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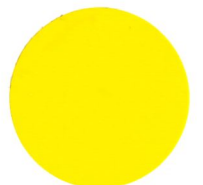
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APPENDIX
**THE PRINCIPLES
OF THE TREATY**

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Note: This appendix was compiled by Dr Janine Hayward.

This appendix draws together some statements by the courts, the Waitangi Tribunal, and the Government in New Zealand regarding the interpretation and application of the principles of the Treaty of Waitangi. The discussion is divided into three sections. The first part investigates the principles of the Treaty according to some seminal judgments of the courts in New Zealand since 1840, with an emphasis on the 1987 Court of Appeal decision in the case of *New Zealand Maori Council v Attorney-General*. The second part discusses the principles identified in some of the Waitangi Tribunal reports released since 1983. The final part presents the principles established by the Labour Government in 1989.

Two important points underlie this discussion. First, the Treaty is a living document to be interpreted in a contemporary setting. Therefore, new principles are constantly emerging from the Treaty and existing ones are modified. Professor Gordon Orr of the Waitangi Tribunal has observed that it may never be possible to formulate a comprehensive or complete set of principles because the Tribunal has dealt with only a limited range of cases and has not speculated about principles relevant to cases yet to be heard.¹ Secondly, and perhaps most importantly, the provisions of the Treaty itself should not be supplanted by the principles emerging from it. In the words of Justice Richardson in the 1987 case:

much of the contemporary focus is on the spirit rather than the letter of the Treaty, on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are.²

APP.1 TREATY PRINCIPLES EMERGING FROM THE COURTS, 1840-1995

The attitude of New Zealand courts towards the Treaty of Waitangi has undergone significant development since 1840. This discussion is not exhaustive; rather it identifies significant cases that demonstrate an initial enthusiasm by the courts for upholding native title to land immediately after the signing of the Treaty in 1840, followed by a period from the mid-1860s well into the twentieth century during which the courts' interpretation gave the Treaty considerably less weight. A further turning point came in 1987 with *New Zealand Maori Council v Attorney-General*.

1. G S Orr, 'Principles Emerging from Waitangi Tribunal Decisions', unpublished paper presented to Tribunal members, 1989, p 1
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 672-673

APP.I.I *R v Symonds* (1847)

The case of *R v Symonds* in 1847 questioned the competence of the settlers to buy land direct from Maori owners (as a departure from the Crown's right of pre-emption stated in the Treaty). In his ruling, Justice Chapman upheld the notion of native title and observed:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of their country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers.³

Justice Martin, Chapman's fellow judge, similarly ruled that the Crown's title to land within the colony was subject to the aboriginal rights of Maori which could only be removed through voluntary act by the native owners.⁴

On the matter of the Treaty itself, Chapman declared that it was simply a declaration of the law the court had applied in making its judgment on this matter. He said:

It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.⁵

APP.I.2 *In re The Landon and Whitaker Claims Act 1871* (1872)

The courts expressed a similar attitude toward native title *In re The Landon and Whitaker Claims Act 1871*. On this occasion, the court ruled that:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown.⁶

Despite judgments such as the two discussed above, the courts' attitude towards native title was not upheld over subsequent years. In particular, it was to change when Chief Justice James Prendergast was appointed in 1875. For the 20 years he was in office, Prendergast consistently denied that aboriginal title had any legal character or that the Treaty reaffirmed or created rights enforceable in the courts. In particular, in the case of *Wi Parata v The Bishop of Wellington* (1877), Justice Prendergast transformed the position of aboriginal title from one subsisting at law, to one held on sufferance of the Crown. He also ruled that the Treaty of Waitangi, 'could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a simple nullity for no body politic existed capable of making cession of sovereignty'.⁷ This set the precedent for Prendergast's subsequent decisions, and those of other judges. In

3. *R v Symonds* (1847) NZPCC 388

4. *Ibid*, p 395

5. *Ibid*, p 390

6. *In re The Landon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, 49

7. *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72