Announcing a fresh look at the Treaty of Waitangi
and its implications for natural resources and public policy—

The Principle of 'Partnership' and the Treaty of Waitangi

Implications for the public conservation estate

A review of the validity of a principle of 'partnership' under the Treaty of Waitangi, and its application to the ownership and control of New Zealand's public conservation and recreation estate

By Bruce Mason. Publisher: Public Access New Zealand Inc. December 1993

An Abstract

Introduction

The Treaty of Waitangi is widely regarded as the founding document for New Zealand. Many also regard it as a 'sacred compact', whose words and interpretation are not as important as the spirit that rises therefrom. Others view the Treaty as a 'historical artifact'—a 'modest little document' that has been adorned with sentiment and well-intentioned rhetoric.

Today it is hard to escape from talk of the Treaty, and related grievances and claims over land and other resources. For instance there is now greatly increased pressure on government assets, and public lands such as national parks, for settlement of claims. Claimants generally seek the return of land. Some also seek shared management responsibility with the Crown.

The Government has taken upon itself the role of sole arbitrator as to its liabilities under the Treaty and the assets it may use in fulfilment of its perceived obligations. Many of those assets include lands held in trust for the benefit of present and future generations. Under the mantle of the Treaty and 'Treaty principles', Government considers it is empowered to do as it alone sees fit with the public estate.

As a consequence there is growing public apprehension that there are profound changes in store to the nature of 'public' lands, how they are managed, and for whose benefit.

Government and claimants are increasingly by-passing the Waitangi Tribunal by direct negotiation of unproven claims. The Department of Conservation is actively instigating the vesting of ownership or control over public lands to Maori interests. This is occurring under a justification of a duty under the Conservation Act "to give effect to the principles of the Treaty of Waitangi".

The authorities assume that a principle of 'partnership' exists between Maori and the Crown.

'Partnership' is commonly interpreted as meaning that a 50:50 entitlement exists between the Crown and Maori to ownership and control of all natural resources.

Government has given impetus to high, but ill-founded, expectations by stating that Maori are an equal partner with the Crown and by implication entitled to half of every Crown-owned resource.

The prevalence of well-meaning rhetoric on the subject, mixed with a residue of guilt, means that it is politically dangerous and 'incorrect' to question the current orthodoxy. However the implications for society of unquestioning application of currently popular political perceptions are too grave to leave unexamined and undebated.

'Principles' of the Treaty and DOC

The 'principles' of the Treaty now have greater status under statute than the text of the Treaty itself. Definitions of the principles of the Treaty have been expressed by the Waitangi Tribunal, the Court of Appeal, and the 1988 Royal Commission on Social Policy.

The major development in the concept of 'partnership' under the Treaty has been at the Court of Appeal. The 1987 New Zealand Maori Council (SOE lands case) provides the starting point for legal significance being attached to the concept of 'partnership' under the Treaty.

In the 1987 case the Court held that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith.

The body of the Court's decision contains no definition of what is meant by 'partnership'.

Notions of 'sharing' and 'equality' that have inevitably risen, make the Court's use of an analogy of 'partnership' surprising. The Chairman of the Court later elaborated on the meaning of a Treaty 'partnership' when he indicated that the concept of partnership does not mean that every asset or resource in which Maori have some justifiable claim to share should be divided equally.

Another principle derived from the Treaty, that of 'equality', is of major significance. The dichotomy between a 'partnership' rather than 'equal citizenship' view of the Treaty underlies the conflict that has emerged over the Department of Conservation's interpretations of their duty to "give effect to the principles of the Treaty of Waitangi" by way of a 'partnership' with Maori.

DOC sees continued ownership of public lands and waters as incidental to its role as a 'steward', and the tangata whenua and its interests as indivisible. 'Higher authority' for management will come from iwi rather than from the purposes set out in administering statutes. Consequently the public will not be able to call to account either the department or Minister of Conservation.

It appears that DOC has taken no notice of subsequent developments to the 'partnership' model at the Court of Appeal but has chosen to pursue its own vision, latterly reinforced by ill-founded utterances from the Minister, that Maori and Pakeha are "equal treaty partners".

The 'partnership' model is now well installed in the department, and receiving uncritical, mechanical application through all policy and operational areas.

The 'partnership' myth

The concept of a 'Treaty partnership' arises from a perceived need for the sharing and re-distribution of power and resources with Maori, rather than from the words of the Treaty itself.

In common parlance, 'Treaty partnership' is ill-defined, confused, and misleading—dangerously so in regard to the Crown's obligations to all citizens and the potential for detriment to the majority of New Zealanders. There is an inherent and inescapable connotation of equality between the 'partners' that make the use of the term inappropriate in the full context of the Treaty.

As a metaphor, 'partnership' raises impossible, and unfair, expectations. In relation to the Treaty, 'partnership' between races, or between the Crown and Maori, is no less than a myth—more so is the notion of 'equal partnership'.

The Court of Appeal has spelt out on three occasions that there is no equality in the 'partnership'. However the driving engines of 'partnership' within and outside Government either haven't heard or don't care to know.

There is an irreconcilable conflict between 'partnership' and 'equal citizenship' views of the Treaty. The former has no basis in the Treaty—it is a creature of social engineers, the judiciary, and a bureaucracy captured by a 'politically correct' Treaty orthodoxy. The latter has direct expression in the usually preferentially quoted Maori version of the Treaty—all New Zealanders have the same rights and duties of citizenship.

There is a major gulf between the legislative 'preservation' purposes of national parks and other protected areas and the variously expressed 'conservation-for-utilisation' preferences of many iwi. Also tribal authority over public access to and use of natural areas contrasts markedly with existing rights of access, conveyed equally on everyone. This conflict of objectives should be fully debated before any consideration is given to handing ownership or control of public lands to private interests.

The 'partnership' course is to change the essential character of public lands and who the intended beneficiaries are, by a confused and undemocratic application of the Treaty.

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