DEVELOPMENTS IN ADMINISTRATIVE LAW:

THE TREATY OF WAITANGI AS AN IMPLICIT FETTER ON THE EXERCISE OF ALL PUBLIC LAW POWERS

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Context/overview

1. An issue of growing importance in administrative law is whether and to what extent those exercising statutory powers need to consider principles contained in overlapping statutes or in the common law more generally. This paper focuses on one aspect of this broader issue: the circumstances in which Treaty principles and Māori customs/tikanga are relevant to the exercise of powers not explicitly made subject to the Treaty of Waitangi.

Direct statutory incorporation

2. Most of the leading Treaty cases have been public law proceedings, for judicial review or for interim relief under s8 of the JAA 1972. In none of the ground-breaking Cooke-era COA or PC decisions was the relevance of Treaty principles doubted as a legal fetter on the exercise of discretionary public law powers, including statutory powers of decision. But in most of those cases there was an explicit Treaty 'hook' in the underlying legislation. In the *Lands* case, for example, that hook was s9 of the SOE Act 1986, which provided that "*Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi*".

3. It followed that from the *Lands Case* onwards it was clear that Treaty principles would need to be addressed by decision-makers where a Treaty clause like s9 had been included by Parliament in the enactment conferring their power of decision. Some examples were s4 Conservation Act 1987; s4 Crown Minerals Act 1991; s8 Resource Management Act 1991; and s8 Hazardous Substances and New Organisms Act 1996. But what of situations where the statute conferring the power of decision was silent on the need to consider Treaty principles – must they be taken into account? Courts have not spoken in a single and consistent voice on this question. But recent case-law suggests a trend towards an affirmative answer.

Indirect/contextual/constitutional incorporation

4. Before looking at that case-law it is helpful to identify the three judicial review devices most suited, and most commonly raised, in arguing that public law powers must be exercised consistently with Treaty principles, even in the absence of an explicit statutory reference to such principles. Those devices are (substantive) legitimate expectations (eg, *Radio Assets* [1996] 3 NZLR 140 (CA), particularly at pp183, 184–185 and 189 *per* Thomas J); mandatory relevant considerations (eg, *Takamore* [2011] NZCA 587 at paras [107], [255] and [259] *per* Glazebrook and Wild JJ; *Radio Frequencies* [1991] 2 NZLR 129 (CA), particularly at pp135, 139, 140, 142 and 144); and the 'clear statement' rule of statutory interpretation by which statutes are interpreted against a backdrop of and consistently with common law fundamentals like Treaty principles (eg, *Barton-Prescott* [1997] 3 NZLR 179 (Full HC) at p184 *per* Gallen and Goddard JJ). Note that these review grounds are equally applicable as devices for limiting the exercise of prerogative and third source/common law powers as they are for limiting the exercise of statutory powers of decision (eg, *Radio Frequencies* [1991] 2 NZLR 129 (CA) at p133).

5. Central to a 'default rule' of the kind noted, ie that Treaty principles should be considered in all exercises of public law powers, is the idea that the Treaty is "*part of the fabric of New Zealand society*" (*Huakina Development Trust* [1987] 2 NZLR 188 (HC) at p210 *per* Chilwell J), and that this triggers a common law presumption that absent clear legislation to the contrary, Treaty and related rights and interests should be protected and promoted by public bodies, including by courts and tribunals (eg, *Ngati Apa* [2003] 3 NZLR 643 (CA); *Auckland Casino* HC Auckland M81/94, 13 July 1994 at p35 *per* Robertson J). This 'default rule' can be seen in action in the *Barton-Prescott* case, where the Full HC reasoned that "*since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and… whether or not there is a reference to the treaty in the statute*" (at p184). It followed in that case that "*Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty*" (ibid.).

<u>Illustrative Treaty principles</u>

6. What are those principles? The list is not exhaustive, and arguably cannot be made so, as the Treaty relationship has been described by the COA to be a "*living*" one (eg, *Lands* case at 655-656 *per* Cooke P). Principles identified to date include partnership between the Crown and Māori; good faith and honourable dealings; active protection and accommodation of Māori rights and interests; Māori self-development; redress for past Crown wrongdoing; cessation of current wrongdoing; and avoidance of future wrongdoing. Rights the Crown must actively protect and accommodate extend to Māori customary rights, including customary rights to resource use and development (eg, *Ngatiwai Trust Board* HC

Wellington CP39/98, 22 December 1998 at p22). The *Lands* case identifies and explains in greater detail many of the Treaty principles noted above.

Māori customary rights/interests

7. The relevance, and the active protection, of Māori customary rights and interests came before the COA last year in *Takamore*. It held that the common law should be developed in conformity with Māori customary rights where that is possible. *Takamore* also confirmed that the Treaty can and should be "*indirectly*" enforced by the courts, including by judges developing the common law "*so far as is reasonably possible, consistently with the Treaty of Waitangi*" (*Takamore* at paras [16] and [254] *per* Glazebrook and Wild JJ; to similar effect is *Knowles* CA146/98, 12 October 1998 *per* Keith J). This very recent holding appears to be a departure from the reasoning in another relatively recent COA case that in the absence of a clear direction from Parliament, Treaty principles would not be relevant to the exercise of discretionary public law decisions (eg, *Mair* [2009] NZCA 625 at para [69] *per* Chambers and O'Regan JJ, Baragwanath J dissenting).

8. In its two holdings, *Takamore* confirms that the courts are receptive to the cross-fertilisation of administrative law with Māori customary rights and values, either by directly giving effect to Article 2 of the Treaty or indirectly as a matter of common law legal method (see *Takamore* at paras [243]-[258]). The cross-fertilisation of administrative law with Māori customary rights and values in this continuing way is consistent with Lord Cooke's past emphases that the Crown/Māori relationship under the Treaty of Waitangi is a "*living*" one (as noted in paragraph 6 above), and that administrative law should continue to evolve as society evolves (eg, *Thames Valley Electric Power Board* [1994] 2 NZLR 641 (CA) at p653).

Standard/intensity of review

9. Where a decision-maker has considered Treaty principles or Māori custom bearing on their discretion, how intrusively will courts review the ultimate decision? The courts have rejected an argument that the manner in which the Crown chooses to fulfil its Treaty obligations is a matter of high policy subject only to intervention for *Wednesbury* unreasonableness (*Broadcasting Assets* [1994] 1 NZLR 513 (PC) at p524 *per* Lord Woolf). The issue of Treaty compliance is for the courts to determine on a correctness basis; or, in Lord Woolf's words, "*a matter on which the Court must form its own judgment on the evidence before the Court*" (ibid.). This approach appears to have been recently confirmed by the majority of the SC in their *Haronga* holding that little deference was due to the Crown's policy preference for district-wide Treaty settlements with large natural groupings (eg, *Haronga* [2011] NZSC 53 at para [98] (no compulsion to remain within the settlement process)).

Constitutional implications?

10. One can find in the early Treaty cases COA judges stressing that the issues before the Courts were "*administrative*" not "*constitutional*" ones (eg, *Radio Frequencies* at p144 *per* Hardie Boys J). The counsel who asked the COA in the *Radio Frequencies* case to put the Treaty on a higher constitutional plane went on to do that as a judge, holding that "*like the Bill of Rights… the Treaty of Waitangi Act extends to the Judiciary*" and as such has the capacity to shape all areas of law (*Mair* at para [88] *per* Baragwanath J, dissenting). The recent case-law referred to above, and *Takamore* in particular, indicates that the judiciary may be more receptive today to grappling with the constitutional status of the Treaty. In this regard, Lord Cooke signalled in 1987 that the time may come to reconsider the rule in *Te Heuheu Tukino* (*Lands* case at p667). Insofar as *Takamore* endorses the theory that Māori customary law is guaranteed under Article Two of the Treaty, which protects Māori rangatiratanga and taonga (see para [243] of the judgment), then the COA has arguably taken some tentative first steps in *Takamore* to give some direct effect to the Treaty, *Te Heuheu Tukino* notwithstanding.

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