiary Education) has signalled a more interventionist approach by the government:

New Zealand is a small country. We need to make best use of our resources to ensure that the appropriate mix of quality tertiary education and skills training is available throughout the country. The Government wants to build a coherent tertiary education system where each institution is encouraged to play to its strengths according to an agreed nationwide plan. ... The Government is clearly signalling that we want to be an active and careful steward of our public tertiary institutions.¹⁶

The government is presently reviewing the strategic direction of tertiary education, and in 2000 it established the Tertiary Education Advisory Commission. The Commission's Terms of Reference state that New Zealand needs "a more co-operative and collaborative education sector".¹⁷ The Commission has also been asked to provide advice on, *inter alia*:

- how the opportunities for increased collaboration and co-operation across the sector can be maximised, and how the links with the wider economy and community can be strengthened;
- how tertiary providers and students can be best positioned to provide and participate in courses of study that complement New Zealand's social, economic and regional needs...¹⁸

There has been no suggestion by the government that competition policy should no longer apply to the tertiary education sector. However, there is a conflict between government's signalled more collaborative and co-operative approach, and the application of competition policy via the Commerce Act 1986.

Part III of this article considers the competition law and policy implications of tertiary providers adopting a co-operative and collaborative approach.

¹⁶ Hon Steve Maharey, Associate Education Minister (Tertiary Education) "Government to place moratorium on further universities" Press Release 16 May 2000.

¹⁷ TEAC Terms of Reference, in TEAC, *Shaping a Shared Vision* supra note 2, 32.

¹⁸ *Ibid*, 33.

III. CO-OPERATION, COLLABORATION AND THE COMMERCE ACT 1986

1. Introduction

The Commerce Act 1986¹⁹ is the legislative basis for New Zealand's competition law and policy. By its long title, it is an "Act to promote competition in markets within New Zealand...". Like other competition or antitrust legislation internationally, its purpose is to ensure that the disciplines of a market economy are not undermined by the aggregation of economic power, or by monopolistic or anti-competitive trade practices. According to Richardson J, the Act:

is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources.²⁰

The Commerce Act therefore promotes and protects competition. It does not protect individual competitors, except incidentally.²¹

To this end, the Commerce Act prohibits, and establishes a regime of penalties and remedies for, a range of anticompetitive behaviours. It also establishes the Commerce Commission with roles in investigation, enforcement, and decision-making. The Commission is empowered to investigate possible contraventions and institute proceedings in the High Court. It may authorise certain restrictive trade practices and grant clearances

¹⁹ There has been substantial recent criticism of the Act, and proposals for reform. However the criticism has mainly been that the Act is perceived as too weak, and it is likely that the direction of any reforms will be toward strengthening the substantive provisions of the Act, and increasing the penalties for breach. See Ministry of Commerce, *Penalties, Remedies and Court Processes under the Commerce Act 1986: A Discussion Document* (January 1998), Ministry of Commerce, *Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues: A Discussion Document* (April 1999), and the Commerce Amendment Bill 1999 and Supplementary Order Papers. For further reference, and background information, attention is directed to <http://www.executive.govt.nz/minister/mallard/commerce/index.html>.

²⁰ *Tru Tone Ltd and Others v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, 358, (1988) 2 NZBLC 103,286, 103,291.

²¹ *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662, 699-700 (HC).

and authorisations for business acquisitions.²² It is required to have regard to Government economic policies.²³

The Commerce Act 1986 applies to both public tertiary institutions²⁴ and private providers, at least in so far as they engage in trade.²⁵ Section 43 provides that the Commerce Act does not apply in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act. There is no such general authorising provision for the tertiary education sector.²⁶

To date the tertiary education sector has received little attention from competition lawyers and regulators,²⁷ and there appears to be limited awareness of the operation of the Commerce Act within the sector. However, tertiary providers need to be aware of the effect of the Commerce Act provisions, and all the more so in an environment in which collaboration between competitors is encouraged.

²² The functions and powers of the Commerce Commission are set out in Part I of the Commerce Act 1986.

²³ Commerce Act 1986, s 26.

²⁴ See Commerce Commission Media Release 1997/118: "Commission Chairman Alan Bollard said the Commission's legal opinion is that tertiary institutions are in competition with each other for students, and they are not exempted from the Act by any other legislation".

²⁵ Commerce Act 1986, s 5, providing that the Act shall bind the Crown in so far as the Crown engages in trade. There is ongoing uncertainty about whether and in what sense tertiary institutions are in fact Crown entities. See State Services Commission, *Crown Entity Reform: Assignment of Crown Entities to Classes* (25 August 2000), <http://www.ssc.govt.nz/siteset.htm>: "At this stage, no decision has been made about whether the legislative proposals will apply to Schools, Tertiary Education Institutions, Trusts, Reserves Boards, and Fish and Game Councils". If tertiary education institutions are not "the Crown" for the purposes of s 5, then the Act applies in full.

²⁶ The Privy Council has taken a narrow view of this exception. See *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* [1991] 1 NZLR 257 (PC).

²⁷ There has been some consideration of Commerce Act issues in proposed mergers. See eg *Commerce Commission Decision No 336, Massey University and Auckland College of Education* (24 December 1998).

2. The Commerce Act 1986: Fundamental Concepts

(a) The concept of competition:

In the Commerce Act, “‘competition’ means workable or effective competition”.²⁸ The judicial approach to competition is that it is:

a mechanism for discovery of market information and for enforcement of business decisions in the light of this information ... competition expresses itself as rivalrous market behaviour.²⁹

In analysing competition and market power the courts take into account elements of market structure:

- (1) the number and size distribution of independent sellers, especially the degree of market concentration;
- (2) the height of the barriers to entry, that is the ease with which new firms may enter and secure a viable market;
- (3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
- (4) the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration;
- (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities; and
- (6) behaviour in the market.³⁰

In assessing competition, courts may take account of potential as well as actual competition.³¹ Further, competition includes competition from “goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand”.³² In tertiary education, courts might

²⁸ Commerce Act 1986, s 3(1).

²⁹ *Re Queensland & Co-Operative Milling Associates Ltd; Re Defiance* (1976) 8 ALR 481, 514-515, followed in New Zealand in (inter alia) *Tru Tone Ltd v Festival Records Records Marketing Ltd* [1988] 2 NZLR 352, and *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647.

³⁰ *Ibid.*

³¹ *Telecom v Commerce Commission* [1992] 3 NZLR 429, 439, *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731, 740-741.

³² The Commerce Act 1986, s 3(3). Note that services supplied outside New Zealand by persons not resident or not carrying on business in New Zealand may not be taken into account. See *New Zealand Magic Millions v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731, 759. However this decision has been subject to criticism. See eg Brunt, “Market

therefore consider competition or potential competition from tertiary providers not based in New Zealand, and without a status as New Zealand institutions or providers under the Education Act 1989. This might include providers of tertiary offerings over the internet, or off-shore providers with articulation agreements with New Zealand providers.

(b) The concept of markets:

Competition takes place in a market, and assessing competition requires a definition of the relevant market. "Market" is therefore an instrumental concept, a tool for analysis of competition and market power.³³

The Commerce Act defines "market" as:

a market in New Zealand for goods or services as well as goods or services that, as a matter of fact and commercial common sense, are substitutable for them.³⁴

A market is:

the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.³⁵

Market definition is a question of fact and degree in each case.³⁶ A market is generally regarded as having dimensions of product, functional level, space and time.³⁷ An exercise in defining a market involves consideration of each of these factors.³⁸

Definition' Issues in Australian and New Zealand Trade Practices Litigation", in Ahdar, R (ed) *Competition Law and Policy in New Zealand* (1991) 115, 142-144.

³³ *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co. Ltd* (1989) 83 ALR 577, 582, followed in *New Zealand Magic Millions v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731, 748-749.

³⁴ Commerce Act 1986, s 3(1A).

³⁵ *Re Queensland & Co-Operative Milling Associates Ltd; Re Defiance* (1976) 8 ALR 481, 517.

³⁶ *Tru Tone Ltd v Festival Records Records Marketing Ltd* [1988] 2 NZLR 352, 358.

³⁷ *Ibid*, 359.

³⁸ See eg *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, *Tru Tone Ltd v Festival Records Records Marketing Ltd* [1988] 2 NZLR 352, and *Hoyts Corporation Holdings Operations (NZ) Ltd v Commerce Commission* (1991) 4 TCLR 459; [1992] NZAR 426.

Thus, in defining a tertiary education market, consideration would be given to each dimension in so far as this is relevant. For example, in the Commerce Commission determination granting a clearance to Massey University to acquire Auckland College of Education, the Commission considered each of these dimensions. It concluded that there were three separate relevant product markets, being programmes of study leading to primary school, secondary school and in-service teaching qualifications. The Commission further concluded that the geographic market was the greater Auckland area (including Northland). It did not consider the functional level dimension to be relevant on the facts.³⁹

3. Commerce Act 1986 Part II: Restrictive Trade Practices

There is a wide range of scenarios in which collaboration between providers could give rise to liability.⁴⁰ These include:

- consortium purchasing of materials or equipment;
- consortium contracts for access to library information, such as databases;
- collaboration in the use of information technology, for example, to supply materials and education to students;
- agreements between providers about which courses will be offered by each provider; for example, agreeing that only two institutions will offer a particular course, one in the north and one in the south, or agreeing that each member of a group of providers will offer one of a range of popular courses (that is, product or territory allocation agreements);
- agreements between providers (the government might also be a party) about what fees will be charged for particular courses of study;
- agreements limiting the number of students in a particular course nationwide (that is, output agreements);
- agreements about the level of financial assistance that will be offered to particular students;
- agreements between providers and particular professional groups in relation to provision of qualifications for entry to those professional groups;
- requirements, systems and procedures for accreditation and peer review;
- collaboration between providers and sports organisations providing elite training facilities and competitions;

³⁹ *Commerce Commission Decision No 336, Massey University and Auckland College of Education*, supra note 27, at 10-13.

⁴⁰ For the purposes of comparison, a review of the application of antitrust laws to tertiary education providers in the United States is in Richmond, "Antitrust and Higher Education: An Overview" 61 *UMKC L Rev* 417.

- agreements with businesses providing goods and services on campus, such as bookshops; and
- joint ventures for research and development.

Part II prohibits a range of anticompetitive conduct. The more blatant anti-competitive activities are prohibited *per se*; that is, they are prohibited without any need to show that the particular conduct has the purpose or effect of substantially lessening competition in a market. The *per se* offences are exclusionary provisions (section 29), horizontal price fixing (section 30) and resale price maintenance (sections 37-38). There is also a general prohibition section (section 27) which adopts a rule of reason approach, prohibiting contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market. Use of a dominant position in a market for anti-competitive purposes is proscribed under section 36.

Penalties for contravention of the restrictive trade practices' provisions are up to \$500,000 for individuals and up to \$5 million in the case of a body corporate. Injunctions and actions for damages are also available remedies.⁴¹

The Commerce Commission may grant authorisation for conduct caught by sections 27, 29, 30, and by the resale price maintenance provisions. Use of a dominant position under section 36 is not authorisable.⁴² The Commission shall not grant authorisation unless it is satisfied that the conduct in issue will result, or be likely to result, in a benefit to the public.⁴³

The Commerce Act does not define "benefit to the public", but in 1990 the Act was amended to add section 3A which provides that, in determining:

whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.

⁴¹ Commerce Act 1986, ss 80-82. Note that, as with s 47, penalties and remedies apply not only to contraventions, but also to attempted contraventions, aiding, abetting, counselling, procuring, inducing or attempting to induce, conspiring, or being party to, a contravention.

⁴² Commerce Act 1986, ss 58-65.

⁴³ Commerce Act 1986, s 61.

The Commission takes a net approach to assessing public benefit. It weighs the likely benefits against the likely detriments to determine the net public benefit.⁴⁴

The Commission considers that a public benefit is any gain to the public of New Zealand, where any gain is measured in terms of economic efficiency. Likewise, a detriment is any loss to the public of New Zealand, measured also in economic efficiency terms. Thus, commonly claimed benefits include cost savings and enhanced profits.⁴⁵ Profits may be claimed as a public benefit, whether earned by New Zealanders or overseas investors.⁴⁶ There must be a causal nexus between the benefit claimed and the conduct or acquisition for which the authorisation is sought.⁴⁷

Changes in the distribution of income, where one New Zealand group gains and another loses, are generally not considered.⁴⁸ Intangible benefits not capable of quantification can be considered, but they are rarely accorded significant weight.⁴⁹

(a) The general prohibition section: section 27

Section 27 prohibits contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market. Establishing liability requires (i) a contract, arrangement or understanding, (ii) definition of the relevant market, and (iii) purpose, effect, or likely effect, of substantial lessening of competition within that market.

Thus, section 27 potentially catches a wide range of anti-competitive conduct, both horizontal and vertical.⁵⁰ The section requires that there is

⁴⁴ *Re Weddel Crown Corp Ltd* (1987) 1 NZBLC (Com) 104,214. See also Ahdar, "The Authorisation Process and the 'Public Benefit' Test", in Ahdar, *supra* note 32, at 217; and Pickford, Michael *The Evaluation of Public Benefit and Detriment Under the Commerce Act* (Commerce Commission Occasional Paper no 7, February 1998).

⁴⁵ Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act* (October 1994), and Pickford, *ibid*.

⁴⁶ *Telecom Corporation of NZ Ltd v Commerce Commission* (1991) TCLR 473, 531.

⁴⁷ Pickford, *supra* note 44, at 18.

⁴⁸ *Ibid*, 4.

⁴⁹ *Ibid*, 4, 22-23.

⁵⁰ See generally *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, *Tui Foods Ltd v New Zealand Milk Corporation Ltd* [1993] 5 TCLR 406 (CA), *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,764,

some duality of action in the form of either a formal contract or a more informal arrangement or understanding.⁵¹ Attempts to reach a contract, arrangement or understanding are also caught.⁵² A provision of the contract, arrangement or understanding will then be covered if it has the purpose, effect or likely effect, of substantially lessening competition within the market as defined.

In tertiary education, section 27 would catch a range of the kinds of collaborative conduct already discussed. It could, for example, apply to agreements about fees and assistance,⁵³ agreements giving exclusive rights to sell goods or services on campus,⁵⁴ agreements dividing up the market by not offering particular courses in competition, and to some forms of consortium buying.

(b) Price fixing: section 30

Horizontal price fixing is illegal per se. Under section 30, a provision of a contract, arrangement or understanding is deemed to have the purpose, effect or likely effect of substantially lessening competition for the purposes of section 27 if the provision “has or is likely to have the effect of fixing, controlling, maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services” that are supplied or acquired by the parties ... in competition with each other. Resupply is also covered.

In tertiary education, section 30 will potentially catch a range of agreements between providers, including:

- fixing maximum or minimum fees, discounts or rebates;
- creating a fee range;

Port Nelson Ltd v Commerce Commission (1996) 5 NZBLC 104,142 (CA), and *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731.

⁵¹ *Re British Basic Slag Ltd's Agreements* [1962] 3 All ER 247, [1963] 2 All ER 807 (CA), *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC), and *Commerce Commission v Wellington Branch NZ Institute of Driving Instructors* (1990) 4 TCLR 19.

⁵² Commerce Act 1986, s 80(1)(b).

⁵³ See *Commerce Commission v Wellington Branch NZ Institute of Driving Instructors* (1990) 4 TCLR 19.

⁵⁴ See *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647.

- creating a fee or discount formula or system;
- controlling costs which contribute to prices; and
- fixing fees in the future.

Providers may share fee information,⁵⁵ but problems will arise where the sharing of information leads to a contract, arrangement or understanding about fees and prices to be charged.

Price-fixing provisions are authorisable, but the Commerce Commission rarely authorises minimum price provisions.

(c) Exclusionary provisions: section 29

Section 29 is intended to catch group boycotts or concerted refusals to deal.⁵⁶ Under section 29, an exclusionary provision is one where there is a contract, arrangement or understanding between two or more parties in competition with each other,

which has the purpose of preventing, restricting, or limiting the supply of goods or services to, or the acquisition of goods or services from any particular person or class of persons, where one of the parties is in competition with the particular person or class of persons who is the target.

In the tertiary education context, section 29 might be used to attack conduct by a group of providers who agree with a professional group to provide exclusively education leading to the entry qualifications for that professional group, and the professional group accredits the provider and agrees to exclude any other potential providers of the same educational services. However, such an agreement might be authorisable under section 58 if it could be shown that efficiencies would result.

Conduct that is not caught by section 29 might still fall under the broader provision of section 27, subject to the rule of reason approach.

(d) Use of a Dominant Position: section 36

Section 36 prohibits a person in a dominant position in a market from using that position for a proscribed purpose. The three elements of the provision are as follows:

⁵⁵ *TPC v Email* (1980) ATPR 40-172, *Re NZ Medical Association* (1988) 7 NZAR 407.

⁵⁶ *Tui Foods Ltd v New Zealand Milk Corporation Ltd* [1993] 5 TCLR 406 (CA).

- (i) a person who has a dominant position in a market,
- (ii) who has used that position,
- (iii) for the purpose of restricting entry in a market, deterring competitive conduct in a market or eliminating a person from a market.⁵⁷

Assessment of dominance first requires definition of the relevant market, and then consideration of dominance within that market.

Section 3(8) provides that:

a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

The section further states that, for the purpose of determining dominance, regard shall be had to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors;
- the constraint exercised by suppliers or acquirers.

Dominance in a market:

involves more than “high” market power; more than mere ability to behave “largely” independently of competitors; and more than power to effect “appreciable” changes in terms of trading. It involves a high degree of market *control*.⁵⁸

For section 36 to apply, a person in a dominant position must *use* that position for one of the proscribed anti-competitive purposes. According to the Privy Council in *Telecom*:

it cannot be said that a person in a dominant market position “uses” that position for the purposes of s 36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.⁵⁹

The third element is to show that the use was for one of the proscribed anti-competitive purposes as listed in section 36, in that or any other market. The

⁵⁷ *Telecom Corporation of NZ Ltd v Clear Communications* [1995] 1 NZLR 385, 402 (PC).

⁵⁸ The High Court test was adopted by the Court of Appeal in *Port Nelson Ltd v Commerce Commission* (1996) 5 NZBLC 104,142, 104,161 (CA).

⁵⁹ *Telecom Corporation of NZ Ltd v Clear Communications* [1995] 1 NZLR 385, 402 (PC).

purpose can be one of a number of purposes, so long as it is a substantial purpose.⁶⁰

Potentially, a tertiary provider or consortium of providers could have a dominant position in a particular market, either as a supplier of goods and services or as an acquirer of goods and services.⁶¹

Examples of possible use of a dominant position might include:

- accreditation requirements imposed by established providers (possibly in conjunction with industry groups) where these are used to exclude new entrants;
- use by a university of its established position and resources to deter entry by a rival provider, for example by engaging in predatory pricing;
- non-recognition by larger institutions of courses offered by smaller providers, for example non-recognition of wananga undergraduate degrees so that those graduates could not then enter postgraduate study.

However, by no means all competitive conduct by dominant parties will be caught by section 36. There will be circumstances where conduct that is seriously detrimental to a smaller provider will be acceptable under the Commerce Act 1986. Competition law protects competition, not competitors.

Thus, for example, a small polytechnic may have one unique and popular course, the success of which is essential to the financial viability of the polytechnic. A university in the same region might choose to enter the market offering a similar course in competition, with the added perceived benefit to students of offering it as a university degree rather than as a polytechnic degree. It is unlikely that such conduct would contravene section 36, even though it may lead to the polytechnic being forced to close. Such an outcome might be contrary to the objectives of government education policy, but it would be acceptable in competition law terms.

(e) Resale price maintenance: sections 37 and 38

Sections 37 and 38 prohibit resale price maintenance by suppliers and third parties.⁶² In simple terms, resale price maintenance is enforcing a minimum

⁶⁰ See Commerce Act 1986, s 2(5)(b).

⁶¹ See Commerce Act 1986, s 29(1) and s3(8).

⁶² See eg *Commerce Commission v Hewlett Packard* (1993) 5 TCLR 136, and *Direct Holdings Ltd v Feltex Furnishings of NZ Ltd* (1986) 6 NZAR 245.

price for resale. Under section 37, a supplier may not induce a reseller to sell goods at or above a minimum price, or take or threaten to take punitive action if the reseller sells below that price. The provisions apply to goods only, not to services.

While the provisions are of some interest, they are not of primary importance in tertiary education. Tertiary providers are not ordinarily involved in supplying goods for resale. However, they may have some limited application, for example, in supplying course materials to a bookshop for resale.

4. *Commerce Act 1986, Part III: Business Acquisitions*

The provisions of Part III also apply to tertiary education providers.

The key provision is section 47, which prohibits any person from acquiring assets of a business or shares, if, as a result of the acquisition that person or another person would be, or would be likely to be, in a dominant position in a market, or that person's or another person's dominant position in a market would be, or would be likely to be, strengthened.⁶³

Pecuniary penalties for contravening or attempting to contravene section 47 can be up to \$500,000 for an individual and \$5 million for a body corporate. Other remedies include injunctions, damages or divestiture of assets.⁶⁴

Sections 66-69 in Part V make provision for acquirers to apply to the Commerce Commission for a clearance or authorisation, and thereby avoid the consequences of contravening section 47. The Commerce Commission will grant a clearance if it is satisfied that the acquisition will not give rise to dominance concerns as described in section 47.⁶⁵ Where dominance concerns do arise, the Commission may grant an authorisation if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.⁶⁶

⁶³ Commerce Commission, *Business Acquisitions Guidelines* 1996 (revised March 1999).

⁶⁴ Commerce Act 1986, ss 83-85. Note that penalties and remedies apply not only to contraventions and attempted contraventions, but also to aiding, abetting, counselling, procuring, inducing or attempting to induce, conspiring, or being party to, a contravention.

⁶⁵ Commerce Act 1986, s 66.

⁶⁶ Commerce Act 1986, s 67.

The Commerce Commission's *Business Acquisition Guidelines*⁶⁷ describe the basis on which the Commission will consider proposed business acquisitions. The Commission will first define the market in relation to the dimensions of product/service, geographic extent, functional level, and, if necessary, time. It will then identify market participants and near entrants. Dominance or likely dominance is then assessed with reference to section 3(9) and case-law on dominance.⁶⁸

The Commission's *Guidelines* specify "safe harbours", particular levels of market concentration which are incompatible with market dominance. In the Commission's view, a dominant position is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist:

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40 percent share of the relevant market;
- the merged entity (including any interconnected or associated persons) has less than in the order of a 60 percent share of the relevant market, and faces competition from at least one other market participant having no less than in the order of a 15 percent market share.⁶⁹

Where a proposed acquisition falls outside these safe harbours, the Commission will consider a range of additional factors⁷⁰ in determining whether it will be likely to result in the acquisition or strengthening of a dominant position.⁷¹ If the Commission determines that the proposed acquisition will be likely to result in the acquisition or strengthening of a dominant position, the acquirer may seek an authorisation on the basis that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.

As previously discussed in relation to authorisation of restrictive trade practices, Commerce Commission assessment of public benefits and detriments has focused increasingly on economic efficiency.⁷²

⁶⁷ *Supra* note 63.

⁶⁸ As previously discussed in relation to use of a dominant position.

⁶⁹ *Supra* note 63, at 17.

⁷⁰ Additional factors include constraints from market entry and constraints from buyers and suppliers. See Commerce Act 1986, s 3(9), and *supra* note 63, at 19-21.

⁷¹ Pickford, *supra* note 44, at 18.

⁷² Note also that Commerce Act 1986, s 3A, applies, requiring the Commission, in considering public benefit, to have regard to efficiencies.

The provisions of Part III clearly apply to tertiary education providers, both public and private. There has been considerable merger activity in the tertiary sector in the last decade. Given the large number of providers, some of which are arguably too small to be viable in the present competitive environment, such activity is likely to increase.⁷³

Where an acquisition may give rise to dominance in a market, the acquiring provider will need to seek clearance or authorisation from the Commerce Commission. Thus, Massey University sought and was granted a clearance to merge with Auckland College of Education in 1998.⁷⁴ The Commerce Commission also investigated the merger of Massey University and Wellington Polytechnic and decided that competition issues did not arise.⁷⁵

Where dominance issues arise and a clearance is not available (for example, where the merged entity would clearly monopolise a market as defined), the acquiring provider will need to seek an authorisation, and establish that there is sufficient public benefit to justify the authorisation.

IV. CONCLUSION: ALTERNATIVE APPROACHES

The Commerce Act 1986 applies to tertiary education, although it has been little used and there is limited awareness of it within this sector. It is nevertheless an important element in the tertiary education regulatory framework, and it has a significant impact on the options available to participants in tertiary education markets.

⁷³ See Ministry of Education, *White Paper*, supra note 10, 1.2: "Currently, New Zealand has seven universities [now eight], 25 polytechnics [now 23], four colleges of education, three wananga, 11 Government Training Establishments, and over 700 private training establishments. This is a high number of tertiary institutions for the size of our country, and they offer courses at widely different levels. A significant number of these institutions are either small or very small. The small size of a number of tertiary institutions has put question marks over their long-term educational and financial viability. Several institutions are working on alliances of various sorts, including, in some cases, full mergers, in order to strengthen their position". An example is Wairarapa Community Polytechnic and UNICOL, based in Palmerston North.

⁷⁴ *Commerce Commission Decision No 336, Massey University and Auckland College of Education* (24 December 1998). Note however that such a merger would require approval and action by the Minister of Education, under section 164 of the Education Act 1989. Such approval has not so far been granted ("Tertiary Merger backers yet to win over Mallard" *New Zealand Herald* 20 September 2000).

⁷⁵ Commerce Commission, "Commerce Commission investigates tertiary education institution mergers" (Media Release 1997/118).

It is clear from recent policy statements that the current government seeks a more planned approach to tertiary education provision, and an environment of co-operation and collaboration between providers. However, as has been demonstrated, the Commerce Act places significant limits on the options for collaboration between providers.

There is an apparent conceptual incompatibility between the government's approach to regulating the tertiary education sector and competition law and policy. The government's tertiary education policy and its competition policy arise from fundamentally different conceptual approaches to regulation. The Commerce Act is designed as a mechanism for the light-handed regulation of a market economy, and it is an Act "to promote competition in markets".⁷⁶ It is not designed to regulate an economic sector in which the government has a strong central planning role, and in which market participants are encouraged to collaborate and co-operate.

It is therefore submitted that, if the government is committed to creating a more planned and collaborative environment for tertiary education, it will need to resolve the conflict with competition law. A number of approaches are possible.

1. Authorisation

The government could continue to apply competition policy to the tertiary sector. It could then rely on the authorisation process as a means to resolve the mismatch of policy objectives. The public benefit test could be broadened to include wider policy goals such as distributional effects, social equity, and regional development.

There are two difficulties here. The first is that the Commerce Commission's approach to public benefit has increasingly been narrowly focused on economic efficiency, and it does not place significant weight on other goals. A major change to the public benefit test for one sector has potential impacts for competition law as a whole.

The second difficulty is that authorisation is not a cost-free process. It costs providers in Commission and professional fees and in staff time, and it creates uncertainty. It thus has the potential to act as a deterrent to collaborative initiatives and innovations.

⁷⁶ Commerce Act 1986, Long Title.

2. Partial Exemptions from the Commerce Act

Collaborative initiatives might be facilitated by creating partial exemptions from the Commerce Act for particular specified activities. However, such an approach is likely to be problematic in practice, as it would be difficult to foresee all of the activities to be exempted and then draft the exemptions appropriately.

3. Full Exemption from the Commerce Act

Tertiary education could be fully exempted from the Commerce Act and brought under its own legislative framework within which elements of competition and collaboration were balanced in a manner appropriate to the sector.

It is arguable that competition policy unmodified is not an appropriate regulatory approach for apparently very imperfect tertiary education markets. If so, use of the Commerce Commission as a generic competition regulator is inappropriate, and a sector-specific regulator, such as an intermediary authority, may be more appropriate.

It is submitted that the most coherent solution would be the creation of such sector-specific legislation. This would require legislation which applies appropriate elements of competition law to prevent anti-competitive arrangements and the aggregation of market power, but which also encourages collaborative initiatives to enhance teaching, learning and research.

THE MĀORI FISHING SETTLEMENT AND THE LOSS OF RANGATIRATANGA

BY STEPHANIE MILROY*

I. INTRODUCTION

The fisheries settlement made in 1992¹ between Māori and the Crown suffered a difficult birth, and conflict and compromise have been the dominant characteristics of its life since then. The settlement saw the extinction of Māori fishing rights under the Treaty of Waitangi. With the selection of a new Treaty of Waitangi Fisheries Commission in August 2000 it seems opportune to reflect on what has occurred under the settlement to date in order to evaluate the success of the settlement and its benefits for Māori.

The key question that this article will address is whether, with all that has happened at the time of the settlement and following, Māori have any chance of achieving tino rangatiratanga in respect of the fisheries. Article 2 of the Māori version of the Treaty of Waitangi provides that Māori should have “te tino rangatiratanga o o rātou whenua o rātou kāinga me o rātou taonga katoa”. Literally translated this means that Māori were guaranteed governance in respect of their land, homes and all other precious things. In the English version of the Treaty Māori were guaranteed “full exclusive and undisturbed possession of the Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess”. Whether one accepts the English or Māori version there is a clear recognition of and protection for Māori rights in the fisheries.

This article begins with the background to the fisheries settlement that was made between Māori and the Crown. The article goes on to look at the nature of the settlement and the issues that arose out of it, and then considers the implementation of the settlement and resulting issues. The article then analyses Māori commercial fishing resulting from the settlement, focussing on an example of a Māori fishing business. The article finally examines the Māori customary fishing regulatory regime that is now in place, before concluding with a discussion on the opportunities, or lack of them, for allowing Māori to exercise rangatiratanga in the context of the current fisheries arrangements.

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¹ The settlement was carried into law in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

II. BACKGROUND TO THE FISHERIES SETTLEMENT

1. *New Zealand's fishing industry*

Aotearoa for its size has a very large fishing area. The Ministry of Fisheries claims that our exclusive economic zone (EEZ) is the fourth largest in the world at 1.3 million nautical square miles.² However, our fisheries resources are not as productive as might be expected for a number of reasons. We have a narrow continental shelf and there is a lack of nutrient upwellings which would encourage marine life.³ The inshore fisheries suffered heavy depletion from the mid-1960s to the mid-1980s, requiring the rebuilding of those fishstocks to sustainable levels.⁴ We are also only on the periphery of some highly migratory species, such as tuna, so that production from those sources is limited.⁵ Nevertheless, the fishing resources we have are valuable both economically and environmentally, and they are of interest to many different groups, including the commercial industry, Māori, and recreational fishers.⁶

The commercial industry is mainly an export industry - 91% by value of product (about \$1.27 billion) is exported, making the fisheries industry the fourth biggest export earner for the country.⁷ The industry has been subjected to far-reaching reforms imposed by the government, partly as a result of the need to ensure the sustainability of the fishing resource, and partly in response to global trading conditions and international obligations in relation to the fisheries.⁸ These reforms, begun in 1983 and including the introduction of the Quota Management System, triggered the major claims made by Māori under the Treaty of Waitangi.

2. *Māori Fishing*

Fish were always an important part of the traditional Māori diet because, apart from birds, fish were the only source of protein in Aotearoa until the arrival of the Pākehā. Thus, Māori were competent fishers, fishing for food

² Ministry of Fisheries, "Our Fisheries Resources", in *Briefing to the Incoming Minister* (Dec 1999), accessed via internet at www.fish.govt.nz/information/briefing_index.html.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*, in the introduction section of the briefing document.

⁸ Chiefly the United Nations' Law of the Sea Conventions and the United Nations' Fishstocks Agreement.

and for trade.⁹ After contact with Europeans, Māori tribes supplied ships and whaling settlements and even exported fish to Sydney, Australia.¹⁰ Until 1870, Māori dominated the fisheries trade, although this gradually changed as settler numbers increased.¹¹

From the late 1800s, the government moved to take greater control of the fisheries on conservation grounds.¹² The government then fostered the commercialisation of fishing¹³ while showing no concern for the trading or commercial interests of Māori.¹⁴ Māori involvement in the management of the industry declined and Māori protests about the decline of the fishstocks were ignored. Māori came to be prosecuted and convicted for taking fish without a licence,¹⁵ despite the existence of our Treaty, common law and customary fishing rights, and the recognition of such rights in various pieces of fisheries legislation.¹⁶ Māori involvement in the commercial industry virtually disappeared and Māori ceased unsuccessful legal battles with the colonial court system until the legal climate changed in the 1980s.¹⁷

⁹ Waitangi Tribunal, *Muriwhenua Fishing Report* (Wai 22) 13-63.

¹⁰ *Ibid*, chapter 3.

¹¹ *Ibid*, chapter 4.

¹² The first fish law was the Oyster Fisheries Act 1866, which was passed as a result of concerns raised about the depletion of oyster beds adjacent to Auckland and other large settlements. The Fish Protection Act 1877 was the first “comprehensive fisheries control measure” in New Zealand. See *supra* note 9 at chapter 5, paragraphs 5.4 and following for other fisheries measures in the period 1870 onwards.

¹³ *Supra* note 9, chapter 6.

¹⁴ *Ibid*, chapter 6 at part 6.2 and following.

¹⁵ For instance, in 1909, the Reverend Manihera Tumatahi was fined £5 for fishing without a licence. He was fishing from his own land, into a lake from which he and his ancestors had always fished (Lake Rotorua), and caught a trout, a species of fish which had been liberated into the lake without the permission of or consultation with the local hapū. See Te Arawa Māori Trust Board *Te Arawa Māori Trust Board* (1974) for further information about this prosecution and the protests by Māori and threatened court action which followed.

¹⁶ In discussions of Māori fishing rights it is frequently forgotten that protection for Māori fishing rights was contained in legislation beginning with the Fish Protection Act 1877, s 8, which provided that nothing in the Act was to affect any of the provisions of the Treaty of Waitangi, or to take away Māori rights to any fishery. This provision was re-enacted in s 77(2) of the Fisheries Act 1908 and again, with slight amendment, as s 88(2) of the Fisheries Act 1983.

¹⁷ The case *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 was the first case of the new era of Māori fisheries litigation which re-opened the issue of Māori fishing rights.

3. Fisheries Reform and the Quota Management System

In the 1980s the government proposed to introduce the Quota Management System (QMS) in order to combat the depletion of the fisheries which had taken place under the old fisheries regime. Briefly, the QMS is an attempt to encourage fishers to farm the resource rather than to plunder it by giving fishers a transferable property right in the fisheries resource. This system was devised to enable the sustainable use of the fisheries by setting a total allowable catch (TAC) which would be established for each fish stock in each year, and by setting a total allowable commercial catch (TACC) as a portion of the TAC. The system then provided for individual transferable quotas (ITQs), which give a share of the TACC to the holder. The ITQ was to be allocated to holders of existing fishing licences as at the introduction of the system. The allocation was made on the basis of historical usage/catch by that licenceholder.

The ITQs are private property rights, and Māori saw the imposition of the QMS as an attempt to privatise the fisheries. From the point of view of Māori the fisheries were never the property of the Crown in the first place, so that the Crown was not entitled to treat the fisheries as private property. Furthermore, since the ITQs were allocated according to catch history it was unlikely that Māori would be able to get back into the industry through the allocation process. Although Māori might still have been able to purchase ITQs in the market, many Māori lacked the capital necessary to obtain ITQs by this method.

4. Challenge to the Quota Management System

The QMS was in direct conflict with the Treaty of Waitangi. A claim was therefore taken by the Muriwhenua people to the Waitangi Tribunal in respect of the introduction of the QMS, amongst other things, and in respect of the QMS the Tribunal said:

The system, we find, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Māori the full, exclusive and undisturbed possession of the property in fishing that to Māori was guaranteed. Like the right envisaged by the Treaty, the quota right of fishermen is held in perpetuity but may be sold, or some other agreement or arrangement may be settled upon. The system has not only excluded the Muriwhenua people, but it has placed real difficulties upon new fishermen getting in.¹⁸

¹⁸ Waitangi Tribunal, *supra* note 9, Summary, xx.

The Tribunal also found that any commercial fishing by non-Māori must “necessarily have interfered with” Māori fishing rights, and that an agreement was therefore required if such fishing was to be permitted.¹⁹ The Tribunal considered that, in light of the changed circumstances, new agreements between the Crown and Māori, whereby the QMS could be introduced in a way that would comply with the Treaty, were essential.²⁰

No such agreement could be reached, and four Māori parties – the Ngai Tahu Māori Trust Board, Muriwhenua, the Tainui Māori Trust Board and the New Zealand Māori Council - sought an interim injunction from the court preventing further fish species from being introduced into the QMS.²¹ The injunction was granted by the court on the basis that Māori had an arguable case that the government was breaching Māori fishing rights.²² The injunction represented a severe setback to the government, which wished to proceed with the introduction of the QMS in order to provide certainty to the fishing industry in terms of the legislative regime under which the industry had to operate. It also represented an apparent turn-around in the law, which had worked against Māori for more than 100 years. However, the decision was an interim one, and Māori were still very anxious and unsure about what the outcome might be if the matter went to court for a final decision on the merits.

The injunction forced the government into negotiations with Māori. The Māori negotiators took the initial stance that, while the whole fishery was Māori property, in the interests of the partnership under the Treaty between Māori and the Crown, and to show the reasonableness required by the court, Māori would settle for 50% of the fisheries. Originally this quota would be transferred to Māori over a 20-year period, but Māori objected to certain requirements of the Crown, and negotiations became drawn out.

The Crown introduced the Māori Fisheries Act 1989 as an interim settlement. That Act provided for the setting up of the Māori Fisheries Commission and for 10 percent of the total fishing quota to be transferred to the Commission, together with \$10 million in cash. This interim settlement

¹⁹ Ibid, 239.

²⁰ Idem.

²¹ These proceedings were later discontinued by s 11 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, as part of the settlement. For a discussion of the legal issues involved, which included both considerations of the principles of the Treaty and aboriginal rights, see *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

²² Ibid.

and the benefits therefrom, which came to be called the pre-settlement assets (PRESA) in later cases, have been the cause of considerable strife in Māoridom, not because of the terms of the interim settlement, but as a result of the terms of the final settlement made in 1992.

III. THE SETTLEMENT

1. Nature of the Settlement

The final settlement of the fisheries claims was made pursuant to the Deed of Settlement signed between the Māori negotiators, other Māori with far less knowledge of the background to the settlement and the Crown, and embodied in legislation in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (FCSA). The Act had, in the words of one commentator, a “turbulent passage” through Parliament.²³ No Māori member of the House supported it, and there was considerable opposition to the settlement and the means by which it was achieved amongst Māori generally.

The FCSA provided for the Crown to pay \$150 million to fund Māori to purchase Sealord Products Ltd in a 50-50 joint venture with Brierley Investments.²⁴ Sealord Products held 26 percent of the total fishing quota. Māori were also to receive 20 percent of all new species of fish brought under the QMS. The name of the Māori Fisheries Commission was changed to the Treaty of Waitangi Fisheries Commission (“the Commission”), and is now called Te Ohu Kaimoana. The Commission is responsible for implementing the settlement, and in particular for developing a method of allocation of the quota and other proceeds of the settlement to iwi (tribes). In exchange, Māori “agreed” that their Treaty fishing rights in respect of commercial fishing had been honoured, and that the deal was in full and final settlement of Māori commercial fishing claims.

Section 9 of the Act brought Māori fishing claims to an end and provided that “no court or tribunal shall have jurisdiction to inquire into the validity of such claims”, including claims regarding the validity of the Deed of Settlement. Section 40 abolished the jurisdiction of the Waitangi Tribunal to “inquire or further inquire into, or make any finding or recommendation in

²³ See Waetford, “Treaty of Waitangi (Fisheries Claims) Settlement Act 1992” [1993] Auckland Universities Law Review 402.

²⁴ It is salutary to remember that at this time Brierley Investments were still considered a profitable and successful business and were still based in Aotearoa.

respect of” commercial fishing, the Deed of Settlement or any enactment relating to commercial fishing.

Section 10 of the Act also provided that “claims by Māori in respect of non-commercial fishing ...[s]hall in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown...” Combined with section 9, this wording clearly indicates that commercial fishing no longer gives rise to Treaty obligations on the Crown. The section also provides for the Minister to make regulations regarding the recognition of customary food gathering, and for consultation with Māori in developing policies. However, the section also says that rights or interests of Māori in non-commercial fishing shall “henceforth have no legal effect”, and are not enforceable before the courts or provide a defence to any criminal or other proceeding.

In essence, the settlement was negotiated by some Māori, notably some of those involved in the court cases which delayed the introduction of the QMS, but the FCSA bound *all* Māori.²⁵ In exchange for rangatiratanga and the other rights Māori had under the Treaty and aboriginal rights’ doctrine, Māori received quota and cash and were forced to accept the QMS and the governance of the Minister of Fisheries. One may wonder how Māori could agree to this, and the answer is that many did not.²⁶

2. Issues Arising from the Settlement

A number of difficulties surround the settlement, some arising from the manner in which the settlement was achieved, others from the actual terms of the settlement. Some of the problems discussed at the time of the settlement have, with the passage of time, been ameliorated, while some problems have arisen which were unforeseen.

²⁵ See *Te Runanga o Wharehauri Rekohu v Attorney-General* [1993] 2 NZLR 301, 307 (CA), where Cooke P states that all parties to the Deed of Settlement agreed that the Deed did not bind those who were not signatories to the Deed. This case was taken by iwi who had not signed the Deed in an attempt to prevent the government introducing a Bill into Parliament which would implement the settlement in accordance with clause 3.5 of the Deed. In this case the Court of Appeal abided by the principle of non-interference by the courts in parliamentary proceedings. The courts could not and would not restrain a Minister from putting matters before the legislative assembly nor constrain a Minister to put matters before Parliament. The result was that the Minister was able to introduce the settlement Bill to Parliament, even though its provisions in binding all Māori did not match the provisions of the Deed of Settlement.

²⁶ See Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307, 1992).

At the time of settlement many Māori were unhappy with the lack of consultation undertaken on the terms of the settlement.²⁷ Many felt that they had been given insufficient detail about the terms of the settlement, and that consultation took place in a very short timeframe. There were also allegations that some of the signatories to the agreement did not have the mandate of the people whom they were supposed to represent.²⁸ In essence, the consultations and negotiations were carried out in a way which brought to mind classic “divide and rule” strategies. Those who could anticipate greatest benefit from the settlement, and who were very uncertain as to how the courts would find on Māori fishing rights in the long run or if Māori could fund an ongoing legal battle, wanted to seize on and implement the settlement before the government changed its mind. However, many Māori were concerned at losing rights which might give governance of the fisheries to Māori. Nor was the prospect of Māori being locked into the Sealords company with Brierleys, a typical corporate player whose primary concern was profit rather than the achievement of Māori aims, and which was best known for the asset-stripping expertise of its founder, an inviting one.

Those who wanted to take more time for consideration were not given time - the Act passed through Parliament without going through the select committee stage which would have allowed submissions to be made on legislation by the public and Māori.²⁹ Those who wanted more detailed information about the settlement were not given it. The Memorandum of Understanding between the Crown and the Māori negotiators containing the essence of the settlement was the document used in the consultation round, but it “was rarely seen except by the negotiators” on the grounds that it contained “privileged information, commercially sensitive, and therefore it remained hidden”.³⁰ Some coastal iwi, such as Ngati Porou, Ngati Kahungunu and Whanau-a-Apanui, all on the east coast of the North Island, did not support the settlement and no agreement was reached with them, although they were, of course, bound by the Act to the settlement. The drafting flaws of the Deed of Settlement and the FCSA evidence the haste with which the deal was rammed through, and the consequence for Māori has been ongoing strife.³¹

²⁷ Ibid.

²⁸ Ibid, 11-15.

²⁹ Supra note 23, at 402.

³⁰ (1992) 532 NZPD 12945, per B Gregory.

³¹ Supra notes 25 and 26 for examples of such strife. See also the series of court decisions relating to the allocation of PRESA under the settlement (*Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 331).

There was some concern about the actual quantum of the settlement,³² given the value of the fisheries, but far more about the specific extinguishment of Māori Treaty rights in respect of both the commercial and non-commercial fisheries.³³ In the earlier years of the Commission's existence, and particularly in 1995 and 1996, there was evidence of a philosophical conflict between Māori and the Crown over the nature of the ownership of the resource.³⁴ This conflict has led to court battles where the Commission has attempted to assert a greater role for Māori in the management of the fisheries than is provided for in the legislation. For instance, in the *New Zealand Fishing Industry Association* case, the Commission tried to argue that the Minister needed to take into account the interests of Māori people before cutting the TACC. However, the Court held that under the settlement Māori were in exactly the same position as all other holders of quota.³⁵ The Minister is required to consult with the Commission about matters such as the setting of the TACC but, as Māori have found in the past, being consulted is one thing and being in charge is another.

A number of circumstances can arise which will affect the tonnage of fish that can be taken under quota. In the *New Zealand Fishing Industry Association* case, the Minister reduced the TACC for snapper in one particular fisheries management area for two years in order to enhance the sustainability of that fish stock in that area. Such a reduction inevitably affects the value of the settlement to Māori. Another example of lack of control that Māori have in relation to fisheries was when one of the southern fisheries management areas was closed because of an epidemic which almost wiped out the whole of the Hooker sealion population; this affected Māori

³² However, according to the Briefing Report to the Incoming Minister of Fisheries, *supra* note 2, Māori now own 40% of quota outright and, with joint venture partners, control 60% of quota.

³³ *Supra* note 26.

³⁴ See *Te Ohu Kaimoana, Te Reo o te Tini a Tangaroa*, Issue Nos 23 and 26, for evidence of such conflict prior to the passing of the Fisheries Act 1996. Also, the editorial regarding "gripes" in relation to the Fisheries Bill, in Issue No 29, February 1996, highlights problems experienced by the Commission at that time. *Te Ohu Kai Moana* strongly advocated for inclusion, in the Bill, of a clause reading that the Act would be interpreted in a manner consistent with the provisions of the FCSA. The Commission's submission was accepted and the provision was enacted as s 5(2) of the Fisheries Act 1996.

³⁵ *New Zealand Fishing Industry Association and Ors v Minister of Fisheries, Treaty of Waitangi Fisheries Commission v Minister of Fisheries*, unreported, Court of Appeal, CA 82/97 and CA 83/97, 22 July 1997, Richardson P, Gault, Keith, Blanchard, and Tipping JJ, 20-21.

fishers who had quota to be fished in that area. At such times Māori have pushed for an increase in the TACC for other species without success. We are left to wonder what might have been the result had Māori retained their rights to governance of the fisheries and the fisheries themselves, under the Treaty and at common law.

One of the other issues relating to acceptance of the QMS by Māori relates to the continuing Crown persistence in pushing for resource rentals. The initial form in which the QMS was developed included the concept that quota holders would pay a resource rental to the Crown for the quota on the basis that the fisheries resource was a common pool resource and that those who “farmed” the resource should pay rental to the representatives (the Crown) of those who “owned” the resource (all New Zealanders). This concept again is in direct opposition to the Treaty which recognised Māori as owners of the resource - why should Māori pay rental for our own resource? The Commission has therefore continued to argue that the resource rental concept is unacceptable, although it has accepted the concept that the costs of the commercial industry should be borne by the industry.³⁶ The government’s focus has therefore moved to the idea of cost recovery for services such as research, registry maintenance, and compliance systems.³⁷ These costs have undermined the value of the settlement.

The other main issue which arose as a result of the settlement, and which is still having ongoing effect, is the distrust and division that was caused between the negotiators themselves, between the negotiators and Māori, and between Māori and Māori. The climate of mistrust flowed on to taint the work of the Commission in implementing the settlement, and is evidenced by the series of cases involving Urban Māori Authorities and their claims for a share of the benefits under the settlement. These cases are referred to in the next part of this article.

IV. IMPLEMENTATION OF THE SETTLEMENT

1. Nature of the Implementation

Under the FCSA legislation the Commission’s main objective is the development of a plan for the allocation to iwi of the assets obtained under the 1989 interim settlement (the pre-settlement assets), and then the distribution of the benefits from the final settlement. The Commission also

³⁶ Te Ohu Kaimoana, *Hui-a-tau Report* (1997) 10. See also Te Ohu Kaimoana, “Te Reo o te Tini a Tangaroa”, Issue 35, February 1997, 2.

³⁷ *Supra* note 2.

seeks to facilitate Māori entry into fishing and to help develop the business and activity of fishing.³⁸ The important point to note is that the Commission has been very active in growing the assets obtained in the settlement, but not without taking the risks associated with commercial ventures. The Commission has made a profit in most years, although in the 1998 financial year it made a loss.³⁹

While the Commission has been developing the plan of allocation, it leased the pre-settlement quota and the 20 percent of quota from new fish species as they were brought into the QMS to iwi. The leases were at a “discount rate” to assist Māori into the industry.⁴⁰

The Commission has also been involved in making submissions on new legislation affecting the industry, including the new Fisheries Act 1996 and its 1999 amendment, which make the statutory fisheries management regime more flexible, less complex and with clearer guidelines.⁴¹ The Commission is active on the Fishing Industry Board and committees, and in many ways has become aligned with the industry vis-a-vis the Crown.⁴²

Another important role of the Commission has been to put in place a training and development strategy to help Māori obtain the skills to be able to utilise effectively the fisheries resource and the benefits flowing from it.⁴³ A scholarship programme allows Māori to enrol in courses relevant to the fishing industry, including management courses, practical fishing operations skills courses and food management courses.

2. Issues Regarding Implementation

In order to accomplish the distribution of the pre-settlement assets, it was necessary for the Commission to develop a method of allocation, which it did in conjunction with widespread consultation with iwi. The method of allocation has been the cause of a lengthy and unedifying court battle between the Commission and traditional tribes on the one hand and Urban

³⁸ A summary of the activities of the Commission can be seen at the New Zealand Seafood Industry website. The requirement to facilitate and develop Māori fishing activity is set out in s 5 of the Māori Fisheries Act 1989, and was part of the interim settlement negotiated between Māori and the Crown.

³⁹ Te Ohu Kaimoana, *Annual Report* (1998) 5.

⁴⁰ *Ibid.*, 19. See also the later Annual Reports of the Commission.

⁴¹ *Ibid.*

⁴² *Supra* note 38.

⁴³ *Ibid.*

Māori Authorities (UMAs) on the other,⁴⁴ and between the Commission and some tribes as to the calculation of the entitlement of iwi to the assets.⁴⁵ The Commission has also faced litigation surrounding the leasing of quota to iwi pending the allocation of the settlement benefits.⁴⁶ All matters raised were not resolved prior to the change of Commissioners.

The essence of the argument between the previous Commission and the UMAs was over whether those to whom the allocation is made should be only traditional tribes or should include the UMAs. The UMAs are organisations that have developed in the cities to provide services to Māori living in the city, some of whom have become displaced from their traditional tribal area and have lost contact with their hapū or iwi. The UMAs provide a range of social services, such as health and employment services, but they also provide a focus for the expression of aspects of Māori culture, such as learning the Māori language, kapahaka (Māori songs and dances), and social and sporting interaction with other Māori. Māori who are members of the UMAs can come from all the different tribes. Many Māori came to the cities to find employment in the middle decades of the last century and their children or grandchildren no longer know the whakapapa which would link them back to their traditional iwi. These people have found support in the environment created by the UMAs.

While the settlement was in compensation for the loss of commercial fishing rights by those who had them (the traditional tribes), the benefits of the settlement were expressed to be for all Māori. The Commission argued that allocation should be made to the traditional tribes who would then have to ensure that the benefits were shared with all members, including those who no longer knew that they were members. The UMAs argued that traditional tribes would not have the systems (and perhaps the incentives) to find all beneficiaries and distribute the benefits to them, and that the UMAs had effectively become the iwi for the displaced. The argument finally turned on the meaning of the word “iwi” as used in the settlement documents. In

⁴⁴ Supra note 31.

⁴⁵ See eg *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*, unreported, High Court, Auckland, CP 395/93, Mar 31, 1999, Anderson J. For discussion of this case see Mikaere and Milroy, “Māori Issues” *New Zealand Law Review* [1999] 353, 369.

⁴⁶ See eg *Te Runanga o Raukawa Inc v Treaty of Waitangi Fisheries Commission*, unreported, Court of Appeal, CA 178/97, 14 October 1997, Thomas, Keith, and Tipping JJ; and *Te Iwi Moriori Trust Board v Treaty of Waitangi Fisheries Commission*, unreported, Court of Appeal, CA 238/96, 14 October 1996, Gault, Thomas, and Blanchard JJ).

Māori, “iwi” can mean “tribe” or it can mean “people”. The Williams Māori-English dictionary also gives the meaning of “iwi” as “nation”. This matter was argued in numerous courts in New Zealand, and one court outside New Zealand, the Privy Council.⁴⁷ The whole country was treated to the utterly appalling sight of a non-Māori judge deciding what a Māori word meant, and worse, to Māori experts from all over the country lining up against each other for one side or the other. The parties ceased to see the matter as one where a badly drafted commercial deal was having its flaws revealed, but saw it as a matter of the mana (prestige, reputation, status) of those involved. Once that happened, the possibilities for settling the matter by consensus between the parties disappeared.

Those who thought that the latest decision of the Court of Appeal, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*,⁴⁸ settled the matter in favour of the traditional tribes will need to reconsider. The Court’s decision means that the new Commission is bound to distribute the settlement assets solely to iwi and not to UMAs, whether the new Commissioners like it or not. The latest word is that the matter will be appealed to the Privy Council.

The new Commission will also need to resolve arguments between the previous Commission and some of the tribes about the basis of calculation of the quantum that each tribe is to receive, and whether compensation should be given in respect of alleged inequities in the leasing rounds which disadvantaged some tribes in terms of the amount of quota, provided to them for lease by the Commission, in comparison to others. Some tribes, such as Ngai Tahu who have lengthy coastlines, would benefit enormously from an allocation method based solely on the proportion that their coastline bears to the coastline of the country. Other tribes which had large populations preferred an allocation method based on population proportions. The previous Commission undertook wide and lengthy consultations with the tribes and originally proposed allocation on the basis of inshore stocks to go by coastline (with which there is general agreement), and deepwater stocks to go 40 percent by population of iwi and 60 percent by coastline. Some of the tribes disagreed with these proportions and took court action,⁴⁹ and the Commission also accepted in its allocation model that a special case should

⁴⁷ *Treaty Tribes Coalition v Urban Māori Authorities* [1997] 1 NZLR 513, an appeal from a decision of the Court of Appeal in *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10.

⁴⁸ *Supra* note 31.

⁴⁹ *Supra* note 45.

be made for the Chatham Islands people who preferred to be treated as having a separate fishery.

The last proposal by the previous Commission was for a 50:50 division between coastline and population, with a separate fishery for the Chathams. The cash was to be shared on a population basis, with some money being put into a development fund to assist Māori into fishing. Shares in the various fisheries companies were to be allocated in proportion to the quantity of quota (by tonnes) allocated to each iwi.

Once the new Commission has devised a plan of allocation, the process is that the Commission must report its plan to the Minister, who can either accept the plan or require the Commission to reconsider it.⁵⁰ If the Minister decides that the plan fulfils the requirements of the settlement, the Commission can proceed to allocation. If not, and no change follows from the reconsideration, the Minister has the option of introducing legislation to protect those beneficiaries who claim that they are disadvantaged by the scheme. On notification by the previous Commission that it intended to make a report to the Minister, an interim injunction was obtained by some of the tribes to prevent the report being made, so as to obtain further time for discussion with the Commission about the plan.⁵¹ It is yet to be seen whether further court action will be taken.

Other aspects of the previous Commission's allocation plan include stringent requirements on iwi relating to recognition of groups as iwi, the validation of the mandates of iwi organisations, and checking of iwi structures to ensure that they are able to account to their members to an acceptable standard. As the law stands at the moment, if the Commission does not recognise a group as an iwi, it will receive nothing from the settlement. As part of the recognition process, iwi organisations must have a mandate from the people they represent. Whether the Commission accepts a group as an iwi with a mandate is determined on guidelines originally developed by the Crown when trying to set up the (now repealed) Runanga Iwi Act. So, for instance, the iwi organisation:

must have a constitution which provides for full participation by iwi members in a regular electoral process. The constitution must entrench this provision and constitutional changes are to be made only with the consent of iwi members. Every iwi organisation must provide for ongoing structural accountability through

⁵⁰ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 15, which amended the Māori Fisheries Act 1989, s 6.

⁵¹ *Supra* note 45.

transparent separation of functions. There must also be appropriate communication and control processes between the entities responsible for the different functions. Every iwi organisation must ensure that access to the benefits of the settlement is available to all their members wherever they may reside and regardless of the strength of their ties to the iwi.⁵²

In other words, the iwi must be a body corporate. Thus, the Commission is requiring that Māori give up their traditional ways of recognising hapū and iwi, and adopt Western methods in order to fit in with the Western corporate model which is being imposed with the settlement.

The irony is that many, if not all, of these requirements could be met by the UMAs, but very few of them by traditional iwi. Many of the requirements for fulfilment of mandate are unheard of in iwi. The choosing of representatives by electoral process, while not unknown in other contexts, seems strange in relation to iwi, and the idea of an entrenched constitution is novel to say the least. The courts have upheld these requirements,⁵³ despite the fact that they are not custom or tikanga (the right way of doing things in the Māori world), as a matter of practicalities, but it is disturbing to see how traditional ways of doing things have been so quickly put aside in favour of European-based organisational models. This surely means a loss of rangatiratanga for those hapū and iwi who used to define themselves.

The previous Commission also developed a dispute resolution procedure intended for use in disputes between or within iwi over the distribution of the benefits of the settlement. It may be a forlorn hope that groups will be able to settle their differences by traditional consensus decision-making rather than having to resort to these procedures.

This whole process emphasises the importance of being clear at the outset of any settlement as to what the underlying principles of the settlement are. Is it to compensate for lost rights and if so who holds the rights? Is it to fulfil rights? How are those rights defined and by whom? Is the settlement to ameliorate the poor socio-economic conditions of a group of people, and if so who are those people? What objectives do you wish to achieve with the settlement: employment, compensation, service delivery, resource protection and conservation, or commercial gain? How best are these objectives to be achieved? Who should benefit, how are they to be identified, and how are they to receive that benefit? Many of these questions were not answered or

⁵² Te Ohu Kai Moana, *Report on the Proposed Method of Allocation of Pre-Settlement Assets* (1998) 7.

⁵³ *Te Runanga o Wharekauri Rekohu Inc v Treaty of Waitangi Fisheries Commission*, unreported, High Court, Wellington, CP 297/95, 11 September 1997, McGechan J.

not clearly answered in the Māori fisheries settlement and thus problems have arisen accordingly.

One last point to emphasise about the settlement is that it was imposed without adequate agreement from Māori and, by “accepting” a property right in the fisheries, rather than fully developing the Treaty right, Māori have been left with diminished, if any, rangatiratanga.

V. MĀORI COMMERCIAL FISHING

1. Developing Māori Commercial Fishing

So far the discussion has focussed on the Crown, Māori in general and the Commission. However, Māori have been actively using the property rights provided by the settlement. As previously stated, the Commission is leasing quota to iwi at a discounted rate while preparing the final allocation plan. A market has been created for the sale and purchase of quota so that it has been possible for iwi to on-sell the leased quota to others in the industry, and thus make a profit. Many iwi have chosen to do this and it remains their sole involvement in the industry. Other iwi, such as Ngai Tahu and Tainui, wished to engage actively in fishing operations. Their ideal goals were not only to make profit which would be fed back to iwi members as dividends, but also to provide employment for iwi members and to ensure that the resource was fished in accordance with tikanga and conservation principles in order to protect and maintain the resource for future generations.⁵⁴

Raukura Moana Fisheries Ltd⁵⁵ is one example of the initiatives by iwi to enter the fishing business. Raukura Moana Fisheries Ltd was set up by three tribes, Waikato, Maniapoto and Raukawa, all members of Tainui waka. The aim of the tribes in going into the venture was primarily to provide employment for their people. However, the company was set up as a standard commercial company - nothing was written into the constitution of the company or any of the founding documents of the company which would indicate that employment was the primary aim of the venture. Each tribe put

⁵⁴ Unfortunately conflicts may develop between the goal of profit and the goals of tikanga and conservation.

⁵⁵ This information comes from my colleague at Waikato Law School, Linda Te Aho, who was until recently a director of Raukura Moana Fisheries Ltd and whose father remains the chairman of the company. I am very grateful to Linda, who generously agreed to be interviewed in order that some of the lessons that were learned by the company could be passed on.

in the start-up capital from its own funds - the tribes had no access to a portion of the fisheries settlement monies for the setting up of the company.

The export industry, which is based on the deepwater fish species, is more profitable than the inshore fisheries, and the company directed its business accordingly. None of the tribes had any commercial fisheries experience to speak of, so it was a new and risky venture for them. The company therefore had to buy in the expertise that they needed to run the fishing operation, especially as the established industry members initially tried to push Raukura Moana out of the industry.

Reliance on outside expertise provided a way into the industry for the company, but consultants tended to see the company as a cash cow, which caused considerable trouble for the company. The consultants were also not as “expert” as the company expected and in some cases really only had a head start on the tribes’ own people. However, the company had to weigh up the risk of using outside experts against letting their own people work their way through. With limited funds and a very difficult trading situation, the incentives were there to buy in the expertise. Steps have been taken to help tribal members gain the skills necessary to run the business, but it may be many years before the dream of an operation run entirely by the tribes will be a reality.

The deepwater manager’s review in the company’s annual report details some of the issues that the company needs to deal with. The manager notes that the “critical success factor” for the company is securing required quota from one fishing season to the next. The quota leases are for one year only and it is important to get sufficient quota in order to make the operation economically viable in the first place, and to make gains from economies of scale. The setting of the TACC for each year also means that the company is not sure from one year to the next what quota it will have. Thus there is huge pressure on the commercial operators, who are keen to see the finalisation of the settlement by the Commission. To deal with the difficulties of short-term leasing, the company has entered into pooling of quota arrangements with other iwi in order to have the “critical mass to spread the risks”.⁵⁶

Another problem with the short-term nature of leased quota is that banks have refused to accept lease quota as security for loans, so there is added pressure in obtaining sufficient working capital to keep a highly volatile business going. Within any one year cash flow is not steady - there are times when the company is paying out continuously with income not due for long

⁵⁶ Chairman’s Report, *Raukura Moana Fisheries Limited Annual Report 1999*.

periods of time, so large amounts of working capital are essential. The company has also retained profits in order to help build up the company but it was not easy to tell tribal members, who have justifiable need for the funds, that they would have to wait.

2. Lessons for Development of Māori Commercial Fishing

While Raukura Moana is now a healthy company it is obvious that there are tremendous difficulties in the way of iwi entering into the fishing business. Many of the lessons to be learned from the Raukura Moana experience are the lessons to be learned from inexperienced people going into any business venture. The fishing business is a competitive, complex and risky business, where some of the factors affecting the business are not within the control of the managers. Other iwi initiatives, for example the Mt Fish initiative, have failed due to inexperience in the business.

Some lessons are particularly relevant to indigenous peoples. The business requires long-term investment and the ability to take the volatility in the returns. However, the returns for entering into the fishing business have been greater than if the tribes had simply sold on their quota. Using the quota also offers better long-term prospects than quota trading.

The amicable agreements that have been reached between the tribes setting up the company, and between the company and the tribes involved in the partnering arrangements, have been very important to the company's success. And the more tribes involved in the business the easier it has been to achieve that success. This can be contrasted with the shambles surrounding the settlement and method of allocation, where huge amounts have been lost in costs and delays.

The tribes also accepted the necessity of delay in providing employment for their own people where the necessary expertise was missing. However, it is very easy to continue along that original pathway of buying in expertise because the company is in a commercial environment where maximising profit becomes the be all and end all. All the incentives are there for company members and the tribal members involved to lose sight of the original objectives. Whatever the tribal objectives are, they need to be written at the outset into the constitutional documents, and probably into the employment contracts of the senior management, so as to be measures of the company's and managers' performance. Of course, there also needs to be allowance for the long-term nature of some of these goals.

The success of a commercial venture may be as close as Māori can come in the commercial fishing industry to claiming back rangatiratanga. However, the limits on the rights of the iwi owning the quota and the vulnerability of any commercial venture mean that this is a very limited form of rangatiratanga.

VI. CUSTOMARY FISHING REGULATIONS

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 included a provision, against the objections of Māori, that non-commercial fishing rights would become legally unenforceable and that instead the Minister, acting in accordance with the principles of the Treaty, shall consult with Māori and “develop policies to help recognise use and management practices of Māori in the exercise of non-commercial rights...”.⁵⁷

One difficulty with the section, amongst others, is that the principles of the Treaty were developed by a Pākehā court interpreting the Treaty when the judges in the court could not even speak Māori.⁵⁸ The court’s principles speak of a partnership and consultation between Māori and the Crown. Under this decision both parties must act in good faith and with reasonableness, but the Crown has the right and duty to govern. The Māori language version of the Treaty actually says that Māori retained tino rangatiratanga, the right to self-government. Section 10 of the Act is therefore a breach of the Treaty in itself because it gives to the Minister the right to make regulations governing Māori in the exercise of our customs.

Another difficulty is that, if Māori wish to challenge the Minister’s actions under the section, the only requirement that the Minister actually has to meet is to consult with Māori. The Court of Appeal has already found that the requirement of consultation is not open-ended,⁵⁹ and there is no necessity for the Minister to act on submissions from Māori. The Minister’s ultimate defence is that the Crown has the right to govern. Māori are dependent on the good faith of the Minister. This is clearly a loss of rangatiratanga.

From the passing of the Act, the Ministry of Fisheries attempted to get agreement on the form of the regulations with a group of Māori representatives. The Māori representatives ultimately walked out of the discussions because the consultation being conducted by the Minister was

⁵⁷ Section 10(b).

⁵⁸ The principles were contained in the judgment of the Court of Appeal in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

⁵⁹ *Ibid*, 665, per Cooke P.

unacceptably inflexible in terms of what the Minister was prepared to negotiate. The Ministry had taken no account of the fact that different hapū around Aotearoa had different customs and practices, and that the regulations needed to provide for this. The result was that a considerable time passed while the Ministry went around to the different hapū and iwi and worked out with them what was needed. The operation of the regulations means that that consultation with the local people must continue.⁶⁰

There are two sets of regulations in place, one for the North Island and one for the South Island, although they are similar in most respects. The regulations in the North Island are called the Kaimoana Customary Fishing Regulations 1998⁶¹ and cover non-commercial customary fishing, which means fishing to provide food for hui (meetings) and tangi (funerals), and which does not involve the exchange of money or other form of payment.⁶²

The regulations provide for the tangata whenua (people of the area) of any particular area to appoint a tangata kaitiaki/tiaki (guardian) who is responsible for issuing authorisations to individuals or groups to fish for customary purposes.⁶³ The tangata whenua notify the appointment to the Minister, who will notify the public by advertisement in the newspaper.⁶⁴ Where there is a dispute about who are the tangata whenua of an area, or over who has been appointed tangata kaitiaki, it must be resolved by the groups involved before the Minister will confirm the appointment.⁶⁵ Only on the advice of the tangata whenua or the tangata kaitiaki may the Minister cancel the appointment once it is made.⁶⁶

The authorisations given by the tangata kaitiaki govern the date when fishing is to occur, who can take the fish, the quantity and size of each species to be caught, the fishing method, the area where fishing is to occur, the purpose and venue for which the fish are needed, and any other matters that the tangata kaitiaki considers necessary.⁶⁷ The fishers must carry the

⁶⁰ The main requirement for consultation under the regulations occurs when tangata whenua apply for the setting up of a mātaimai reserve. See Reg 20.

⁶¹ SR 1998/434.

⁶² Recreational fishing by Māori is covered by the Amateur Fishing Regulations, which apply to Māori and non-Māori alike.

⁶³ Reg 5.

⁶⁴ Reg 6.

⁶⁵ Reg 8 provides for a dispute resolution process to be undertaken where there is disagreement on such matters.

⁶⁶ Reg 10.

⁶⁷ Reg 11.

authorisation with them when they go fishing. The enforcement of the regulations is carried out by fisheries officers. It should also be noted that all the processes of appointment of tangata kaitiaki go back through the Minister's office. So, while the local people have a certain measure of control, it takes place within the oversight of the Minister.⁶⁸

The tangata kaitiaki must keep accurate records of the authorisations that they issue and the quantities of fish taken.⁶⁹ They also take part in fisheries management processes, such as setting the TAC and developing regulations.⁷⁰ They must report to tangata whenua each year on how the fishing has been managed, and to the Ministry each quarter on the quantity and species harvested and in what area.⁷¹

The regulations provide for tangata whenua to have a say in the management of their customary fisheries, including the activities of commercial and recreational fishers. The tangata kaitiaki may also develop management plans for the fisheries within their area for approval by the tangata whenua.⁷² These documents can be "Iwi Planning documents" for the purposes of the Resource Management Act 1991, which means that the plans will be taken into account by local and regional councils in developing their plans and considering resource consents. The plans can also be used for the development of sustainability measures for the fisheries in the area. The sustainability measures ultimately guide the setting of the TAC by the Minister.

The regulations also provide for the establishment of mātaimai reserves,⁷³ which are areas where the tangata whenua manage all non-commercial fishing by making bylaws. The bylaws apply to everyone, and generally commercial fishing is prohibited within the reserve unless the tangata kaitiaki proposes to the Minister that a commercial harvest be allowed for specified species and quantities for a specified period. The Minister will then consult with the tangata whenua and representatives of people with an

⁶⁸ See eg reg 34 which gives the Minister powers regarding the management of the rohe moana (defined area of the sea) where the Minister considers, for example, that it is not being "managed in a manner consistent with sustainable utilisation of the fisheries resources..."

⁶⁹ Regs 35 and 36.

⁷⁰ Regs 14–17.

⁷¹ Reg 38.

⁷² Ibid.

⁷³ Regs 18–32 govern the setting up and administration of mātaimai reserves.

interest in the fish stock and recommend (or not) that a regulation allowing the commercial harvest to take place.

Approval of a mātaimitai reserve proposal is over to the Minister who must be satisfied that:

- a special relationship exists between tangata whenua and the area of the proposed reserve;
- the proposed reserve is a traditional fishing ground;
- the proposed reserve can be effectively managed by the tangata whenua;
- the general management aims are consistent with the sustainable use of the fisheries resources in the area;
- the proposed mātaimitai reserve is not a marine reserve;
- the reserve will not unreasonably affect the ability of the local community to take fish for non-commercial purposes;
- the reserve will not prevent persons with a commercial interest in a species from taking their quota or annual catch entitlements, or those with a commercial fishing permit from taking fish within the fishing management area;
- the reserve will not unreasonably prevent non-commercial fishers from fishing within the fishing management area.⁷⁴

Once a mātaimitai reserve is established, control of the fishing in the area lies with the tangata kaitiaki, although the making of the bylaws also goes through a process to obtain the approval of the Minister.

The result of these regulations is that Māori can have some control over customary fishing and some control in respect of mātaimitai reserves, but it is still within the overarching control of the Minister.

VII. CONCLUSION

The settlement of Māori fishing claims has had far reaching effects on the fishing industry and on Māori. The promise of the Treaty, that Māori would continue to enjoy the governance and bounty of the fisheries resources that they had prior to European contact, has not been fulfilled. There has been more litigation by Māori on the settlement than on any other single issue which has faced Māori. Huge amounts of money have been paid to lawyers, but Māori are yet to see a final allocation of the benefits eight years afterwards. The settlement provided for the extinguishment of Māori rights, including tino rangatiratanga, in exchange for limited rights under the QMS and the customary fishing regime. Whether that exchange will provide Māori

⁷⁴ Reg 23.

with the benefits of governance that we would have had under the Treaty is yet to be seen. But, in light of what has been provided under the legislation, any rangatiratanga will be but a shadow of what might have been.

Ki Te Ao Mārama

**Tenth Anniversary Hui-ā-Tau
1998 Conference Proceedings of
Te Hunga Roia Māori o Aotearoa
(Māori Law Society)**

Te Hunga Roia Māori (the Māori Law Society) was established in 1988 to provide an annual opportunity for Māori lawyers to discuss legal and ethical issues relevant to Māori. Since that time, the organisation has grown dramatically and its membership now includes practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and law students.

The 1998 conference was a significant event in the life of Te Hunga Roia Māori: we celebrated our first ten years with a particularly interesting line-up of speakers and we were also fortunate enough to gain the necessary funding to produce the papers presented. Our contributors ranged from practitioners to doctoral students, from Professor of Māori studies Mason Durie to Mohawk legal academic Patricia Monture-Angus. The contents of the Conference Proceedings are similarly diverse, ranging from the highly academic to the very practical. A table of contents is as follows.

- *Introduction* Craig Coxhead
- *At the Boundary: Indigenous Lawyers in the 90's* Patricia Monture-Angus
- *Beyond Treaty of Waitangi Claims: The Politics of Positive Development* Mason Durie
- *Te Hunga Roia in Context: A Brief Journey Through Time* Moana Jackson
- *Post-Settlement Implementation Issues* Robert Joseph
- *Seeing the "Māori Subject": Some Discussion Points* Paul Meredith
- *Insolvency Law: The Impact on Māori* Troy Wano Rawiri Eriksen
- *Te Puni Kokiri Workshop Report: The Te Ture Whenua Māori (Māori Land) Act Review*
- *Mortgages and the Alienation Provisions of Te Ture Whenua Māori Act* Stephanie Milroy
- *Legal Aid Applications, Criteria and Process Workshop* Victoria Kingi
- *Understanding the Litigation Process Workshop* Karleen Broughton
- *On Being Māori and Being a Lawyer: The Musings of a Māori Legal Academic* Ani Mikaere

Copies are available at a cost of NZ\$15 (including postage) from:

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Auckland.

Alternatively, email James Hudson at j.hudson@auckland.ac.nz

ADDRESSING ANOMALIES CREATED BY THE FICTION OF LIFE IMPRISONMENT

BY SHADIA RAHMAN*

I. INTRODUCTION

The sentencing of serious violent offenders is an issue that is currently attracting great public interest in New Zealand. This article looks at one aspect of sentencing such offenders: the sentencing of multiple offenders who are subject to life imprisonment. Although life imprisonment is considered under the law to be imprisonment for life, many of those subject to life imprisonment are released from prison on parole while they are still alive. But the common law on sentencing does not recognise this reality. Consequently, anomalies result when it comes to the sentencing of those who have committed other offences as well as the offence attracting life imprisonment.

This article attempts to address those anomalies. It first explains the common law relating to the sentencing of multiple offenders who have committed an offence punishable by life imprisonment, and examines the anomalies created by this law. It then analyses the ways in which these anomalies are currently addressed by legislation in New Zealand, and analyses the adequacy of these legislative measures. Finally, it proposes an alternative way to address the anomalies created by the common law.

II. COMMON LAW ON SENTENCING MULTIPLE OFFENDERS

1. Multiple Offenders

Multiple offenders are those who are either being sentenced for more than one offence at the one trial, or who are already serving a sentence and are being sentenced for another offence.¹ The offences may have arisen from a single incident, or they may have been committed on separate occasions over a period of time.² The following examples illustrate the type of situations in which multiple offences can arise:

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¹ Von Hirsch, A and Ashworth, A (eds) *Principled Sentencing: Readings on Theory and Policy* (1998) v.

² Donovan, "Buck Should Stop Here: Consecutive Sentencing of Multiple Offenders in Iowa" (1980) *Iowa L Rev* 468, 481. This may occur because there were separate trials or because the second offence occurred in prison.

- A stabs B and then sets fire to B's house; A is convicted of murder and arson;
- C is serving a sentence of life imprisonment; after formulating a cunning plan, she escapes from prison and robs a bank, seriously injuring two security guards in the process; she is convicted of aggravated robbery and two counts of causing grievous bodily harm;
- D is a serial rapist and murderer; over the course of a year, he sexually violates and murders 12 women; he is convicted on 12 counts of murder and 12 counts of sexual violation by rape.

Ordinarily, there are two ways to deal with a situation where an offender has received more than one sentence. One is simply to add together the sentences received for each offence. This is known as consecutive or cumulative sentencing. So, for example, if an offender has received two sentences of four years' imprisonment each, under consecutive sentencing he or she would serve a total of eight years' imprisonment. The other way is to allow the offender to serve all the sentences at the same time – so that for each day the offender spends in prison, one day is taken off each of the separate sentences imposed. This is known as concurrent sentencing. Under concurrent sentencing, the offender receiving two four-year sentences would spend only a total of four years in prison, as he or she would serve both four-year sentences at once. Normally, a mixture of concurrent and consecutive sentences is imposed in order to arrive at a total sentence that fairly represents the totality of the offending.³

2. Multiple Offenders and Life Imprisonment: The Rule in *Foy*

In the case of life imprisonment, consecutive sentences *cannot* be imposed. Courts are not allowed to impose a consecutive sentence on life imprisonment. This rule derives from English case law, primarily *R v Foy*. In that case, Lord Parker of the English Court of Appeal stated:

Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but when they do come out it is only on licence, and the sentence of life imprisonment remains upon them until they die. Accordingly, if the court makes any period of years consecutive to life imprisonment, the court is passing a sentence which is no sentence at all, in that it cannot operate until the sentenced man dies.⁴

³ For more detail, see Hall, *G Hall's Sentencing* (2000).

⁴ [1962] 1 WLR 609; [1962] 2 All ER 246, 247 (CA).

This reasoning was adopted by the New Zealand Court of Appeal in *R v de Malmanche*.⁵ In that case, a life prisoner, previously convicted of murder, took part in a prison riot in which, among other things, he assaulted a warden. A Magistrate passed a sentence on that assault charge, cumulative on the sentence of life imprisonment. The Court of Appeal quashed that sentence, and substituted a concurrent sentence, reasoning that because there was no provision for a sentence of life imprisonment to be brought to an end – but merely for the prisoner to be discharged “on licence” – no sentence could be imposed cumulatively upon it.

3. *The Nature of a Life Sentence*

A life sentence must be imposed for murder,⁶ and is the maximum penalty that may be imposed for manslaughter⁷ and a small number of other offences.⁸ When a convicted offender is sentenced to life imprisonment, it does not mean that the offender will necessarily spend the rest of his or her life in prison. All life prisoners are eligible to be released on parole after they have served their minimum non-parole period – this is a period of ten years,⁹ unless the sentencing Judge orders a longer minimum non-parole period for that offender under section 80(1).¹⁰

But there is no obligation ever to release life inmates, even when they become eligible for parole. And when they are released, they are released subject to conditions imposed by the Parole Board. They remain subject to these conditions for life. If they breach these conditions, or if they commit an offence or are considered to be likely to commit an offence, they can be recalled to prison to continue serving their life sentence in prison.¹¹

⁵ Unreported, Court of Appeal, CA73/65, 28 March 1966, North P, Turner and McCarthy JJ.

⁶ Crimes Act 1961, s 172. A life sentence may also be imposed for piratical acts which involve murder, attempted murder, or acts which endanger the life of any person: Crimes Act 1961, s 94.

⁷ Crimes Act 1961 s 177.

⁸ Dealing in class A drugs (such as heroin) (Misuse of Drugs Act 1975, s 6(2)(a)); hijacking (Aviation Crimes Act 1972, s 3); 14 military offences under the Armed Forces Discipline Act 1971 and two offences under the Chemical Weapons (Prohibition) Act 1996.

⁹ Criminal Justice Act 1985, s 89(1).

¹⁰ Criminal Justice Act 1985, s89(2). This aspect will be dealt with in more detail later in this article.

¹¹ Criminal Justice Act 1985, s 107I, s 107L. Note, however, the comments of Randerson J in *Hart v Parole Board* [1993] 3 NZLR 97, 99 (HC), where he stated that “plainly an

This is why Lord Parker LCJ stated in *Foy* that the sentence of life imprisonment remains on those sentenced to it for the rest of their life – even if they do not spend the rest of their life in prison. And because the sentence never ends, there is no point at which a sentence purported to be made consecutive to the life sentence can begin – therefore, it is not conceptually possible to impose a sentence consecutive to life imprisonment.

4. Problems with the Rule in *Foy*

The prohibition on sentences consecutive to life imprisonment creates many problems. First, as identified by Hammond J in *R v McElroy*,¹² it creates an anomaly. If an offender is sentenced for rape on one day and murder on the following day, then the sentences can properly be made consecutive. The logic of Parker LCJ in *Foy* would not apply in this case. But if the sentence for murder is imposed first, then *Foy* would apply, and the sentences must be made concurrent.

A second problem is that those who commit offences punishable by life imprisonment are effectively unpunished for any other crimes they may commit. The situations in which this can arise include multiple murders,¹³ other crimes committed at the same time as the murder (or other offence punishable by life imprisonment),¹⁴ and crimes committed by those serving a sentence of life imprisonment either in prison or after escaping from prison.¹⁵ *McElroy* itself provided an example of a situation where a murderer committed other offences at the same time as the murder, including rape, arson and manslaughter. Hammond J was unable to find any principled way of ensuring that the offender was punished to a greater degree than if he had simply committed murder. *R v de Malmanche*, discussed above, provides an example of a life inmate committing further offences and effectively being unable to be punished for those offences.

In addition, there have been a number of cases in New Zealand in which persons sentenced to life imprisonment have escaped and committed further crimes while at large. One is *R v Haunui and Greening*,¹⁶ where two accused serving terms of life imprisonment for murder escaped and terrorised a

application [for recall to prison] will usually be made only where an offence of some seriousness occurred while the offender is on parole”.

¹² [1993] 3 NZLR 192, 196 (HC).

¹³ As with offender D.

¹⁴ As with offender A

¹⁵ As with offender C. See further *R v Haunui and Greening* (1992) 8 CRNZ 543 (HC).

¹⁶ (1992) 8 CRNZ 543 (HC), Fisher J.

neighbouring family in order to obtain weapons, goods and vehicles. Knowing full well that they could not be subjected to further terms of imprisonment, the two offenders hugely enjoyed their further court appearance, much to the consternation of the sentencing judge, Fisher J.¹⁷ All that Fisher J could do in this situation was to direct that his remarks about the offenders be brought to the attention of the parole authorities, with a recommendation that the offenders' parole eligibility date be substantially postponed. He could not impose a sentence that would have any practical effect on the offenders – and even the steps he did take were questioned as to their validity by Hammond J in *McElroy*, as the Parole Board is supposed to be an independent body.¹⁸ It seems anomalous that, while offences punishable by life imprisonment are arguably regarded as the most serious crimes in New Zealand, those who commit them are effectively absolved from any further punishment for further crimes they may commit.

A third problem is, as arose in *Haunui* and recognised by Hammond J in *McElroy*, that, if at sentencing, a life prisoner hurled abuse at the court, the court “could not even to pass a cumulative sentence of contempt to maintain the integrity of its own processes”.¹⁹

Finally, the inability to punish further those subject to sentences of life imprisonment is contrary to the purposes of sentencing, and the sentencing theories and principles that are currently applied in New Zealand. The primary purpose of sentencing in New Zealand is to protect the public from crime, and to preserve the peace and order of society.²⁰ This is achieved by imposing sentences upon offenders which are commensurate with the seriousness of the offences committed – in other words, sentences which are deserved by the offender (“just deserts”); sentences which deter the offender and others from committing (further) offences; sentences which prevent offenders from committing further offences by incapacitating them; and sentences which rehabilitate offenders so that they are not inclined to commit any further offences. But the inability to impose consecutive

¹⁷ See *R v Haunui and Greening*, supra note 15, at 546, per Fisher J: “I am glad that you are enjoying this occasion, going by the smiles on your faces”.

¹⁸ The Parole Board does on occasion take into account the views of the courts when making decisions on parole (see *Gordon v Parole Board*, unreported, High Court, Dunedin, CP13-98, 13 November 1998, Hansen & Chisholm JJ). However, it is an independent body, and it is therefore undesirable for a court to give directions to the Board.

¹⁹ Supra note 12, at 195.

²⁰ Criminal Justice Act 1985, s 5; *R v Clarke*, unreported, Court of Appeal, CA255/98, 3 September 1998, Keith, Heron & Elias JJ).

sentences onto a sentence of life imprisonment is contrary to the first three of these purposes of sentencing:

First, it becomes almost impossible to impose a sentence that is commensurate with the total offending by an offender if no extra sentence can be imposed on someone who has committed murder. For example, offender D, who committed 12 murders, would receive no greater a sentence than an offender who had committed only murder. The same applies to offenders A and D, who have both committed offences which are worse than murder alone, and therefore deserve weightier sentences. Yet there is no way to sanction the more serious nature of this offending, as consecutive sentences cannot be imposed to reflect the extra offending.

Secondly, the rule in *Foy* can weaken the deterrent effect of sentencing, because once an offender has committed an offence attracting a life sentence, there is no incentive not to go on offending as the punishment imposed can be no more severe than a simple life sentence. Thus, the principle of individual deterrence is undermined by the inability to sanction the other offending. General deterrence is also undermined to some degree, because members of the public will note that, if they are sentenced to life imprisonment, they will be immune from further punishment for any other that crimes they may have committed or be inclined to commit.

Thirdly, although it is difficult to predict which offenders are likely to reoffend upon release, evidence has shown that one of the best predictors of future offending is past criminal activity.²¹ Those with a history of past offending are the ones most likely to reoffend in future. Thus, those who have committed multiple offences on unrelated occasions (such as offenders C and D) are more likely to reoffend when released. Yet the rule in *Foy* prevents the incapacitation of these offenders for any longer period of time – and thus prevents the Court system from protecting the public from these offenders.

Thus, in addition to the problems already discussed, the rule in *Foy* is contrary to most of the purposes of sentencing.

²¹ Research by the 1986 (United States) National Panel on Research on Criminal Careers: Blumstein, A, Cohen, J, Roth, J and Visher, C (eds) *Criminal Careers and Career Criminals*, Vol I (1986).

5. *Departure From the Rule in Foy?*

At first glance, the easiest answer to this problem would be simply to disregard the conceptual limitations pointed out by Parker LCJ in *Foy*, and allow the imposition of consecutive life sentences in appropriate situations. But there is one problem that would prevent this course of action having any practical effect in New Zealand. That is that imposing a sentence consecutive to life imprisonment (or vice versa) would make no difference to the date at which the offender would be eligible for parole. Under section 92(2) Criminal Justice Act 1985, when calculating parole eligibility for an offender serving consecutive terms of imprisonment, the procedure is to treat the consecutive terms as one term of imprisonment. So, for example, consecutive terms of five years' imprisonment and life imprisonment would be treated effectively as one term of life imprisonment – as it is nonsensical to envisage a single term of “life + five years”. Thus, the date of eligibility for parole would be the same as that for life imprisonment, even if the offender *were* facing a sentence consecutive to a term of life imprisonment.

III. LEGISLATIVE RESPONSE TO ANOMALIES

1. *Criminal Justice Act, section 80*

The Criminal Justice Amendment Act (No. 1) 1993 provides some relief for the problems caused by the rule in *Foy*. It brought in a new section 80 of the Criminal Justice Act, allowing a sentencing court to order an offender being sentenced to an “indeterminate sentence” (which includes life imprisonment)²² to serve a minimum period of imprisonment of *more* than the ten years set out in section 89 before being eligible for parole.

When the new section 80 was first enacted, a court could make such an order only if it was satisfied that the circumstances of the offence were “so exceptional” that such an order was justified. This was a very high standard: the Court of Appeal in *R v Parsons* stated that “[i]t is a power to be exercised only in the exceptional case which is so horrendous or repugnant as to justify additional denunciation”.²³ But the wording was changed in 1999, bringing in a standard of the circumstances of the offending being merely “sufficiently serious” to justify the order.²⁴ “Sufficiently serious” means out

²² Criminal Justice Act 1985 s 2

²³ [1996] 3 NZLR 129, 131 (CA).

²⁴ Criminal Justice Amendment Act (No. 2) 1999.

of the ordinary but not exceptional.²⁵ The change in wording lowered the threshold for imposing minimum non-parole periods.

One effect of section 80 is that, where a person who commits an offence punishable by life imprisonment also commits other offences, the sentencing court *can* ensure that the multiple offender is punished more than a single offender who commits only the offence punishable by life imprisonment. The court can do this by making an order that the multiple offender must serve a longer period in prison before being eligible for parole. There is no statutory restriction on the duration of the minimum term specified in an order under section 80, and in theory a sentencing judge could impose a sentence well in excess of the ten-year parole date that would otherwise apply. To date, the longest minimum term ordered under section 80 for murder is 18 years.²⁶

The appropriate punishment of multiple offenders was not the primary reason why the present section 80 was enacted. It was one reason,²⁷ but more important was the need to meet the public demand for denunciation and punishment for particularly horrendous crimes – whether these crimes were accompanied by multiple offending or not.²⁸ The section therefore applies also to single offenders who commit the offence attracting life imprisonment in a particularly repugnant or brutal way.²⁹ There are many factors which a

²⁵ Criminal Justice Act 1985 s 80(5A).

²⁶ This was imposed on Carlos Namana, who shot Mangakino police officer Constable Murray Stretch last year: *R v Namana*, unreported, High Court, Rotorua, 5 September 2000, T99/2180, Nicholson J; and on Taffy Hotene, who raped and murdered journalist Kylie Jones in Auckland: *R v Hotene*, unreported, High Court, Auckland, 523/2000, 9 October 2000, Paterson J).

²⁷ See comments of Mr Rob Munroe during the Second Reading of the Bill: (1993) 535 NZPD 15714, 10 June 1993: “That will mean that if community revulsion is clearly expressed – perhaps if multiple offending has taken place – a High Court judge will be able to express at the time of sentencing, not later, the feeling of the court”.

²⁸ See the comments of Hon D A M Graham in (1993) 535 NZPD 15916 at the Third Reading of the Bill (17 June 1993).

²⁹ See eg *R v Mane*, unreported, Court of Appeal, CA 233/99, 24 August 1999, Blanchard, Gallen and Anderson JJ, where the court made an order for a minimum non-parole period of 17 years for a “carefully planned and cold-blooded execution” of a prosecution witness in his own home; and *R v Krynen*, unreported, High Court, New Plymouth, T1/96, 6 June 1996, Robertson J, where the court made an order for a minimum non-parole period of 12.5 years for a random slaying with an axe of a neighbour who was not known to the offender, in circumstances where the offender was suicidal and his object

court can take into account in deciding whether the circumstances of an offence are “sufficiently serious” to attract the operation of section 80. These include an unusual level of premeditation, brutality, depravity or callousness,³⁰ or any home invasion involved.³¹

The courts have, however, specifically noted the commission of multiple offences as one of the factors to take into account when considering an order under section 80.³² The surrounding circumstances of offending, including any other offences committed at the same time, can properly be taken into account when making an order under section 80. In *R v Sibley*,³³ for example, the offender pleaded guilty to the murder of a three-year-old child and the attempted murder of her mother. The offender received a concurrent sentence for the attempted murder. Despite this, the Court of Appeal noted that it was appropriate for the purposes of section 80 to regard the attempted murder as forming part of the circumstances surrounding the offence of murder – and therefore appropriate to take it into account when making an order under section 80.³⁴

A review of the cases shows that multiple offending often features in cases where orders are made under section 80. In *R v Watson*,³⁵ Scott Watson received a minimum non-parole period of 17 years for the random opportunistic murder of two young people who posed no threat or harm. David Bain received a minimum non-parole period of 16 years for shooting five members of his own family.³⁶ The defendant in *R v Kirner*³⁷ received a minimum non-parole period of 15 years for the rape and murder of an

was to commit a violent and horrendous act in which he expected to be killed by the police.

³⁰ See *R v Wilson* [1996] 1 NZLR 147. (Note that this case predates the change of wording in 1999).

³¹ By law, if the offending involves a home invasion, the court must impose a minimum non-parole period of at least 13 years: Criminal Justice Act 1985, s 80(2A).

³² See *R v Wilson*, supra note 30.

³³ Unreported, Court of Appeal, 290/97, 15 October 1997, Henry, Tipping and Williams JJ.

³⁴ The Court of Appeal reduced the concurrent sentence received for the attempted murder of the child’s mother from 10 years to eight years, in order to ensure that the appellant was not “punished twice for matters properly reflected in the murder sentence with its extended minimum non-parole period”.

³⁵ Unreported, High Court, Wellington, T2693/98, 26 November 1999, Heron J. Upheld on appeal: *Watson v R*, unreported, Court of Appeal, 384/99, 8 May 2000, Richardson P, Gault and Henry JJ.

³⁶ *R v Bain*, unreported, High Court, Dunedin, T1/95, 21 June 1995, Williamson J.

³⁷ Unreported, High Court, Christchurch, T43/95, 25 October 1995, Fraser J.

intoxicated and helpless victim. *R v Barlow*³⁸ involved the premeditated execution of two businessmen in their office – the offender received a minimum non-parole period of 14 years. In *R v Sibley*,³⁹ the offender received a minimum non-parole period of 13 years for the murder of a three year-old child and attempted murder of her mother in an act of revenge for being evicted.

This shows that the courts have begun to use to advantage this provision that allows them, in appropriate cases, to censure and punish more harshly those subject to life imprisonment who are more deserving of censure. Although there is provision for the Parole Board and a Prisons Board to override a judicially-imposed minimum period,⁴⁰ there is no record of this having been done to date. It seems, therefore, that section 80 is having an effect on solving some of the problems relating to multiple offenders subject to life imprisonment.

2. Does s 80 Completely Solve the Problem?

Prior to the 1999 amendment, it could have been argued that the section would apply only in a very small number of cases. This was particularly after the comments of the Court of Appeal in *R v Parsons*, that the power under s 80 was to be exercised only in the “exceptional case which is so horrendous or repugnant as to justify additional denunciation”.⁴¹ In fact, the Justice and Law Reform Committee noted the limiting effect of these comments in the very small number of section 80 orders following that case. However, since the 1999 amendment, the threshold has been lowered, and it can now be assumed that the powers under section 80 will be able to be used more easily in appropriate situations.

However, section 80 itself does not cover the whole range of problems thrown up by the rule in *Foy*. It would cover, for example, offender A, who was convicted of murder and arson, and offender D, who was convicted of 12 counts of murder and sexual violation by rape. If this offending was considered “serious enough”, offenders A and D could properly be sentenced to longer minimum non-parole periods than the ordinary ten years. This would serve the purposes of just deserts, deterrence and incapacitation noted above. These offenders would receive sentences that were more proportionate to the gravity of their offending. The sentences would deter

³⁸ Unreported, High Court, Wellington, T1/95, 15 December 1995, Neazor J.

³⁹ *Supra* note 33.

⁴⁰ Criminal Justice Act 1985, ss 97 and 100.

⁴¹ *Supra* note 23, at 131, per Doogue J.

others, who would now know that committing an offence punishable by life imprisonment does not give them licence to commit other offences without fear of further punishment. And it would incapacitate these dangerous offenders for a longer period of time.

But it would not cover a serial offender who was being sentenced for his or her offences in isolation. If an offender (offender E) had committed three murders, each not more serious than any other murder, then each murder in itself would not attract the operation of section 80: it would not be “sufficiently serious” to justify the imposition of a minimum period of imprisonment of more than 10 years. Together, it is quite likely that the offending would be sufficiently serious to attract the operation of the section: *R v Sibley*⁴² indicates that other offences can be taken into account when considering an order under section 80. But if offender E was tried for and sentenced for these murders separately,⁴³ then it is questionable whether the section would apply. Because section 80(2) requires the court to consider the “circumstances of *the offence*”, if it was sentencing for each murder separately, it is unlikely that it could take into account the circumstances of any other offence not currently before the court. This would apply even when offender E was being sentenced for the second and third murders – even though the court would have full knowledge of the previous murders, it is unlikely that they could be taken into account. As pointed out by Tipping J, the purpose of section 80 is not to give public protection, but to denounce the conduct of the offender,⁴⁴ and public protection is not a matter that can be taken into account under section 80. Thus, the sentencing court would not be able to take into account the fact that offender E had committed two other murders, and offender E would simply receive concurrent life sentences – and be treated no differently by the court system than an offender committing a single offence.

Similarly, it is questionable whether section 80 could apply to such an offender as described by Hammond J in *McElroy*: one subject to a sentence of life imprisonment who hurled abuse at the court. Because this does not make up part of the offence to be considered under section 80, the section could not be used to, as Hammond J put it, “maintain the integrity of [the court’s] processes”.⁴⁵

⁴² Supra note 33.

⁴³ This could be, for example, if an order for severance was made under the Crimes Act 1961, s 340(3).

⁴⁴ *R v Sibley*, supra note 33.

⁴⁵ Supra note 12.

Section 80 also does not cover offenders like offender C, who was serving a sentence of life imprisonment, but escaped and committed further offences. The court could impose a minimum period of imprisonment on offender C under section 80(4) (which applies to serious violent offending attracting a sentence of more than two years' imprisonment). But this cannot be imposed consecutively on the life sentence – the sentence for the offences committed upon escaping would have to be concurrent. Therefore any minimum period of imprisonment imposed under section 80(4) would be served concurrently with the life sentence. The sentencing court could not, for example impose a 15 year sentence in order to make the sentence for the further offending so long that it continues beyond the parole date applicable to offender C's life sentence, because the sentence imposed must still be commensurate with the gravity of the offending.⁴⁶ And the minimum period of imprisonment imposed under section 80 cannot be any longer than the sentence itself.⁴⁷ As a result, unless offender C was nearing her parole eligibility date under the life sentence,⁴⁸ any sentence imposed for C's further offending does not amount to any real punishment. The same would apply to any life inmate who commits further offences – whether in prison, as in *de Malmanche*, or outside, as in *Haunui and Greening*.⁴⁹

Thus, while section 80 does much to ameliorate the problems created by the rule in *Foy*, it is clear that there are areas that still need to be addressed.

IV. ANOTHER ANSWER TO THE PROBLEM

1. *Canadian Bill C-247*

A Bill currently before the Canadian Senate (Bill C-247) also addresses the problems raised by the inability to impose consecutive sentences on life imprisonment.⁵⁰ One of the cases giving rise to concern in Canada was that of Clifford Olson, serial killer of 11 children. In a hearing before the Parole Board, Mr Olson read out a letter from his lawyer that had advised him to

⁴⁶ See comments of Fisher J in *R v Haunui and Greening*, supra note 16, where Fisher J considered but rejected this course of action.

⁴⁷ In fact it must be at least three months' shorter than the sentence: see Criminal Justice Act 1985, s 80(6).

⁴⁸ In which case the sentence imposed for the further offending *would* extend beyond her parole eligibility date.

⁴⁹ Supra notes 5 and 16.

⁵⁰ At present, Bill C-247 is before the Committee on Legal and Constitutional Affairs, having passed both its first and second readings. For the text of Bill C-247, see Appendix.

admit at once to all the murders he had committed, so that he could take full advantage of concurrent sentencing. In open court, Mr Olson mocked, "They can't do nothing. They can only give me a concurrent sentence". Mr Olson recognised that, due to the prohibition on consecutive life sentences, he could receive a sentence no greater than if he had committed only one murder. This case greatly disturbed some members of Canada's Parliament,⁵¹ and the result was a Private Member's Bill aimed at ensuring that those subject to life sentences can be effectively sentenced for other offences that they may commit.

Although a situation like Clifford Olson's would now be covered in New Zealand by section 80 of the Criminal Justice Act 1985,⁵² Canada's Bill C-247 takes a somewhat different approach to the problem. It advocates granting judges the power to order the offender (in appropriate cases) to serve consecutive *minimum non-parole periods*. Thus, a sentencing judge can, where appropriate, order an offender to serve, on the expiry of one minimum non-parole period, a further period of up to 25 years. This gets around the problem of not being able to impose consecutive life sentences, while still ensuring that those subject to a sentence of life imprisonment can nevertheless receive real and effective punishment where this is appropriate.

The wording used in Bill C-247 is poorly chosen, and the Bill in its current form is an example of hasty drafting.⁵³ For example, it makes consecutive non-parole periods mandatory for further offences *other* than murder,⁵⁴ but leaves to the judge's discretion the imposition of consecutive non-parole periods where the further offence is another murder.⁵⁵ This could give rise to the unfortunate situation where an offender who commits, say, a murder and a car burglary, could end up facing a longer minimum non-parole period than an offender who committed three murders – because the sentence for

⁵¹ See the Debates in the Canadian Senate, 17 November 1999, para 1515; and the Debates in the Canadian House of Commons, 1 May 1998 (*Edited Hansard*, Parliament of Canada, <http://parl.gc.ca/36/2/parlbus/chambus>).

⁵² Note, however, that it would only be covered if Mr Olson confessed to all his murders before or at sentencing. If he confessed to others after sentencing, he would be in the same situation as offender E, and his previous offending could not be taken into account when sentencing for the murders confessed to later.

⁵³ Bill C-247 was substantially redrafted so that it could be reinstated after the Select Committee recommended that the Bill and its clauses be deleted in their entirety: see the Debates in the Canadian House of Commons, 25 March 1999 (*Edited Hansard*, Parliament of Canada, <http://parl.gc.ca/36/2/parlbus/chambus>).

⁵⁴ Bill C-247, clause 2.1.

⁵⁵ Bill C-247, clause 2.2.

the first offender is mandatory. This is contrary to the all-important principle that sentences must be proportionate – which occupies a central position in Canada’s sentencing system as well as our own.⁵⁶

However, despite the flaws in the drafting of Bill C-247, the concept behind the Bill is one that could well be used in New Zealand to overcome the problems posed by the rule in *Foy*. Under a consecutive non-parole period approach, offenders such as offender C and offender E could, if appropriate, receive effective sentences for offences committed. In the case of offender C (who escaped from prison and committed further offences), the sentencing Judge could order offender C to serve another period of time (say, three years) *after* she had finished serving the 10-year non-parole period under her life sentence. Thus, offender C would serve 13 years before being eligible to be considered for parole. This would mean that offender C can be effectively sentenced for the offences she committed upon escaping from jail. It would also provide a solution for the problems faced by Fisher J in *Haunui and Greening*.⁵⁷ Similarly, if it is considered appropriate that offender E serve a longer minimum non-parole period once it is discovered that she committed *three* murders, not one, then this could be effected by the sentencing Judge ordering the non-parole period for her second or third murder to be consecutive upon the non-parole period for the first.

The consecutive non-parole period approach proposed in Canadian Bill C-247 is, therefore, a practical answer to the problems posed by *Foy*.

2. *A Cap on the Total Non-parole Period?*

Bill C-247 provides that the total non-parole period to be served by an inmate is not to exceed 50 years. However, such a provision can create problems. Some of these were pointed out by Senator Bryden in the Canadian Senate at the second reading of Bill C-247.⁵⁸ The 50-year limit is arbitrarily chosen. It can result in a judge who is sentencing an offender who has already received additional non-parole periods being limited in the length of the non-parole period he could impose for no reason relating to the actual offence itself. Thus, even if a minimum non-parole period longer than this 50 years is warranted for an offender (say, Clifford Olson), a Judge

⁵⁶ See the Canadian Criminal Code s 718.1, which states proportionality to be the “fundamental principle”.

⁵⁷ *Supra* note 16.

⁵⁸ See the Debates in the Canadian Senate, 11 April 2000, para 1705 (*Edited Hansard*, Parliament of Canada, <http://parl.gc.ca/36/2/parlbus/chambus>).

could not impose it. This is contrary to principles of sentencing such as proportionality.

A “cap” such as that in Bill C-247 would not be necessary in the New Zealand context. It was not considered necessary when section 80 of the Criminal Justice Act 1985 was introduced – so that a judge in New Zealand could, theoretically, impose a minimum non-parole period of 99 years. But a review of the cases shows that judicial practice has been responsible in this area. The longest non-parole period imposed to date for murder is 18 years.⁵⁹ Most non-parole periods imposed under section 80 are of 13 or 14 years. This shows that there is no need to constrain New Zealand judges by an arbitrary limitation on the length of the minimum non-parole period.

3. Objections to Consecutive Non-parole Periods

A review of the debates in the Canadian House of Commons and Canadian Senate is useful to show the objections which can be taken to the imposition of consecutive periods of non-eligibility for parole.

First, it is argued that even the worst offenders can be rehabilitated, and that lengthening their prison sentence only delays the chance for these offenders to become mature, contributing members of society. However, allowing the imposition of consecutive non-parole periods would not prevent the possible rehabilitation of the offender being considered at sentencing – just as it would be with the sentencing of any multiple offender *not* subject to a sentence of life imprisonment. As rehabilitation is, along with just deserts, deterrence and incapacitation, one of the primary purposes of sentencing in New Zealand, a sentencing judge would still be required, when sentencing an offender subject to life imprisonment, to take into account rehabilitation considerations.

Secondly, because imprisonment involves such an immense restriction on the liberty of inmates, and has such a huge impact on their lives, it is argued that sentences should be as short as possible. Lengthening sentences intervenes even further in inmates’ lives, and is something that should be avoided. There is also a feeling that there are too many people in New Zealand prisons already, and shorter sentences will reduce the overall number of prisoners.⁶⁰ Restraint in sentencing is one of the most important

⁵⁹ *Supra* note 26.

⁶⁰ See for example (1993) 535 NZPD 15712; (1993) 535 NZPD 15727. There is good statistical support for this point of view: a report recently published by the Ministry of

sentencing principles in New Zealand. Section 7 of the Criminal Justice Act 1985 requires sentences of imprisonment to be as short as is “consonant with protecting the safety of the community”. It is argued that allowing consecutive non-parole periods would unduly lengthen sentences and would result in offenders serving an even longer term in prison. Again, however, simply allowing the imposition of consecutive non-parole periods would not detract from this principle. Restraint would still be one of the factors considered by a sentencing judge at sentencing. If lengthening the amount of time a life inmate had to serve before being eligible for parole was, in a particular case, not “consonant with protecting the safety of the community”, then the judge would not impose a consecutive period. The change proposed simply *allows* a judge to impose a further sentence on an offender where this is necessary or appropriate – it does not suggest that this should always be done.

Thirdly, it is argued that allowing consecutive non-parole periods to be imposed would result in increased costs to the public of keeping the sentenced offenders in prison for longer. But those who commit murders and other offences attracting a life sentence make up a very small part of the prison population – only about six percent of total inmates.⁶¹ Of the small number of inmates sentenced to life imprisonment, many would already be covered by section 80 of the Criminal Justice Act 1985, so that, if appropriate, they could already be made to serve a minimum non-parole period of longer than 10 years. And, as demonstrated above, it is unlikely that judges would impose very long total non-parole periods under the suggested law change – so that the total length of non-parole periods is unlikely to increase unreasonably. Given this, it is likely that the increased fiscal cost to the public of the suggested law change will be minor.

The law change proposed only removes an anomaly in the law – simply allowing those who have committed offences punishable by life imprisonment to be subject to consecutive sentencing in a manner similar to those who commit other offences. Thus, the potential objections to the proposed law change must be of limited merit.

Justice shows that New Zealand has one of the highest gross imprisonment rates in the Western World (Ministry of Justice, *The Use of Imprisonment in New Zealand* (1998)).

⁶¹ As at 20 November 1997, life inmates made up 6.2 percent of total inmates: Ministry of Justice, *Census of Prison Inmates 1997* (1998).

V. CONCLUSION

The prohibition against sentences consecutive to life imprisonment continues to create anomalies in the law, despite the ameliorating effect of section 80 of the Criminal Justice Act 1985. Section 80, while it solves the problems relating to those who commit or are sentenced for multiple offences at the same time, does not address the problems relating to those who do not fall into this category – such as life inmates who commit further crimes, or offenders who are sentenced for their multiple offences on separate occasions. This creates the situation that our sentencing system is unable to impose proper sentences on some of the most serious offenders that come before it.

The current state of the law is therefore unsatisfactory. One way to address the anomalies created is to adopt the broad approach proposed in Canada's Bill C-247 and allow judges to impose consecutive periods of non-eligibility for parole. While there is no research indicating the success or otherwise of the approach at this stage (as the Bill has not yet been passed by the Canadian Senate), the approach is theoretically sound. If it is adopted in New Zealand in a flexible manner, without unduly limiting the discretion of the sentencing judge by mechanisms such as a cap on the total sentence, then it has the potential to overcome the shortcomings present in section 80. This would have the advantage of enabling the courts to sentence some of our most serious offenders in the principled manner so prized by New Zealand's sentencing system.

APPENDIX:

BILL C-247

An Act to amend the Criminal Code and the Corrections and Conditional Release Act (cumulative sentences)

As passed by the House of Commons October 19, 1999

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

CRIMINAL CODE

1. Section 271 of the *Criminal Code* is amended by adding the following after subsection (1):

Sentences to be served consecutively (2) Subject to subsections (3) and (4), a sentence imposed on a person for an offence under subsection (1) shall be served consecutively to any other sentence for an offence under subsection (1) or section 272 or 273 to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1), unless the judge who sentences the person is satisfied that the serving of that sentence consecutively would be inconsistent with the principles of sentencing contained in sections 718 to 718.2 of the *Criminal Code*, in which case the judge may order that the sentence be served concurrently.

Factors (3) In deciding whether to make an order under subsection (2), the court shall have regard to
(a) the nature of the offence;
(b) the circumstance surrounding the commission of the offence;
(c) the degree of physical or emotional harm suffered by the victim arising from the commission of the offence;
(d) whether the offender abused a position of trust, power of authority in the commission of the offence;
(e) the criminal record of the offender; and
(f) the attitude of the offender respecting the offence committed by the offender.

Reasons (4) Where the court makes an order under subsection (2), the court shall give both oral and written reasons for that order.

CORRECTIONS AND CONDITIONAL RELEASE ACT

2. Section 120 of the *Corrections and Conditional Release Act* is amended by adding the following after subs (2):

Sentences to be served consecutively (2.1) The portion of a sentence of imprisonment for life that a person who has been convicted of first degree murder or second degree murder must serve before the person may be released on full parole is, subject to subsection (2.2), that provided for in section 745 or 745.1 of the *Criminal Code* and, in addition, where the person is under another sentence of imprisonment in respect of another offence arising out of the same event or series of events or under any other sentence at the time the sentence of imprisonment for life is imposed on the person, the lesser of one third of any other sentence of imprisonment and seven years.

Subsequent murder conviction (2.2) Subject to subsections (2.3), (2.4) and (2.5), where a judge sentences a person to a term of imprisonment for life for first degree murder or second degree murder and the person is at the time the sentence is imposed, subject to a sentence of imprisonment for life for another first degree murder or second degree murder, the judge may order that the person shall, in addition to the parole ineligibility period referred to in section 745 or 745.1 of the *Criminal Code* to which the person is subject in respect of the conviction for the other first degree murder or second degree murder or the remaining portion of that period, as the case may be, serve on the expiry of that period or remaining portion of that period, a further period not exceeding twenty-five years in respect of the first degree murder or second degree murder for which the judge is sentencing the person.

Maximum parole ineligibility (2.3) Where a person is required to serve more than one further parole ineligibility period referred to in subsection (2.2), the periods shall be served consecutively but in no case shall the total period of parole ineligibility exceed 50 years.

Factors (2.4) In deciding whether to order a further period of parole ineligibility under (2.2) and in deciding the length of that period, the sentencing judge shall have regard to whether the total period of parole ineligibility would adequately denounce the murder and whether it would adequately acknowledge the harm done to the victim.

Reasons (2.5) Where the court does not make an order under subsection (2.2), the court shall, orally and in writing, explain why it did not make that order.

TEACHING LAW IN THE CONTEXT OF STUDENT DIVERSITY

BY DOROTHY* AND PETER SPILLER**

I. INTRODUCTION

The primary theme of this article is that teaching in the context of student diversity needs to be responsive to and respect different identities, and build on them in the teaching and learning process. The article focusses on the teaching of law students at the University of Waikato.

The University of Waikato Law School, like the rest of the University, has a diverse student body. There is the usual wide range of academic abilities, with students who are set to make their mark in the legal world and others whose talents are better directed elsewhere. The Law School is mainly populated by New Zealanders of European extraction, but the School has the highest proportion of Māori students of any Law School in New Zealand. There are students from overseas, including those from Pacific Island countries and Asia. In addition, there are New Zealand residents whose mother tongue is not English and who have different cultural traditions.¹ Another feature of the Waikato law student body is the range in ages: a high percentage are mature age entry students, some of whom are without formal academic entry qualifications.²

This diverse student population presents many challenges for teachers in the Law School. Student diversity dramatises issues of teaching and learning that many academics were able to avoid when students were from an academic elite and formed a relatively homogeneous group. Pedagogical awareness of and reflection on this diversity is imperative if all law students are to enjoy equal learning opportunities.

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¹ The 2000 enrolments in the School of Law were: 55.6% European extraction, 28.5% Māori, 7.5% Asian, 3.5% Pacific Islander, and the rest noted as "other".

² The 2000 enrolments in the School of Law were: 55.5% under 25 years, 29.7% 25-39 years, and 14.8% 40 years and over.

In our discussion, we shall outline some of the key pedagogical principles that we believe are important for teaching in a context of student diversity. We shall also describe specific practical applications in the context of the teaching of Legal Systems, a first-year law course at the University of Waikato Law School.

II. ACKNOWLEDGING AND BUILDING ON DIVERSITY

Our views are premised on the beliefs that we hold about the goals of university teaching and learning. We believe that university education should go beyond the teaching and learning of the skills, language and thinking associated with a specific discipline. We believe that university teaching should develop what Ramsden terms “a change in conceptual understanding”, both in the discipline itself and in a broad sense.³ It is also our belief that students should eventually acquire the ability to evaluate ideas, challenge assumptions and grapple with a range of perspectives. In the pursuit of these goals, we believe that learning with and alongside other people is essential. Students need to engage with other ways of thinking, seeing and communicating. In this process, cultural diversity can be a rich resource. Likewise, the experiences of mature students in other areas of life (as parents, in the work force, or in first-hand contact with the law) can be valuable.

In order to build upon diversity, differences need to be acknowledged and become part of classroom practice. If we can accommodate differences in our teaching, students can connect their classroom learning with who they are, rather than compartmentalise it as a separate (and alien) experience. Writers on tertiary education, such as Brookfield and Preskill, have suggested ways of building on diversity.⁴ One technique is to ask students to talk about themselves as members of social classes or cultural groups at the beginning of a set of classes. Another idea is that on occasions students can work in “affiliate groups” which match the communities from which students come. A slightly different approach which they cite is one developed by the Fetzer Institute, as part of its diversity dialogues. In this exercise, named “the circle of objects”, discussion group participants talk briefly about an artefact that they have brought into the classroom which says something about their ancestry. The discussion leader begins this process and participants speak without interruption when they feel ready.

³ Ramsden, P *Learning to Teach in Higher Education* (1992) 4.

⁴ Brookfield, S and Preskill, S *Discussion as a Way of Teaching* (1999).

This format may also mean that the class learns to respect silence while waiting for participants to speak.⁵

A belief in the importance of acknowledging student diversity underlies the design of the Legal Systems course. In this course, which accommodates 200 first year law students, the emphasis has shifted away from the lecture format to smaller group teaching. A weekly lecture is retained, but the limitations of this format, not least in terms of the anonymity and passivity of the student body, are recognised. The class is divided into stream groups, and it is in the weekly double period streams that the essential teaching and learning takes place.

The stream meetings enable the identity and name of each student to be recognised in a more personalised environment than in the plenary lecture setting. Knowing the name of each student is a powerful dynamic in the educational process: this is a humanising factor in itself, it increases the sense of motivation and accountability in each student, and it helps to build a learning community. Another benefit of the small group learning approach is that it can break down stereotypes and negative images of sub-populations. In large classes, part of the dehumanising and anonymous effect of the large numbers is that people may be grouped into stereotypical classifications (such as radical Māori or racists).

The first stream meeting of the year is spent largely on allowing each student to speak about his or her own background, life experience and reasons for choosing to do law. The responses range from the 18-year-old European student attracted to law by the soap operas on television, to the Taiwanese and Fijian students whose fathers had directed them to obtain commercial law qualifications to use in the family business back home, and to the Māori students whose family needed help with claims to land or other resources. This process enables the lecturer to have a sense at the outset of who comprises the diverse mix of students in the class, and so to link into the identity of the audience in shaping and presenting the teaching. The process also allows the students themselves to have a sense of the differences and links that exist within their student body, and build a learning community that respects difference.

At the end of each of the first three quarters, an assessment is conducted on the section of the course covered: tests are held at the end of the first and third quarters and an essay is written at the end of the second quarter. Those who do poorly in the assessment are invited to attend an extra set of classes

⁵ *Ibid*, 104.

in the following quarter, to prepare them for the next assessment. At the start of the classes, the students are asked to identify why they think they have not done as well as they had hoped, and their responses are used to help shape the extra tuition. Those in this “struggling students” group, many of whom come from minority cultural groups, appear to have distinctive problems, not least in terms of language and the ability to understand the requirements of the course and its assessment components. The lecturer then designs classes using visual aids and examples geared to the particular requirements of this group.

III. COLLABORATIVE LEARNING

Collaborative learning in which the peer group is a primary learning resource has many well-documented benefits.⁶ In a diverse student body, group learning can facilitate the sharing of a range of perspectives. Differences in ways of thinking, learning and seeing can be harnessed for the benefit of the group outcome. Communication between students is often much easier than in the teacher-centred classroom. Where there are different levels of prior knowledge and experience, informal or formal opportunities for peer tutoring can be encouraged. Hinett and Thomas give a number of examples of peer-assisted learning in a law context.⁷ One idea is that students bring examples of recent lecture notes that they have taken. These are exchanged with a peer and the students provide each other with feedback on lecture note strategies, highlighting the main theme and other features of the notes.⁸ Other commentators have given interesting examples of how they use collaborative learning in other professional disciplines such as engineering and medicine.⁹

In addition to the pedagogical benefits, peer group networks can act as important socialisation and acculturation agents in the tertiary learning environment. For many students from different social and cultural backgrounds, the discourses of the disciplines and of the university itself appear alien and inaccessible. Students may feel powerless because of their unfamiliarity with the culture of the university, both explicit and hidden.

⁶ Spiller, D “Using the peer group as a teaching and learning resource - redefining the role of the teacher” (*Proceedings of the 1998 Annual Conference of the Higher Education Research and Development Society of Australasia* (1998)).

⁷ See Hinett, K and Thomas, J *Staff Guide to Self and Peer Assessment* (1999).

⁸ *Ibid*, 50.

⁹ Ditcher and Pearse, “Group learning in a mechanical engineering design class”, in Spiller, D (ed) *Narratives from Tertiary Teaching* (2000); and Miller, Loten and Schwartz, “Successful formats for applied learning in small-group tutorials in pathology, clinical biochemistry and other subjects” in Spiller, *ibid*.

Peer networks can give students a safe context to process the norms and expectations of the university, and they can provide students with transition communities which can help them negotiate the tertiary community. Bruffee also argues that peer learning builds on networking and collaboration that most students are familiar with in their everyday lives.¹⁰

There are many practical ways in which collaborative learning methods can be integrated into the teaching and learning environment. These range from group endeavours on small tasks to extended group projects.¹¹ Students meet outside class time and pool their resources to work on aspects of their courses such as course readings, case analysis, problem-solving and examination preparation. The study group helps students to economise on time and to share diverse perspectives. The group also offers a supportive network that helps students cope with the tertiary environment and, in particular, with the specific demands of law learning.

There is considerable debate in the literature as to whether such groups should be culturally homogeneous or heterogeneous. Uri Treisman, for example, who used collaborative learning approaches to enhance the mathematics and physics learning of students from minority cultures at Berkeley University, established groups of students from diverse cultures.¹² This meant that students could benefit from culturally different learning styles and approaches. A culturally diverse group would be our personal preference because of our belief in the rich dialogical potential of cultural diversity. However, there may also be a significant role for culturally homogeneous learning groups where students want the support of an affiliate group.

Another debatable point in relation to study groups is the role that can be played by staff. A study group's comfort and potential may be restricted by a regular staff presence, and where peer groups are based on cultural lines a great deal may be expected of staff who are perceived as being culturally friendly. However, students may like a degree of staff feedback on their group endeavours and deliberations. It may be possible to allocate some slots in the curriculum when staff would be available to offer students feedback on the quality of their group learning, and also enhance their own sense of students' understanding.

¹⁰ Bruffee, K *Collaborative Learning* (1993) 27.

¹¹ Spiller, *supra* note 9.

¹² Treisman, U, paper delivered at the International Consortium of Educational Development Conference, Austin, Texas (1998).

At the Waikato University Law School, there is a Māori student grouping (Te Whakahiapo) which facilitates and supports collaborative learning. The Legal Systems course offers a separate stream for Māori students, and this is conducted by a Māori lecturer. At the start of the year, the self-introduction of the students in each of the streams immediately alerts the students to possible peer groups which they can form. At the initial class, there are sometimes palpable reactions from the listening students as people announce themselves to be ex-police officers, Fijian Indians, or mothers coping with lectures in between household chores, and within a short space of time peer groups are formed. To foster peer group learning and support, the lecturer, in the early weeks of stream meetings, directs the class to divide into small groups in order to discuss a set topic and to report back to the group as a whole.

Many law students have reported on the peer group as being particularly helpful in the law learning process. Whereas students from other cultures may be shy about asking questions or making comments in class, their peer group provides a safe environment and reassurance that they are not on their own. Māori students in particular demonstrate their need for peer group formation, to replicate the “awhi” (embracing) communal support of their own culture and to counteract the isolation which a number of them experience. On occasions the lecturer in the course has attended a peer group (at its request) to give assistance which is focussed on the group’s distinctive needs.

IV. DIALOGUE BETWEEN TEACHER AND STUDENTS

Dialogue between staff and students is imperative in any tertiary classroom, but is especially significant in classrooms with diverse groups of students. For deep learning to occur, and for students to be fully engaged in the academic process, teaching must connect with the students and their histories. Occasional tests are limited by their summative function and cannot provide the lecturer with an ongoing sense of what is happening for the students in relation to their learning. The teacher should create, in addition to more traditional assessment, regular opportunities for dialogue. Angelo and Cross suggest the use of brief probes, discussions or questionnaires at the beginning of a course.¹³ These strategies give the teacher an idea of the levels of understanding, knowledge and expectations that students bring into the classroom. Brookfield recommends the weekly use of the critical incident questionnaire in which students are asked to respond anonymously to certain questions. The student responses can be

¹³ Angelo, T and Cross, P *Classroom Assessment Techniques* (1993) 2ff.

read very quickly by the teacher who can, where possible, make modifications, backtrack, or help the students see the rationale for what is being done.¹⁴

Dialogue which shows that the teacher is responsive to student needs can undoubtedly enhance the teaching and learning experience, but also has other benefits for students. Practices of this nature invite students to participate more actively in the teaching and learning process and give them the satisfaction of contributing to the character of the teaching. These strategies may also go some way to reducing the power imbalance in the classroom and nurturing students' sense of self-esteem. Such a shift in power can be very helpful to students whose cultural and personal histories are very different from the dominant discourses of university learning. Furthermore, sustained dialogue can help to build an atmosphere of trust and mutual respect.¹⁵

A form of dialogue is sustained in the Legal Systems course through the students' completion of a weekly preparation exercise. The completion of 80% of these qualifies the students for 5% of the final mark. Because each week forms a building block in the educational process leading to the final assessment, it is important that students attend classes each week and are adequately prepared for each class. The exercise means that students are prompted, week by week, to do the readings and to begin the vital process of translating their thoughts into writing. The preparation worksheets afford feedback to the lecturer from the students as to what they are learning. Where there are recurrent misunderstandings, the lecturer can then return to the issues involved and explain them in a different way. The worksheets also give the opportunity for the students to have regular constructive feedback from the course teachers, thus enhancing students' understanding in areas where they need help, and giving confidence through affirmation of work

¹⁴ Brookfield, Stephen *Becoming a Critically Reflective Teacher* (1995) 115. The Classroom Critical Incident Questionnaire poses the following questions: 1. At what moment in the class this week did you feel most engaged with what was happening? 2. At what moment in the class this week did you feel most distanced from what was happening? 3. What action that anyone (teacher or student) took in class this week did you find most affirming and helpful? 4. What action that anyone (teacher or student) took in class this week did you find most puzzling or confusing? 5. What about the class this week surprised you the most? (This could be something about your own reactions to what went on, or something that someone did, or anything else that occurs to you).

¹⁵ Fraser, "Building relationships in the classroom through peer teaching and peer assessment", in Spiller, *supra* note 9. We do however acknowledge that there are different perceptions amongst students of the appropriate degree of familiarity with staff.

that is well done. Because students have prepared for each session, they are readier to contribute to the class, thus further increasing their confidence and enhancing the quality of the discussion. Quieter and less industrious students then have the opportunity of seeing how well their peers perform and can consider possibilities for their own development. Well-prepared students can contribute valuable thoughts and ideas to each other, and the lecturer stands to gain from new insights coming from students.

Dialogue between lecturer and students is developed in other ways. There is the feedback obtained through the assessment which takes place at the end of each quarter. In the streams, the lecturer sometimes follows up the lecture given earlier in the week by asking each student to relate one new idea or insight gained from the lecture, and to raise any questions which they may have about the material covered. The range of insights which students obtain from the same lecture provides ample testimony to the diversity of the student body. At the end of each major section of the course, the lecturer asks each student in the stream to indicate the easiest and the most difficult aspects of the work in that section. Again, there is a range of responses, from the person with a previous degree who is coping easily with the course, to the school leaver struggling with a less regimented environment, to the Māori student who finds the university world more individualistic and competitive than her home setting. The feedback allows the lecturer the chance to modify the teaching of the course, by building on these diverse experiences. This process also allows the students a greater feeling of belonging in the course and the sense that their distinctive personalities are being recognised and valued.

V. PEDAGOGY FOR DIVERSITY

An environment of trust is promoted when different approaches and ways of doing things are valued and respected. At the beginning of a teaching module, it may be helpful to find out, not only about students' prior knowledge and life experience, but also about important cultural values and preferred learning approaches. Some familiarity with basic cultural norms of different groups of students can help teachers to avoid insensitive comments and behaviour. For example, sitting on a table is unacceptable in Māori culture. Māori students have said that, when a teacher sits on the table, it can affect their entire sense of wellbeing in the classroom. Learning approaches may also vary across cultures, for instance, a collaborative mode of learning is often the preference of Māori and Pacific Island students.¹⁶ Finding out about these differences can help the teacher to adopt more inclusive

¹⁶ Ibid.

practices. A wide range of teaching approaches gives students the opportunity to build on their own preferred learning styles, and also to take on the challenge of different ways of learning.

Using diverse teaching and learning strategies is one cornerstone of a pedagogy designed to meet the needs of a diverse student body. The language used by academic teachers is another important aspect of teaching that can promote better learning by a diverse student body. The language used by academic teachers may have many cultural overtones as well as subject specific idioms. Teachers can easily make their language more accessible and even make discussion of the particular discipline a regular part of their teaching. Many terms that are widely used in assignment setting, such as “critique” or “critically evaluate”, are not as self-explanatory as teachers seem to imagine. Traditionally, many academics have refused to accept the education of students in tertiary literacies as part of their job. The change in university populations in most countries is gradually compelling academics to reconsider their role, and to accept that teaching the language and modes of thinking and writing in the university and in their disciplines is something which can and should be taught.

In the Legal Systems course, students are exposed to as wide a range of teaching methods as possible. Efforts are made to use visual aids, including overhead transparencies and power point presentations, together with examples designed to reach a variety of cultures. It is recognised that deep learning is achieved for all if teaching methods provide for different perspectives as the course progresses.

At the weekly lecture, either a staff member gives an overall framework for learning in the streams that week or a guest speaker shares practical insights into the area of legal practice being covered.¹⁷ In streams, various teaching strategies are utilised. These include teacher-centred sessions, where the lecturer takes the student through a judgment so as to develop skills of case analysis, to small group interaction and then oral presentation by members of the class on points discussed, to the assignment of an extract to each member of the class for reading and then oral explanation. At the end of the year, students in each stream are presented with the lecturer’s rendition, against the background of a popular song, of the gist of the work covered, and

¹⁷ Thus, in the first quarter, on statute law and Parliament, a local MP speaks of the passage of legislation in Parliament; in the second quarter, on the judiciary and case-law, a local High Court judge speaks of the role and functions of a judge; and in the third quarter on the legal profession, a local practitioner speaks on the role and responsibilities of a lawyer.

students are encouraged to present their understanding of the work in a song or limerick form. The unfailing experience is that this last-named learning experience reaches students who have not been touched by any other teaching strategy, and exposes talents which have not been revealed before, thus facilitating confidence-building and creativity. In particular, Māori culture sets great store by the use of waiata (songs) at gatherings, and Māori students have responded well to this learning experience.

In the lectures and streams, conscious efforts are made by the staff to make as few assumptions as possible. Appealing to student memories of New Zealand of the 1980s can sometimes draw out useful student experiences, but such appeals may mean little or nothing to school-leavers and new immigrants. Anecdotal and idiomatic speech is sometimes used to capture the imagination of some members of the class, but always needs to be followed by a more prosaic rendering of the message. Thus, for example, the statement that “the powers that be placed this matter in the too-hard basket” has immediately to be followed by “the Government found this matter too difficult to deal with”. Care is also taken with pronunciation, including the proper enunciation of Māori terms and phrases which now permeate the law.

The Legal Systems course recognises that language is at the heart of the discipline of law: the mark of an accomplished lawyer is his or her use of precise, concise and effective language. Efforts are made by the lecturers in the course to model the use of such language in presenting the objectives and assessment requirements of the course. At the beginning of each quarter, the lecturer uses the plenary lecture to explain the nature of the assessment that will conclude that part of the course. Students are given the questions that they must address in the assessment, and the lectures, streams, readings and preparation exercises are all directed to preparing students to that end. This teleological or end-centred teaching approach focusses student effort in an efficient and economical way, and is found to be of value by almost all of the diverse student body.

Focus on language also comes through the requirement that students regularly read selected cases from an early stage of the course. The language of the law, while more accessible today than in previous times, still requires a mental shift by many students coming to law for the first time. In their reading of cases, students begin to see how the unique and sometimes antiquated legal expressions are intertwined in the presentation of the cases. The regular preparation exercises require the students to reflect their own understanding of the material and its language, and alert the lecturer to

wayward spellings and misunderstandings.¹⁸ This process is underscored by the assessment at the end of each of the first three quarters.

VI. CONCLUSION

In the 1950s, Robert McGechan of Victoria University of Wellington Law School challenged his contemporaries by saying that students should “learn the techniques, the way of the law and not so many legal rules; because we want [them] to learn for keeps, not to pass examinations”.¹⁹ The deep learning of legal methods and patterns of thought in each member of a diverse student body poses formidable challenges. This process requires of the law teacher qualities of vigilance, patience, sensitivity, tolerance, openness to change, and hard work. At times the challenge appears insuperable and there are periods of exhaustion and frustration. But the modern-day student diversity can be an intoxicating mix, helping to keep the teaching process a dynamic one. And the recognition of student diversity in the education process is peculiarly apposite to the discipline of law. After all, the unceasing flow of new legislation and case-law is itself a testimony to the law’s response to the infinite variability and diversity of human behaviour.

Ko Aotearoa ngā tāngata, ko kawē kē te ngākau.

Gathered are the people of Aotearoa, but each heart responds to a different calling.

¹⁸ Thus, for example, the lecturer encounters adverbial (adversarial), Council (counsel), descented (dissented), first insistence (first instance), higherarchy (hierarchy), orbiters (obiter), precedence or president (precedent), and statue (statute).

¹⁹ McGechan, “The Case Method of Teaching Law” (1953) 1 VUWLR 9.

MODERN TREATY MAKING WITH FIRST NATIONS IN BRITISH COLUMBIA

BY DAME EVELYN STOKES*

I. INTRODUCTION

There is a long history of efforts by indigenous or First Nations peoples to gain recognition of their traditional rights and title to lands and resources.¹ In recent years, the negotiation of settlement of the claims of First Nations peoples against the Crown in Canada has been actively pursued, although there are many criticisms of the rate of progress and effectiveness of negotiations. The intention of this article is to review the development of the treaty-making process which was outlined in recommendations of the British Columbia Claims Task Force and accepted by the federal and the British Columbia provincial governments.²

The process of “treaty-making” in British Columbia is of relevance to New Zealanders because of the close parallels. There is a similar environment and population, considerable “third party interests” in the lands and resources under negotiation, and a large number of different tribal groups. There is also a similar time-frame of colonisation in the 19th century, and much that is comparable between complaints of First Nations and Māori grievances put

* DNZM, Professor of Geography, University of Waikato. This article has been prepared after several visits to British Columbia in the last five years. I have met and talked with many people and cannot name them all. However, I do want to acknowledge the assistance of my brother, Graeme Dinsdale, Chairman of the Islands Trust and member of the South Island Regional Advisory Committee in British Columbia, who arranged meetings and acquired relevant materials for me, as well as providing a local government perspective. I am grateful to several people who have given their time to talk about their views on treaty-making: Barbara Fisher, Commissioner, and Paul Kariya, Executive Director, British Columbia Treaty Commission; Paul Tennant, University of British Columbia; Frank Cassidy and Hamar Foster, University of Victoria; Murray Rankin and members of the Vancouver Island provincial negotiating team; John Langford and members of the Vancouver Islands federal negotiating team; members of the South Island Regional Advisory Committee; and staff in the Treaty Negotiations Division of the Ministry of Aboriginal Affairs, Victoria. I am grateful to many other people in British Columbia – First Nations, non-aboriginal interests, bureaucrats, lawyers, academics and others. However, the opinions and interpretations in this article are mine.

¹ See Tennant, P *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989* (1990) for a review up to 1989.

² The Report of the British Columbia Claims Task Force, 28 June 1991.

before the Waitangi Tribunal about the impact of colonisation, the loss of land and resources, and the desire to retain and nurture cultural identity. Although the British Columbia Treaty Commission does not function as a commission of inquiry (like the Waitangi Tribunal), there is much in the treaty-making process which it oversees that has parallels with the settlement of Māori grievances here. There is one important difference in that the treaty-making process in British Columbia is now a tripartite one, involving both federal and provincial governments and a First Nation.

Until 1990, when the British Columbia provincial government decided to participate in the ongoing negotiations between the Nisga'a Tribal Council and the federal government, the province had denied the continuing existence of any aboriginal rights. It asserted that any aboriginal title or interest had been extinguished by the establishment of British colonies and British sovereignty in British Columbia before 1871, when the province joined the Canadian confederation. Apart from the so-called "Douglas Treaties" on Vancouver Island (which comprised 14 separate land purchase agreements negotiated between 1850 and 1854 that also recognised aboriginal hunting and fishing rights), and an extension of Treaty No 8 into the northeastern corner of the province, there were no other treaties with aboriginal peoples in British Columbia.

The decision of the British Columbia government in 1990 to participate in Nisga'a land claim negotiations with the federal government, and the establishment of the British Columbia Treaty Commission in 1993, led to a great deal of public discussion and debate in the media and elsewhere. Some deny any provincial government obligation to deal with aboriginal issues, citing this as a federal government responsibility. Many query the cost of treaty settlements and the impact on British Columbia taxpayers. Others are concerned about the economic and social impacts of Indian protests, road blocks, injunctions against logging, and aboriginal claims to the fisheries. There is a fear, a paranoia even, about the treaty-making process, born of uncertainty and ignorance of the issues, legal and historical, which have led to the current situation in British Columbia:

The public discussion has been given momentum by the expression of concern by those who perceive that their interests may be affected by treaty outcomes. These include the forestry, mining, and fishing industries, municipalities, and

environmental groups. Among these interests there arises the demand, ostensibly made by the public, to openness in the process of treaty negotiation.³

It was to be expected that governments would respond politically to this sort of public debate. There was a change of government in British Columbia in 1996 but no change in treaty-making policy:

One possible answer is that a decision to pursue treaties is purely a matter of government policy, a policy which reflects a broad-based political platform. However, in British Columbia, the initiative toward a treaty-making process was taken by the former government then continued with a more substantial commitment by the incumbent government. It is difficult to imagine two more diametrically opposed political views than those represented by the former and present governments. Yet, both implemented policies directed at the settlements of aboriginal rights issues by treaties.⁴

These writers, both Vancouver lawyers, contended that “there is now emerging in the law of Canada a legal obligation which may require the Crown to make treaties with First Nations, as a condition of the use of territory subject to aboriginal title”.

However, another British Columbia lawyer, Melvin Smith QC, was very critical of British Columbia government policy, and questioned whether British Columbia should be involved at all, citing the terms under which the province joined the Canadian Confederation in 1871, which charged the federal government with responsibility for Indian affairs. Smith maintained that any provincial responsibility to provide land for reserves for Indians was discharged by 1924 when reserve boundaries were finalised:

Now the Court of Appeal in *Delgamuukw* has determined that there is a modest aboriginal interest that must be discharged. We must honour that finding because that is the law of the land based on the constitution. But the Court left open the question of which order of government - federal or provincial - has the obligation to discharge it. In my view, a good case can be made that it is the federal government and it alone that has that obligation.⁵

³ Slade and Freedman, “The Source of the Obligation to Treat with the Indian Nations”, paper presented to conference, *Treaty-Making in British Columbia*, Pacific Business and Law Institute, Vancouver, British Columbia, 29-30 November 1994.

⁴ *Ibid.*

⁵ Smith, M *Our Home or Native Land? What Government's Aboriginal Policy is Doing to Canada* (1995) 265.

He also considered that, if the federal government wanted to settle land claims, “then it should be required to buy from the province, presumably at fair market-value, any land or resources it wished to include in a land claim”.⁶ However, in general, Smith opposed transfer of “full ownership over land and extensive social and economic benefits”, because this went “far beyond what is necessary to discharge the aboriginal interest”.⁷

In contrast with Smith’s narrow legalistic view, Slade and Freedman⁸ maintained that “whatever the impact of the public debate on government policy on the negotiation of treaties, the necessity for Canadian governments to address aboriginal rights issues will remain”. Failure to do so “would yield up greater social disruption and uncertainty”. This view was echoed in an opinion piece by Stephen Hume in the *Vancouver Sun* entitled “Why treaty talks with the Nisga’a cannot be allowed to fail”. Hume addressed the monetarist arguments about the costs of settling British Columbia land claims, which in one estimate might be C\$8 billion:

Before swooning, keep in mind that just about the time the Calder decision by the Supreme Court [in 1973] sent its wake-up call to the federal government, 30,000 natives in Alaska were ceded 40 million acres of land and nearly \$1 billion in cash. Even at \$150 an acre – the U.S. government has just \$606 an acre for 1,330 acres of Alaskan swampland the value was close to \$7 billion.

Consider please, that \$7 billion in 1971 would be \$28 billion in today’s dollars, a reminder that at most we might offer B.C.’s Indians a quarter of what their cousins next door were given to extinguish aboriginal claims.

Consider, also, that since the Nisga’a sat down to negotiate the mix of cash and land with which they could shed their economic dependence on Ottawa, British Columbians generated wealth worth at least \$1.3 trillion from lands and resources confiscated from First Nations without compensation.

But what’s at issue is more than cash. It is the wherewithal for aboriginal people to secure their cultural survival. They want to join the confederation we built on this land. They want to do it as dignified equals. They do not want to abandon their language, their spiritual identity, their connection to ancestral places or their cultural heritage in the process.

⁶ Ibid, 266.

⁷ Ibid, 264.

⁸ Supra note 3.

And why should they? We didn't. We brought our languages, our cultures and our political and legal institutions. By what moral right do we now deny the legitimacy of the laws, traditions, customs and rights that were here before we imported ours?

....First Nations are in this for the long haul. The ethical and moral test they bring to the larger society will not evaporate simply because expedient politicians pretend they can simply walk away.

Because they can't walk away. A growing arsenal of powerful court decisions compels the government to either negotiate a solution or to have it unilaterally imposed by the judiciary - a judiciary which appears increasingly impatient with the obfuscating evasion of responsibility by government.⁹

There has been a good deal of frustration among First Nations in British Columbia at the apparent lack of progress in negotiating settlements. Some of this has been expressed in occupations of land and in road blocks set up in various part of the province. In a commentary entitled "K'Watamus Speaks", the questions of political lack of will and the shortcomings of the Indian Act were addressed:

When you read in the newspaper, the Attorney-General saying, "Roadblocks will not achieve justice for aboriginal people, there will be no negotiations on substantive issues concerning aboriginal people while the blockade is in place" (Vancouver Sun, Wednesday June 7 1995). This statement is pure rhetoric. I've read a lot of First Nation history where these kinds of political events have taken place where the non-Indian politician continues to blame the Aboriginal People for stepping out of line (blockades etcetera), therefore will not resolve the issue at hand. The point is, the governments of the day intentionally forget that it is they who are out of line.

The roadblocks are deliberate but humane ways by The First Nations to get the direct attention of governments.

Again we read in the same paper, the politicians in the legislature pointing fingers at each other instead of working together to resolve the Aboriginal question....

How many First Nation politicians are showing frustration at this point because of the lack of government involvement in resolving the dysfunction on reserves created by the Indian Act? Every First Nation chief is frustrated but what can they do when the government condemns them for becoming impatient. Roadblocks by Indians is not a negotiating tactic, it's the last straw. It's the government officials who are breaking the law in Canada by neglecting to do their duty as politicians.

⁹ *Vancouver Sun* 19 July 1995.

In closing, I will repeat what the Attorney-General said, "Let me say this to those who would choose the path of lawlessness as a means of achieving their ends - that path will not succeed".

My question to the Attorney-General: Can you tell us which path will succeed, that you may take us through so that it will show Canadian Justice has served its people. The treaty process isn't going anywhere. It is in reverse right now, so please show us... which political process will finally resolve this issue.¹⁰

A publicity pamphlet, entitled "Building New Partnerships", issued jointly in 1994 by the First Nations Summit, the British Columbia Ministry of Aboriginal Affairs and the Federal Treaty Negotiation Office in Vancouver, described the treaty-making process as: "[a] modern day answer to historical obligations". It emphasised the benefits for all British Columbians and the "spirit of mutual trust and cooperation" between the parties in conducting negotiations:

Treaties are negotiated agreements that will spell out the rights, responsibilities and relationships of First Nations and the federal and provincial governments. The negotiation process is likely to deal with far-reaching issues such as land ownership, self-government, wildlife and environmental management, sharing resources, financial benefits and taxation. ... Treaties will benefit all British Columbians by forming the blueprint for new relationships between Aboriginal and non-Aboriginal communities. These new partnerships will create economic certainty and increase investment and jobs in the province.

II. THE LEGAL BACKGROUND

It is beyond the scope of this article to consider in detail the legal arguments about the nature of aboriginal rights or title. However, it is fair comment that the treaty-making process now evolving in British Columbia has been spurred on by several significant judicial decisions. In 1973 the Nisga'a Tribal Council had claimed that Nisga'a aboriginal title had never been extinguished in the Nass Valley in northern British Columbia. The Supreme Court of Canada ruled that aboriginal rights were based on occupation and use of traditional territories over a long period, but divided evenly on the question of the continued existence of Nisga'a aboriginal rights to the present.¹¹ The ambiguity of this decision persuaded the federal government to begin negotiating treaties to define aboriginal rights to land and resources in regions where no treaty had been made. During the 1970s, a federal policy

¹⁰ Kahtou, *The Voice of B.C. First Nations* Volume 4, No 7, July 1995.

¹¹ *Calder v Attorney-General for British Columbia* (1973) 34 DLR (4th) 145.

of negotiation of “comprehensive claims” evolved.¹² The Nisga’a Tribal Council began negotiations in 1976. By 1988 more than 20 comprehensive claims had been lodged with the federal government by First Nations in British Columbia. Only the Nisga’a claim was in negotiation under the then current federal policy of dealing with only one comprehensive claim per province at one time.¹³

In 1984 the Musqueam Indian Band, who live at the mouth of the Fraser River in southern British Columbia, sued the federal Crown for breach of trust over a transaction concerning a lease of reserve lands for a golf course in the Shaughnessy district of the city of Vancouver. The Supreme Court of Canada recognised a pre-existing legal right of First Nations and a fiduciary obligation of the Crown, both on and off the reserve, to protect the interests of aboriginal people.¹⁴ During the 1980s, there was increasing political activity by First Nations, court proceedings including, for example, a successful injunction against the timber company Macmillan Bloedel to prevent logging of forests on Meares Island in the Clayoquot Sound area of Vancouver Island, protests and road blocks, and increasing media attention to First Nations claims. Much of this activity was directed against British Columbia government policy of granting timber licences on Crown lands which allowed clear cutting of forests, regardless of any aboriginal claims or concerns about destruction of cultural sites, loss of hunting rights, or other environmental impacts. There were similar concerns about fisheries and mining activities.

The term “First Nations” is used in Canada to describe the indigenous population, Indian, Inuit and Métis. Although the term Indian has been used historically for aboriginal populations of North America, it also has a specific definition in Canada to refer to people who have status under the Indian Act, and excludes “non-status Indians”, Inuit and Métis. The term native has also been used, although the term aboriginal is now more widely used. Late in 1991, the Ministry of Native Affairs in British Columbia was renamed the Ministry of Aboriginal Affairs. In the federal government, the Department of Indian and Northern Affairs (DINA), formerly known as the Department of Indian Affairs and Northern Development (DIAND), is responsible for the administration of the Indian Act and lands set aside as Indian reserves. While the federal Crown holds the title for lands reserved for Indians, all other Crown lands in British Columbia are vested in the

¹² Department of Indian Affairs and Northern Development, *In All Fairness, A Native Claims Policy* (1981).

¹³ See Figure 1 below.

¹⁴ *Guerin v The Queen* (1984) 13 DLR (4th) SCC.

province. Indian reserve lands are thus outside the jurisdiction of both provincial and local governments in British Columbia. The terms of union with the Canadian Confederation, which British Columbia joined in 1871, included maintaining the federal responsibility for dealing with all matters related to indigenous people.

The Canadian Constitution Act 1981 provided in section 35 (1) that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed”. In section 35 (2), aboriginal peoples were defined as including “Indian, Inuit and Métis peoples of Canada”. In 1990 Ronald Sparrow, a member of the Musqueam band, appealed his conviction on a charge under the Fisheries Act on the ground that this was inconsistent with section 35 of the Constitution Act. The Supreme Court of Canada referred to *Guerin v The Queen* and other cases in noting that “the *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation”. The Court went on to state:

That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginal is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹⁵

The effect of the *Sparrow* case was a ruling that aboriginal and treaty rights are capable of evolving over time and should be interpreted liberally, and that governments may regulate existing aboriginal rights only for compelling reasons such as conservation and management of resources. In the case of fisheries, conservation issues are paramount, but the next priority must be to aboriginal food fishery before other user groups. It was probably the *Sparrow* discussion which most provoked the British Columbia government to rethink its position on the question of aboriginal rights. In 1990, the British Columbia government decided to participate in the ongoing federal government negotiations in the comprehensive claim of the Nisga’a Tribal Council.

In 1984, the Gitskan and Wet’suwet’en Hereditary Chiefs sought recognition by the Supreme Court of British Columbia of their ownership of some 57,000 square kilometres of traditional territory in northern British Columbia and their right to govern it, as well as compensation for loss of lands and resources. In 1991, the Court dismissed the claims to ownership and aboriginal rights and ruled that the Crown had extinguished aboriginal title

¹⁵ *R v Sparrow* (1990) 70 DLR (4th) 385, 408.

before 1871. The Court also stated that the Gitskan and Wet'suwet'en Hereditary Chiefs "are entitled to a declaration that, subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the [tribal] territory for aboriginal sustenance purposes".¹⁶ There was a good deal of dissatisfaction over this judgment on all sides.¹⁷ The Gitskan and Wet'suwet'en chiefs took their case to the British Columbia Court of Appeal. This Court ruled that the Gitskan and Wet'suwet'en people have "unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right" to much of their traditional territory, and that "such rights are of a *sui generis* nature".¹⁸ This did not alter the view that the radical title vested in the Crown, but it did overturn the view that aboriginal rights or interests had been extinguished by the assertion of British sovereignty in British Columbia before the province joined the Canadian Confederation in 1871. The Court of Appeal also suggested that the scope and content of aboriginal rights should be defined by negotiation rather than litigation in the courts.

III. THE BRITISH COLUMBIA TREATY COMMISSION

On 21 September 1992, the "British Columbia Treaty Commission Agreement" was signed in Vancouver by representatives of the First Nations Summit and the Prime Ministers of British Columbia and Canada. The agreement established a Commission of four members, two appointed by First Nations, and one each by the two governments plus an independent chair, the Chief Commissioner. The agreement stated that "[t]he role of the Commission is to facilitate the negotiation of treaties and, where the parties agree, other related agreements in British Columbia". It was also agreed that the two governments would pass appropriate legislation "to establish the Commission as a legal entity". On 1 March 1996, both the British Columbia and federal governments proclaimed the British Columbia Treaty Commission Act. In the meantime the appointment of Commissioners for two-year terms from 1993 was made by Orders in Council. The First Nations Summit agreement to establish the Commission, and then to ratify the 1996 Act, was by resolution. Funding of the operation of the Commission is shared by the two governments. The British Columbia Treaty Commission

¹⁶ *Delgamuukw and Others v The Queen* (1991) 79 DLR (4th) 185, 537.

¹⁷ See Cassidy, F (ed) *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (1992); Monet, D *Colonialism on Trial: Indigenous Land Rights and the Gitskan Wet'suwet'en Sovereignty Case* (1992); Stokes, "The Land Claims of First Nations in British Columbia" (1993) 23(4) *Victoria University of Wellington Law Review* 171-190; and Mills, A *Eagle Down is our Law: Witsuwit'en Law, Feasts and Land Claims* (1994).

¹⁸ *Delgamuukw v British Columbia* (1993) 5 W W R 97.

established its office in Vancouver and began receiving “Statements of Intent” from First Nations on 15 December 1993.

The aboriginal population of British Columbia in 1995 was approximately 155,200, or about 17 percent of the total aboriginal population of Canada. Of these approximately 87,700 are “status Indians” as defined in the Indian Act, and 67,500 are non-status Indians and Métis who live in the province. Some 46,500 status Indians, or about 53 percent, live on reserves in 350 communities. The average size of a village on a reserve is about 120 people. There are 1634 reserves, mostly on small pockets of land near rivers, lakes, or on the coast:

Aboriginal people who leave their reserve homes generally do so in search of employment, or to escape crowded housing conditions and social distress that exist in many reserve communities. But in leaving the reserves, they lose benefits that are available to them from Indian and Northern Affairs, Canada, such as social assistance, housing and tax benefits. Aboriginal people who live off-reserve are eligible for the same programs and benefits that are available to all British Columbians. For those who live on-reserve however, many of these programs are out of reach. The paradox of aboriginal life in British Columbia, as in many other parts of Canada, is that the reserve is home. But on-reserve, there is little employment opportunity.¹⁹

There are some 220 separate bands and most of these have amalgamated locally into about 33 tribal councils, although some bands have affiliations to more than one council. About 20 bands are “independent” and are not members of any tribal council. There are 10 major linguistic areas and a much larger number of languages which are not mutually intelligible. There is also considerable variation in social, political and economic organisation within and between band and tribal council areas.

The British Columbia Treaty Commission is frequently described as “the keeper of the process of treaty-making”. Its role is independent and neutral, but it does not investigate the nature of claims against the Crown. Its principal function is to manage the treaty negotiations, assess readiness, provide funding to First Nations, monitor progress, set in place dispute resolution services if required, and generally ensure that the commitments entered into by the parties are carried out. The term “First Nation” was defined in the British Columbia Treaty Commission Agreement:

¹⁹ Ministry of Aboriginal Affairs, *The Aboriginal Peoples of British Columbia: A Profile* (1992) 6.

“First Nation” means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

The British Columbia Treaty Commission has established a six-stage process for negotiation of treaties:

“Stage 1: Statement of Intent”. This is a brief document filed with the B C Treaty Commission by the claimant group which must identify the First Nation and the aboriginal people it represents, confirm that the claimants have a mandate to negotiate, describe the geographic area of that First Nation’s traditional territory within British Columbia, and identify a formal contact person for communications.

“Stage 2: Preparation for Negotiations”. Once a Statement of Intent is accepted by the Commission, it gives written notice to the two governments and convenes an initial meeting of the parties within 45 days. This meeting is normally held within the territory of the First Nation concerned. The parties then work on preparation for their negotiations and must meet “readiness criteria” which include appointment of a chief negotiator, and allocation of resources to carry out negotiations. The First Nation must also identify and begin to address any issues of overlapping claims with neighbouring First Nations. The two governments are required to obtain background information on the communities, people and interests likely to be affected by negotiations, and to establish mechanisms for consultation with non-aboriginal interests.

“Stage 3: Negotiation of a Framework Agreement”. This is a negotiated agenda that identifies the issues to be negotiated, the goals of the negotiation process, any special procedural arrangements and a timetable for negotiations. The parties are also expected to embark on a programme of public information that will continue throughout the negotiations.

“Stage 4: Negotiation of an Agreement in Principle”. This is the stage of substantive negotiations to form the basis of a treaty. The ratification process will be agreed and an implementation plan considered. There is also provision for public review in British Columbia of agreements in principle before ratification.

“Stage 5: Negotiations to Finalize a Treaty”. While there is provision for additional agreements on minor issues to be negotiated as required, it is intended that the treaty

will be a durable document signifying a new relationship between First Nations and the provincial and federal governments.²⁰

By mid 1995 there were 43 First Nations who had submitted “Statements of Intent” which had been accepted by the British Columbia Treaty Commission. By 30 June 1996 the total was 47. Some of these were individual bands, some were tribal councils, and other groups described themselves as a “nation” or “hereditary chiefs”. Most of these were still engaged in the second and third stage of the treaty-making process, but 11 groups had met the “criteria for readiness”, negotiated a framework agreement, the third stage, and moved to Stage 4, negotiation of an agreement in principle, by mid 1996.²¹ It was estimated in 1994 that about 65 percent of First Nations in British Columbia had agreed to participate in the process of treaty negotiations.²² By June 1996, the British Columbia Treaty Commission was expressing concern about “system overload” and inadequate funds to resource so many separate negotiations.²³

IV. THE FEDERAL GOVERNMENT PERSPECTIVE ON TREATY NEGOTIATIONS

The federal government of Canada has jurisdiction over all matters in relation to aboriginal people. In a draft paper entitled “British Columbia Treaty Negotiations, The Federal Perspective”, produced in the Federal Treaty Negotiation Office in British Columbia in June 1995, the treaty negotiations were described as “unfinished business” that for “historical, legal, economic and social reasons” needs to be completed:

As the Constitution is silent on the nature, scope and extent of aboriginal rights, and because the Court decisions have not resulted in a clear definition of aboriginal rights, legal disputes have arisen over these issues. The courts have, however, clearly indicated that when dealing with aboriginal rights, they are to be regarded as use, site, and group specific. This means that wherever the court considers issues of aboriginal rights, it does so in the context of the particular facts and the particular group before it. Accordingly, there remains much uncertainty with respect to land and resource

²⁰ “With continuing goodwill, commitment and effort by all parties, the new relationship will be brought to life at this stage” (*British Columbia Treaty Commission, Policies and Procedure* (1994) 12).

²¹ *British Columbia Treaty Commission, Annual Report* (1996) 23.

²² Fisher, “British Columbia Treaty Commission: An Update”, paper presented to conference, *supra* note 3.

²³ *Supra* note 21, at 24.

use. Resolving this uncertainty can be pursued by litigation or negotiation. The courts have endorsed negotiations as the best way to resolve land claims.²⁴

There was an economic dimension to this “uncertainty” in First Nations’ protests, court judgments and injunctions:

In this climate of uncertainty, British Columbians and other Canadians have lost opportunities to areas where there are fewer uncertainties related to the use of lands and resources. The extent of such lost opportunities was examined in a 1990 Price Waterhouse study. This study estimated that over \$1 billion and 1,500 jobs had been lost in the mining and forestry sectors alone as a result of disputes over land claimed by aboriginal people in British Columbia.²⁵

There were also social dimensions in that the “socio-economic conditions of aboriginal communities lag behind other communities in British Columbia”. In the same paper, under the heading “The Federal Vision”, it was stated:

Canada seeks a society in which a new relationship has been forged with First Nations; a relationship based on respect and trust and one that reconciles modern Canadian realities and traditional native aspirations.²⁶

This “new relationship” is to be “built on a process of negotiations” between First Nations and the British Columbia and federal governments. Among the “Fundamental Elements of the Federal Vision” are the desire “to pursue certainty as to the rights and obligations of all land and resource users”; to “deal with aboriginal issues with equality and finality”; to negotiate practical treaties protected by the Constitution, as well as other agreements; and “to protect third party interests and balance the interests of all Canadians”. The “certainty” resulting from treaty settlements would mean increased confidence for investors, and therefore increased revenue and jobs for all British Columbians:

First Nations, too, will have increased opportunities for economic development. The provision of a clearly-defined land base, access to resources and financial benefits will assist their aspirations for sustainable communities and self-reliance.... The integrity of the Canadian nation will be enhanced. Negotiations are not about separateness nor segregation. They will not result in sovereign states or autonomous enclaves within the boundaries of Canada. Treaties, including their self government components, will enhance aboriginal participation in Canadian society.... Finally,

²⁴ Federal Treaty Negotiation Office, *British Columbia Treaty Negotiations: The Federal Perspective* (Draft) (27 June 1995) 2-3.

²⁵ *Ibid*, 3.

²⁶ *Ibid*, 4.

both the Department of Indian Affairs and the *Indian Act* should no longer be necessary. The anachronistic and paternalistic structures can be dismantled and First Nations at long last take charge over their own futures.²⁷

The concept of an “inherent right to self-government” was defined in the constitutional amendments proposed in 1992:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction:

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
- (b) to develop, maintain and strengthen their relationship with their lands, waters and environment

so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.²⁸

Although the “Charlottetown Accord” was not ratified by all the provinces, the concept of an aboriginal right to self-government became federal policy. The federal government announced on 10 August 1995 a “negotiating process which will enable Aboriginal peoples to implement their inherent right of self-government”. The Minister of Indian and Northern Affairs, Ronald Irwin, stated that “the paternalistic system has just not worked – and the proof is all around us”. This new approach was intended to “give Aboriginal communities the legitimate tools they need to make a tangible positive difference in the lives of Aboriginal peoples”. It was also recognised that there was “no single model of self-government”, and that each First Nation community would negotiate with federal and provincial government representatives on matters important to them. It was noted that “[t]his may include new arrangements in areas such as Aboriginal languages, cultures, education, health, housing and social services among others”. A number of “key principles” were identified as the policy basis for negotiating self-government agreements:

- the inherent right is an existing Aboriginal right under the Canadian Constitution;
- self-government will be exercised within the existing Canadian Constitution; it should enhance the participation of Aboriginal peoples in Canadian society;
- the *Canadian Charter of Rights and Freedoms* will apply fully to Aboriginal governments as it does to other governments in Canada;
- due to federal fiscal constraints, all federal funding for self-government will be achieved through the reallocation of existing resources, as outlined in the 1995 Budget;

²⁷ *Ibid*, 5-6.

²⁸ *Consensus Report on the Constitution (Final Text)* (28 August 1992) 14.

- where all parties agree, rights in self-government agreements may be protected in new treaties under Section 35 of the Constitution [Act], in addition to existing treaties, or as part of comprehensive land claims agreements;
- federal, provincial and Aboriginal laws must work in harmony; laws of overriding federal and provincial importance such as the Criminal Code will prevail;
- the interests of all Canadians will be taken into account as agreements are negotiated.²⁹

The issue of governance was already on the agenda for treaty negotiations in British Columbia. The Department of Indian and Northern Affairs affirmed this in a separate information release dated 10 August 1995:

The federal government is committed to full and extensive consultation with the public and third party groups in British Columbia. In other words, the principals [sic] and practices of openness which currently characterize the B C treaty-making process will also apply to self-government negotiations. The advice of the existing Treaty Negotiation Advisory Committee (TNAC) and Regional Advisory Committees (RAC's) will be sought in support of self-government negotiations. Public information initiatives will also encompass self-government.³⁰

The response in British Columbia was more sceptical. The *Vancouver Sun*, reporting the federal government announcement, noted that giving “municipal-type powers to aboriginal governments won’t avert a looming crisis in B C treaty negotiations”, referring to the recent break down of the Nisga’a negotiations. The President of the Nisga’a Tribal Council, Joseph Gosnell:

said he was unimpressed by Irwin’s announcements. He said he found it difficult to believe Ottawa would be able to carry through such a sweeping national policy when it is unable to agree with the B C government over sharing the cost of a single treaty with the Nisga’a ... The response from Victoria was also cool – aboriginal affairs assistant deputy minister Joy Illington described the proposal as an incursion into provincial jurisdiction and an attempt to shift costs on to the B C taxpayers. Gosnell said the Nisga’a manage several of the services – including health care and education – Irwin is offering to negotiate. He suggested Irwin is simply tagging along behind the Nisga’a and other tribes that have already taken on similar responsibilities.³¹

Some of the most vigorous opposition to the treaty-making process in British Columbia, and second only to concerns about the cost of treaty settlements,

²⁹ Government of Canada, Communique/News Release, 10 August 1995.

³⁰ Department of Indian and Northern Affairs, Communique/News Release: “Government Launches Process for Negotiating Aboriginal Self-Government”, 10 August 1995.

³¹ *Vancouver Sun*, 11 August 1995.

is on the issue of aboriginal self-government. An extreme conservative view is that of Melvin Smith, QC, who was critical of both federal and provincial government policy on aboriginal affairs:

The outcome of these treaty negotiations, as presently contemplated, with the self-government arrangements which are likely to follow, could re-shape the economic, social and political face of British Columbia. If this process goes ahead, at the end of the day, B C may create dozens of fiefdoms, or so-called "First Nations", each with their own law-making body, territory, justice system and economy. In process and in substance the present B C treaty-making process is ill-conceived, unworkable, unaffordable and unjust. It must be substantially modified.³²

In a review of the relationship between aboriginal people and the Crown in Canada, Frank Cassidy described the "troubled hearts" of both First Nations people and those of European descent who have not yet learned to live comfortably with each other:

The movement for indigenous self-government has come a long way in the past thirty years. If it is to continue to proceed forward and if difficult issues such as achieving a balance between the right of indigenous peoples as indigenous peoples and as Canadians are to be resolved, then Canadians are going to have to look deep into their own history and culture. Canadians are going to have to think about their country, its past and future, in vastly different ways than those to which they have become familiar. It might be agreed that this is not very likely. And that may be so, but such an argument should not obscure what is necessary for a full recognition of the indigenous right of self-government in Canada today.³³

The demise of the Indian Act, the transfer of certain powers of self-government to First Nations, and reform of land tenure arrangements are among the long-term objectives of federal policy.

V. THE BRITISH COLUMBIA GOVERNMENT PERSPECTIVE ON TREATY NEGOTIATIONS

In late 1993 the British Columbia government produced a booklet outlining its attitude to treaty negotiations:

British Columbia is committed to the resolution of treaty settlements with the aboriginal First Nations of our province. We have made this commitment because we

³² *Supra* note 5, at 104-105.

³³ Cassidy, "Troubled Hearts: Indigenous People and the Crown in Canada" (1994) 35(2) *Pacific Viewpoint* 191.

can no longer afford to ignore issues that will have a profound effect on all our lives in the years ahead. The status quo is no longer a viable option for this province. Social stability and economic certainty are essential to the well being of all British Columbians, and the courts have made it clear that treaty negotiations, not costly litigation, are the best way to resolve these historical issues. First Nations have said they want to build independent, healthy, productive communities. They need a definitive framework within which their unique culture can flourish, and all British Columbians need the reassurance that positive steps are being taken to end years of indecision.

It won't be easy. But it will be fair. Treaty settlements issues are complex. There are many voices to be heard and many points of view to be reconciled. Consensus will not be achieved overnight. But the will is there, and the British Columbia government's mandate is clear: we will seek fair, affordable, long-term solutions that serve the rights and reflect the interests of all British Columbians.

Fairness, above all else, will remain the cornerstone of the settlement process. Settlements should recognize the rights, privileges and obligations of all citizens. Privately owned property is not on the table. And the province will not enter into any agreements that place undue financial burden on the taxpayers of British Columbia.³⁴

The political rhetoric that justified the reversal of British Columbia government policy in recognising aboriginal rights and accepting the need to negotiate treaties was based on objectives of "economic certainty, social stability and new hope for the future".³⁵

While the British Columbia government had been forced into this position by the courts, there was general agreement that negotiation was the only way through the situation. The difficulties lay in establishing a process that was effective and acceptable to all parties. The increasing level of protest by First Nations during the 1980s, and the implications of judicial decisions such as the *Sparrow* case in 1990, also had the consequence that pressure from a variety of other groups was being put on the British Columbia government to deal with aboriginal rights issues. Early in 1991, a "Third Party Advisory Committee" was established, comprising over 30 representatives from the timber, mining and petroleum industries, commercial and sport fishing interests, farming organisations, local government, labour organisations and environmental and recreational groups. This committee met periodically and reported directly to the Minister of Aboriginal Affairs.

³⁴ Government of British Columbia, *In Fairness to All: Moving Towards Treaty Settlements in British Columbia* (1993) 2-3.

³⁵ *Ibid.*, 45.

In 1993 the Ministry of Aboriginal Affairs was restructured to service the requirements of the treaty-making process, parallel with the establishment of the British Columbia Treaty Commission. A Treaty Negotiations Division was established to service the negotiating teams and various other committees. The province was divided into several regions, each with its own negotiating team. A regional negotiating team comprises a chief provincial negotiator and several other negotiators, each with a responsibility for a particular claim, or group of claims. In addition, one team member is responsible for consultation, including servicing the Regional Advisory Committees which are described below. The team is also provided with legal counsel and other administrative and secretarial staff. The negotiating teams work closely with the equivalent federal negotiating team in each region.

A statement produced by the British Columbia Ministry of Aboriginal Affairs in 1994 set out some principles that apply to treaty negotiations throughout the province:

- the Canadian Constitution will apply to all citizens of B C;
- private property will not be on the table;
- fair compensation for unavoidable disruption of commercial interests will be assured;
- province-wide standards of resource management and environmental protection will continue to apply;
- continued access to hunting, fishing and recreational opportunities will be guaranteed;
- jurisdictional certainty between First Nations and local municipalities must be clearly spelled out.

These and two additional points were included in a statement by British Columbia Premier Mike Harcourt on 23 September 1994:

- agreements must be affordable to B C taxpayers;
- the federal government's primary constitutional and financial responsibility for treaties must be maintained.

Harcourt underlined the inherent political conflict between federal and provincial responsibilities, and reiterated the British Columbia view, consistently held by all British Columbia governments, that the costs of negotiating with aboriginal people is primarily a federal responsibility.

The Minister of Aboriginal Affairs, in providing instructions to provincial negotiating teams, has been concerned with ensuring consistency province-wide. In policy development, the Treaty Negotiations Advisory Committee

(TNAC), which is discussed below, was seen as playing an important role to ensure that the interests of local government, industry, communities, and labour and environmental organisations are considered. It was also recognised that some elements of settlement packages will be specific to particular negotiations with First Nations but must fall within the province-wide mandate. Overall review of negotiations is coordinated by the Treaty Mandates Branch of the British Columbia Ministry of Aboriginal Affairs and reported to the Minister. The British Columbia Cabinet must approve the “mandates” or instructions given to provincial treaty negotiators.

VI. “OPENNESS” AND “THIRD PARTY” CONSULTATION

The British Columbia Claims Task Force in 1991 briefly considered “non-aboriginal interests”, often referred to as “third parties”, and recommended that these “be represented at the negotiating table by the federal and provincial governments”. The Task Force commented that the two governments “face a major challenge in properly representing the full range of non-aboriginal interests in negotiations”, but did not consider that third parties as such should be involved in negotiations. The Task Force also identified a need for “public education and information”, but this is a separate issue from consultation with third parties. The legal issues are clear, that negotiations are between First Nations and the Crown, represented by both federal and provincial governments. The pragmatic political reality is that powerful third-party interests have lobbied for more participation in the treaty-making process.

In July 1993, the Third Party Advisory Committee was given a more formal existence as part of the restructuring of the Ministry of Aboriginal Affairs which set up the Treaty Negotiations Division. By 1994, the Committee was renamed the Treaty Negotiations Advisory Committee (TNAC), and included the representatives of major sectors and groups in British Columbia as well as provincial and federal representatives. The Committee meets regularly with the function of providing input to policy-making at a provincial level. Its meetings are not open to the public. Each member of TNAC also participates in the monthly meetings of one or more of five “sectoral committees” – fisheries, lands and forests, wildlife, governance, and energy, minerals and petroleum resources.

A number of interest groups have also established their own organisations. For example, the Council of Forest Industries (COFI) has established an Aboriginal Affairs Division. So too has the Union of British Columbia Municipalities. The local government role is discussed below. The theme of the February 1995 Newsletter of the COFI Committee on Aboriginal Affairs

was “Organizing for Treaty Negotiations”, and outlined the status of negotiations and contact people in federal and provincial negotiating teams:

The Council of Forest Industries Aboriginal Affairs Division is working to help forest industry members assess the impact of these negotiations and determine how we need to organize our participation.... COFI believes the outcome of treaty negotiations will reflect forest industry interests in proportion to our level of involvement in the process. Every one of us has a responsibility to become as knowledgeable as possible and to make our voices heard either directly to the governments [federal and provincial] or through our industry representatives.³⁶

The forest industry is a powerful lobby group, and, like the commercial fishing industry and others, has spoken out about concerns over treaty negotiations. There are also well-organised environmental groups who, in a coalition with First Nations, have succeeded in either preventing or at least restricting logging, and who maintain a steady opposition to the practice of clear cutting by timber companies. The injunction against any logging of Meares Island, and joint management agreements between the British Columbia government and Nuu-cha-nulth tribes for the Clayoquot Sound area of western Vancouver Island, are examples of restrictions imposed on timber company operations. The issue of negotiating “interim measures” to deal with aboriginal rights before specific treaty negotiations are finalised is one that has concerned TNAC and is discussed in a later section. The one theme that seems to link all the various interest groups is the desire for certainty and finality as the outcome of treaty negotiations. It is probably in response to lobbying by conflicting interests that the British Columbia government has put a great deal of emphasis on “openness” and “consultation”, although the TNAC members are bound by confidentiality in their meetings.

On 19 September 1994, “Instructions on Open Negotiations” were issued by the British Columbia government, which included a statement of “Principles for Openness”:

Negotiations must not be done in secret. Openness must be the starting point for treaty negotiations, with any closed negotiations the exception, rather than the rule. Provincial negotiators will therefore be instructed to negotiate with the federal government and First Nations as open a process as possible. Open negotiations could include:

- opening main table negotiation sessions for observation by anyone;

³⁶ Council of Forest Industries, (February 1995) 3(1) *Newsletter of the COFI Committee on Aboriginal Affairs* 1.

- broadcasting some negotiating sessions on local cable television or radio;
- opening up side tables to stake holders where specific issues are being discussed.³⁷

Some of the ways in which British Columbians could have “meaningful input into the process” included the Treaty Negotiations Advisory Committee (TNAC), a regional consultation process of public forums, the regional advisory committees (RAC), and an agreement with the Union of British Columbia Municipalities (UBCM) which ensured local government participation through local treaty advisory committees (TAC). There was also to be publication of “province-wide mandates, setting out the bottom lines and goalposts for the negotiations”, as well as information sharing throughout the process. In addition, there is provision that all treaty settlements will be submitted to the British Columbia legislature for ratification, before final approval by federal government in Ottawa, and thus subject to further public scrutiny.³⁸

In an address to the Union of British Columbia Municipalities, 20 September 1994, British Columbia Premier Harcourt commented that “[t]he old framework for negotiating treaties with the Nisga’a First Nation has demonstrated how mandatory confidentiality clauses can undermine public trust in the process”. This was a scarcely disguised swipe at the federal policy of negotiating comprehensive claims both with the Nisga’a in British Columbia and with other aboriginal peoples in the northern regions of Canada, which had not been open to any public scrutiny. This was also a little unfair, because the Nisga’a Tribal Council had gone to considerable trouble to provide information to the public about their negotiations. It has been suggested privately by some officials that perhaps the British Columbia government “over-reacted” in the pursuit of openness in negotiations. This meant that meetings “in committee”, in which all parties may freely debate alternative options, may be severely constrained. In practice, it simply means that much of this debate is carried on informally, by “working parties”, and the public negotiations become more formally structured occasions, after understandings are reached. In its Annual Report of July 1996, the British Columbia Treaty Commission referred to the need for public information and the need for a “balance of openness and confidentiality” in treaty negotiations:

Parties need time to explore interests and explore options in a safe and confidential environment. They need to develop trust among themselves when they have

³⁷ Ministry of Aboriginal Affairs, *News Release: Provincial Policies for Openness in Treaty Negotiations* (19 September 1994).

³⁸ See Figure 2 below.

narrowed the issues for continued discussion, the time should be appropriate for the talks to be open to the public.³⁹

The First Nation is also required to agree to a process of consultation with third parties, openness in treaty negotiations, and participation in public education and information activities. To this end, an "Openness Protocol" must be signed by the principal negotiators of the First Nation and the federal and provincial governments, which sets out the respective obligations in some detail.

VII. REGIONAL ADVISORY COMMITTEES (RAC)

Within each regional area served by a provincial and federal negotiating team, a system of regional advisory committees has been established. These committees are made up of representatives of a wide range of organisations and community groups. For example, the distribution list for the South Island Regional Advisory Committee, established in May 1995 and covering the south and east side of Vancouver Island, included 56 representatives from agriculture (farmers' organisations), commercial fishing (both industry and unions), community services, education (school trustees' associations), environment and conservation groups, forestry companies and forest contractors, health authorities, labour organisations, local government, outdoor recreation, real estate and homebuilders' associations, small business (Chambers of Commerce), sport, fishing and tourism, transportation and utilities, and wild life interests.

The terms of reference for regional advisory committees note that both federal and British Columbia governments are committed to consultation, and that the "readiness criteria" set out by the British Columbia Treaty Commission require that a mechanism be put in place for consultation with non-aboriginal interests. The regional advisory committee is "a cross-sectoral committee representing any organizations whose interests may be directly affected by treaty negotiations". The purpose of the committee is to provide information and advice to federal and provincial negotiators, to "ensure that the interests and expertise of economic, resource, environmental, social and governmental sectors are understood and taken into account" in the process of negotiation of treaties. The RAC is also expected to "contribute to treaty arrangements that are workable and lasting" and to be "a vehicle for information exchange among the various sectoral interests and the federal and provincial negotiators". The administration and financing of RAC meetings is the responsibility of the federal and provincial negotiating teams. The committees meet quarterly, or more often if required,

³⁹ *Supra* note 21, at 29.

at various centres within the region. Meetings are open to members of the public, who may be given speaking rights at the invitation of the chairperson. Media representatives are “asked to identify themselves as a matter of courtesy”.

Early meetings of each RAC have focussed on organisational issues and agreement on the terms of reference. The next stage is the organisation of workshops to assist the RAC in defining the interests of each group represented which may be affected or should be considered in treaty negotiations within the RAC region. It is too soon to assess the effectiveness of the RAC. However, it does provide a mechanism for communication and consultation which is open to public view. In contrast, the TNAC structure is bound by confidentiality provisions, and its purpose is primarily to provide sectoral input to the development of British Columbia provincial government policy on treaty negotiation issues. The RAC is also intended to be a means of providing information to the federal and provincial negotiating teams. At a meeting of one RAC attended by the writer in 1995, there were strong expressions of opinion that First Nations should be asked to meet directly with the RAC, but it was never intended that the RAC be directly involved in negotiations. The RAC is also intended as a vehicle for public information about treaty negotiations in the region. However, there is a need for RAC members themselves to be educated about the legal and historical background which has led to the treaty-making process now in train in British Columbia before this public information role can become effective.

VIII. LOCAL GOVERNMENT AND TREATY NEGOTIATIONS

In 1991, in response to British Columbia government proposals to participate in a process of negotiating treaties, the Union of British Columbia Municipalities (UBCM) began to address the implications for local governments. Policy papers were prepared, setting out “basic principles and criteria for the successful resolution of land claims”. The negotiation process “must be fair, open, principled and community based”. Criteria for “success of process” included that it must be “democratic, efficient and acceptable”, and mechanisms to achieve this must include “public information and education; public consultation; a dispute resolution process and pro-activity on the part of local governments”.⁴⁰

In September 1994, the UBCM produced another policy paper which attempted to define “the municipal interest”. It was considered that there

⁴⁰ *Union of British Columbia Municipalities, Local Government and Aboriginal Treaty Negotiations: Defining the Municipal Interest, A Policy Paper* (1994) 9.

were many implications for the 75 local governments “with reserve lands within or adjacent to their boundaries and for those dependent on resources in traditional aboriginal territories”. The UBCM considered that local government interests would be general, or common to all negotiations and to the community generally, and that some would be specific to local government, such as “revenue and taxation, planning, infrastructure and servicing, and governance and jurisdiction”.⁴¹ Among general interests identified were “certainty and finality” in treaty settlements; “affordability”, meaning “they will not impose any extraordinary financial burdens on the people of British Columbia”; maintaining “social and economic stability”; settlements being within the Canadian Constitution, “the Charter of Rights and Freedoms to apply to all citizens and residents”, and “equity and fairness”; similar standards of land use planning, environmental protection and other regulatory provisions to apply on both local government and First Nation territories; fee simple lands not be part of negotiation, nor subject to expropriations, and compensation be payable for other forms of interest in land or resources which may be part of a treaty settlement; concern about management and jurisdiction over various resources, especially forests, water and agricultural land; the negotiation process to “be as transparent as possible”, and encouragement of consultation, communication and public information between local governments and First Nations; and the establishment of “mechanisms for dispute avoidance and that there be a formalized process for dispute resolution following the final settlement”.⁴²

In a further paper prepared by the UBCM Executive in April 1995, the focus was on “certainty and finality” as “the primary outcomes of treaty negotiations”. The UBCM preference was for a surrender of the vague general concept of “aboriginal rights” and to replace this with a definition of specified treaty rights to land and resources, while acknowledging that “cultural and similar rights” might continue. Underlying the local government concerns is a fear of loss of revenue if large areas of land and resources are transferred to First Nations as part of any treaty settlement. Nor do local governments want to inherit continuing disputes over property tax, planning issues, or services such as water supply, sewerage, and garbage disposal. Indian lands are the responsibility of the federal government and lie outside the jurisdiction of local or provincial governments.

Property on Indian reserves has been exempt from taxation since 1876 when the federal Indian Act was passed. The intention was to protect reserve lands and ensure that use of Indian property on reserve lands would not be eroded

⁴¹ *Ibid*, 13.

⁴² *Ibid*, 10-12.

by taxation. One way for a First Nation to move toward greater self-reliance and economic independence is to assume control of property taxation on reserve lands. There were problems, however, for First Nations who wanted to tax non-Indian users of reserve lands. An earlier interpretation of the Indian Act suggested that leased land was no longer “in the reserve”, and that the First Nation’s taxation powers therefore did not apply. This was remedied by an amendment to the Indian Act in 1988 which allowed a First Nation to pass a property taxation bylaw for a reserve, which has to be reviewed by the Indian Taxation Advisory Board, and then approved by the federal Minister of Indian and Northern Affairs.

In 1990, the British Columbia government passed the Indian Self-Government Enabling Act, which provides for withdrawal of provincial and municipal authorities from taxing reserve lands when the First Nation taxation bylaws take effect. In the same year, the Westbank and Kamloops Indian Bands passed taxation bylaws and since then nearly 40 other First Nations have followed their lead. In 1994, the British Columbia Ministry of Aboriginal Affairs estimated that less than one percent of the province’s property tax base was on reserve land. The Ministry commented that “[b]and taxation has little effect on the overall revenues of either provincial or local governments, but has been of significant benefit to First Nations with taxation powers”.⁴³ In a number of cases where First Nations have established their own taxation schemes, they have also negotiated service agreements with the local municipality for sewerage, water supply, garbage collection or other services or facilities. Municipalities have, however, expressed concern that, if large areas are transferred to First Nations as part of treaty settlements, there will be a consequent loss of revenue to local governments.

On 22 March 1993, a “Memorandum of Understanding” was signed by representatives of the Province of British Columbia and the Union of British Columbia Municipalities. The British Columbia government recognised that “local government constitutes a unique and special government interest in the negotiation of modern day treaties”, and agreed to establish “a process for local government representation” before the framework agreement negotiations stage of treaty-making is commenced. The British Columbia government also agreed to consult on any matter affecting local government interests, including:

⁴³ Ministry of Aboriginal Affairs, *Information About First Nations Property Taxation* (1994).

- any proposed changes to legislation that may directly or indirectly affect local government;
- fiscal arrangements between the Province and local governments;
- land selections in areas within or adjacent to municipalities;
- the creation of new institutions of governance where local government interests are affected;
- terms of settlement related to service production and delivery;
- issues related to the financing, construction and maintenance of municipal infrastructure;
- issues related to land use planning, zoning, regulation, and standards and codes;
- emergency services within local government service boundaries;
- bylaw enforcement.

The UBCM agreed to participate in “the implementation of a process of public information and education in each land area” and cooperate in “a process of public consultation”. The British Columbia government also agreed to provide funding to cover costs beyond those normally covered by member contributions to UBCM.

On 19 September 1994, a further document was signed by representatives of the British Columbia government and UBCM, entitled “Protocol... for implementing the Memorandum of Understanding on Local Government Participation in Aboriginal Treaty Negotiations”, which dealt with the first four stages of the treaty-making process. The agreement set out provisions for identification of local government interests that may be affected by treaty-making, establishment of a comprehensive consultation process with local governments in each treaty area, and establishment of local treaty advisory committees (TAC). At the readiness stage for a framework agreement, each local government in a treaty negotiation area could nominate one representative to a TAC. One member of a TAC would be nominated to be present with the provincial negotiator’s team at the negotiating table with full access to the agenda and knowledge of issues under negotiation. The local government role had shifted from consultation to participation in negotiation, to the extent that the TAC representative acted as an adviser on the provincial negotiating team. The British Columbia Government had also agreed to set up RACs, but the TAC representative at the negotiating table would not also be a member of the RAC. The role of the TAC, as defined in the “Protocol”, is to ensure “that the provincial team is fully aware of local government’s interests and that those interests have been considered in Agreement in Principle negotiations”.

IX. "INTERIM MEASURES"

The British Columbia Claims Task Force had recommended in its Report that "[t]he parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process".⁴⁴ A discussion paper produced by the British Columbia Ministry of Aboriginal Affairs in May 1995 provided a definition:

An interim measure is an activity related to the management or use of land or resources undertaken before or during treaty negotiations, i.e. in the interim before treaties are settled or the land question is resolved in other ways, that is aimed at meeting British Columbia's legal obligations and policy commitments as well as representing and protecting the rights and interests of all British Columbians.⁴⁵

Two kinds of interim measures were identified. The first, described as "program-related", are concerned with agreements between the British Columbia government, through any of its ministries, with any First Nation. Such agreements may include the protection of specific sites such as burial grounds or berry picking areas, the sharing of information on development proposals or land use plans, the participation of First Nations in joint management of lands and resources, or their access to employment, training programmes or other economic development initiatives. A number of such agreements have already been signed. The second form of interim measure are "treaty-related". Such measures are intended to protect agreements already reached by both the federal and provincial negotiators with the First Nation concerned and which are already set out in a framework agreement. Protection measures may include an agreement not to alienate land, or the restriction of certain land development activities. There is also a requirement for consultation with affected third parties by reference to the Treaty Negotiations Advisory Committee and RACs, and in accordance with the Protocol Agreement with the Union of British Columbia Municipalities.

Interim measures, according to a statement produced by the Ministry of Aboriginal Affairs, do not:

- transfer the jurisdiction of lands and resources to First Nations;
- include broad moratoria over land and resource development; or
- predetermine the outcome of treaty negotiations.⁴⁶

⁴⁴ Supra note 2, at 65.

⁴⁵ Ministry of Aboriginal Affairs, *British Columbia's Approach to Interim Measures Regarding Lands and Resources: Discussion Paper* (25 May 1995).

⁴⁶ Ministry of Aboriginal Affairs, *Information About Interim Measures* (1994).

Individual British Columbia government ministries are responsible for notifying and consulting with First Nations whenever aboriginal rights may be affected within that ministry's jurisdiction: forestry issues are dealt with by the Ministry of Forests, fishing issues by the Ministry of Agriculture, Fisheries and Food, and disputes over a protected area by the Ministry of Environment, Lands and Parks. While interim measures can include agreements on management of lands and resources, or protection of specific cultural sites, they may also include the establishment of a framework to transfer responsibility for child welfare, social services or education from the Province to a First Nation. The onus, however, appears to be on the government ministry to notify and consult with First Nations and also to notify and consult with third parties whose interests may be affected. The Ministry of Aboriginal Affairs stated that "[m]inistries are responsible for making sure all interests – aboriginal and non-aboriginal – are represented and respected through open and accessible negotiations".⁴⁷

In January 1995, in a direct response to the British Columbia Court of Appeal judgment in the *Delgamuukw* case, a "Crown Land Activities and Aboriginal Rights Policy Framework" was issued by the British Columbia Ministry of Aboriginal Affairs. This represented a greater emphasis on fiduciary obligations of the Crown in British Columbia "to consult with First Nations regarding Crown activities on unoccupied Crown land", derived from the judgments in the *Guerin* and *Sparrow* cases. Now, if the Province wished to engage in any activity on Crown land, it had to make its best efforts first to determine if aboriginal rights existed in that area and if the proposed activity would infringe upon those rights. The effect of this policy is to require the various government departments and agencies to be more pro-active in determining the nature of any aboriginal rights on Crown lands. It is also intended that this policy framework should complement the interim measures arrangements. The Framework provided that:

In some cases it may be effective for staff and First Nations to prepare an agreement that identifies who consults with whom, about what, with what time-lines, towards what objectives, with what avenues of appeal/dispute resolution etc. rather than having ad hoc consultation on individual items.

Alternatively, interim measures agreements may set out what steps will be taken by the line agency to avoid the infringement of aboriginal rights, i.e., what site will be specifically managed or protected (e.g. burial grounds), how artifacts will be treated, how streams will be protected from logging damage or how First Nations will have

⁴⁷ Ibid.

input into planning for the future development. In addition, they may also identify how the interests will be represented.

Interim measures arrangements may have broader focus than simply avoiding infringement of aboriginal rights. For example, they may also identify other benefits to the First Nation such as employment, training, funding for data collection etc. This is where they may depart from *Delgamuukw* obligations and shift towards other commitments of government....

Staff should never set aside *Delgamuukw* obligations to negotiate an interim measures arrangement. They may want to negotiate an agreement to resolve conflict between an aboriginal right and a proposed Crown land activity in an attempt to have them co-exist. They may also wish to ensure other government commitments can be met. If an agreement fails, staff must still ensure that the policy framework is implemented.⁴⁸

In effect, the recognition of aboriginal rights by the British Columbia government, and the implementation of an appropriate framework, is still being driven by judgments in the courts. It remains to be seen how effectively this aboriginal rights policy framework is implemented on Crown lands in British Columbia. In July 1995, the Ministry of Environment, Lands and Parks (MELP), which administers most of British Columbia Crown lands, produced a document entitled "Procedures for Avoiding Infringement of Aboriginal Rights". This document emphasised the need to collect information and consult with First Nations in order to avoid "infringement", defined narrowly as "an action of the Crown [which] significantly impairs an aboriginal right and, as a result, aboriginal peoples are undermined in their ability to continue activities such as hunting, fishing and trapping for food, social and ceremonial purposes and other activities intrinsic to their cultural traditions".⁴⁹ This document also narrowly defined consultation as a process of asking for information to identify the nature of aboriginal rights:

We do not consult to ask for agreement or consent to an activity, or to ask for an assessment of the impact of an activity on aboriginal rights. The province retains responsibility for this determination.⁵⁰

In its second annual report, the British Columbia Treaty Commission identified the negotiation of interim measures as one of the "significant

⁴⁸ Ministry of Aboriginal Affairs, *Crown Land Activities and Aboriginal Rights Policy Framework* (25 January 1995) 12-13.

⁴⁹ Ministry of Environment, Lands and Parks, *Procedures for Avoiding Infringement of Aboriginal Rights* (1995) 3.

⁵⁰ *Ibid*, 10.

challenges” that need to be addressed to ensure the success of the treaty-making process:

First Nations are very concerned that developments which could alienate resources in their traditional territories during treaty negotiations are occurring with little or no regard to their interests. British Columbia is concerned about maintaining ongoing economic development in the province, balancing the interests of all parties, and providing certainty about the use and management of lands and resources. Both British Columbia and Canada have expressed the view that interim measures should be specific; potentially complex interim measures negotiations may further delay treaty negotiations.

The Commission has not played a major role in interim measures so far, because it has considered that they deal with substantive issues which should be negotiated by the parties. However, conflicts over interim measures are beginning to have a negative effect on the treaty process and the Commission has a duty to safeguard that process.

So far, British Columbia and Canada have delegated authority to individual government ministries and departments for many interim measures issues, primarily those that have arisen early in the process. The implementation of these policies, mainly by British Columbia, has been inconsistent.⁵¹

While a number of “interim-measures agreements” have been put in place, most of them relate to the provincial government’s obligations to consult First Nations and fall outside the treaty process. Apart from the Nisga’a agreement with MELP in 1992 on co-management of Nisga’a Lava Bed Memorial Park, no specific treaty-related agreement had been negotiated by late 1995. The British Columbia Treaty Commission also commented in 1995:

There has been confusion and fear about interim-measures agreements in the non aboriginal communities, which see their interests also being affected The Commission intends to monitor the process of negotiating interim-measures agreements to ensure that treaty negotiations continue to be conducted fairly and that public confidence is maintained. The Commissioners firmly believe that interim measures are critical to the success of the process.⁵²

In its third annual report produced in July 1996, the British Columbia Treaty Commission noted that “conflicts” about “interim measures continue to

⁵¹ *British Columbia Treaty Commission Second Annual Report 1994-1995*, 11-12.

⁵² *Ibid*, 12.

jeopardize the treaty process” because the British Columbia provincial government refuses to consider them until the fourth stage of treaty making, after a framework agreement has been signed.⁵³ The Commission considered “interim measures are integral to treaty negotiations” and strongly recommended that the British Columbia government “reconsider its refusal to negotiate the full range of options for interim measures during the earlier stages of treaty negotiations”.⁵⁴ In the late 1990s, leaders of First Nations were still complaining about the inadequacy of “interim measures”.

X. SOME CONCLUDING COMMENTS

It is too soon to assess the effectiveness and impacts of the treaty-making process in British Columbia. Only one group, the Nisga’a Tribal Council, had reached the stage of signing a draft treaty in 1998, ratified by the tribe and British Columbia Parliament, and in 1999 before the federal Parliament in Ottawa. The Nisga’a negotiations began in 1976 and a framework agreement was signed in 1991, before the treaty-making process overseen by the British Columbia Treaty Commission was established. There are many criticisms levelled at the process: too slow and cumbersome; too many bureaucrats, advisers and consultants involved in the treaty-making “industry”; too much money being spent on government processes and not enough directed to First Nations to ensure that they are properly resourced for a negotiation process. This latter concern is one highlighted by the British Columbia Treaty Commission, which as “keeper of the process” also has the task of allocating funds to First Nations to support negotiations. The funding for the 1994-1995 fiscal year was just under C\$19 million, of which 80 percent was in the form of a federal loan, and the balance was made up of 60 percent federal and 40 percent provincial contributions. In the 1995-1996 fiscal year, the total funding of the Commission was almost C\$24 million, and over C\$25 million allocated for 1996-1997. A large proportion of funding to First Nations is in the form of loans to be deducted from subsequent settlements when negotiations are completed. The 1991 Task Force had recommended that sufficient funds be made available to First Nations and that the British Columbia Treaty Commission would act as the independent body to allocate them:

The funding process requires First Nations to submit budgets and work plans detailing their financial requirements for the negotiations. In the 1994-95 fiscal year funds requested by the First Nations in the Treaty Commission process substantially exceeded the available funds. In no case could the Commission provide the level of

⁵³ *Supra* note 21, at 26.

⁵⁴ *Ibid.*, 28.

funding requested by any First Nation. The amount of funds provided over the long term does not appear to be sufficient to accomplish the goals expressed by the Task Force. Even with savings through such steps as information sharing, the gap between First Nations needs and available funds will widen because the financial needs of First Nations are expected to increase as they progress through the process.⁵⁵

In its Annual Report the Commission reiterated its concern about the adequacy of funding to resource First Nations during the treaty-making process.⁵⁶

Not only were funds insufficient, but the annual basis of funding allocations constrained longer-term planning. There have also been complaints about excessively bureaucratic procedures:

The combined year-to-year and stage-by-stage [of negotiations] approach to funding is complex and inhibits long-term planning. It also creates additional paper work, because new budgets and work plans have to be filed every year and for every stage. First Nations find that excessive amounts of paper work and a cumbersome process unduly distract them from the immediate task of preparing for negotiations. Canada and British Columbia are concerned that public funds are properly accounted for. The Commissioners agree with this objective, but are of the view that accountability can be achieved in a simpler manner.⁵⁷

It is also relevant that the funding is mainly in the form of loans, which raises the issue of what happens to repayments if negotiations break down. The federal loans become repayable 12 years from the date of first advance on the loan if negotiations end before reaching an agreement in principle. These and other financial issues have led to a review of the funding programme by federal and provincial governments, and by the Commission, and greater simplification of legal and paperwork is seen to be required "to ensure that funding arrangements reflect a fair treaty process".⁵⁸

Issues related to funding include the ways in which the negotiations are conducted, the information gathering and research required to support the negotiations, the involvement of legal and other advisers, consultants of various kinds, and the professional fees charged for these services. Some First Nations have taken a very pragmatic approach to negotiations and focussed on what is practicable. Some professional advisers have urged their First Nations clients to work through the whole history of their grievances as

⁵⁵ *Supra* note 51, at 15.

⁵⁶ *Supra* note 21, at 26.

⁵⁷ *Supra* note 51, at 15.

⁵⁸ *Supra* note 21, at 25.

part of the negotiation process. The British Columbia Treaty Commission role in monitoring, not only the monetary costs, but also the historical, cultural, social and legal parameters of the negotiating process is a challenge in itself. Effective dispute resolution mechanisms need to be put in place. In some areas, resolution of overlapping claims has yet to be addressed, but this is seen as a matter for First Nations to sort out for themselves. There is no formal structure for resolving disputes between governments and/or First Nations. Although a memorandum of understanding was signed by British Columbia and federal governments in June 1993 on sharing the costs of treaty-making, the Nisga'a negotiations were delayed for many months in 1995 while the two governments renegotiated this issue. It is generally accepted that, having now established itself, the British Columbia Treaty Commission needs to take a more pro-active role as the keeper of the process. But the Commission has no judicial powers to enforce its role, or arbitrate in disputes, and some consider its effectiveness is therefore limited.

The role of third parties in the treaty-making process remains problematic. The federal government has agreed to participate in a process that emphasises openness in negotiations and consultation with third parties. The provincial government is keenly aware that not all voters in British Columbia support the idea of treaty-making. Many see First Nations' demands as trouble-making, which is a disincentive to investors, and resent funds being diverted to settlements. Local governments also have concerns about loss of revenue. The British Columbia government does not want to pay the costs, and steadfastly maintains that dealing with First Nations is a federal responsibility. The problem is that most of the lands and resources that might become part of any settlement are vested in the Crown in right of British Columbia, which means the potential loss of a source of revenue to the province. The federal government is being pressured to pay for such losses, and for compensation to any user holding any form of tenure less than full title from the British Columbia Crown whose interests may be affected. It is likely that arguments between the two governments about who pays will continue to encumber the treaty-making process, as the Nisga'a negotiations have already demonstrated.

First Nations want to talk directly with government negotiators as representatives of the Crown. They do not see any requirement to have third parties at the negotiating table, but have been required to agree to consultation procedures, "openness" and information sharing. The third party interests in the treaty negotiation structure are required to provide information and advice to the two governments on how their interests may be affected. The various advisory committees also provide a vehicle for dissemination of information and education of the public at large, but this

function is poorly developed as yet. The British Columbia Treaty Commission has sponsored production of some educational materials and encouraged all parties to provide information for the general public. It remains to be seen whether some of the powerful lobby groups can be kept at a reasonable distance, to allow space for negotiations to proceed, and whether the British Columbia government can maintain this balance.

Finally, there remains the issue of what happens to First Nations that have not yet agreed to participate in the treaty-making process. Some, but not all, of the people on Vancouver Island want to maintain their reliance on the "Douglas treaties" as a basis for their self-government in the future. Some want to negotiate only with the federal government, leaving out the provincial government, but in current circumstances this may be unrealistic. Some are waiting to see how things shape up before they commit themselves to the process. A few do not want to have anything to do with it. Chief Joe Mathias of the Squamish Nation, Chairman of the First Nations Summit and a member of the British Columbia Claims Task Force in 1991, has used the image of a ship leaving the harbour: either you are on the ship and going somewhere, or you are left behind on the wharf.

There can be no firm conclusions as yet. A treaty-making process has been set in place, with administrative structures and a large and complex range of hopes and expectations. There remain many difficult questions, including the fundamental issue for First Nations – can aboriginal rights be negotiated away? Alternatively, can there be a legal definition of what constitutes aboriginal rights? If negotiations under the British Columbia treaty-making process fail, then, once again, the courts may be confronted with resolution of these issues. The negotiation of treaties will inevitably include both a legal and a political dimension. Sufficient momentum has now been given to the treaty-making process in British Columbia that doing nothing is not an option.

FIGURE 1

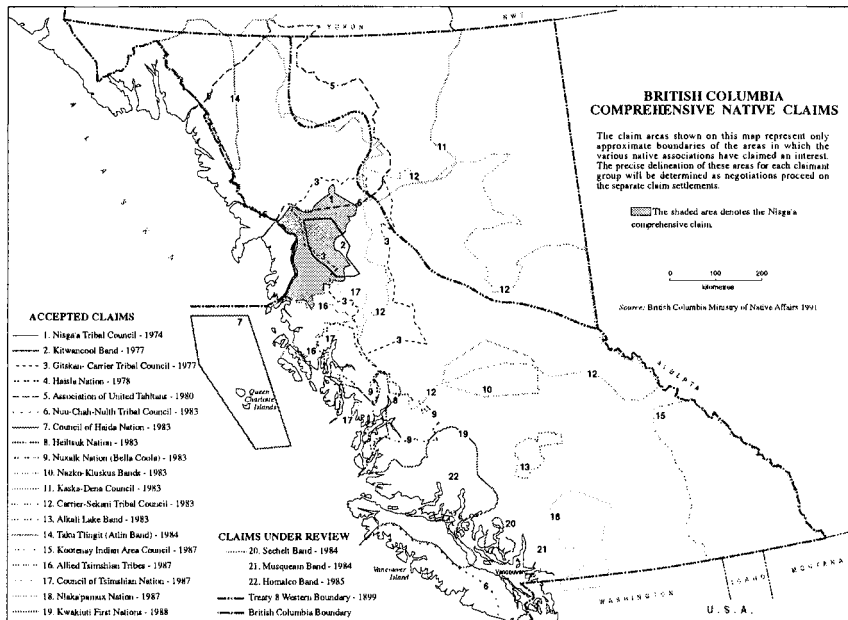
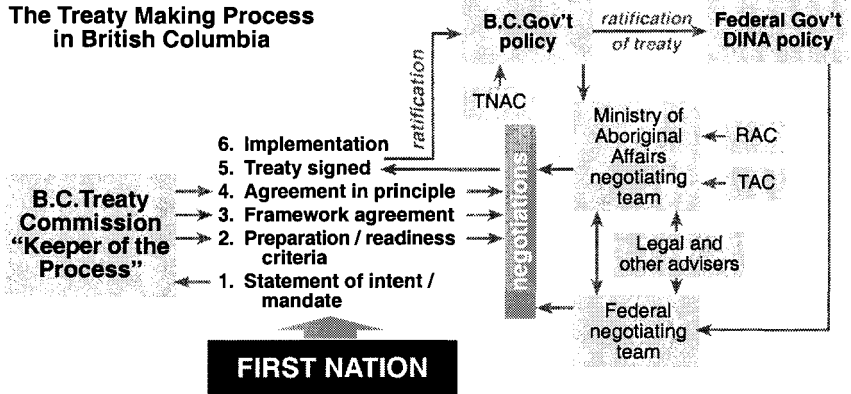


FIGURE 2

**The Treaty Making Process
in British Columbia**



JUDICIAL SPEECHES

SPEECH FOR ADMISSIONS CEREMONY

BY THE HONOURABLE JUSTICE PENLINGTON*

For those of you who have just been admitted, Friday 8 September 2000 will be a very special day.

It will be a day that will stand alongside such important days in your life as the birth of a child, a wedding day, or the death of a loved one.

For on this day, each of you who has been admitted has changed your status. Before this ceremony you were a law clerk or a law student; or perhaps you had a degree or qualification in another discipline. Now, as the result of the solemn commitment which each of you has made, and the order which I have just pronounced, you have become a barrister and solicitor of the High Court of New Zealand, and an officer of this Court.

Now, as the result of this simple but important ceremony, you have the right of audience in any court in our legal system; a right and a privilege which sets you apart from your fellow citizens who have not been so admitted.

At this time, you are entitled to pause on the journey of life, to stand proud, and to derive satisfaction from your achievement in gaining admission to the Bar. For your admission represents the culmination of many years of dedicated study and sacrifice; many years of hard work, punctuated at times with anxiety and anguish. But that is over. You have now reached your goal. You are now entitled to savour this pleasurable moment in your life as you embark on a professional career in the law.

On behalf of all the judges, I warmly congratulate each of you. I welcome you to the fraternity of the law.

Not only is this a memorable day for you who have been admitted, but it is also a memorable day for others. Let us not forget those loved ones – your wife, your husband, your partner, your parents, your siblings, your whanau,

* Judge of the High Court of New Zealand, Hamilton. This speech was delivered by Penlington J on the occasion of the last admissions ceremony over which he presided prior to his retirement. The School of Law, University of Waikato, records the appreciation of its staff and students for the valuable support which Penlington J has given to the School.

your wider family, your friends – who, during the long and arduous years of toil and study, have lovingly and loyally helped and supported you, who have given you strength and sometimes the wherewithal to carry on. They too, each and every one of them, deserve your gratitude and your appreciation. On your behalf, I publicly thank them. Without their love, loyalty, help and support, and the many sacrifices which they have made, you would not be standing where you are today. They too are entitled to share in the pride, the joy and the satisfaction of this special day.

And then there is another group: the Law Faculty at the University of Waikato. I am certain that you would want me to acknowledge a special debt of gratitude to the members of the Faculty for the part which they have played in your achievement; and more latterly to the members of the Institute of Professional Legal Studies.

These good persons have taught you, have helped and encouraged you, and have examined you – obviously to the mutual satisfaction of both sides. On your behalf, I thank them one and all.

And it is especially pleasing once again to be able to welcome to this ceremony the Dean, Professor David Gendall, and members of the faculty. I also welcome the Legal Director of the Institute for Legal Professional Studies, Michael Robb.

I am particularly pleased as well to see once again, and welcome, Professor Margaret Bedggood, who led the faculty with distinction for a time as Dean.

I record an apology from the Attorney General, The Honourable Margaret Wilson, the founding Dean. Parliamentary duties have precluded her from being present. But for those duties, she would have very much liked to have been here.

I welcome, too, the leaders of the practising profession in Hamilton. I ask the newly admitted members of the Bar to note that here today we have three Queen's Counsel – Mr Alan Hassall, Mr David Wilson, and Mr Paul Heath – and the President of the Waikato Bay of Plenty District Law Society, Mr Philip Morgan. On your behalf, and on behalf of the Court, I would like to thank those senior members of the Bar, and you Mr President, for taking the time and the trouble to appear today. I am personally most grateful for your presence.

The appearance of the leaders of the profession is a tangible sign to you, the new members of the profession, of the welcome which awaits you, and the

importance which the organised profession, the Law Society, attaches to every new practitioner who comes into the profession.

You come into this great profession in challenging and changing times. The rapidity of change in our community is often frightening. The law is no exception. Three recent landmark cases demonstrate the vitality of the common law; its adherence to fundamental principle; and yet its preparedness to change to meet modern conditions and to embrace public perceptions of what is fair and just in our society.

First, there is *Lewis v Wilson & Horton Ltd.*¹ This was the now infamous case about the American billionaire who came into New Zealand with some cannabis. He was discharged under section 19 of the Criminal Justice Act 1985. That is the equivalent of an acquittal; and he had his name suppressed until a Full Court of this Court and then the Court of Appeal, on a challenge by the *New Zealand Herald*, strongly reaffirmed the fundamental principle of open justice. In delivering the judgment of the Court of Appeal, our Chief Justice, Dame Sian Elias, said:

The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice.²

Thus, in *Lewis*, that fundamental principle of fair and open justice – justice not only being done but being seen to be done - was reaffirmed in loud and clear terms.

The second case is *Lange v Atkinson*.³ The plaintiff was a former Prime Minister and the defendants were a magazine publisher and its political commentator. The latter pleaded the defence of qualified privilege on the basis of “political expression”. The case was litigated to the Privy Council and back to the Court of Appeal. The case is a classical example of the Court’s striving to achieve a balance between freedom of expression and protection of reputation; two cherished, fundamental and long-standing principles of our modern society.

¹ Unreported, Court of Appeal, CA 131/00, 29 August 2000.

² At para 79, p 28.

³ [1997] 2 NZLR 22 (HC); [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257 (PC); and [2000] 3 NZLR 385 (CA).

The third case is *Arthur J S Hall & Co v Simons*.⁴ In it, the House of Lords ruled that the present day circumstances of modern litigation and court practice no longer justified barristerial immunity. As a result of their Lordships' decision, there must inevitably be a move towards a greater accountability by members of the practising profession in the discharge of their professional duties in court.

Whether we are part of the profession or not, we can gain strength from these three cases, for they show that the courts, the judges, and the practising profession are each playing their part in seeing that the rule of law continues as one of the central pillars of our free and democratic society.

And now to your future as you enter the profession in these exciting and challenging times at the beginning of a new millennium. I urge you to keep four points firmly in mind:

- First, let your goal always be the pursuit of excellence and professionalism. I urge you to be true to your oath or affirmation.
- Secondly, remember the twin duties – the duty to the court, the duty to the client.
- Thirdly, remember that as an officer of the court you have both exclusive privileges and heavy responsibilities. Do not abuse those privileges. Always discharge those responsibilities. At all times duty must prevail over self-interest. At all times, there must be the clear stamp of honesty and integrity.
- Fourthly, remember that the practice of the law is more than a mere business; it is a profession, a learned profession which is based on service to your fellow citizens.

As you go forth to your new calling, I wish you good luck. There will be much hard work, many joys, many disappointments. I believe that you will derive immense personal satisfaction from the practice of the law. I believe that you will not regret your choice of vocation.

And may I conclude on a personal note. This is the last Admissions Ceremony over which I shall preside as a permanent judge of the High Court, and as a resident judge here in this city of Hamilton. For me too, this will be a memorable day.

⁴ [2000] 3 WLR 543; [2000] 3 All ER 673.

Today's ceremony brings back many memories. I remember my own admission on 24 February 1956. Only a handful of us – nine practitioners in all – admitted individually in the Judge's Chambers in the elegant old Supreme Court building in Christchurch, which alas has been replaced by a modern – dare I say, functional - building that does not have the grace and charm of its predecessor. I envy each of you having your admission in open court and in the presence of all who are close and dear to you. The photograph of my admission day has always hung proudly in my office, and more latterly in my Judge's Chambers. That milestone was marked afterwards by one dry sherry, shouted by our respective moving counsel in the Edwardian grandeur of the old Clarendon Hotel in Christchurch, and then back to work.

I have greatly enjoyed presiding over Admission Ceremonies here in Hamilton since the first admissions by the former Chief Justice, the Right Honourable Sir Thomas Eichelbaum, on 20 May 1994.

Over the years, almost without exception, the candidates presenting themselves for admission have been products of the Law Faculty of the University of Waikato. To Margaret Wilson, Margaret Bedggood and David Gendall, and to all the members of the Faculty over the years, I pay a special tribute. The Law School nearly foundered; but by the strength, courage, perseverance and foresight of the whole Faculty, it survived. It is now well and truly established. Its students are now in the front rank. They are now taking positions in some of the most prestigious New Zealand law firms. The standard of legal scholarship is of a high order. This is a great credit to the Faculty.

I especially mention the mootings. This has become a triumph for those who have given their time to it, and in particular I mention David Wilson QC and Joan Forret.

For the future, I wish the Faculty well. There are some poetic Māori words which are apt: tukua kia kohure kia tamaota kia kauru-o-rangi. A liberal translation is simply this. The Law School can be likened to a great kauri. It is straight and strong. It will stand tall. It will spread its canopy. It will nurture new growth. It will grow forever.

It has been an honour and a privilege to preside today.

ADDRESS TO GRADUANDS

BY CHIEF JUDGE J V WILLIAMS*

The Chancellor, Faculty, distinguished guests, graduands and families: Tēnā koutou katoa.

It is a rare honour indeed to be invited to address you here today at this the seventh graduation of the Waikato Law School. The seventh wave is always the biggest and the best. I don't know if you are the biggest, but I am sure you are the best.

You are graduands from a law school which (I suspect uniquely among the Law Schools) has three founding principles:

- biculturalism – the importance of the Māori dimension to New Zealand and to law;
- law in context – the idea that law is not value free, but is a product of our times whether judge or legislature-made;
- professionalism – the idea that law is a calling and that the highest standards must be maintained.

I see now that 30 percent of you are Māori, a third of you are mature students returning from the work force, and two-thirds of you are women. These numbers are a stunning testament to the great work of this ground-breaking law school and I offer my congratulations to the University, to the Dean and staff of the Law School and most of all to you the graduands. The seventh wave truly is the best.

Now you must go out and earn a living. That is often a daunting task. To take the marine metaphor a little too far no doubt, you will often feel (in these early years) like a piece of driftwood getting washed around in a heavy swell. Don't worry, that feeling will remain until you retire.

As the structure of your degree implies, not all of you will go into legal practice. Some of you will work in the public sector, some in commerce and management, some in sport, and no doubt some as distinguished academics. Those of you who go into legal practice will practise in the many and increasingly specialised areas of law: commercial transactions, securities,

* Chief Judge, Māori Land Court.. This address was delivered at the graduation ceremony of the School of Law, University of Waikato, Hamilton, on 18 April 2000.

banking, property, environmental, civil litigation, Māori issues, public, criminal, family, youth, and the list goes on.

The professional world which you are about to enter appears to value information but lack wisdom. It is global and yet troublingly insular in its values and priorities. It is seduced by complexity and afraid of simplicity. Into this world you carry your lawyer's box of skills. Wherever you end up, the legal method, which is the backbone of your training, will stand you in good stead. The ability to cut quickly to the real issues; the ability to sort the relevant from the irrelevant; the instinct to think first and talk or write only after you've finished thinking: these traits are basic to your training. The more information-overloaded complex and global our world becomes, the more valuable those skills will be.

There will be plenty for you to do. Even as early as 1864, Sir John Gorst wrote:

Every country has some staple manufacture, and there can be no question that laws are the staple manufacture of New Zealand.⁵

In short, you are almost certainly assured of a meal ticket.

I do not wish to underplay the importance of that simple fact, particularly since, in this modern age of user pays, you have paid through the nose for it.

But there is more to life than that. It is, after all, the year 2000 and more than ever we confront the finite nature of our presence here on this planet and of the gaping chasm between those that have and those that have not. It is your duty as a lawyer to strive not just for yourself. You must strive for a just self. You must lead good lives and you must believe in something.

You, who have been fed a steady and healthy diet of biculturalism, law and context and professionalism, must see law not just as a living but as a calling. You are better equipped than any generation before you for the task.

Take the race issue for example. Those of you who are Māori are now used to asserting your identity positively in the law without being arrogant and "in your face" - for that approach makes people defensive and unyielding. Those of you who are Tauīwi have learnt to accept that Māori context without feeling threatened by it, and without the tendency to cringe, which was often

⁵ Gorst, Sir John Eldon, *The Māori King, or, The Story of our Quarrel with the Natives of New Zealand* (1864) 134.

seen in generations before you. For all of you, your training at this law school has made that possible.

Issues of race, racial difference and race conflict are litmus issues for our country. These are issues upon which generations of lawyers and New Zealanders have gagged. We have found the dish impossible to swallow. For you, Māori, Pakeha, Pacific Islanders, Asians, graduates of this law school, the free interchange of ideas between the races is normal. This is not easy, never easy, but normal.

To borrow a phrase from another political movement altogether: you are the harbingers of a third way. This is a new path between Māori anger and Taiwi defensiveness; a bridge between mana Māori on the one hand and a Pakeha sense of rightful place on the other.

And what I have just postulated about Māori/Taiwi relations applies equally in other areas where law meets context.

As a result, in addressing you here today I am filled with hope and optimism for our collective future as lawyers and as New Zealanders.

Kaua mā tutuki waewae
engari mā upoko pakaru.

Give your goals every ounce of your strength
And if in the end you fall short
Don't let it be because you tripped over your own feet.
Let it be because the forces ranged against you
Busted your head.

Congratulations to you the graduands; and good luck.

Tēnā koutou katoa.

BOOK REVIEWS

HABEAS CORPUS: AUSTRALIA, NEW ZEALAND THE SOUTH PACIFIC, by David Clark and Gerard McCoy. Palmerston North, Dunmore Press, 2000, 300 pp. Price \$119.95 (incl gst).

“The writ of habeas corpus is rather like a classic that everyone has heard of but no one has actually read” states the first sentence of this text.

Rising to the challenge, I sallied forth into what I imagined was an area where the going would be somewhat rough. It was not. I encountered a text which vividly told of the history, context, process and procedure of the remedy of habeas corpus, from 1678 to the present day.

As the authors state (at pp 14 and 15), the writ has been lauded for its history and also labelled as being outdated. The authors successfully strive to place the remedy’s context by walking the reader through its history in this Australasian and South Pacific region.

We travel from Jeremy Bentham’s criticism of the absence of the writ in the penal colonies of New South Wales in 1803 to the first Supreme Court sittings in Auckland in 1842. We traverse the effects of Māori insurrections on the issue of the writ in the *Winara Parata* case of 1880 ((1880) O, B & F 31 (SC)). Here the detainee was incarcerated in a Dunedin prison and did not wish to be released even though his father had sought the writ. The Māori Wars brought Māori prisoner legislation, which was designed in effect to deprive prisoners “of the right to apply for a writ of habeas corpus” (at pp 184-185). This was followed by indemnity legislation, which allowed a Colonial Governor to pass indemnity legislation to cover his own acts while in office (at p 185, referring to the Indemnity Act 1866 (NZ), section 2, and the Indemnity Act (NZ), section 2). This legislation highlighted the struggles of the day.

The reader then travels through the history of the remedy, including the World Wars and emergency legislation which saw the suspension of habeas corpus. The authors present the following quote (at pp 184 and 185) which demonstrates how the currency of the writ was doubted:

The safety of the country is infinitely more precious than empty talk about Habeas Corpus, or the Bill of Rights, or the Magna Carta. All these things will crumble to dust unless we are successful in this struggle. This is no time for academic talk about the liberty of the subject when the very foundations of real liberty are in danger of complete destruction.

We are then shown in succeeding chapters how important and user-friendly this writ is to the countries under examination.

In chapter three we see the use of the writ in bail applications in New South Wales, in terms of the Bail Act 1978 (NSW). The writers point out that the writ does not generally extend to damages or compensation, as its primary aim (from its conception) is that of the liberty rights of human beings. In chapter four, the writers analyse jurisdictional rules. The writers make the important point (at p 73) that the writ cannot be used against Superior Courts because:

the non-reviewability of the orders of these courts rests on two bases. The first is that historically the writ has never been lain in respect of a sentence of a superior court where the prisoner is said to be in due execution. ... secondly, that the writ, though sought by a citizen usually, is actually issued by the judges at the instance of the Crown and the Courts have maintained that the Crown cannot review itself.

The pitfalls and exceptions to this, as with all other aspects of the issuing of the remedy, are explored in depth by the authors. They canvass extradition orders, orders regarding refugee cases, and the power of the Speaker of the House.

The text is broad in its coverage of the workings of the habeas corpus writ and extends the discussion to cover areas such as child custody (in chapter five). In this chapter the writ is explained in terms of its parallel to guardianship and custody legislation. The currency of the text is shown by its references throughout to the draft Habeas Corpus Bill 1999 (NZ). Section 10 of this Bill provides that child custody cases should be referred to the Guardianship Act 1968 rather than proceed through the formality of the laying of a habeas corpus. This chapter goes on to deal with the registration of an order between jurisdictions in the Australasian region (see p 137, citing *Crain v Crain* [1991] NZFLR 224).

Chapter six deals with standing for the order and those who seek it, including children, other individuals and organisations. We are then taken into the complexity of grounds of review (chapter seven), and territorial limits (chapter eight) where foreign jurisdictions and the power of domicile in child abduction cases are traversed. The New Zealand Court of Appeal decision of *Jayamohan v Jayamohan* (1997) 15 FRNZ 486 (CA) is cited, in which the Court of Appeal maintained that a full bench was necessary to decide a case where the writ was in issue, again indicating the Court's serious application of the remedy in current applications.

Chapter nine deals with this remedy in light of emergencies. The authors mention the Fiji Coups D'Etat in 1987 and the Constitution of July 1997 where the right to protection of personal liberty and rights of detainees was mandated. This certainly is topical in light of the recent political situation in Fiji and the mention of the remedy of habeas corpus for the leaders of the recent coup.

Practice and procedure are dealt with in detail in a lengthy chapter ten in which the authors have dealt with the issues arising from the writ's use. This section is invaluable for those wanting to understand the correct usage of the writ, and deals with the main jurisdictions. This chapter would, however, not supply the step-by-step process necessary for practitioners.

At the end of this text I was surprisingly energised by the steep learning curve in reading what I had long thought of as a remedy outdated and certainly a classic not read. This is not a book for the "browser". However, for academics, students and practitioners wanting an overview of the use of this writ in the jurisdictions covered, it is an ideal starting point, outlining the theoretical constructs of origin and usage.

WENDY BALL*

PRIVACY: INTERPRETING THE BROADCASTING STANDARDS AUTHORITY'S DECISIONS JANUARY 1990 TO JUNE 1998, by Michael Stace. Palmerston North, Dunmore Press, 1998, 103pp. Price \$19.95 (incl gst).

To the rights-assertive modern world, one of the most surprising gaps in the common law must be the lack of an independent right to privacy and of a corresponding tort law protecting it. A century ago, the emerging Realist philosophy of judicial activism led to the creation of just such a right in the United States. It is only recently, however, that New Zealand judges, drawing in part from that American development, have attempted to delineate a similar right here (see *P v D* [2000] 2 NZLR 591). Parliament has stepped in to protect some aspects of privacy through legislation. The most familiar example of this legislative intervention is the Privacy Act 1993. However, that Act applies only to personal information and, even in respect of these matters, is severely restricted in relation to news media. A lesser known, but just as significant, provision for the protection of personal privacy is to be found in the Broadcasting Act 1989. Section 4(1) of the Broadcasting Act requires broadcasters to maintain standards which are

* Senior Lecturer in Law, University of Waikato.

“consistent with” inter alia, “the privacy of the individual”. It is the task of the Broadcasting Standards Authority to promote and enforce these standards.

This short book recounts the development by the Authority of an extremely valuable New Zealand jurisprudence of privacy which has a much wider scope than the protection of personal information. Using a chronological synopsis of the Authority’s leading decisions and Advisory Opinions, Michael Stace, who is the Authority’s Executive Director, sets out the issues which it had to confront. Starting from the tentative moves of some New Zealand judges towards the recognition of claims to privacy, the Authority incorporated elements from the American tort of invasion of privacy to arrive at initially five, and then later, two further “Privacy Principles”. Generally, Stace’s historical approach works well and the reader is shown the Authority tackling, for example, the fine balance between free speech and privacy claims, the significance of distinctions between public and private places, and the extent to which intrusion is justified by the public interest. However, it has to be said that one or two of the cases are summarised so cryptically as to make little sense unless the reader has already some familiarity with the incidents giving rise to them. Perhaps this is compensated for by the fact that readers can follow through a case that is of interest quite readily through the Authority’s user-friendly Web page.

What emerges from the work of the Authority is a conception of privacy wide enough to incorporate (a certain amount of) freedom from intrusion, prying and harassment, (a certain amount of) anonymity, and (a certain amount of) protection of personal details. The interpretation that the Authority has given to this “right to be let alone” by broadcasters takes into account both statutory constraints such as the Bill of Rights Act, and the presumed prevailing values of New Zealanders. The Authority’s approach has been endorsed in the High Court in *TV3 v BSA* [1995] 2 NZLR 720, and forms a rich resource for the future development of a tort of invasion of privacy. Michael Stace has performed a very useful service in extracting the privacy decisions from the now large number of cases concerning broadcasting standards which have gone before the Authority, and pointing out the trends behind those decisions. He should be encouraged to continue to do so through updates of the book.

But one is left wondering whether it is really enough simply to record the decisions, the Privacy Principles and their development. As Executive Director of the Broadcasting Standards Authority, Michael Stace may well have felt himself constrained to adopt the public service ethos of refusing to criticise or express personal opinions about the Authority’s decisions and

reasoning. This suspicion seems to be confirmed when, in the closing paragraphs of the book, he – rather incongruously - adopts the persona of “the Authority”. His measured style throughout only hints at the existence of an underlying debate about the scope of privacy. This is a pity. The value of the book would be greatly augmented if the author went beyond chronicling and impartial analysis into a more detailed exploration of the philosophical underpinnings of the Authority’s approach, pointing out inconsistencies, challenging assumptions, and questioning the correctness of decisions. The book provides an excellent opportunity for a discussion of, say, the nature of “prying” or the relationship which the Authority has developed between the fair treatment of programme participants and their privacy. Indeed the format of each chapter (a synopsis of key cases followed by a summary of that stage in the development of the Authority’s thinking) would readily accommodate a “critical independent voice” at the end. Alternatively the concluding chapter might deal with these issues more fully. This observation of an opportunity missed should not, however, be taken as a denial of the undoubted utility of Stace’s clear exposition of the Authority’s decisions.

Only a proportion of the complaints dealt with by the Broadcasting Standards Authority relate to privacy matters. Michael Stace has performed a useful service in extracting these and drawing out the themes and developments within that particular area of the Authority’s responsibilities. His book is a handy guide to what is now quite a sizeable body of case-law. It will be a valued resource not only for those who have an interest in broadcasting standards but also for anyone involved in the evolution of a wider New Zealand jurisprudence of privacy.

Ken Mackinnon*

* Associate Professor of Law, University of Waikato.



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THE MCCAW LEWIS CHAPMAN ADVOCACY CONTEST

R v RONGONUI

BY TANYA PETERSON*

I. SUMMARY OF ISSUES

In the High Court in Wellington, Janine Rongonui was convicted of murder and sentenced to the mandatory term of life imprisonment. Rongonui had relied upon the partial defence of provocation, provided for in section 169 of the Crimes Act 1961. Rongonui now appeals her conviction on the ground that the trial judge's directions to the jury as to the meaning of section 169(2)(a) of the Crimes Act 1961 were incorrect and resulted in a miscarriage of justice. The issue to be determined is the correct interpretation of section 169(2)(a) in light of its statutory context and the common law.

II. SUBMISSIONS OF COUNSEL FOR THE CROWN

May it please the Court, the submissions for the Crown, in support of the High Court Judge's directions, are as follows:

1. The meaning of section 169(2)(a) of the Crimes Act 1961, in terms of its text and purpose, differentiates between the self-control of an ordinary person and the characteristics of the accused by the use of "but otherwise".
2. In accordance with the case-law, the characteristics of the accused in section 169(2)(a) of the Crimes Act 1961 apply only to the susceptibility of the accused to provocation, not to the accused's level of self-control.

Submission One

The meaning of section 169(2)(a) of the Crimes Act, in terms of its text and purpose, differentiates between the self-control of an ordinary person and the characteristics of the accused by the use of "but otherwise".

1.1 Section 169(2)(a) of the Crimes Act 1961 states:

- (2) Anything done or said may be provocation if –

* LLB student, University of Waikato, winner, 2000 McCaw Lewis Chapman Advocacy Contest. The competitors in the Contest were required to stand in the shoes of either counsel for the appellant or counsel for the Crown, and present an argument as at the day of the hearing in the Court of Appeal.

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control.

1.2 Section 5 of the Interpretation Act 1999 provides the legislative guidelines in New Zealand for ascertaining the meaning of legislation. Under section 5, the meaning of legislation is to be "...ascertained from its text and in the light of its purpose".¹ Section 5 also provides that in ascertaining the meaning, factors including "...the organisation and format of the enactment" may be considered.²

1.3 The Crown submits that the meaning of section 169(2)(a) of the Crimes Act must be ascertained in accordance with section 5 of the Interpretation Act 1999.³ Section 169(2)(a) must be interpreted from its text, in light of its purpose, and in consideration of its organisation and format.

1.4 In applying the above approach to the interpretation of section 169(2)(a), the Crown submits that the words "but otherwise" dominate the section. It is submitted that the absence of these words, or their replacement by any other words, would result in section 169(2)(a) having a substantially different meaning. The organisation and format of the section provide, in the words of Professor Orchard, that:

For a characteristic to be relevant it must make it more likely that a person with ordinary self-control would have lost self-control and reacted as the accused did, and it must make this more likely for some reason other than that it reduced that power of self-control.⁴

1.5 The function of the words "but otherwise" is further illustrated in Sir Francis Adams' analysis of section 169(2)(a):

A homicide committed under provocation results from a conflict between (a) the offender's sensitivity or susceptibility to the provocation, and (b) the offender's power of self-control. Whereas the offender's characteristics are relevant to (a), they are irrelevant to (b).⁵

¹ Interpretation Act 1999, s 5(1).

² Section 5, subss (2) and (3).

³ Section 4, "Application".

⁴ Orchard, "Provocation – Recharacterisation of 'Characteristics'" (1996) 7 Canterbury Law Review 202, 208.

⁵ Adams, *F Adams on Criminal Law* (4th ed) para CA169.10A.

1.6 It is the appellant's argument that "characteristics" are directly relevant to an accused's power of self-control. The Crown submits that such an argument means ignoring the words "but otherwise" in section 169(2)(a), and effectively nullifies Parliament's inclusion of them. The Crown further submits that such a move is beyond the jurisdiction of the Court as it effectively rewrites the legislation, and that is the sole responsibility of Parliament.

1.7 The Crown submits that the purpose of section 169 can be ascertained by reference to the New Zealand Parliamentary Debates. The Honourable J R Hanan described the Bill as a response to a then recent decision of the House of Lords in *Bedder v the Director of Public Prosecutions*.⁶ The decision resulted in the physical peculiarities of an accused having to be disregarded in relation to a defence of provocation, even if the provocation was directed at those same peculiarities. The Minister introduced the changes to section 169 as "...a more reasonable test", with the result that:

Anything done or said may now be provocation if it was sufficient to deprive a person, having the power of self-control of an ordinary person but otherwise having the characteristics of the offender, of the power of self-control.⁷

1.8 In *R v Campbell*, the Court stated:

The purpose of the enactment of section 169 was to give some relief from the rigidity of the purely objective test of the reactions of the reasonable person.⁸

The Crown submits that section 169(2)(a) achieves the purpose intended by Parliament and set out in *R v Campbell* only when interpreted as submitted above in paragraph 1.3. Interpreted in this way, a person is still held to the objective test of having the self-control of an ordinary person, but the relief is that "characteristics" can be taken into consideration when assessing the person's susceptibility to the provocation.

Submission Two

In accordance with the case law, the characteristics of the accused in section 169(2)(a) of the Crimes Act 1961 apply only to the susceptibility of the accused to provocation, not to the accused's level of self-control.

⁶ [1954] 2 All ER 801.

⁷ (1961) 328 NZPD 2681.

⁸ [1997] 1 NZLR 16, 25.

The three leading New Zealand authorities that deal with the interpretation of section 169(2)(a) are *R v McCarthy*,⁹ *R v Campbell*,¹⁰ and *R v McGregor*.¹¹ The Judicial Committee of the Privy Council considered the section in *Luc Thiet Thuan v The Queen*.¹²

2.1 The Crown submits that the observations of this Court in *R v McCarthy*¹³ in relation to section 169(2)(a) be applied in this case. In *R v McCarthy*, the Court defined the questions posed by section 169(2)(a) as being:

...[W]hether the alleged provocation in fact caused the accused to lose self-control to the extent of committing the homicide, and whether a person with the accused's characteristics other than any lack of the ordinary power of self-control could have reacted in the same way.¹⁴

The approach of the Court in *R v McCarthy* is in accordance with the Crown's submissions as to the correct interpretation of section 169(2)(a), and as to the significance of the words "but otherwise".¹⁵

2.2 *Luc Thiet Thuan v The Queen*¹⁶ was a decision of the Judicial Committee of the Privy Council, from an appeal from the Court of Appeal of Hong Kong. In this case, their Lordships considered the issue of provocation as provided for in English legislation (being identical in this area to Hong Kong legislation).¹⁷ In their reasoning, their Lordships considered the New Zealand legislative provisions and case law for the defence of provocation and approved the interpretation of section 169(2)(a) established in *R v McCarthy*.¹⁸ The Crown submits that this consideration by the Privy Council is highly persuasive to this Court.

2.3 The Crown submits that the findings of this Court in *R v Campbell*¹⁹ in relation to section 169(2)(a) be applied to this case. In *R v Campbell* this Court adopted the same line of reasoning on this issue as was set out in the

⁹ [1992] 2 NZLR 550.

¹⁰ Supra note 8.

¹¹ [1962] NZLR 1069.

¹² [1997] AC 131.

¹³ Supra note 9.

¹⁴ At 558.

¹⁵ See paragraphs 1.2 to 1.8 above.

¹⁶ Supra note 12.

¹⁷ Homicide Act 1957.

¹⁸ Supra note 12, at 143.

¹⁹ Supra note 8.

observations of this Court in *R v McCarthy* and approved by the Privy Council in *Luc Thiet Thuan v The Queen*:

...[T]he jury may take the ... characteristic into account in assessing the gravity of the [provocation] when applied to the particular person to whom it was addressed. ... But in turning to the objective question, the self-control of the hypothetical person is taken to be that of an ordinary person and not overlaid with the consequences flowing from the possession of the characteristic.²⁰

As with *R v McCarthy*, the approach of this Court in *R v Campbell* is in accordance with the Crown's submissions as to the correct interpretation of section 169(2)(a), and demonstrates the significance of the words "but otherwise".²¹

2.4 *R v McGregor* is the leading New Zealand case in support of the argument for the appellant.²² In *R v McGregor* the Court stated the following:

The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him.²³

The Court in *R v McGregor* interpreted section 169(2)(a) to mean that "characteristics" are directly relevant to the self-control of the offender.²⁴ The Crown submits that this interpretation be distinguished on two grounds: first, that it does not comply with the guidelines for statutory interpretation set out in the Interpretation Act 1999; and secondly, that it has been superseded by the more recently established interpretations in *R v McCarthy* and *R v Campbell*.

2.5 *R v McGregor*, *R v McCarthy* and *R v Campbell* are the three leading cases in New Zealand that deal with the interpretation of section 169(2)(a). All three cases were heard in the Court of Appeal, and each before a bench of three judges. The Crown invites this Court of five judges to consider its most recent statements on section 169(2)(a) as being highly persuasive in coming to its decision.

²⁰ At 26.

²¹ See paragraphs 1.2 to 1.8 above.

²² *Supra* note 11.

²³ At 1081.

²⁴ *Ibid.*

2.6 It is acknowledged that there may be difficulties in the application of section 169(2)(a). The Crown submits that it is the role of the Court to interpret the section as enacted, and the role of Parliament to ameliorate it. In the words of Lord Goff of Chieveley:

If the statute is now perceived to lead to unacceptable results, steps should be taken as soon as possible to persuade the ... legislature ... to amend it.²⁵

2.7 The issue on appeal is the correctness of the High Court judge's directions to the jury as to the meaning of section 169(2)(a). The judge's directions include the following:

...[C]haracteristics can only be taken into account in assessing the accused's sensitivity or susceptibility to the particular provocation. These special characteristics apart, she is expected to have the powers of self-control of an ordinary person.²⁶

The Crown submits that the judge's directions are correct because they are in accordance with the interpretations of section 169(2)(a) established in *R v McCarthy* and *R v Campbell*.

III. CONCLUSION

In conclusion for the Crown, it is respectfully submitted that:

1. The meaning of section 169(2)(a) of the Crimes Act, in terms of its text and purpose, differentiates between the self-control of an ordinary person and the characteristics of the accused by the use of "but otherwise".
2. Following the most recent New Zealand authorities on the interpretation of section 169(2)(a), and in line with a recent Privy Council judgment, the characteristics of the accused apply only to the susceptibility of the accused to provocation, and not to the accused's level of self-control.

The Crown respectfully submits that the High Court judge's directions to the jury regarding provocation were correct, and that accordingly this appeal be dismissed.

May it please the court, that concludes submissions for the Crown.

²⁵ *Supra* note 12, at 148.

²⁶ *R v Rongonui* [2000] 2 NZLR 385, 409.