LAWYERS, HISTORIANS, ETHICS AND THE JUDICIAL PROCESS

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The calls on an advocate's loyalty in court are several and sometime's conflicting. In this article Richard Boast observes that in tribunals, and particularly the Waitangi Tribunal, these conflicts are often magnified. He then proceeds to critique, partly from his own experiences, the role of both lawyers and historians in such a forum, concluding that the increased tensions are largely due to changes in the procedures in the Tribunal incident on the pressure from clients to see their causes vigorously pursued.

I INTRODUCTION

This article is an analysis of the ethical questions involved in the preparation and presentation of historical evidence in civil proceedings in contemporary New Zealand, with particular reference to the Waitangi Tribunal. For the purposes of discussion, "ethics" is understood in the broadest possible sense as simply meaning that part of legal studies concerned with questions of proper and appropriate behaviour in the various contexts of legal practice. The ethical duties of lawyers as set out in the New Zealand Law Society's Rules of Professional Conduct for Barristers and Solicitors have two principal aspects.[1]

* Senior Lecturer in Law, Victoria University. The subject-matter of this article has been discussed with a number of people. Thanks are in particular due to Giselle Byrnes, with whom the writer discussed some preliminary issues, and to Deborah Edmunds, and Bryan Gilling for their comments on the draft. Thanks are additionally due to Deborah Edmunds and to Dominic Wilson for assistance in locating key documents. To a large extent this article is based on the author's own observations of the Waitangi Tribunal. In 1989, along with P R Heath, the present writer acted as counsel for the claimants in the Pouakani (Wai 33) claim, and attended all of the hearings relating to that claim. Since then the writer has prepared historical reports for and given evidence as a historian in the following claims, in some on a number of occasions: Muriwhenua Lands (Wai-45), Te Whanganui-a-Orotu (Wai 55), Ngawha geothermal (Wai 304), Te Arawa geothermal (Wai 153), Chatham Islands, Mohaka-Waikare raupatu, and the Wellington Tenths claims.

1 New Zealand Law Society, Rules of Professional Conduct for Barristers and Solicitors, 4th ed 1996. The promulgation of codes of ethics is an important attribute of a self-governing profession. See also: the Law Society of England and Wales, The Guide to the Professional Conduct of Solicitors; American Bar Association's Model Rules of Professional Conduct and Code of Judicial Conduct; The International Bar Association's International Code of Ethics, 1988.

Firstly there are the ethical duties owed by lawyers to their clients: of confidentiality, of loyalty without conflict, of care and diligence. There are also ethical duties owed to the courts and to the public generally, some of which are strictly legal duties mandated by the Law Practitioners Act 1982 and the common law generally, and others which are more in the nature of professional and moral responsibilities. It is well-known, however, that there is an unresolved tension between legal ethics in the first and second senses: ethical duties to advance the interests of one's client can conflict to a degree with ethical duties to the courts and the public. This tension is as true of the Waitangi Tribunal as of any other forum. This tension, however, is not the main focus of this essay, which is concerned more broadly with the conduct of Waitangi Tribunal and related proceedings.

The New Zealand Law Society's own ethical code, while requiring practitioners to "never deceive or mislead the court or the tribunal" nevertheless requires all practitioners engaged in court proceedings to "fearlessly uphold the client's interests, without regard for personal interests and concerns".[2] This is a strict and solemn duty. Essentially the same obligation is mandated by the International Bar Association's code:[3]

> Lawyers shall always maintain due respect towards the Court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or any other person.

The main thesis of this article is that the presence of lawyers in a forum such as the Waitangi Tribunal will inevitably have a marked impact on its process and procedure. This transformation is mainly due, it will be argued, because of lawyers' commitment to their professional ethical obligations, rather than, as some believe, because lawyers are committed to a hegemonic legal discourse.

This article is not, however, solely concerned with the ethical duties of lawyers. To a degree it is also concerned with the ethical responsibilities of historians. When giving evidence in a court or tribunal, historians are of course under certain "ethical" duties which are in the strictest sense legal in nature: they must not lie to the court, for instance, cannot refuse to answer appropriate questions put by counsel or the court, and so on. Over and above that, however, there has not been until recently much discussion of what might be said to be historians' professional ethics. That such a discussion has begun to emerge[4] is due perhaps to a growing community of "public historians" who specialise in preparation of

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2 New Zealand Law Society, Rules of Professional Conduct, for Barristers and Solicitors (4th ed 1996) para 8.01.

3 International Bar Association, International Code of Ethics, (1988) para 6.

4 See eg Barry Rigby, "Shouldn't We Say Just What We Profess?", New Zealand Historical Association Newsletter, No 3, June 1994, 15.

historical evidence. Professionalisation and codes of ethical conduct tend to go together. And certainly there is a similar tension between different kinds of ethical responsibilities as arises in the case of lawyers: historians have responsibilities to their "clients", but they also have broader duties owed to the courts, to the public, and to the integrity of their own discipline.

Lawyers have of course long been used to using experts from other disciplines in legal proceedings, and in civil and criminal cases the expert evidence of engineers, pathologists, scientists and so on is a routine affair. There is an elaborate corpus of evidentiary and procedural rules relating to such evidence, which is received and acted on by the courts with little difficulty. Until the 1980s, however, historians very seldom gave evidence in courts and tribunals. Today such evidence has become, if not exactly commonplace, certainly much more important. By far the most important venue for the presentation and testing of such evidence is the Waitangi Tribunal, established by statute in 1975.[5] The use of historical evidence in the Waitangi Tribunal poses some particular difficulties, not merely because of the scale and complexity of the evidence itself, but also because the Tribunal's own procedure is still in a state of dynamic evolution.

The growing importance of historical evidence reflects recent changes in New Zealand law which have brought Maori grievances to the fore. The main innovation has been the Waitangi Tribunal itself, established to hear Maori claims that acts or omissions of the Crown were, or are, contrary to the "principles" of the Treaty of Waitangi.[6] The widening of the Tribunal's jurisdiction in 1985 to hear claims backdated to 1840[7] meant that the Tribunal was inundated with a flood of claims relating in the main to events that took place last century. Such claims must obviously be documented by historians. To a lesser extent historical evidence - although not, as will be seen, historical testimony - has also made an appearance in the ordinary courts as these, too, have begun to grapple with important questions relating to the relationship between the Maori people and the New Zealand state. Historical evidence has also made an appearance in the Maori Land Court, this being largely attributable to recent changes expanding the Court's jurisdiction in a number of significant respects. Lastly, some claims have been, or are being, negotiated and settled by direct negotiations between Maori and the government, but even here background reports by expert historians are often important, and historians play, to varying extents, a role in the negotiation process itself.

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5 Treaty of Waitangi Act 1975. The legislation was largely the responsibility of Matiu Rata, at that time Minister of Maori Affairs in the 1972-75 Labour Government. For the background see P Spiller, J Finn and R Boast, *A New Zealand Legal History* (Brookers, Wellington, 1996) 170-73.

6 Treaty of Waitangi Act 1975 s 6.

7 Above n 6, as amended by Treaty of Waitangi Amendment Act 1985 s 3.

II HISTORICAL EVIDENCE IN THE WAITANGI TRIBUNAL

A *The Professionalisation of the Waitangi Tribunal*

At the present time lawyers and expert historians play a dominant role in Waitangi Tribunal proceedings. This was not the case in the early years of the Tribunal's history. Early reports such as the Motunui-Waitara (1983), Kaituna River (1984) and Orakei (1987)[8] reports reveal an older, less professionalised Tribunal in which claimants were sometimes wholly unrepresented,[9] in which the Crown was represented only by office solicitors from the government departments involved (instead of as now by counsel from, or instructed by, the Crown Law Office), and in which historical evidence was comparatively unimportant. These earlier claims broke new ground in a procedural sense, in that the Tribunal took a number of innovative steps to conform its process to Maori marae protocol. In 1983 the North Taranaki Motunui case was heard not in a courtroom but, for the first time, on a marae; claimants could give their evidence in the Maori language if they wished; and the case began and ended with formal marae ceremonial. The Tribunal's main objective at this time was to let Maori state their own grievances in their own manner as much as was possible within the formal confines of the requirements of a statutory commission of inquiry.[10] It was in this early phase that the Tribunal's procedure had the closest affinities to the "community hearings" of the kind carried out by Judge Berger in Alaska and Canada.[11]

In 1985 the Waitangi Tribunal was in effect completely reconstructed. The main change was jurisdictional in nature. From 1975-85 the Tribunal could only investigate acts or omissions of the Crown arising after 1975, the date of enactment of the parent Act, showing that as originally envisaged the Tribunal's functions did not include comprehensive enquiries into the past. In 1985, however, the Labour government amended the 1975 Act, and backdated the Tribunal's powers of inquiry to include all acts or omissions of the Crown since 1840.[12] The Tribunal was at the same time substantially enlarged, and was

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8 Waitangi Tribunal, Motunui - Waitara Report, Wai-6, 1983; Kaituna River Report, Wai-4, 1984; Orakei Report, Wai-9, 1987.

9 As in Orakei (above, n 8): see Record of Proceedings, pp 205-8. Dr David Williams of the Faculty of Law, Auckland University, however, made written and oral submissions in support of the claim.

10 See the Tribunal's comments in the Motunui-Waitara Report, 2nd ed 1989, 5.

11 See T Berger, Northern Frontier, Northern Homeland: The report of the Mackenzie Valley Pipeline Inquiry, (1977); M Jackson, "The Articulation of Native Rights in Canadian Law", (1984) 18 UBCL Rev. 255. For commentary on the Tribunal's procedure see E T Durie and G S Orr, "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence", (1990) 14 NZULR, 62; R P Boast, "The Waitangi Tribunal: 'Conscience of the Nation' or Just Another Court?", (1993) 16 University of New South Wales LR 223.

12 Treaty of Waitangi Amendment Act 1985 s 3.

empowered to commission research reports and appoint counsel to represent claimants.[13] It took some time before the amending legislation began to affect Tribunal practice. As the enquiry into the Ngai Tahu claim began in 1987, however, it became apparent that a new kind of investigation, novel in its scale and complexity, was under way. The gigantic Ngai Tahu case lasted from 1987-1990 in a sequence of twenty hearings, heard all over the South Island. In September 1987, at the second Ngai Tahu hearing, Harry Evison, a historian with a long-standing interest in the history of Ngai Tahu lands, presented historical evidence to the Tribunal on a level of scale, detail and complexity that had not been seen before, and before long the Crown responded in kind.[14]

The Ngai Tahu case established definitively the procedural features which now dominate Tribunal process. These are, firstly, for claimants to be represented by counsel, often, indeed, senior counsel;[15] secondly, for the government's response to be coordinated by the Crown Law Office based at Wellington rather than by departmental solicitors; and thirdly for the extensive use of expert historians by the claimants, the Crown, and by the Tribunal itself. The move to a more formalised procedure was cemented in place by the Waitangi Tribunal itself. In 1990 the Tribunal released a set of procedural guidelines which state that the Tribunal "prefers" claimants to have legal representation, "especially when dealing with 'historic' claims based on documentary sources".[16] This has been invariable practice since then.

The Tribunal has retained the procedural innovations begun in 1983. Claims are still heard on marae. Kaumatua give evidence in the Maori language, the day's sessions are begun and ended by prayers, and at the commencement of a case there is invariably the formal ceremony of welcome by which the Tribunal, its staff, and the attendant historians, lawyers and spectators are called onto the marae, followed by formal speeches of welcome and response. However, the actual conduct and structure of the hearings is for the most part ordinary civil tribunal process, not very different from, say, the Environment Court, and the

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13 Above n 12, ss 2, 7, 8.

14 Ngai Tahu are the principal Maori tribe of the South Island. Evison has published a number of studies on Ngai Tahu history, of which the most important is *Te Wai Pounamu: The Greenstone Island: A History of the Southern Maori During the European Colonisation of New Zealand* (Aoraki Press, Christchurch, 1993); the Waitangi Tribunal hearings and reports are discussed at pp 488-97.

15 Thus the Ngai Tahu claim was conducted on behalf of the claimants by Paul Temm QC; and Sian Elias QC represented the claimants in the Rotorua Geothermal claim, the Mohaka River Claim, and the Chatham Islands claim. Both Temm and Elias subsequently were appointed as judges of the High Court.

16 Department of Justice, Waitangi Tribunal Division, Practice Note on Procedure, 1 November 1990, in Department of Justice, Practice Notes of the Waitangi Tribunal, Wellington, 1992 7-3, para 2.4.

bulk of the hearing is taken up by the presentation of expert evidence and the elaborate cross-examination of historians and other witnesses by a battery of lawyers.

These changes have not gone unnoticed by commentators. Jane Kelsey has argued that Pakeha processes have now taken over Tribunal procedure to such an extent that Maori have become reduced to "paying spectators in their own cause".[17] Elsewhere Kelsey has complained that Maori claimants have been excluded from the Waitangi Tribunal process "as Pakeha lawyers, legal procedures, and legal concepts captured the proceedings".[18] Putting to one side the perhaps irrelevant fact that many of these "Pakeha lawyers" who practice before the Tribunal are in fact Maori, the term "captured" as used by Kelsey here is a loaded one, conveying an impression of insensitive and gung-ho lawyers imposing themselves on the Tribunal and deliberately wresting it away from its true path for some kind of mercenary or hegemonistic end. The truth is much more complex. Lawyers do, after all, have ethical duties to their clients, and are only in the Waitangi Tribunal in the first place because their clients have chosen them for the purpose and instructed them to be there. The transformation of the Tribunal process is arguably in fact a consequence of lawyers living up to their ethical responsibilities as they perceive them, and is an unintended and fairly inevitable consequence of the fact that it is lawyers who have the task of managing complex litigation, including Waitangi Tribunal litigation. If it is somehow culpable for lawyers to be running, say, the Ngai Tahu case - which cannot have been Ngai Tahu's own opinion - who should be doing it?

B The Muriwhenua Report 1993: A Case Study

In 1997 the Waitangi Tribunal released its Muriwhenua Report, addressed, as is required by the Treaty of Waitangi Act 1975, to the Minister of Maori Affairs (Tau Henare). This report is the Tribunal's most recent major report into a historic Maori grievance. Although concerned with the history of a small region, and that only to 1865 (there are further reports to come), the report is a substantial document. It is 456 pages long and comes with all the trappings of a major work of scholarship - footnotes, maps, drawings, graphs, tables, photographs and a comprehensive bibliography. In form the report is quite unlike, say, a judgment of the High Court, and although it has obvious affinities with the report of a royal commission or of a commission of enquiry its scale and scholarly trappings certainly differentiate it from most judicial productions. In addition to its badges

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17 Kelsey, "Treaty Justice in the 1980s", in P Spoonley, D Pearson and C MacPherson (eds), *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand*, 1990, 214, at 219. As noted above, however, most of the "paying" is now actually done by public agencies such as the Waitangi Tribunal and the Crown Forestry Rental Trust. Many, although certainly not all, claimant groups are not in any kind of financial position to be paying for legal representation and historians.

18 J Kelsey, *A Question of Honour*, (Allen & Unwin, Wellington, 1990) 235-6.

of scholarly respectability, the report comes with official trappings as well - it is published under Crown copyright, commences with a formal address under the New Zealand coat of arms directed at the Minister, and is an intimidatingly official-looking, bulky and expensive document (retailing at around $90). To buy it one must make a foray to the Bennetts Government bookshop, where Waitangi Tribunal reports are to be found alongside census data, Treasury briefing papers, OECD reports and other official texts. If the Muriwhenua Report is, at least in some sense, a work of history, it is also Official History: it carries all the hallmarks of definitiveness and comes stamped with the imprimatur of the state. It is a public document and is an expression of what may be called public doctrine.

Fittingly, in view of its external appearance, in terms of its content the Muriwhenua Report is both a historical discussion and a judicial text; or, rather, it is not quite either, but sits in an awkward space between a judgment, a report, and a history book. Lawyers interested in the Tribunal's developing analysis of the principles of the Treaty of Waitangi will in all likelihood skip most of the very elaborate historical discussion. However few lovers of New Zealand history will, one suspects, want to read the report either. Even for the specialist professional historian the Muriwhenua report is intimidating due to its length, complexity, and necessary absorption in the technicalities of surveys, land alienations, and the language of deeds. It is also likely to prove somewhat unrewarding, in that the report is not much focused on the questions that would most interest a historian of colonial Muriwhenua: the interactions between Maori and settlers, the changing economic and social organisation of Maori society in the region, environmental changes and their effects, the impacts of Christianity and indigenous millennial faiths, and the applicability of the various explanatory models that historians have developed to explain social, economic and political change in the nineteenth-century Pacific.

If the Muriwhenua Report should be seen in part as a history book, it is a fairly demanding and technical one; and the colour and drama of nineteenth-century life in one of New Zealand's most remote, beautiful and fascinating regions certainly fails to emerge from its pages. The report is a long, tightly-argued, uncompromising legal-historical discussion. For all the energy and creativity that has gone into its production, it is likely that the report will languish largely unread. Who, one might ask, is its imagined public?[19]

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19 The writer believes that it is still pertinent to ask this question even though, as is noted later in the text, the Waitangi Tribunal is not a free agent but is a body charged with a specific statutory mission, and I certainly do not mean to suggest that the Tribunal has a free hand to write entertaining reports for the public to enjoy. The Tribunal must nevertheless surely hope that its reports will be widely read and provoke debate and discussion not only amongst lawyers and historians but amongst the public. The Ngai Tahu Report, a massive. two-volume study, was released in 1991 with a short overview report. The writer suggests that this is a worthwhile precedent which might lead to more informed public debate. The difficulties of envisioning an imagined public have also been commented on by Bryan Gilling in his review of the Tribunal's

Regardless of whether historians will actually want to read the report, they have certainly played an important role in its construction. The Tribunal began its process of inquiry into the Muriwhenua claim in May 1987. Actual hearings began in 1990; there were then sixteen separate hearings from 1990 to 1994; one Tribunal member, Dr Evelyn Stokes of the University of Waikato, then prepared a full review of the evidence which was completed in May 1996 and the report itself was released in 1997. By my count a total of 194 separate reports, statements of evidence, collections of documents, and legal submissions were filed with the Tribunal in the course of the proceedings. These documents range from fairly straightforward briefs of evidence of a dozen pages or so to bulky historical reports hundreds of pages long which refer to hundreds more documents in their turn. How many thousands of pages it all adds up to is anyone's guess. Putting to one side the evidence given by the claimants themselves, the collections of original documents, and the various publications and reports which were tabled in evidence although not specifically commissioned for the Muriwhenua proceedings, there were (again by my count) 52 separate reports prepared specifically for the case by expert witnesses. Most of these reports exceeded 100 pages in length; even at a conservative estimate of 100 pages per report, that adds up to well over 5000 pages of material, all of it densely-written and closely referenced, equal in length to about 12-13 substantial books (and forming, moreover, just a fraction of the total volume of written material produced in evidence in the case).

The amount of material, in other words, would seem to be beyond the capacity of any one individual to absorb, indicating the extraordinary demands the process places on counsel, who somehow have to do their best to grasp the extraordinarily diverse material and comment on it in closing submissions. Of the 52 commissioned reports in the Muriwhenua case, 41 were primarily historical in nature, with the remaining 11 prepared by experts in anthropology, linguistics and economics; but even here much of the material was historical in the sense that it related to Maori understanding of particular deeds and transactions in the past. Interestingly, there was only a small amount of specialist evidence dealing with economic and social conditions in Muriwhenua today.[20] Overwhelmingly, then, the process was an inquiry into history.

Rangahaua Whanui report, this being not a report produced in response to a particular claim, but is rather an attempt by Tribunal staff to describe the "big picture", as it were, based on a number of commissioned regional and thematic studies. See Alan Ward, Rangahaua Whanui National Overview Report, 3 vols, (Waitangi Tribunal/GP Publications 1997); Bryan Gilling, "Rangahaua Whanui Overview", People's History (Newsletter of the Historical Branch, Department of Internal Affairs), No 25, July 1997, 7.

20 There is only one report dealing with this, this being Wai 45 Doc#A2, a socio-economic profile of the region by James Newall. However the Tribunal's Muriwhenua Land report only takes events down to 1865, so perhaps there may be more evidence on contemporary Muriwhenua Maori society in subsequent proceedings.

The scale of the Muriwhenua claim illustrates how readily the amount of evidence in a Waitangi Tribunal case can accumulate to the extent that the whole process can be at risk of collapsing under its own weight. The Muriwhenua case was comparatively untroubled by cross-claims; had there been the contested counterclaims that have appeared in some other cases the difficulties would have been even more acute. In civil litigation the objective of pleadings and pre-trial process is to narrow issues so that trial can be more manageable and less costly. In the Waitangi Tribunal the issues all too readily, far from narrowing, can expand and proliferate as the hearings go on: the process of research can uncover new issues that no-one was aware of when the case began. Historical research often only throws up fresh puzzles and further problems. Thus a particular problem for lawyers involved in the Waitangi Tribunal process is simply that of trying to keep the material within graspable limits.

C Legal Status of Waitangi Tribunal Reports

The formal status of Waitangi Tribunal reports was considered by the Court of Appeal in 1990 in *Te Runanga o Muriwhenua v. Attorney-General*.[21] The Court of Appeal, having rejected a doomed argument that the Waitangi Tribunal's findings of fact in the Muriwhenua Fisheries Report (1988) had the status of res judicata in related civil proceedings,[22] went on to find that the Tribunal's reports were only admissible as standard works in general literature under s 42 of the Evidence Act.[23] As far as the Court of Appeal is concerned, when it comes to matters of factual proof in the ordinary courts,[24] a Waitangi Tribunal report is basically just a kind of authoritative history book. Cooke P said:[25]

> The High Court judges were clearly right in holding that the Waitangi Tribunal's Muriwhenua Fishing Report comes within the section as being a published book dealing with matters of public history, and to some extent anthropology (or sociology), which may be considered to be

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21 [1990] 2 NZLR 641.

22 See per Cooke P above n 21, 651, where following the approach of Eichelbaum CJ and McGechan J in the High Court, he notes that "the crucial point is that the Waitangi Tribunal is not a Court and has no jurisdiction to determine issues of law or fact conclusively".

23 Section 42 of the Evidence Act 1908 allows all Courts "in matters of public history, literature, science, or art" to refer "for the purposes of evidence" to "such published books, maps, or charts as such Courts or persons consider to be of authority on the subjects to which they respectively relate."

24 A different approach may be possible in other tribunals which are not bound by the full formalities of the law of evidence. For example s 276(2) of the Resource Management Act 1991 provides that the Environment Court "is not bound by the rules of law about evidence that apply to judicial proceedings".

25 Above n 21, at 653.

> of authority on those subjects. In the discretion of the Court it may therefore be referred to "for the purposes of evidence" - those are the very words of the section - on matters of fact and science.

It is very important that the exact context of the Court of Appeal's discussion - proof of facts in related civil proceedings - be borne in mind, and the Court's analysis not extended to other contexts. The Court of Appeal clearly had some difficulty in finding an appropriate way to characterise Waitangi Tribunal reports, and may be said to have stretched a point to have found that it was a "published book" of "authority" on its subject matter. In fact a Waitangi Tribunal report is, as noted above, not a history book, or at least it is not only a history book, whatever its legal status in terms of proof of matters of fact. The Waitangi Tribunal's reports are primarily judgments issued by a judicial body. Its findings of fact are the outcome of a process of inquiry, and are different in kind from the conclusions of an individual scholar toiling alone in the archives. Nor are Tribunal reports written and structured in a manner that bears any resemblance to an ordinary history book. Those who doubt this need only turn to the Waitangi Tribunal's Ngai Tahu Report (1991) and compare it to Evison's books on Ngai Tahu history. One reason for discomfort in accepting that a Waitangi Tribunal report basically just a rather large, technical and demanding history book is that the government may itself decide to treat it that way, and to prefer more congenial historical opinion garnered from elsewhere. Waitangi Tribunal reports, in other words, have a public law status that ordinary books certainly do not.[26] Historians are not usually regarded as being liable to judicial review.

The Tribunal does not, however, merely make findings of fact. It has also built up a body of concepts and doctrine deriving from the text of the Treaty of Waitangi and from the 1975 Act. The Tribunal's discussions of Treaty discourse, or what might be called its findings of law, seem to be regarded by the ordinary courts as ordinary legal precedent which can be taken judicial notice of whenever appropriate. On a number of occasions the Courts have adopted, or at least commented respectfully, on the Tribunal's legal findings.[27] Thus the Tribunal's dual nature is once again revealed: as a Tribunal of fact its productions are no more authoritative than any other work of history, but as a legal or judicial body its legal findings are, while certainly not binding on any other body, certainly treated with some deference.

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26 As seen in *Attorney-General v NZ Maori Council* [1992] 2 NZLR 129, where the Court of Appeal held that the Crown could not allocate radio frequencies without having regard to the relevant Waitangi Tribunal report, which in the circumstances of the case was a relevant consideration impacting on the Minister's decision.

27 See eg *Maori Council v Attorney General* [1987] 1 NZLR 641, at 661 (Cooke P).

D The Waitangi Tribunal's Historical Discourse

The Waitangi Tribunal is not a free agent but is circumscribed by its own empowering Act. Its task is not to construct historical narratives, but, rather, to enquire whether acts or omissions of "the Crown" are contrary to the "principles" of the Treaty of Waitangi. No change was made to this basic statutory requirement when the Tribunal's jurisdiction was expanded in 1985. The government of the day obviously believed it meaningful for the Crown's actions in the past to be evaluated and judged by the standards of the principles of the Treaty of Waitangi. Nineteenth-century politicians such as Donald McLean or Sir George Grey may have believed themselves under a duty to act morally, or ethically, or as Christians (both were devout Christians), but not according to a set of "principles" articulated by a statutory tribunal to be established in the future. Grey may well have believed that his actions did comply the Treaty, his understanding of which probably had little in common with that of Chief Judge Durie. In determining the "principles" of the Treaty, the Tribunal's stance has been determinedly present-minded. There has been no attempt to search, for, say, a nineteenth-century understanding of what the "principles" of the Treaty may have been and to judge the actions of the Crown in the past by such a historically-relativist understanding. Rather, the Tribunal has preferred to construct a set of standards which it perceives as valid and relevant at the present day, and to judge the Crown's actions in the past by those standards. Of course the Tribunal has constructed its present-day discourse concerning the "principles" of the Treaty out of what may be called historical materials: the Maori and English texts of the Treaty, the various official instructions to Governor Hobson and so on. Nevertheless the Tribunal's principles are a modern construct. One can imagine the similar intellectual difficulties involved in, say, establishing a modern international Tribunal charged with passing judgment on the eighteenth-century slave trade measured by the standard of contemporary international human rights law.[28]

Historians involved in the Waitangi process are therefore engaged in a process which is in a fundamental respect profoundly unhistorical. Waitangi Tribunal history is present-minded or Whig history with a vengeance, in that the actions of people in the past are being judged not by their standards but by ours. This is itself a further illustration of the legalism of the Tribunal process: the Common Law has always been present-minded even when

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[28] It is difficult to push this line of argument too far without becoming hopelessly ensnared in the relativism-universalism debate which runs through all the human sciences, including law and history. Are there universal standards? Current human rights law is based on the assumption that there are. It was no answer to the proceedings at Nuremberg that what was done by those on trial was ethically acceptable according to the norms of Nazi Germany. Generally the further back into the past one goes the more difficult it becomes to apply modern criteria of ethical behaviour; but historians are not, after all, burdened with the problem of making legal judgments in the here-and-now. Historians can plausibly say that their task is to understand the past rather than to sit in judgment on it, an option that is simply not open to the Waitangi Tribunal.

ostensibly concerned with reviewing the past. As McHugh puts it, the Common Law is "committed to a notion of immanence, the idea that somehow all its principles have always existed".[29] Similarly the Tribunal acts on the working assumption that the Treaty's principles, as currently understood, have always existed. The standard that is employed, moreover, is not any simple one but is a quite elaborate construct in its own right, that of the "principles of the Treaty", a construct which is still evolving and which in some respects is still not very coherent. Once again, then, the dual nature of the Tribunal's functions is apparent. In part its task is to conduct a historical investigation: to find out what happened. In this respect it makes findings of fact based on the work of expert historians. But this is only a part of the Tribunal's task. It is under a statutory obligation to interpret those facts in a particular manner. In defining the principles of the Treaty, and in passing judgment on the past in the light of those principles, the Tribunal is exercising functions of law. In doing so, it applies a quintessentially legal approach to the past.

III HISTORICAL EVIDENCE IN OTHER COURTS AND TRIBUNALS

It might be imagined that the sequence of cases in the ordinary courts dealing with Maori claims and the status of the Treaty of Waitangi since the seminal decision of the Court of Appeal in *New Zealand Maori Council v Attorney General* in 1987[30] would also involve a considerable amount of historical testimony being given at trial. This is, however, not the case, for the simple reason that in none of the "Treaty" cases of recent years has there been testimony of any kind. All of the main decisions, including the 1987 state-owned enterprises case itself, have arisen from interlocutory questions of law and have been fought out on the basis of legal arguments. Although in some of the cases significant amounts of historical evidence have been put into Court by affidavit[31], there has been no oral presentation by or

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29 P G McHugh, "The Historiography of New Zealand's Constitutional History", in P A Joseph (ed), *Essays on the Constitution*, (Brooker's, Wellington, 1995), 344 at 346.

30 [1987] 1 NZLR 641

31 An example is the Court of Appeal decision in *Tainui Maori Trust Board v Attorney-General*, [1989] 2 NZLR 513. The main issues before the Court of Appeal were entirely points of law arising from preliminary arguments, including the applicability of the so-called "clawback" provisions of the Treaty of Waitangi (State Enterprises) Act 1988. Although there was no historical testimony was given, the documents filed in the Court of Appeal by the plaintiffs included a long affidavit by Ngapare Hopa of Waikato University, dealing with the history of the Waikato confiscations of the 1860s, and appending numerous primary and secondary sources. See *R Te K Mahuta and Tainui Maori Trust Board v Her Majesty's Attorney-General and Minister of Finance and Minister for State Owned Enterprises*, Case Removed, nd, vol 2.

cross-examination of historians (or of any other scholarly experts). This sharply distinguishes the New Zealand case law from its equivalents in Canada[32] or Australia.[33]

If there ever were a substantive civil case in the ordinary courts which required direct testimony on the historical background to aboriginal title or Treaty of Waitangi Tribunal issues the scale and expense of the process could well be more than any litigant could bear, as is shown by McEachern CJ's comments in the British Columbia Supreme Court in *Delgamuukw v R* in 1991:[34]

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32 Historical evidence in an aboriginal rights case in Canada first became critically important in the judgment of Hall J in *Calder v A G British Columbia* (1973) 34 DLR (3d), 145, at 169. For an analysis of historical issues in Calder and in subsequent Canadian aboriginal rights cases see J R Fortune, Comment, "Construing Delgamuukw: Legal Arguments, Historical Argumentation, and the Philosophy of History", (1993), 51 U Tor Fac L Rev 79.

33 The trial judge in *Mabo v Queensland*, Moynihan J, heard a considerable volume of evidence in a trial which lasted for 67 sitting days, and released an unreported Determination of Facts dated 16 November 1990. See B A Keon-Cohen, "Some problems of proof: the admissibility of traditional evidence" in M A Stephenson and S Ratnapala (eds), *Mabo: a Judicial Revolution*, (University of Queensland Press, Brisbane, 1993), 183-205. See also Brennan J's comments on the procedural background to the reference to the High Court of Australia in *Mabo v Queensland* (1992) 107 ALR. 1, 55-56. Following Mabo the Australian government released a discussion paper (Mabo: the High Court decision on Native Title: Discussion Paper, AGPS., Canberra, 1993) which advocated the establishment of a special tribunal to deal with the resolution of native title issues. The discussion paper argued (p.31):

> that there is a strong argument that the delays (eg in collecting and presenting data), conflicts (eg between the various potential stakeholders), uncertainties and possible polarisation of community views arising from large scale litigation are to be avoided.

The procedural and evidentiary problems involved in a substantive native title in the ordinary courts in Australia were vividly shown in *Cooee v Commonwealth of Australia* (1993) 118 ALR 193. At issue here was a substantive native title claim to an area of 80,000 square miles. Mason CJ held that the pleadings were defective in that (I) the land subject to the claim was not identified with sufficient precision; and (ii) private owners within the claim area were not, as was required, identified and joined as parties.

34 [1991] 3 WWI 97, at 116-7. McEachern J's decision was appealed to the Supreme Court of British Columbia, (1993) 104 DLR. (4th). 470, and from there to the Supreme Court of Canada which gave judgment on 11 December 1997: *Delgamuukw v British Columbia*, unreported, Supreme Court of Canada, 11 December 1997, text obtained from [http://www.droit.umontreal.ca/doc/csc-scc/en/index.html]. This case involved a claim of territorial aboriginal title to areas totalling 58,000 square kilometres of British Columbia brought by the Gitskan and Wet'suwet'en hereditary chiefs. The case was dismissed by McEachern J at trial and the plaintiffs' appeal was dismissed by a majority of the Court of Appeal of British Columbia; but the Supreme Court of Canada reversed and has ordered that the case be remitted for trial. A key issue in this mammoth-scale litigation was the treatment by the trial judge of oral histories given by the plaintiffs. McEachern J found that such oral history, although admissible, was entitled to no independent weight; but the Supreme Court found that McEachern J's approach was contrary to the Supreme Court's earlier decision in *R v Van der Peet* [1996] 2 SCR. 507. McEachern J's approach to historical, anthropological and traditional evidence has proved very controversial in Canada: see generally

> A total of 61 witnesses gave evidence at trial, many using translators from their native Gitskan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript of evidence at trial, 5,898 pages of transcript of argument, 3,039 pages of commission evidence and 2,553 pages of cross-examination; about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they had referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.

McEachern J heard 374 days of evidence and his judgment, which reviews the material very thoroughly, is about 400 pages long. Whatever the concerns about the delays and costs involved in the Waitangi Tribunal process, there are certainly no grounds for believing that the process would be any cheaper, less elaborate or more expeditious in the ordinary courts (rather the reverse). Those who argue that the Tribunal's caseload should be transferred to the ordinary courts need to consider the truly numbing scale and costs of a case such as Delgamuukw. The Waitangi Tribunal process is, for all its difficulties, comparatively cheap and highly productive; and it has allowed substantive historical questions to be investigated in a judicial manner on a range and scale that would be unimaginable in the ordinary courts.

The only courts at the present time which have seen a degree of historical testimony are the Maori Land Court and its appellate tribunal, the Maori Appellate Court,[35] both of which have received a number of interesting extensions to their powers in recent years. These new powers include[36] s 30 of Te Ture Whenua Maori/Maori Land Act 1993, which gives to the Court new powers relating to representation enquiries. Section 30 provides:

Bruce G Miller (ed), Special Issue, B C Studies, No. 95, Autumn 1992; Frank Cassidy (ed.), Aboriginal Title in British Columbia: *Delgamuukw v The Queen*, Institute for Research on Public Policy/L'Institut de Recherches Politiques, Montreal, 1992.

35 Both courts are set up by statute. The Maori Land Court has been in existence since 1865 and the Maori Appellate Court since 1894. The current statute is Te Ture Whenua Maori/Maori Land Act 1993.

36 Also of note is s 6A of the Treaty of Waitangi Act 1975, as inserted by the Treaty of Waitangi Amendment Act 1985, which gives to the Maori Appellate Court a special jurisdiction to determine boundary issues arising out of cross-claims in the Waitangi Tribunal. This jurisdiction has not been much used, but in 1989-90 the Maori Appellate Court heard vast quantities of

The Maori Land Court may -

(a) At the request of any court, commission or tribunal, supply advice, in relation to any proceedings before that court, commission or tribunal, as to the persons who, for the purposes of those proceedings, are the most appropriate representatives of any class or group of Maori affected by those proceedings; and

(b) At the request of the Chief Executive or the Chief Judge determine, in relation to any negotiations, consultations, allocation of funding, or other matter, the persons who, for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Maori affected by the negotiations, consultations, allocation, or other matter.

The power thus conferred on the Court is, on the face of it, extraordinarily wide. Section 30(b), in particular, empowers the Court to "determine" the "appropriate representatives" of any class or group of Maori in relation to any negotiations or consultations and so on. Thus in Re Ngati Toa Rangatira[37] the Maori Land Court was concerned with the determination of the proper representatives of the iwi (Ngati Toa) for four specific purposes: receipt of scallop fishing quota; receipt of fin-fish quota; consultation with the Marlborough District Council in regard to the exercise of the latter's statutory functions; and negotiations with the Crown over the disposal of Crown lands in the South Island. To deal with this it was necessary to present to the Maori Land Court a considerable amount of historical evidence in order to document the history of this particular iwi and its evolving representative structures. This was prepared and presented by professional historians who were subjected to cross-examination in the Maori Land Court.

IV LAWYERS AND HISTORIANS: PROCEDURAL ASPECTS

A Lawyers and Procedural Innovation: A Model

J H Langbein, a legal historian based at the University of Chicago, has published a number of key articles on the history of the criminal trial in seventeenth and eighteenth-century England.[38] Langbein's main thesis is that English criminal procedure was

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historical evidence arising in such a claim: see In re a Claim to the Waitangi Tribunal by Henare Rakiihia Ta u and the Ngai Tahu Trust Board, (1990) 4 South Island ACMB 472.

37 (1994) 21 Nelson MB 1 (Maori Land Court, 8 December 1994, Judge Hingston).

38 J H Langbein, "The Criminal Trial Before the Lawyers" (1978) 45 U Chi L Rev 263; "Shaping the Eighteenth Century Criminal Trial: a View from the Ryder Sources", (1983) 50 U Chi L Rev 1. See also: J M Beattie, *Crime and the Courts in England 1660-1800*, (Princeton University Press, 1986); J Innes and J Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England", (1986) 25 Journal of British Studies 380; S Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-Century England", [1990] 75 Cornell L Rev 497.

transformed once defence counsel were permitted to appear in the Old Bailey and at the assizes in felony trials. Before the eighteenth century defence lawyers were not permitted in felony cases, with the not unsurprising result that trials were rapid, unstructured, and wholly dominated by the judge:[39]

> What we today think of as the lawyers' role was to some extent filled by the other participants in the trial, especially the judge. But a lot of what lawyers now do was left undone, which naturally shortened the proceedings.

As defence lawyers gradually became more usual in the course of the eighteenth century, there were a number of changes in trial procedure. Lawyers brought into the criminal trial process practices that they were familiar with in civil proceedings. Cases became more tightly structured into "Crown" and "defence" cases, the rules of evidence became much stricter, and it gradually became routine for the judge to make directions to the jury if the only evidence against the prisoner came from accomplices. Defence lawyers began this process of transformation firstly by cross-examination of prosecution witnesses; only later - not until the nineteenth century - did it become standard for counsel to address the jury at the end of the case before the trial judge's summing-up. Many of the features of the Anglo-American criminal trial that we take for granted today are in fact of fairly modern origin, brought about by the consequential effects of allowing defence counsel in felony cases. Langbein does not, it must be stressed, consider this transformative process with any enthusiasm; in fact his starting point is that the modern criminal trial, at least in the United States, has become "unworkable as a routine dispositive procedure".[40]

In a strikingly similar manner Waitangi Tribunal procedure has also changed as the process has come to be increasingly dominated by lawyers and expert witnesses. Langbein's model does not completely accord with the evolution of the Waitangi tribunal since 1983, when it released its first major report, as lawyers have, to a degree, played a role in the Waitangi Tribunal process from the beginning. Nevertheless a modified form of Langbein's analysis contains useful insights for an analysis of the shifts in Tribunal practice that have occurred over its history. Lawyers, as Langbein recognised, will inevitably import and apply the procedures and techniques with which they are familiar. The most obvious manifestation of this in the Waitangi Tribunal is the growing tendency for lawyers to cross-examine historical witnesses at increasing length. As cross-examination and the role of experts has increased there have been consequential changes. Again, following Langbein's model to some extent, one is the emergence of debate on the burden and standard of proof to be applied by the Tribunal, both in the exercise of its special and its ordinary jurisdiction.

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39 Langbein, "Criminal Trial Before the Lawyers" above n 38, 282.

40 Langbein, "Shaping the 18th Century Criminal Trial", above n 38, 134.

However, it must also be recognised that lawyers do not cross-examine witnesses or make submissions on a burden of proof only because this is what lawyers normally do. Lawyers in the Waitangi Tribunal are not acting merely out of blind habit. They see themselves as being under a duty to cross-examine witnesses. To not cross-examine, for example, may well be an ethical failure in the first of the two senses discussed at the beginning of this article: that is the duty to advance the interests of one's client. No doubt the same was true of eighteenth-century barristers defending felons in jury trials at the Old Bailey. Langbein's emphasis on the virtues of the "criminal trial before the lawyers" is shared, one suspects, by few lawyers or historians (or criminals).

B Cross Examination

The most striking shift in Tribunal procedure, and one directly attributable to lawyers, is the growing scale of cross-examination of expert witnesses. The following discussion is unfortunately somewhat impressionistic, based as it is on the author's own experience as counsel and as an expert witness before the Tribunal, and also as a witness of the experiences of others. Drawing from my own experience, the first point to be stressed is that cross-examination and re-examination of Maori kaumatua witnesses before the Tribunal is quite rare. The Crown lawyers exercise marked restraint in this respect, and, indeed, to cross-examine such witnesses at length, many of whom are elderly, and who are after all giving evidence on a marae before an audience largely comprised of their own families, is an extremely difficult task. Mostly the kaumatua evidence is accepted as such, and although it might be commented on in submissions, is usually simply left to the Tribunal to take account of and evaluate. This is perhaps another way of saying that in many cases the kaumatua evidence is non-contentious essentially background material which has little bearing on the real questions at stake. These are historical in nature and are documented in the historical reports.

Secondly, Tribunal hearings are not always a straightforward contest between Maori claimants and the Crown. In most claims there are often a number of cross- or counter-claimants, hostile to the main claim in varying degrees, who are themselves represented by lawyers and who will also have expert historical witnesses of their own. Thus in the Chatham Islands claim the present author gave evidence on behalf of an essentially cross-claimant group, and was cross-examined by counsel for the main claimant group at considerable length but was asked no questions at all by the Crown. The writer also had a somewhat similar experience in the Wellington Tenths claim currently being heard by the Tribunal.

Thirdly, the Tribunal's process is both "adversarial" and "inquisitorial". One aspect of this is that expert witnesses are questioned not only by counsel but also by the Tribunal itself, which can certainly make the process extremely fatiguing and demanding for the witnesses, some of whom will have been under the delusion that giving evidence in the

Tribunal is less stressful and contentious than it is in the ordinary courts. On those occasions when the present author has given evidence before the Tribunal there has invariably been very close questioning by counsel and by the Tribunal itself.

Fourthly it does seem to be the case that the scale of cross-examination is definitely increasing. This is not merely a factor of the number of lawyers present, but also reflects tendencies for witnesses to be cross-examined at greater length and, perhaps, more abrasively. In its early years there was relatively little cross-examination in the Tribunal, and the President of the Tribunal and other senior members saw little point in it. In 1990 Chief Judge Durie and G S Orr, in a key article on Tribunal procedure, expressed the opinion that in general terms excessive cross-examination on a marae was generally inappropriate and extensive cross-examination of expert historical witnesses unnecessary:[41]

> Quite apart from proceedings on the marae, the adversarial system has needed further modification to cope with the voluminous quantity of historical and other scholarly opinion that is received. In the Ngai Tahu claim, and with the consent of counsel, only limited questions of clarification were put at the conclusion of such evidence. Opposing counsel were invited to submit written questions and comments later, to which a written rejoinder would be filed, leave being given to recall the witness should that be necessary. This system worked well both in clarifying differences and saving considerable sitting time and costs. It is doubted that extensive oral examination assists the resolution of complex historical issues.

In the Pouakani case in 1989, in which the present writer was one of the counsel for the claimants and which was chaired by Judge Russell of the Maori Land Court, cross-examination was likewise limited and confined to questions of clarification. The Tribunal's own Practice Note on Procedure, released in November 1990, also indicates that cross-examination should ordinarily be limited:[42]

> Generally only limited questions of clarification are put following the formal presentation of a research report. Opposing counsel are invited to submit written questions and comments to which a written rejoinder will later be filed with leave to recall the witness if need be. It is doubted that extensive oral examination assists the resolution of complex historical issues. It is better that counsel flag the matters in dispute and adduce contrary evidence or opinion later.

These strictures, however, bear no relation at all to current practice, in which elaborate cross-examination of expert witnesses is commonplace, and no different in any way from

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41 Durie and Orr, "Role of the Waitangi Tribunal", above n 11, 70.

42 Waitangi Tribunal, Practice Note, Procedure, 1 November 1990, in Department of Justice, Practice Notes of the Waitangi Tribunal, Wellington, 1992, 7-5, para 3.2.

that in any other court. The cross-examination can indeed be as methodical and as prolonged as in any jury trial, and perhaps in some ways even more mentally exhausting for lawyer and witness alike. Why the Tribunal has not acted to insist on compliance with its own procedural guidelines is unclear. The present writer has himself been cross-examined on historical evidence for hours, and has seen expert witnesses being cross-examined on occasion for periods longer than a day. I certainly do, however, share Chief Judge Durie's and Professor Orr's doubts as to whether extensive oral cross-examination helps much to resolve "complex historical issues".

Finally, historians play a dual role in cross-examination. They are, most obviously, on the receiving end of it. However they also play an important role in assisting lawyers to prepare cross-examination for opposing witnesses. Lawyers rarely have time to master all the detail of a complex historical report prepared by an opposing party and typically seek the assistance of historians to read the report carefully, find out its flaws and weaknesses, and even to prepare lists of questions to put to the witnesses. At the hearings historians often sit with counsel at the front tables and are expected to comment in detail on the evidence as it is presented. Thus cross-examination is not a simple matter of lawyers cross-examining historians, but is to some extent a matter of historians cross-examining their colleagues though counsel.

C Proof

Until recently there has been little discussion of the incidence and standard of proof in the Waitangi Tribunal. The Tribunal's practice directions give the impression that concepts of proof in fact have little relevance to how the Tribunal goes about reviewing the evidence and constructing its reports:[43]

> Regard must also be had for the final objective, which is not so much to find for one side or the other as to produce a comprehensive report sufficient to satisfy the relevant Ministers of the Crown, the public and indeed future generations that all matters that should have been examined have been, and that the report provides a sufficient base for a lasting settlement to be sought.

The objective, then, is to prepare a comprehensive report. The Tribunal can conduct its own research and does not see itself as bound in any way by issues agreed to by counsel. It is difficult to see, then, that concepts of proof as applied in the ordinary courts have much relevance. Although claims are required to be carefully researched and documented, the process is one of inquiry, not civil action: there is no such thing as a prima facie claim, or any sense that the claimants are required to prove claims to a particular standard or the

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43 Above n 42, 7-1, para 1.3.

Crown to disprove them. All parties collectively produce a corpus of evidence and submission which the Tribunal then reworks into a comprehensive discussion. The terminology of proof and disproof is not much used in the Tribunal's reports. Indeed in the Turangi Township Report (1995) the Tribunal stated:[44]

> We consider it unhelpful to suggest that either the claimants or the Tribunal should be bound by court rules of civil procedure as to the burden of proof.

In some recent claims, however, Crown counsel have raised a number of issues concerning the standard and burden of proof.[45] Of particular importance is the question whether different requirements apply in the exercise by the Tribunal of its special, as opposed to its ordinary jurisdiction.[46] This point was covered fully in a special ruling of the Tribunal issued in March 1997,[47] where the Tribunal found that whether exercising its general (recommendatory) or special (binding) jurisdiction, the general approach to standard and burden of proof should be the same. Thus although no party before the Tribunal has any burden of proof cast on it, the general standard of proof, based on the Tribunal's consideration of the totality of the evidence once all the evidence was to hand, is the balance of probabilities.[48] The technicalities do not matter for present purposes. Rather,

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44 Turangi Township Report, Wai 84, 1995, 293. The suggestion is here made that although the parties are not themselves bound by any requirements as to standard of proof, the Tribunal is, in a sense: "when all the evidence is in, the Tribunal must decide on the totality of the relevant evidence before it the extent to which, if at all, the claims before it are made out. It is then appropriate to do so on the balance of probability."

45 As well as in the Turangi Township case in 1995, other instances include the Crown's closing submissions in the Te Whanganui-a-Orotu (Wai 55) (see Wai 55 Doc# K13, 21-23 and Muriwhenua Lands (Wai 45) (see Wai 45 Doc#O1, p 18) cases.

46 This question is too complex to be fully explicated in this article. In brief, the Tribunal has had some binding powers conferred on it in addition to its general jurisdiction to make recommendations to the Minister of Maori Affairs. By ss 8A and 8B of the Treaty of Waitangi Act 1975, as inserted by s 4 of the Treaty of Waitangi (State Enterprises) Act 1988 the Tribunal was given power to make binding recommendations that land vested in a state-owned enterprise be returned to Maori ownership. Further binding powers were conferred on the Tribunal in relation to Crown-owned exotic forest land in 1989, see Crown Forest Assets Act 1989 and railway land in 1990. See New Zealand Railways Restructuring Act 1990, ss 43-48.

47 Decision of Tribunal in re s 8A of the Treaty of Waitangi Act 1975 and in re a claim by Mahlon Nepia on behalf of Ngati Turangitukua relating to the Turangi Township, Wai 84, Doc#2.57 (25 March 1997).

48 Above n 47, 43-44. On this occasion the presiding officer was Professor G S Orr. The Tribunal is differently constituted for each claim it hears, however, and in other claims where the presiding officer is Chief Judge Durie a different view has been expressed. In the Muriwhenua claim Chief Judge Durie queried whether a higher standard of proof might be required when the Tribunal is exercising its binding recommendations: see Wai 45 Doc. # I6; and to similar effect in the Eastern Bay of Plenty claims, see Wai 46 Doc # 2.59 and 2.104. The present writer's view is that there is a

the point to be stressed is that, just as in the case of the eighteenth century criminal trial, the involvement of lawyers has led to questions of standard and burden of proof being raised.

D Paying the Piper

The Treaty of Waitangi Amendment Act 1985 permitted the Waitangi Tribunal to grant legal aid to meet the costs of claimant counsel. In 1991 the Legal Services Act brought the funding of Waitangi Tribunal claims under the ordinary civil legal aid system.[49] The amount of funding set aside for Waitangi Tribunal litigation is, however, relatively restricted. The major research funding providers are the Waitangi Tribunal itself, which meets the costs of research commissioned by itself or on behalf of claimants, and the Crown Forestry Rental Trust established by the Crown Forests Assets Act 1988. This latter enactment was passed as part of a comprehensive national settlement in 1988 of Maori claims to Crown-owned "exotic" (ie plantation) forests. Part of the arrangement was that some of the income derived by the Crown from the sale of cutting rights in these forests was to be paid into a special fund, the interest on which could be used to fund research into claims to the Crown lands occupied by the forests. The Crown Forestry Rental Trust, which manages the fund tends to be reluctant to pay legal costs although it has certainly generously funded research and claim administration. Although the Trust does assist with legal costs to some extent, the Crown Forestry Rental Trust reserves to itself the right to disallow payment for legal work which, in its judgment, exceeded what was reasonable in the circumstances.[50]

There has been some friction between lawyers and the Crown Forestry Rental Trust. The Trust obviously has a duty to maintain and manage its fund and must be careful not to expend it too readily on legal costs. On the other hand lawyers who do become involved in

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clear distinction between the Tribunal's ordinary and its binding jurisdiction, and given that there is no appeal from the Tribunal's decisions and the scale and value of the assets that may potentially be subject to the Tribunal's special jurisdiction, the argument that different standards of proof should apply is well made. To blur these differences, as now seems to have been done, seems to run the risk of courting further debate on the standard and burden of proof in the exercise of the Tribunal's ordinary jurisdiction.

49 Legal Services Act 1991, ss 19(1)(f), 32 (1), 72, 73.

50 In its standard document circulated to claimants (Crown Forestry Rental Trust memorandum, "Assistance with the costs of legal services", September 1996) the Trust states in determining payment of legal costs it will apply Barker ACJ's approach in *Gallagher v Dobson* [1993] 3 NZLR 611. Here Barker ACJ followed Donaldson J's approach to reviewing solicitors' bills of costs in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436. Donaldson J (as he then was) stated that the object was to "arrive at a sum which is fair and reasonable, having regard to all the circumstances". This was a standard to be applied by the Courts in taxing bills of costs or the Law Society in certifying a bill. Whether an organisation such as the Crown Forestry Rental Trust is able to appropriately determine fair and reasonable legal fees may perhaps be doubted.

Waitangi Tribunal litigation frequently find that they have to spend much of their time trying to arrange funding, to the detriment of time spent on effectively managing the claim, and that they are often left in a state of some uncertainty as to whether all their costs will be met. The ethical problems this can cause are only too real. What should a lawyer do who finds, half-way through a claim, that sources of funding have suddenly evaporated or most of a particular bill disallowed? Lawyers engaged in the Tribunal process can find that they are bombarded with memos and directions from the Waitangi Tribunal insisting that various things be done by certain times. Practitioners are understandably reluctant to accumulate hours of time working to comply with Waitangi Tribunal directions for which the prospects of ever getting paid are uncertain at best. The difficulties of obtaining funding for legal services can mean that in the early stages of a claim claimants may be commissioning large amounts of research while being effectively without legal representation. This can cause difficulties caused by lack of coordination or research.

What has happened, then, is that the Waitangi Tribunal process has become increasingly professionalised, so much so that as early as 1990 the Tribunal announced that its strong preference was that major claims be represented by counsel. However avenues for funding for counsel are comparatively restricted, while on the other hand there is a substantial amount of money available to fund research. Ideally lawyers representing claimants, cross-claimants and the Crown should at least read all the research material prepared for the claim by all parties. This basic requirement may not, however, be easily met, given the restricted sources of funding for legal costs and the incredible scale and complexity of the evidence.

E A Historian's Perspective

Some indication of the varying roles historians play in the Tribunal process has already been given. Briefly these include the tasks of research and report-writing, presentation of the evidence at hearings (including responding to cross-examination and questioning), and advising and assisting counsel in formulating the response to opposing parties, including the preparation of cross-examination of opposing witnesses.

What are the ethical standards that historians should adhere to in carrying out these various functions? Historians are not bound by the very particular responsibilities owed by lawyers to their clients. Historians are not advocates but experts, who must qualify themselves as such and who are then given the privilege of giving evidence as to their own opinions. However, historians are usually called to give evidence not in any lofty and detached manner but on behalf of particular parties, often in a very complex, long-standing and fraught dispute, and it is my own experience that inevitably historians are "advocates"

to a degree.[51] The same is perhaps true of all expert witnesses in civil and criminal litigation. In the case of historical research, however, given the range and scale of the documentation and the fact that the discipline of history always involves a certain amount of selection and interpretation, there is somewhat more scope for "advocacy" than, say, in the case of engineers called to give evidence on the reasons for mechanical failure of a particular product. In history, whether "academic" or "public", and at least in early modern and modern history where the range of documentary sources is vast, it is never possible to read and adduce all the evidence bearing on a particular historical problem. There is always some selection and emphasis. Nor is it possible to simply produce evidence without interpreting it and analysing it.

To pursue this further, imagine the case of an academic historian who decides for his or her own interest to write a book on the Waikato confiscations of the 1860s, and that of a historian briefed by the Crown to prepare a report on the same subject-matter for the purpose of Waitangi Tribunal proceedings. It is naive to believe that the two tasks are the same. Academic historians for a start have the freedom to choose any framework they like for reading and interpreting the evidence, and usually like to come up with an approach which is stimulating and novel, or which at least allows historians to demonstrate to their colleagues how up-to-date they are with the latest historiographical theories. The historian retained by Crown law has no such freedom. Obviously he or she has been retained by the Crown and thus there is an in-built stance that on the whole the evidence will be selected and read to put a favourable gloss on the Crown's actions (in the same way that claimant historians will want to put an unfavourable gloss on it). Moreover, the brief may in fact involve a set of highly specific research questions set by the instructing lawyers or by the Waitangi Tribunal itself. All history involves selection and interpretation. But in litigation the key difference is that the interpretive structure and research design is pre-selected. This may still leave the historian considerable scope for freedom of manoeuvre, and many can (and do) discuss historiographical and methodological questions in reports prepared for the Waitangi.[52]

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51 The Tribunal does routinely, however, use its own staff to prepare historical reports on claims, who then table their reports and give evidence to the Tribunal at the hearings, and who may be cross-examined in the same manner as claimant and Crown historians. For example Dr Barry Rigby of the Waitangi Tribunal prepared a sequence of major reports for the Muriwhenua Land (Wai 45) claim. The Tribunal does sometimes commission outside historians to present evidence on behalf of the Tribunal itself - if claimant and Crown historians are "advocacy historians" then Tribunal staff and Tribunal-commissioned historians are perhaps more in the role of amicus curiae.

52 Certainly the present writer has done so, and on more than one occasion. (How helpful such discussions are to counsel, claimants and the Tribunal is another matter.) In fact historiographical debates of real importance and sophistication do come up before the Tribunal. One example is the

Historians who are involved in litigation thus do surrender a certain amount of scholarly freedom. But this is not the only difference. Historical reports prepared for courts and tribunals are somewhat different in terms of style and documentation from history books and articles produced for the scholarly community or the general public. Anyone who has ever tried to read a commissioned historical report written for the Waitangi Tribunal will be sorely tried by the seemingly over-elaborate documentation, lengthy quotations, and (too often) leaden style of the reports. These features are in fact products of the particular tasks historians are required to do for court proceedings. The material has to be thoroughly documented and cited comprehensively. After all, the report will be read by historians retained by the opposite side, and any shortcomings are likely to be exposed by cross-examination. The net result tends to be very elaborate and lengthy reports supplemented by massive "document banks", these being supplementary volumes containing vast amounts of semi-legible photocopies of manuscripts, Land Court minute books, and the like.

In short, historians engaged in litigation are subject to constraint in terms of the questions they are asked to resolve and the way in which the work is written. One conclusion might be that the entire enterprise is, therefore, from a scholarly viewpoint, hopelessly suspect, and historians should simply decline to be involved in it. The only "ethical" response of the discriminating historian to the Waitangi Tribunal would be to completely avoid it. Partly the response to this is a sociological one: job opportunities for history graduates are few and far between, and certainly university positions seldom become available and are much fought over when they do. Many history graduates are glad enough to be take advantage of the opportunities to earn a living that the Waitangi Tribunal and related processes offer. But that is not the only answer. It is quite possible to retain one's self-worth as a historian while being actively engaged in the Waitangi Tribunal process.

The real question is to formulate ethical standards that are appropriate and relevant while recognising the constraints legal procedures impose. There certainly are bare minima that are comparatively easy to recognise. Reports must be properly researched and written and not designed to mislead. Historians must fully and frankly respond to questions from opposing counsel and the Tribunal, should not disguise shortcomings in their own research, and should be prepared to admit that there are alternative ways of reading the evidence if that is what they think. As public history continues to grow in New Zealand, with the attendant growth in professional bodies and (most recently) the development of special

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discussion of "tuku whenua" in the Muriwhenua Lands case (that is, whether pre-Treaty deeds of sale should be understood as absolute alienations or as mere grants of rights of occupation in accordance with Maori custom). See generally the Waitangi Tribunal's Muriwhenua Lands Report, Wai 45, 1997, ch 3.

university programmes aimed specifically at producing public historians, it can be expected that there will be an increasingly sophisticated debate over professional ethics.

V *A PROBLEM OF LEGAL ETHICS?*

In noting the tendency of lawyers to import their usual practices and discourses into new arenas such as the Waitangi Tribunal, no moral criticism is intended. The present writer does not mean to suggest that lengthy cross-examination of historians, for example, is unethical. In terms of the ways in which lawyers conceptualise their ethical responsibilities to their clients, it would usually be "unethical" to not cross-examine them. Claimants are unlikely to be impressed if their barrister declines to cross-examine hostile opposing witnesses because of a high-minded personal commitment to the virtues of community hearings. Nor is it unethical for historians to produce long, carefully-documented and elaborate reports. "Ethically" speaking, this is what they should be doing. However, it remains important to carefully consider whether the increasing legalism and elaboration of the Waitangi Tribunal process is desirable in a general sense. This question can be considered more fruitfully, I would suggest, on an instrumental plane than on the level of a discussion of ethics.

Some points can be made by further considering cross-examination of expert witnesses. In a criminal or civil trial cross-examination is closely integrated into an adversarial trial process. The cross-examination is recorded by a stenographer and copies are made available to counsel as trial progresses. Statements and admissions made by witnesses in the course of the case are often of crucial importance. In summings-up and addresses to the jury particular answers given in examination in chief or in cross-examination may be commented on in detail and important implications drawn from them. But none of this is true of the Waitangi Tribunal, which is an entirely different form of enquiry. There is no stenographer present, and although the proceedings are certainly recorded, the tapes are seldom if ever transcribed. Particular answers given in cross-examination are seldom commented on in closing submissions.

More importantly, perhaps, the process of constructing a judgment of the High Court in a civil case and a Waitangi Tribunal Report are distinct in a number of respects. In a civil action the judge is confronted with transcribed oral testimony presented in accordance with strict rules of evidence and trial procedure. In the Waitangi Tribunal the members of the Tribunal have to deal with a vast mountain of highly discursive written reports. In writing its report the Tribunal typically does not discuss the various historical reports presented in evidence in detail, but instead constructs yet another narrative of its own, selecting and arranging the material according to its own design and producing what is, in the end, in part, a work of history in its own right. Assuming that this accurately characterises Waitangi Tribunal practice, it has to be asked quite what is the purpose of the lengthy cross-examination of expert witnesses? As cross-examination seems to serve, on an

instrumental plane, little real purpose at present, either tribunal procedure needs to change or else the way in which the Tribunal constructs its reports needs to change. The problem, in other words, is not so much one calling for resolution by lawyers but rather for resolution by the Tribunal. There is a mis-match between Tribunal hearing procedure and the Tribunal's writing and reporting techniques.

In short, calls to lawyers to moderate their behaviour are beside the point. The current problematic state of the Tribunal process derives from a structural configuration of stresses and pressures. These include the Tribunal's own statutory mission as defined by its own empowering legislation, the inherent complexity of all forms of judicial investigation into historic grievances, the inevitable Whig vision of judges and lawyers when confronted with historical materials, and the professional ethical responsibilities of lawyers and (to a lesser degree) historians. All these factors are now, the writer suggests, placing what was originally intended to be a fairly simple and straightforward process under severe strain. The Tribunal has moved from its classical era into a Baroque phase.