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By Judge Anthony Willy

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On a plain reading of the treaty document anything less conducive to the notion of a partnership between the signatories is difficult to imagine. It is therefore necessary to look elsewhere to find what breathes life into this myth. No recourse can be had to International law because the document is not a treaty. International law only recognizes compacts entered into by sovereign states. Those inhabitants signing did not exercise sovereignty of these Islands in 1840. That they did not sign as Sovereigns of New Zealand is clear beyond doubt because a number refused to do so including the representatives of the Ngapuhi tribe.

If what was agreed in 1840 is not and never was a treaty it can only be construed as a simple agreement between the signatories. Like all contracts it was and is to be observed in good faith. The fact is the Māori signatories had and continue to have a duty to cede to the British Crown sovereignty which includes all property which they individually or collectively possess. This is no different from any other subject of the Crown in relation to land ownership. We none of us own our land absolutely we hold it in an estate in fee simple from the Crown, but our title is good against the whole world. So, it became the case for the Māori inhabitants. Ownership of their land was guaranteed and only the Crown had the right of purchase. This has been well understood since the time of the signing. It conferred valuable benefits on the Māori population. They became British citizens enjoyed the benefits of the Rule of law and the protection of the Crown from any other foreign incursions of the like of the French, Spanish Dutch, or Portuguese. All of which were aggressive colonial powers at the time.

Then there is the plain fact that it was and is constitutionally impossible for the Crown to enter into a partnership with her subjects. She can as she did in 1840 make promises to them but by definition, the Crown is supreme, and the people are subject to her laws albeit under the then British system of parliamentary government. This has been and remains the position to the present time. The Constitution Act 1986 provides that: S. 2 The Sovereign in right of New Zealand is the head of state of New Zealand and shall be known by the royal style and titles proclaimed from time to time.

Currently the Sovereign of New Zealand is King Charles III. By definition it is impossible for him to share that Sovereignty with any other person or body of persons. To do so would mean he was no longer the sovereign in terms of s. 2 above. The position and status of our Sovereign has been so well understood for the better part of the last two hundred years, that it is demeaning to have to explain it. But then there are none so blind as those who will not see.

And that brings us to: The State- Owned Enterprises case. As noted, there is much talk among Māori activists and their camp followers that there is legal authority for the proposition that the treaty document constitutes a "partnership" between an indeterminate group of those claiming Māori antecedents and our sovereign government. The case relied on is the 1987 decision of the Court of Appeal in the State-Owned Enterprises case. It is therefore important to understand what that case does decide.

The background is that the Labor Government in the early 1980s decided to bring a defined group of hitherto state- owned activities into a new business model, and to this end introduced into Parliament legislation giving effect to that policy. The bill as amended contained a provision that in transferring any of the named assets to

the new entity the Crown cannot act in a manner inconsistent with the principles of the Treaty. The New Zealand Māori Council brought proceedings in the High Court seeking to have principles defined to ensure that any transfer of such assets would not prejudice existing claims before the Waitangi Tribunal, and any future claims which might be brought. The Crown decided that such a protection would be unworkable and relied on another provision of the Bill which expressly protected existing claims and so issue was joined. The case was referred to the Court of Appeal without a judgment of the High Court on the substantive issues. The President of the Court of Appeal, Cooke P rather grandly described the contest as probably the most important case to come before the courts since the signing of the treaty. Five judges sat and while agreeing on the outcome (which was to refer the matter back to the parties to consider their positions in light of the reasoning of the Judges in their judgments.) each Judge gave an individual judgment.

It is clear from this that their Honors' were not able to concur in a joint judgment containing reasoning common to them all. That said although each Judge approached the question giving different emphasis to the arguments of the Plaintiff and the Crown none held that it is a "principle" of the treaty that on its signing in 1840 a partnership came into existence between the Queen Victoria and the Māori inhabitants of New Zealand. In addition, it is clear from all of the judgments that the Courts was not called upon to interpret the provisions of the treaty document. The sole enquiry was; what principles if any can be drawn from the document which are relevant to race relations in contemporary New Zealand?

The judgments run to 77 pages, and it would be tedious to attempt to traverse them. The salient reasoning which can be drawn from the Judgments of each Judge is as follows:

Cooke P.
Considered that it is an open question whether the document is a treaty at International Law. He described it as a bargain between Queen Victoria and the signatories by which the Queen was to govern the Māori inhabitants and they became her subjects in all respects the equal of the European settlers. He said; Māori's have a duty to observe the upmost good faith to the Queen and full acceptance of her governance. In the course of delivering his reasons his Honor at times used the word "partnership" but always in the context of the duties of good faith and honest dealings owed one to the other.

Richardson J.
Noted that after the signing of the treaty at Waitangi by the fifty Confederation Chiefs Hobson made two proclamations declaring the Crown's sovereignty. The first covering the North Island where sovereignty flowed from the treaty, the second covering the South Island which provided that British Sovereignty was acquired from Captain Cook's discoveries of an "empty land." It is these proclamations which constitute the legality of the grant of Sovereignty to the Queen. The Judge noted the concession of Judge Durrie a past Waitangi Tribunal Chairman that the treaty was not a legal contract and who confirmed that it has not, and is not part of the law of New Zealand. He viewed the dealings at Waitangi and elsewhere concerning the document as creating a "solemn compact" which placed a duty on all who signed to act reasonably and good faith and described the obligations as "one of honor."

Somers J.
Agreed with the other Judges that the Treaty forms no part of the municipal law of New Zealand. His Honor points out that even the enactment of the Treaty or some part of it into municipal law, that would not stop Parliament changing any of its provisions. The principles which this Judge draws from the wording of the document and the circumstances in which it was signed he says hark back to Lord Normanby's instructions to Captain Hobson that. All dealings with the aborigines for their lands must be conducted on the principles of sincerity, justice and good faith as must govern your transactions with them for recognition of her Majesty. sovereignty in the lands. His Honor considered "that it was on those principles that it must be assumed the Māori's also adhered to. It is noteworthy that Governor Gibbs of Australia had similar instructions from the Crown: To conciliate

the affections of the Aboriginal people, to live in amity and kindness and do them no wrong. Crucially Bisson J. considered that in a contemporary setting this means that each party owed the other a duty of good faith. The kind of duty which civil law partners owe to each other. The Judge held that those obligations are the same today as they were in 1840.

Casey J.
Took the same view he held that the benefits and obligations created by the Treaty are those consisting in the nature of a partnership. His Honor later in his judgment amplified these observations and said I have spoken of what I perceive to be a relationship akin to a partnership between the Crown and Māori people and of its obligation on each side to act in good faith. "Akin" means "similar to but different from." Hence His Honor could not have expressed himself more clearly. He was at one with the other judges. The reference to a partnership is only by way of analogy as a means of explaining what the principles are which can be drawn from the Treaty, sincerity, justice and good faith.

Bisson J.
Finally Justice Bisson J. reiterated that in the case before them the Court is not concerned with the interpretation of the Treaty only an attempt to define the "principles" that which actuated it. This he said, "does not involve the interpretation of the Treaty, because it does not form, and never has formed part of our law. His Honor agreed with the other Judges that the principles are those of honesty and good faith. Interestingly in arriving at this conclusion His Honor was obviously influenced by the words of Tamati Waka Nene Chief of the Ngatihao Tribe which conclude with the famous utterance:

"Oh, Governor sit do not thou go away from us, remain for us, a father a judge a peacemaker. Yes, it is good it is straight. Sit though here dwell in our midst. Remain do not go away. Do not listen to what the chiefs of Ngapuhi say stay though or friend, our father our governor. Such then was the understanding of a senior Chief whose oratory carried the day and the signatures of most of those present. These words speak eloquently of a relationship of trust confidence and good faith which the tribes reposed in the Crown".

Conclusion
It is therefore clear beyond any doubt that the case is not authority for the proposition that a partnership as understood in our common law exists between the Crown in Parliament and some innominate group of people of Māori extraction Shorn of this blatant misreading of the case the activists are left with only their wish list of wanting to share in the governance of New Zealand.

Given that these claims are devoid of principle, common sense, or any legal basis it is beyond time that our Parliamentarians stopped pandering to such blatant self-serving nonsense. It is clear that David Seymour's bill in whatever form it finally emerges will go a long way towards putting an end to this racially divisive nonsense. It is deserving of the wholehearted support of the coalition government. If that results in a round of buttock bearing and threats then so be it. Wiser heads among the Māori tribes will soon prevail, and they will get on with what they do best, running their businesses.

It is interesting that identical questions are arising in Australia concerning relationships between the Crown there and the Aboriginal people. It is refreshing to hear Jacinta Price a Senator of mixed blood (aborigine and convict) say that the continuing impacts of colonization are positive, and that Aboriginals have the same opportunities as other Australians. The worst thing, she says, is to tell them they are victims. Shades of Paul Goldsmiths MP's similarly expressed views which were howled down by our media.