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Patriating Appeals:
New Zealand's withdrawal from the
Judicial Committee of the Privy Council

A thesis presented in partial fulfilment of
the requirements for the degree of

Master of Arts
in
History

Massey University, Palmerston North
New Zealand

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2016

Abstract

In 1900, the Judicial Committee of the Privy Council was the final court of appeal for one-quarter of the world's people residing in the British Empire, with the notable exception of those who lived in the British Isles. Despite the major exodus from the Judicial Committee's jurisdiction in the two decades following the end of the Second World War, it was not until the late 1960s before the possibility of New Zealand's departure was raised. A sporadic debate then ensued.

In 1986, the Government initiated the first of three formal attempts to end New Zealand appeals to the Judicial Committee. Each attempt was very contentious, and it was not until 2003 when this objective was achieved. This thesis examines the ending of New Zealand appeals to the Judicial Committee. It identifies a series of debates, involving common themes and contrasting political positions, over more than 35 years. It also identifies changing legal features, which provide an important backdrop to the debates. It concludes with an assessment of why this process took so long.

Preface

During my public service career, I was fortunate to work with a great team of colleagues from several Government Departments, on the final proposal for ending appeals to the Judicial Committee of the Privy Council, and for developing the legislation which founded the Supreme Court of New Zealand. The Attorney-General, Hon. Margaret Wilson, was responsible for the project, while the Solicitor-General, Terence Arnold, QC, led the officials. The team's role brought us into contact with a wide range of New Zealanders, many of whom had strong views as to whether appeals should continue to London or be redirected to a new Supreme Court in Wellington. We were conscious that this was an historic event.

In preparing for a new phase of life, I decided to undertake post-graduate studies in history, and New Zealand's efforts to end appeals to the Judicial Committee became an obvious topic for my thesis. This study only briefly touches on the period when I was directly involved. Many of the 'hard yards' in developing the nature of the change had been done by others during earlier Administrations: ministers, judicial leaders, officials, and community leaders including from Maori and the legal profession; and by Margaret Wilson with her first proposal as Attorney-General.

Ferretting in the archives and studying various legal articles, I became aware that there is a bigger story to tell, both of the efforts of those who sought to adapt and enhance New Zealand's access arrangements to the Judicial Committee, and of the efforts of those who worked to find a New Zealand-based alternative. Legally trained historians may offer further insights, but there is also very useful information sufficient for the general historian. I trust this thesis contributes towards the development of that bigger story.

Naturally, I was excited to be involved in the Supreme Court project. It accorded with my own perspectives. R.G. Collingwood asks can historians be impartial? In his answer, he observes: 'it is the historian's judgments of value that select from the infinite welter of things that have happened the things that are worth thinking about.'¹ This thesis presents my judgments, informed by my fortunate vantage point as one of the policy advisers who worked on the final proposal, of the efforts that resulted in the patriation of appeals to New Zealand.

¹ R.G. Collingwood, Can Historians be Impartial? In *The principles of History and other writings in philosophy of history*, edited by W.H. Dray and W.J. van der Dussen, (Oxford: Oxford University Press, 1999), 217.

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Abbreviations

AC – Appellate Committee of the House of Lords in the United Kingdom.

BAILII – British and Irish Legal Information Institute.

CJ – Chief Justice.

CRNZ – Criminal Reports of New Zealand.

J – Justice

NZAR – New Zealand Administrative Reports.

NZLII – New Zealand Legal Information Institute.

NZLJ – New Zealand Law Journal

NZLR – New Zealand Law Reports.

NZPCC – New Zealand Privy Council Cases.

NZPD – New Zealand Parliamentary Debates.

NZTC – New Zealand Tax Cases.

P – President (of the New Zealand Court of Appeal).

PRNZ – Procedural Reports of New Zealand.

QC/KC – Queen’s/King’s Counsel.

Rt. Hon. – The Right Honourable, it denotes that the person has been appointed to the Privy Council, and includes both judicial and political Privy Counsellors.

TVNZ – Television New Zealand.

VUWLR – Victoria University of Wellington Law Review.

Acknowledgements

There is a wide range of people to whom I am indebted, and offer my heartfelt appreciation.

Massey University has a fantastic distance learning service. In particular, I wish to thank:

- My supervisor, Professor Michael Belgrave who brings insights not only as an academic historian teaching the craft, but also as a professional historian having encountered some of the same events and personalities from a different vantage point. His encouragement to check their relevance, has saved me from overlooking significant, related events, and consequently has strengthened this thesis. He attempted to persuade me to reduce the size of the thesis, while suggesting the addition of one or two more points to provide background clarification.
- Dr Geoff Watson who has readily ensured I am kept up to date with relevant post-graduate student programmes and information, as well as assisting with the administrative arrangements, and providing helpful tips on the presentation of this thesis.
- The members of the History Group of the School of Humanities, both at the Palmerston North and at the Albany campuses.
- The librarians: I have greatly availed myself of the library services especially at the Palmerston North and the Wellington campuses. Books, journal articles and on-line resources were easily delivered. Advice was readily given by the librarians. I also appreciated the Bonus scheme, which enabled me, through Massey, to borrow books from Australian universities
- Ashley McGrillen of the Information Technology Services group assisted with formatting of this thesis.

Through the University Libraries of Australia and New Zealand scheme (ULANZ) I accessed books and journals at Victoria University of Wellington, both for general history at the Kelburn campus and for legal history at the Pipitea campus. Further

library resources were readily available at the National Library and the Alexander Turnbull Library. My thanks, too, to the librarians at these libraries for their assistance.

I also acknowledge the assistance of staff at Alexander Turnbull Library in securing copies of photographs to illustrate this thesis.

Government Ministers – especially Hon Christopher Finlayson, QC, Attorney-General, and Hon Amy Adams, Minister of Justice - and officials allowed liberal access to relevant Cabinet papers, principally of the National Government's proposal 1994-1996, and I express my gratitude them, and to Rachel Hayward and Anna Fleming of the Cabinet Office for making these arrangements. Anna readily chased down additional papers, whenever we found an additional reference.

I thank the Chief Archivist and the staff at Archives New Zealand for facilitating my access to the various files of different Government Agencies as well as the relevant personal papers of Rt. Hon. Sir Robert Muldoon, Hon. Dr Martyn Finlay, QC, and Rt. Hon. David Lange.

I also thank the Rt. Hon. Paul East, QC, for access to his papers when, as Attorney-General, he appeared as an *amicus curiae* before the Judicial Committee in *Richard Prebble v Television New Zealand*. My thanks, too, to the Rt. Hon. Sir Donald McKinnon for access to his file containing his exchange of correspondence with Hon. Sir John White, QC. Mr Francis Cooke, QC, provided helpful clarification about his father, the late Lord Cooke of Thorndon.

The Ministry of Foreign Affairs and Trade permitted me to view certain files which have yet to become openly available at Archives New Zealand. Similarly, the Ministry of Justice permitted me to view certain files which have yet to become openly available at Archives New Zealand. My special thanks to Judith Forman and Ruth Fairhall for facilitating this access. [Both Ministries and the Cabinet Office required me to submit draft extracts, using these relevant official documents, for their review: no changes to my text were required by these Government

departments.] Judith Forman also assisted me in borrowing books from the Ministry of Justice library.

There are also many friends, colleagues, and family members whom I must thank for their interest and encouragement.

My wife, Veronique Vervoort, has lived with my interest in this project for a very long time. To her, my heartfelt gratitude and love.

I, alone, am responsible for the opinions and errors in this study.

Patrick McCabe

31 July 2016

Chapter One - Introduction

In 1954, historian J.C. Beaglehole wrote on ‘the growth of national independence’ in New Zealand,² in which he observed, ‘the process of constitutional growth is clear in its main lines, though the historian’s microscope still finds employment.’³ More than 50 years later, legal historian Richard Boast lamented that ‘the law has not penetrated very deeply into the consciousness of historians’ even though there was ‘a thriving, if relatively new sub-field’ of legal history.⁴ He cited as evidence for his claim, *The New Oxford History of New Zealand* (2009), which had no references to the Court of Appeal or the Judicial Committee of the Privy Council, the two most important courts in New Zealand’s history.

New Zealand came under the Judicial Committee’s jurisdiction in 1840, although it was not until 1860 that New Zealand was formally recognised.⁵ At the start of the twentieth century there was a very strong correlation between the jurisdiction of the Judicial Committee and the extent of the British Empire: it was ‘the supreme tribunal of the Empire.’⁶ Virtually the only part of the Empire not included were the major jurisdictions of the United Kingdom itself, and for even minor elements of that, appeals were directed to the Judicial Committee. The jurisdiction of the Judicial Committee began to decline, with the geo-political rearrangements

² J.C. Beaglehole to Janet Paul, 7 April 1954, in *Letters of J.C. Beaglehole*, chosen & edited by Tim Beaglehole, (Wellington: VUP, 2013), 313.

³ J.C. Beaglehole, The Development of New Zealand Nationality, *Cahiers d'histoire mondiale: Journal of World History*, vol.2, no.1 (August 1954), 106-23. The Journal was a ‘new UNESCO historical quarterly.’ (J.C. Beaglehole to Janet Paul).

⁴ Richard Boast, New Zealand Legal History and New Zealand Historians: A Non-meeting of Minds, *Journal of New Zealand Studies*, 2010, 23-35.

⁵ Order in Council, 10 May 1860 recognised the Supreme Court (as the High Court was then known) of New Zealand.

⁶ Lord Haldane, The Work for the Empire of the Judicial Committee of the Privy Council, *The Cambridge Law Journal*, Vol.1, No.2 (1922), 143-155, 144.

following the First and the Second World Wars, and the United Kingdom's enactment of the Statute of Westminster in 1931. By mid-century, the larger colonies with the largest number of appeals had withdrawn. Further departures followed as former colonies gained their political independence from Britain. Today just 11 of the 53 member countries of the Commonwealth,⁷ with an aggregate population of less than six million, down considerably from the 400 million – one-quarter of the world's population – it served a century before, continue to direct appeals to the Judicial Committee.⁸

The surprising aspect is that New Zealand was one of the last countries to withdraw, and was the last of the former Dominions to do so. This thesis seeks to 'employ the historian's microscope' to examine one element of 'the process of constitutional growth', and in doing so, take up part of Boast's challenge: to study the efforts to end New Zealand appeals to the Judicial Committee of the Privy Council⁹ and thereby obtain juridical independence. While this study focuses on the period 1986 to 2002, an understanding of the earlier period, especially of the

⁷ This count does not include those countries which have withdrawn from the Commonwealth, or its predecessor, the British Empire, e.g. Ireland and Hong Kong, but does include those countries which were never part of the British Empire, but have joined the Commonwealth, e.g. The Gambia.

⁸ The Judicial Committee also continues to hear occasional appeals from the United Kingdom – although the range has been reduced; the Crown Dependencies of Jersey, Guernsey and the Isle of Man; and from certain British overseas territories, and sovereign bases.

⁹ Today, there are more than 500 living Privy Counsellors, appointed from the ranks of senior politicians, judges and bishops during the reign of Queen Elizabeth II. As a working institution, the Privy Council comprises current United Kingdom Government Ministers who have been appointed Privy Counsellors. A small number of Ministers, led by the Lord President of the Council, meet monthly with Her Majesty to obtain formal approval to Orders, including assenting to legislation and approving judgments of the Judicial Committee. [The New Zealand equivalent is the Executive Council, which comprises Government Ministers and meets regularly with the Vice-Regal Head of State, the Governor-General, to approve delegated legislation and Orders in Council.] The Privy Council has several Committees, the most significant of which, for this study, is the Judicial Committee, which comprises only those Privy Counsellors who have held high judicial office. Typically, in the New Zealand debates, the terms Privy Council and Judicial Committee are used interchangeably. This thesis primarily uses the term 'the Judicial Committee'.

twentieth century, is very important to understand the historical context which influenced the subsequent developments. The thesis also concludes with a short summary of the subsequent implementation and commencement of the Supreme Court. This thesis seeks to answer why it took New Zealand so long to patriate appeals, compared with most other countries.

This is the first survey of the long debate on ending New Zealand appeals. There is no full-length study of New Zealand and the Judicial Committee. There is, however, a series of articles on aspects of New Zealand's relationship with the Judicial Committee.¹⁰ While it is invidious to single out specific articles, it is suggested that the leading articles are Cameron,¹¹ Cooke (1987),¹² Eichelbaum,¹³ and Spiller (2002).¹⁴ Sir Robin Cooke's 1987 lecture on New Zealand's national legal identity, presented a profound change in his opinion and had a significant effect on the subsequent debate. Cooke's legal and judicial career spanned the second half of the twentieth century. Not only did he leave a significant record of legal and judicial writing, including judgments, but also, as will be shown, his work can also be found in the documentary records. In total, through his various writings and his ideas, he was the dominant figure through the formal efforts to end appeals to London.

¹⁰ The main articles, all written by legally trained authors, are provided by Baldwin (1989), Burns (1984), Callan (1930), Cameron (1970), Sir Robin (later Lord) Cooke (1983, 1987, 1988, 2000, 2001), Cornes (2003), Cox (2002), Sir Thomas Eichelbaum (1995), Haslam (1972), Joseph (1985, 2003), Sir Kenneth Keith (2005), Sir Ivor Richardson (2012), Megan Richardson (1997), Spiller (2002, 2003, 2005), Sir Robert Stout (1904, 1905), and Young (1995).

¹¹ B.J. Cameron, Appeals to the Privy Council – New Zealand, (1970) 2 *Otago Law Review*, 167.

¹² Sir Robin Cooke, The New Zealand National Legal Identity, 3 *Canterbury Law Review* (1987) 171

¹³ Sir Thomas Eichelbaum, Brooding inhibition: or Guiding Hand? Reflections on the Privy Council appeal, in P.A. Joseph (ed.), *Essays on the Constitution*, Wellington, Brookers, 1995. 112-128.

¹⁴ Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History*, Wellington: Thomson Brookers, 2002, especially Ch. 16.

Margaret Wilson delivered successive lectures at Waikato and Auckland Universities in 2010 and 2014 respectively, on her, eventually successful, efforts to end New Zealand appeals to London and to establish the Supreme Court.¹⁵ Both lectures, the second slightly revised from the first, were subsequently published.

As noted above by Boast there is a small sub-field of legal history, which includes a small general New Zealand legal history by Spiller, Finn and Boast;¹⁶ two books on the Court of Appeal by Spiller (2002),¹⁷ and Bigwood;¹⁸ and three collections of essays honouring three leading New Zealand judges, all of whom were judicial Privy Counsellors: Rt. Hon. Lord Cooke;¹⁹ Rt. Hon. Sir Ivor Richardson;²⁰ and Rt. Hon. Sir Kenneth Keith.²¹

Some insights on New Zealand's withdrawal from the Judicial Committee can be gained from the earlier debate on New Zealand's adoption of the United Kingdom's Statute of Westminster 1931 in 1947. The need for the 1931 Statute arose initially when it was discovered, in 1926, that for 42 years Canada had not allowed criminal appeals to the Judicial Committee, even though, as a Dominion, it was not legally empowered to do so. In 1944, Victoria University College held a series of lectures

¹⁵ Margaret Wilson, From Privy Council to Supreme Court: A Rite of Passage for New Zealand's Legal System, *Waikato Law Review*, Vol.18, (2010), 1-14; and Establishing a Final Court of Appeal for New Zealand, in A. Stockley and Michael Littlewood (eds.), *The New Zealand Supreme Court: the first ten years*, Wellington: LexisNexis New Zealand Ltd., 2015.

¹⁶ Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, (2nd ed.) Wellington: Brookers, 2001.

¹⁷ Spiller, *New Zealand Court of Appeal*, op cit.

¹⁸ Rick Bigwood (ed.), *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years*, Hart Publishing: 2009.

¹⁹ Paul Rishworth, (ed.), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon*, Wellington: Butterworths, 1997.

²⁰ D. Carter, and Matthew Palmer, (ed.), *Roles and Perspectives in the law: essays in honour of Sir Ivor Richardson*, Wellington: Victoria University Press, 2002.

²¹ Claudia Geiringer and Dean R. Knight, (eds.), *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith*, Wellington: Victoria University Press: 2008.

on New Zealand and the Statute.²² Works by Angus Ross and Harshan Kumarasingham also provide relevant insights.²³

Historians have variously dated the decline of British influence in New Zealand to the decade commencing 1965. Jock Phillips identified 1965,²⁴ James Belich 1969,²⁵ and Frank Corner 1972.²⁶ The law is, however, among the more conservative aspects of any society, and while the first, serious questioning of New Zealand's continued use of the Judicial Committee can be seen in this period, it was not until the 1980s that serious discussion on withdrawing began. Instead, New Zealand continued with the 'better-Britons' approach suggested by Belich, as it welcomed the opportunity for senior judges to sit, on occasions, in London, and maintained a view that the existing appeal arrangements provided the best option for the Court system and its users.

The principal primary sources of information for this study are the formal reports on which the main proposals for change were presented. Attorneys-General, Ralph Hanan in 1969, and Jim McLay in 1983, began the official debate, while the 1978

²² J.C. Beaglehole, (ed.), *New Zealand and the Statute of Westminster*, Wellington: Victoria University College, 1944.

²³ Angus Ross, Reluctant Dominion or Dutiful Daughter? New Zealand and the Commonwealth in the Inter-War Years, *Journal of Commonwealth Political Studies*, 10(1), (1972), 28-44. Harshan Kumarasingham, *Westminster Regained: The Applicability of the Westminster System for Executive Power in India, Ceylon and New Zealand after Independence*, Ph.D. Thesis in Political Science, Victoria University of Wellington, 2008; and *Onward with Executive Power: Lessons from New Zealand 1947-57*, Wellington: Institute of Policy Studies, 2010.

²⁴ Jock Phillips, The Constitution and Independent Nationhood, in Colin James (ed.) *Building the Constitution*, (Wellington: Institute of Policy Studies, 2000), 69-76.

²⁵ James Belich, *Paradise Reforged*, (Wellington: Penguin Press, 2001).

²⁶ Frank Corner, 'Frank Corner', in Malcolm Templeton (ed.) *An Eye, and Ear, and a Voice: 50 years in New Zealand's External Relations 1943-1993*, (Wellington: Ministry of Foreign Affairs and Trade,) 64-126. See also, Frank Corner, Kirk presents a New Zealand Face to the World, in Margaret Clark (ed.) *Three Labour Leaders: Nordmeyer, Kirk and Rowling*, (Palmerston North: Dunmore Press, 2001), 139-167. A M.A. graduate in history, Corner was Secretary of Foreign Affairs, 1972-1980.

Report of the Royal Commission on the Courts identified the arguments for and against ending New Zealand appeals to the Judicial Committee.²⁷ Formal reports were developed by the Law Commission in 1989;²⁸ the Solicitor-General in 1995;²⁹ the Attorney-General in 2000;³⁰ and an Advisory Group to the Attorney-General in 2002.³¹ These sources have been supplemented by material drawn from Archives New Zealand, including, liberal access to many of the relevant Cabinet papers. Access to the views of interested parties were available through submissions, speeches and newspaper articles.

The *New Zealand Law Journal (NZLJ)* was a mine of information. Published since 1928, initially fortnightly and then monthly (11 times per year), it provides not only keynote papers and conferences reports, but also useful case commentaries on leading judgments, including those of the Judicial Committee on New Zealand appeals. As well, the *Law Journal* provides an understanding of the law profession in New Zealand and its leading personalities. Before the gradual establishment of the Law Reviews by the respective Law Schools of the New Zealand universities, the *Law Journal* provided virtually the only outlet, short of overseas journal publication, for legal articles.

The principal histories of the Judicial Committee are provided by Howell who covers the early period, 1833-1876;³² and Swinfen who provides a longer view

²⁷ *Report of the Royal Commission on the Courts*, Wellington, Government Printer, 1978

²⁸ The Law Commission, *The Structure of the Courts*, Preliminary Paper No.4, Wellington: December 1987; and *The Structure of the Courts*, Report No. 7, Wellington: March 1989.

²⁹ Solicitor-General [J.J. McGrath QC], *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of termination and Court Structure*, Wellington: Crown Law Office, 1995.

³⁰ Attorney-General [Hon. Margaret Wilson], *Reshaping New Zealand's Appeal Structure*, December 2000.

³¹ Report of the Advisory Group, *A New Supreme Court: Replacing the Privy Council*, Wellington: Office of the Attorney-General, 2002.

³² P.A. Howell, *The Judicial Committee of the Privy Council, 1833-1876, Its Origins, Structure and Development*, Cambridge: Cambridge University Press, 1979.

from 1833 to 1985, including coverage of the decline of its jurisdiction.³³ As British judges on the House of Lords Appellate Committee were usually the only, or, at least, the majority of, the judges hearing appeals at the Judicial Committee, key histories of the Appellate Committee provide relevant insights, including contrasting comparisons.³⁴

The relocation from 9 Downing Street, where it was based since 1837, of the Judicial Committee to shared facilities with the new United Kingdom Supreme Court in October 2009, prompted a major transfer of the Judicial Committee's historic records to British National Archives. As well, all decisions since 1996, and selected historical decisions since 1809, are now available on-line from the British and Irish Legal Information Institute (BAILII).³⁵ As New Zealand formally departed, an effort was made to ensure that decisions of all New Zealand appeals determined by the Judicial Committee were available on-line. A total of 314 separate judgments on appeals from New Zealand have been identified, and, a list of these judgments has been checked against, and updated from, earlier published

³³ D.B. Swinfen, Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986*, Manchester: Manchester University Press, 1987.

³⁴ Key references are Louis Blom-Cooper and Gavin Drewry, *Final Appeal: a study of the House of Lords in its judicial capacity*, Oxford: Clarendon Press, 1972; Louis Blom-Cooper, Brice Dickson, and Gavin Drewry (eds.), *The Judicial House of Lords, 1876–2009*, Oxford: OUP, 2009; Alan Paterson, *The Law Lords*, London, MacMillan Press, 1982; and Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, Oxford, Hart Publishing, 2013. Sir Kenneth Keith, contributed a chapter to Blom-Cooper et al (2009) on the interplay with the Judicial Committee, while several authors contributed perspectives on the Old Commonwealth, including former Australian judge, Hon Michael Kirby, on Australia and New Zealand.

³⁵ www.bailii.org This database also includes the results of a 2010/11 exercise in which the Institute of Advanced Studies at the University of London (website: www.ials.sas.ac.uk) scanned an important collection of documents from the Judicial Committee, including, for 48 New Zealand cases determined between 1956 and 1985, not only the judgment, but also the case for the appellant; the respondent's case; and a record of the proceedings in the courts below.

lists.³⁶ As the BAILII database is searchable, a search has enabled the identification of judgments involving a New Zealand Judge.³⁷ The formal law reports, principally *the New Zealand Privy Council Cases, 1840-1932* and *the New Zealand Law Reports*, provided valuable additional information in headnotes written by senior barristers, although not every judgment was formally reported.

The transfer of the Judicial Committee's records has provided a rich new source of archival material for scholars. Funding initiatives,³⁸ new research networks, and new scholarship are emerging.³⁹ This has coincided with wider developments in historiography in which 'the newer history of empire ... focuses on the interconnectedness of the different parts of empire.'⁴⁰ Laidlaw suggests the need 'not just to connect metropole and periphery, nor simply to consider the effect of the latter on the former, but to take seriously the reverberations of actions and ideas in one colonial location across other colonial spheres.'⁴¹ For the New Zealand historian, contrasting approaches are suggested by Ballantyne's webs of

³⁶ *New Zealand Privy Council Cases, 1840-1932* (1938), (NZPCC); the Law Commission (1987); the Solicitor-General (1995); and the Advisory Group (2002). Appendix One provides a list of the 314 judgments, while Appendix Two provides a statistical summary of New Zealand appeals.

³⁷ Appendix Three provides summary statistics of the New Zealand judges at the Privy Council.

³⁸ In the United Kingdom, the Arts and Humanities Research Council has funded a research network drawing together interdisciplinary scholars from across Britain, as well as countries like India, Canada and Australia, with a view to encouraging research on the Judicial Committee's records. At the same time, the Canadian Social Science and Humanities Research Council has funded a project with a related scope examining colonial law and imperial justice.

³⁹ Recent studies include Shaunnagh Dorsett and Hunter (eds.) *Law and Politics in British in British colonial thought* (2010); Bonnie Ibhawoh *Imperial Appeal* (2013); and Shaunnagh Dorsett and John McLaren (eds.) *Legal Histories of the British Empire* (2014). Australian-based Shaunnagh Dorsett formerly lectured at Victoria University of Wellington, and her 2010 book includes separate contributions from New Zealand legal historians, Paul McHugh, Damen Ward and Mark Hickford.

⁴⁰ Dorsett and McLaren, *Laws, engagement and legacies*, Ch.1 in Dorsett and McLaren (eds.), 4.

⁴¹ Zoe Laidlaw, *Breaking Britannia's Bounds? Law, Settlers, and Space in Britain's Imperial Historiography*, *The Historical Journal*, Vol 55(3), September 2012, 807-830, 830.

empire and Barnes' focus on London as New Zealand's metropole.⁴² This thesis focuses on New Zealand's connection with the metropole because that approach, more appropriately, reflects the nature of the relationship. Despite the Judicial Committee being 'the supreme tribunal of the British Empire', it was rare for judgments to draw on decisions made by courts in other parts of the Empire/Commonwealth. Moreover, the connection was viewed as part of the close links between New Zealand and both the Monarch, in particular, and Britain, in general.

Paul McHugh identified two types of a 'tradition' of the constitutional history of New Zealand: the older, general accounts, and the 'particularist' histories, focused largely on 'the history of Crown-tribe relations.' In his view, both types are whiggist interpretations in which '[t]he past is depicted as a harmonious progression to the present.'⁴³ At the risk of adding to the whiggist interpretations, although the events were not always harmonious, this thesis seeks to relate the various efforts to key wider issues of their time.

Chapter Two sets the historical context, beginning with a sketch of the origins of the Privy Council and its judicial role, noting the reforms of the nineteenth century, which established its role as the supreme appellate tribunal for the colonies. During the twentieth century, New Zealand's strong endorsement of the Judicial Committee contrasts with that of the other Dominions – Canada, Australia, South Africa, and later Ireland and India. It was not until 1969 when public murmurings about leaving the jurisdiction of the Judicial Committee first began.

⁴² Tony Ballantyne, *Webs of Empire: Locating New Zealand's Colonial Past*, Wellington: Bridget Williams Books, 2012; and Felicity Barnes, *New Zealand's London: A Colony and its Metropolis*, Auckland: Auckland University Press, 2012.

⁴³ P.G. McHugh, The Historiography of New Zealand's Constitutional History, in Philip A. Joseph (ed.) *Essays on the Constitution*, (Wellington: Brookers, 1995), 344-366.

Chapter Three examines the first formal proposal to withdraw from the Judicial Committee, initiated by Geoffrey Palmer. In 1987, Palmer formally announced that New Zealand would end appeals to the Judicial Committee by 1990. He requested the Law Commission review the New Zealand judicial system. In 1990, Cabinet, apprehensive about transferring further powers to an already powerful Court of Appeal, did not proceed with the termination of appeals to the Judicial Committee, but did implement many of the other, unrelated recommendations from the Law Commission's 1989 report.

Chapter Four examines the efforts of the National Government between 1994 and 1996, based on the report of the Solicitor-General, J.J. McGrath, QC. This proposal faced strong opposition from Maori and, to a lesser extent, the legal profession and some business interests. Nevertheless, the National Government introduced legislation terminating appeals before the 1996 general election. That election, New Zealand's first under the Mixed Member Proportional (MMP) electoral system, resulted in a Coalition Government between National and New Zealand First. As New Zealand First had won most of the Maori electorates, National was obliged to withdraw its legislation.

Chapter Five examines the Labour Government's efforts between 2000 and 2002, which initially built on earlier proposals, but then resulted in agreement to establish the Supreme Court on 1 January 2004.

In responding to Boast's challenge, this thesis seeks to contribute to Finn's 'creat[ion of] an accessible public record of events,' even though, like other non-lawyer authors, I can face a limitation in 'not manag[ing] to master the legal issues involved in the events.'⁴⁴

⁴⁴ Jeremy Finn, Sir Kenneth Gresson: A Study in Judicial Decision Making, *Canterbury Law Review* [Vol.6, 1997], 481-498, 481.

A note on nomenclature: many of the participants in the debate were, or became, judges. I have acknowledged their judicial status at the time of the first reference, for example, 'Mr Justice' or 'Justice' but afterwards mainly used their surname only.⁴⁵ The use of the honorific, 'Rt. Hon.', denotes the person is a Privy Counsellor.

⁴⁵ New Zealand dropped the prefix 'Mr' when the first woman judge, Dame Silvia Cartwright, was appointed to the High Court in 1993.

Chapter Two – British to the Core

Introduction

This chapter sketches the origins of the Privy Council, and the nineteenth century reforms of its appellate role to establish the Judicial Committee. It then outlines the New Zealand's engagement with the Judicial Committee, identifying both its very strong adherence to maintaining the Committee as New Zealand's final appellate court, and its generally strong support for measures strengthening the Committee's place in the Commonwealth despite the large exodus of many other former colonies after 1946. Despite the beginnings of a debate for change, New Zealand remained firmly committed to retaining appeal rights to the Judicial Committee.

Origins

The Privy Council in England dates from the eleventh century when it comprised a group of chief advisers, including the Lord Chancellor and the Justiciary, at the court of the Sovereign. The Sovereign was considered to be the fountain of justice, and was assumed to be present in all his courts.⁴⁶ Subjects with a grievance against the findings of the subordinate courts could petition the Sovereign. The Privy Council acted in an advisory capacity, when the Sovereign exercised this jurisdiction.⁴⁷ A. V. Dicey⁴⁸ noted that between 1066 and 1376, the English institutions assumed a form from which, at the end of that period, they have never essentially varied: 'a Parliament consisting of two Houses, the Law Courts, and a Council with peculiar powers, and distinguishable from both the Law Courts and the Parliament.' During this period, 'in a gradual process the judicial and legislative executive and political functions, were separated and assigned to different bodies.'⁴⁹ Over time, domestic appeals were redirected to the House of

⁴⁶ For many years there was an empty chair at the Judicial Committee, reserved for the Sovereign.

⁴⁷ Howell, *The Judicial Committee of the Privy Council*, *op. cit.*, 3.

⁴⁸ A.V. Dicey, *The Privy Council, the Arnold Prize Essay 1860*, (London: MacMillan and Co, 1887), 6.

⁴⁹ *Ibid.*, 6-7.

Lords, and ‘in 1641, the most important surviving branches of the Council’s jurisdiction in England were swept away’⁵⁰ by the Long Parliament.

The King in Council retained appellate jurisdiction from the overseas jurisdictions, notably the Channel Islands, which were remnants of the Duchy of Normandy and had their own law and courts.⁵¹ Eventually this jurisdiction was extended to overseas colonies, beginning with the American plantations. In the seventeenth and eighteenth centuries, most of the early appeals were from the West Indies. Despite the loss of the 13 colonies, which formed the United States of America, the expansion of the British Empire in the latter part of the eighteenth and early decades of the nineteenth century saw a steady rise in the number of appeals to the Council. Appeals were processed by an Appeals Committee, meant to comprise ‘such members of the Privy Council as had held high judicial offices’, but, on occasions, lay members outvoted the judicial members.⁵² With growing duties in the domestic courts, judicial members were often not able to commit themselves to the demands of the Privy Council’s Appeals Committee. Moreover, the Committee’s workload was compounded by the complexity of the diverse legal systems from which appeals originated.

In 1828, Henry Brougham, then MP for Winchelsea, highlighted that of 517 appeals lodged between 1815 and 1826, only 129 had been heard, and identified the need for reform. In 1830, he was appointed Lord Chancellor in the Ministry of the Second Earl Grey, and moved to the House of Lords. Through the Judicial Committee Act, 1833, Brougham reconstituted the Privy Council’s appellate machinery, establishing the Judicial Committee, comprised only of judicial Privy

⁵⁰ Howell, *The Judicial Committee of the Privy Council*, 4.

⁵¹ *Ibid.*, 4.

⁵² F.W. Maitland, *The Constitutional History of England*, (Cambridge, 1908). 463, cited by Howell, *The Judicial Committee of the Privy Council*, 8.

Counsellors.⁵³ The Act transferred all the appellate jurisdiction from 44 colonies and plantations, and other territories and jurisdictions; appeals in prize suits from the colonial and other Vice-Admiralty Courts; and the entire appellate jurisdiction of the King in Council. The Judicial Committee also dealt with ecclesiastical matters, principally appeals in matrimonial and testamentary causes.⁵⁴ Further reforms were made during the nineteenth century, including in 1844 to enable the admission of appeals by Order in Council, from any Colony, even though there is no Court of Error or of Appeal.

Judith Bassett writes of ‘the many alterations to the Court structure over the first decade’ of the new colony of New Zealand.⁵⁵ Eventually, it was ‘a more pragmatic and advanced legal system than any other of its time.’⁵⁶ New Zealand began with a Supreme Court, as its principal court of first instance proceedings, together with District Courts and Magistrates Courts. These latter Courts had very limited jurisdictions, and the District Courts were abolished in 1909. Apart from in the Supreme Court, few judicial officers were legally trained. As New Zealand did not

⁵³ Different authors use different spelling – either Counsellor or Councillor. The New Zealand Government’s official practice is that the former is the preferred spelling, following advice from the Privy Council Office in 1953: ‘Their theory is that these gentlemen are not members of a Council, like a City Council, but are Counsellors to the Queen, and this group of individual Counsellors makes up the Privy Council.’ F.H. Corner, New Zealand High Commission, London, to T.J. Sherrard, Esq., OBE, Clerk of the Executive Council, Wellington, 9 September 1953. ABHS W4627 950 Box 3680, Archives New Zealand.

⁵⁴ ss.1-3, the Judicial Committee Act, 1833. The notable exception to judicial membership are the Lord President, the Lord High Chancellor of Great Britain and the Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, or former holders of these Offices, are also included. In practice, as will be discussed below, only the Lord Chancellor was a significant member, and his involvement dwindled in the final decades of the 20th century, and ended at the start of the 21st century. The above discussion also draws on Howell, *The Judicial Committee*, especially Chapter 2, the Creation of the Judicial Committee and the early development of its Constitution, 23-71.

⁵⁵ Judith Bassett, *The New Zealand Legal System: Early Historical Influences*, in Rick Bigwood (ed.) *Legal Method in New Zealand: Essays and Commentaries*, Wellington: Butterworths, 2001, 16.

⁵⁶ *Ibid.*, 23.

have a Court of Appeal, in 1846 it adopted the model practiced in other British Colonies, and established a Court of Appeals, comprising the Governor and the Executive Council (excepting the Attorney-General). This Court was to operate until there were enough judges,⁵⁷ and could grant leave to appeal to the Judicial Committee where the amount in dispute was £500.⁵⁸ The Court was abolished in 1860, and the Court of Appeal was established in 1862.⁵⁹

In 1876, in Britain, the Office of Lords of Appeal in Ordinary, was created. These Judges were entitled to a life peerage, and to vote in the House of Lords. Initially two were appointed. The maximum was increased gradually to reach six in 1913, and eventually to reach 12 in 1994.⁶⁰ These judges are Britain's top judges. Other members of the House of Lords who had held high judicial office – mostly retired Lords of Appeal in Ordinary – and the serving Lords of Appeal in Ordinary became known as 'Law Lords.' The Law Lords were the main members of the House of Lords Appellate Committee⁶¹ – the United Kingdom's top Court until 2009 – and, from the late nineteenth century and especially through the twentieth century, provided the bulk of the judicial members for the Judicial Committee of the Privy Council. Initially, however, the first judges were Privy Counsellors who held, or

⁵⁷ Supreme Court Amendment Ordinance, 1846, clause 3. See *The Ordinances of New Zealand passed in the first ten sessions of the General Legislative Council A.D. 1841 to A.D. 1849*, (Wellington, 1850). [Compiled by Alfred Domett.] The Ordinance is also available on-line at www.legislation.govt.nz under legislation as enacted, New Zealand Acts 1841-2007.

⁵⁸ *Ibid.*, Clause 8.

⁵⁹ The Court of Appeal Act 1862. It comprised of two or more Judges of the Supreme Court.

⁶⁰ Appellate Jurisdiction Act 1876, Appellate Jurisdiction Act 1913, and the Maximum Number of Judges Order 1994 (SI 1994/3217), respectively. Information from Louis Blom-Cooper, Brice Dickson and Gavin Drewry, (eds.), *The Judicial House of Lords*, 748.

⁶¹ In October 2009, the Appellate Committee's functions were transferred to the newly created United Kingdom Supreme Court, with the first Judges being the existing members of the Committee. The Judges are not eligible to sit in the House of Lords, while serving Judges. The move was first announced in 2003, and legislated for under the provisions of the Constitutional Reform Act 2005, but not implemented until separate, suitable premises were available. At the same time, the Judicial Committee was relocated to the same premises.

had held, high judicial office in the United Kingdom. Later, this group was supplemented by Britons who had served as judges or as the Governor's legal adviser in British India;⁶² and who had been appointed Privy Counsellors. In 1886, the possibility of appointing colonial judges to the Judicial Committee was raised, and in 1895, legislation was enacted to enable three colonial judges to be appointed Privy Counsellors and able to sit on the Judicial Committee.⁶³ The initial appointments, made in 1897, were Sir Samuel Way,⁶⁴ Sir John de Villiers;⁶⁵ and Sir Samuel Strong.⁶⁶ Further appointments were made in the following decade – principally successive Chief Justices of Canada. Except for de Villiers, these initial colonial appointments did not impress Robert Reid, a future Lord Chancellor,⁶⁷ who was reported to have observed that de Villiers' 'talents were the only thing that redeemed the experiment of placing colonial judges on the Privy Council from being a complete failure.'⁶⁸ De Villiers was elevated to the peerage in 1910,⁶⁹ the

⁶² British India comprised what is now known as India, Pakistan, and Bangladesh (which separated from Pakistan in 1971).

⁶³ Walker, Eric A., *Lord de Villiers and his Times, South Africa 1842-1914*, (London: Constable and Company, 1925), 117.

⁶⁴ Chief Justice of South Australia, 1876-1916.

⁶⁵ Chief Justice of the Cape Colony, 1874-1910, and Chief Justice of the Union of South Africa, 1910-1914.

⁶⁶ Chief Justice of Canada 1892-1902.

⁶⁷ Becoming Lord Loreburn, Lord Chancellor, 1905-12.

⁶⁸ F.X. Merriman to Mr P. de Villiers, (eldest son), 9 September 1914, quoted by Walker, *Lord de Villiers*, 83.

⁶⁹ He sat on several occasions in the Judicial Committee, where he was the leading Judge with Roman-Dutch legal experience. Walker (*op. cit.*, 120 and 495) states de Villiers never sat on the House of Lords Appellate Committee, but, more recently, Britain's senior-most judge identified him as sitting on two appeals in the House of Lords, in one week in July 1913, where he recorded brief concurrences on both occasions – see Lord Bingham, [Tribute to] Lord Cooke, *New Zealand Law Journal*, July 2007, 203. Cooke's was a life peerage, reflecting the existing British practice, whereas de Villiers received a hereditary peerage. [The Third and Fourth Barons de Villiers settled in New Zealand, Noel Cox, *The British Peerage: A Legal Study of the Peerage and Baronetage in the Overseas realms of the Crown with Particular Reference to New Zealand*, *NZULR*, Vol.17, 1997.] The similarities between de Villiers and Cooke were striking: both studied in England and were

first of two Empire/Commonwealth judges to be elevated. The other was New Zealand's Lord Cooke of Thorndon.

In 1909, The Syed Ameer Ali⁷⁰ was appointed to the Judicial Committee. Mr Ameer Ali had been a Judge of the Calcutta High Court, and was the only Muslim ever to be appointed a member of the Judicial Committee. He served until 1924, mostly hearing appeals from the Courts of British India, as the Judicial Committee operated two Committees, with one dedicated to appeals from British India. Mr Ameer Ali also attended meetings of the Privy Council itself.⁷¹

In 1908 and 1913, British law changes increased the number of colonial Judges who could be appointed. The 1913 amendment enabled the appointment of Sir

admitted to the English Bar; both then had distinguished legal and judicial careers in their domestic country; both gave valuable service on the Judicial Committee; and were then appointed to the House of Lords.

⁷⁰ This is the older spelling of his name used in the Judicial Committee judgments. The more modern spelling is Saiyid Amir Ali. A profile is provided by Nandini Chatterjee, in *Law, Culture and History: Amir Ali's interpretation of Islamic Law*, in *Legal Histories of the British Empire*, Shaunnagh Dorsett and John McLaren (eds.).

⁷¹ For instance, in 1909, he was one of ten Privy Counsellors present when King Edward VII approved the Order in Council granting special leave to appeal in the New Zealand petition *Manu Kapua & others v Para Haimona & another*. Order permitting the case to be brought before the Privy Council, made at the Court at Buckingham Palace, 22 November 1909. Governor's files, Archives Reference Number CL 172 1. Special leave was required as the Native Appellate Court could not grant leave to appeal to the Judicial Committee. Judge William Gilbert Mair of the Native Appellate Court: 'upon reading s.94 of the Native Land Court Act 1894 it seems to me that the decision of the Native Appellate Court being final and conclusive the [Native Appellate] Court has no power to proceed further in the matter.' [Native Land Court, Whangarei, 1907.] The appeal, from a judgment of the Native Appellate Court (now known as the Maori Appellate Court), concerned a dispute over native land and title as part of the Te Akau block, with the appellants being Tainui and the respondents being the chief members of Ngatitahinga, near Raglan. The Attorney-General was later granted special leave (by King George V in Council in 1910) to join the respondents as a party to the appeal. After hearing extensively from the appellants' counsel, but without hearing from the respondents' counsel (including Solicitor-General, John Salmond, KC), the Judicial Committee dismissed the appeal. The judgment is reported at (1913) NZPCC 413.

Joshua Williams, a Judge of the New Zealand Supreme Court (as the High Court was then known) since 1875. He retired from the Supreme Court and went to live in London, hearing 18 appeals between June 1914 and January 1915. He died, aged 78, in December 1915. Over the next 50 years, a small number of Empire/Commonwealth Judges – mostly Chief Justices of the Dominions – were appointed Privy Counsellors, and sat occasionally on the Judicial Committee.⁷²

The Final Appellate Court

By 1900, the Judicial Committee of the Privy Council was the final appellate Court for approximately one-quarter of the world's population. Appeals involved a variety of legal systems – English common law; domestic statutes of the Dominion, colony or territory appealed from; Roman-Dutch law, in cases from South Africa, Ceylon, and, until 1917, British Guiana; Hindu or Muslim Law, from British India, French-Canadian law from Quebec.⁷³ For appeals in ecclesiastical matters or appeals involving admiralty law, the Judicial Committee was augmented, either by archbishops or judges with admiralty experience, as appropriate. The Judicial Committee also heard appeals from the decisions of England's Disciplinary Committees of the medical, dental, optician and veterinary professions, as well as from the Channel Islands and the Isle of Man. Other, more obscure jurisdictions included the Consular Courts of China and Japan, and from the Dominions of the Ottoman Empire, although that Court usually sat in Istanbul, or in Alexandria in

⁷² Of the New Zealand Chief Justices during this period, Sir Robert Stout, Chief Justice 1899-1926, was appointed in 1921; Sir Michael Myers, Chief Justice 1929-1946, was appointed in 1931; Sir Humphrey O'Leary, Chief Justice 1946-1953, was appointed in 1948; and Sir Harold Barrowclough, Chief Justice 1953-1966, was appointed in 1954. Sir Charles Skerrett, Chief Justice 1926-29 was the only twentieth century Chief Justice not appointed a Privy Counsellor. Stout sat in 1926, hearing six appeals; and Myers sat in 1936, hearing two appeals. O'Leary and Barrowclough did not sit on the Judicial Committee. (Wild thought Barrowclough sat on one appeal in 1959, but he is not listed in any judgment of the Judicial Committee in the period he was Chief Justice – 1953-1966).

⁷³ Quebec used the French law from *Coutume de Paris*, which differed widely from the *Code Napoleon*, with which the British judges were more familiar, see Coen G Pierson, *Canada and the Privy Council* (London: Stevens and Co, 1960), 19.

Egypt, if required. After the First World War, the Palestine Mandate was added. The Judicial Committee also could consider special references if requested, but the last of these cases was determined in 1958, while the last Prize Court appeal was determined in 1945.

For many decades, the Judicial Committee followed what were termed ‘peculiar practices’ in its procedures. These included, until 1966, the practice of only issuing a single judgment, which represented the majority’s decision. This followed the traditional practice, established in the sixteenth century, when the Privy Council only gave a single opinion to the sovereign. Even if a judge agreed with the majority on the final resolution of the appeal, but arrived at that decision through different reasoning, he could not issue his reasons,⁷⁴ and neither were dissenting opinions disclosed. There was a considerable debate on dissenting opinions, especially at and after the 1911 Imperial Conference, but by 1914, the various governments and courts of the Dominions and their states, had conceded the *status quo*.⁷⁵ The likely success of the reforms to widen membership of the Judicial Committee was threatened when Australian Judges refused to sit if dissenting opinions were not allowed. This resulted in the 1966 change, promoted in a paper by the Lord Chancellor,⁷⁶ Lord Gardiner, and made by Order in Council.⁷⁷ Even more significant was the strong adherence to precedence, which has been a strong feature of the English common law tradition. On some occasions this had resulted

⁷⁴ It was not until 1999, when Dame Sian Elias, Chief Justice of New Zealand, was appointed a Privy Counsellor, that there was a female judge eligible to sit on the Judicial Committee.

⁷⁵ Copies of the various communications between London and the Colonies are available in the files series of the Governor, at Archives New Zealand.

⁷⁶ Lord Gardiner, Dissenting Opinions in the Judicial Committee of the Privy Council, Memorandum by the Lord Chancellor, 16 June 1965. A copy was provided to the Prime Minister, Rt. Hon. K.J. Holyoake, by the British High Commissioner to New Zealand on 16 July 1965. After consulting the Chief Justice and the Solicitor-General (H.R.C. Wild, QC), Attorney-General, Mr Hanan, recommended the Prime Minister agree with the proposal on 16 August 1965.

⁷⁷ The Judicial Committee (Dissenting Opinions) Order 1966, made on 4 March 1966. Her Majesty Queen Elizabeth The Queen Mother gave Her Majesty’s approval to the Order at the Privy Council meeting, as The Queen was overseas at the time.

in strange decisions. In 1966, the House of Lords finally acknowledged that there may be a time when a judgment should break with an earlier precedent.

As a Committee of the Privy Council, its decisions, whether to grant a petition for special leave to appeal or on the appeal itself, are formulated in the form of a recommendation to the Sovereign in Council. It is only when the Order in Council is made that the decision was final. In practice, the recommendation of the Judicial Committee is always adopted, as Lord Chancellor Sankey observed in 1935:

according to constitutional convention it was unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law.⁷⁸

The view was reinforced in a 1963 judgment:

In their [Lordships'] opinion it has long been recognised that the Order in Council which implements the decision of such appeals is in everything but form the equivalent of a legal judgment. ...

It is true, no doubt, that the Privy Council appeal existed by prerogative right, except so far as it was actually created or regulated by statute, but it is a mistake, when speaking of the prerogative in the judicial sphere, to speak of it as if its exercise were not as much Her Majesty's duty as Her Majesty's right. Justice is "owed"; it is not granted by favour or accorded at discretion.⁷⁹

⁷⁸ *British Coal Corporation v The King*, [1935] A.C. 500 at 511-512.

⁷⁹ *M.B. Ibralebbe alias Rasa Wattan and another (Reasons) v The Queen* (Ceylon) [1963] UKPC 34. The Judgment refers to earlier judgments from 1880, and 1926 as well as Sankey's 1935 statement and Dicey's 1860 essay to reinforce this message. As will be noted below, Maori were to raise the contrary view during the subsequent New Zealand debates on ending appeals to the Judicial Committee.

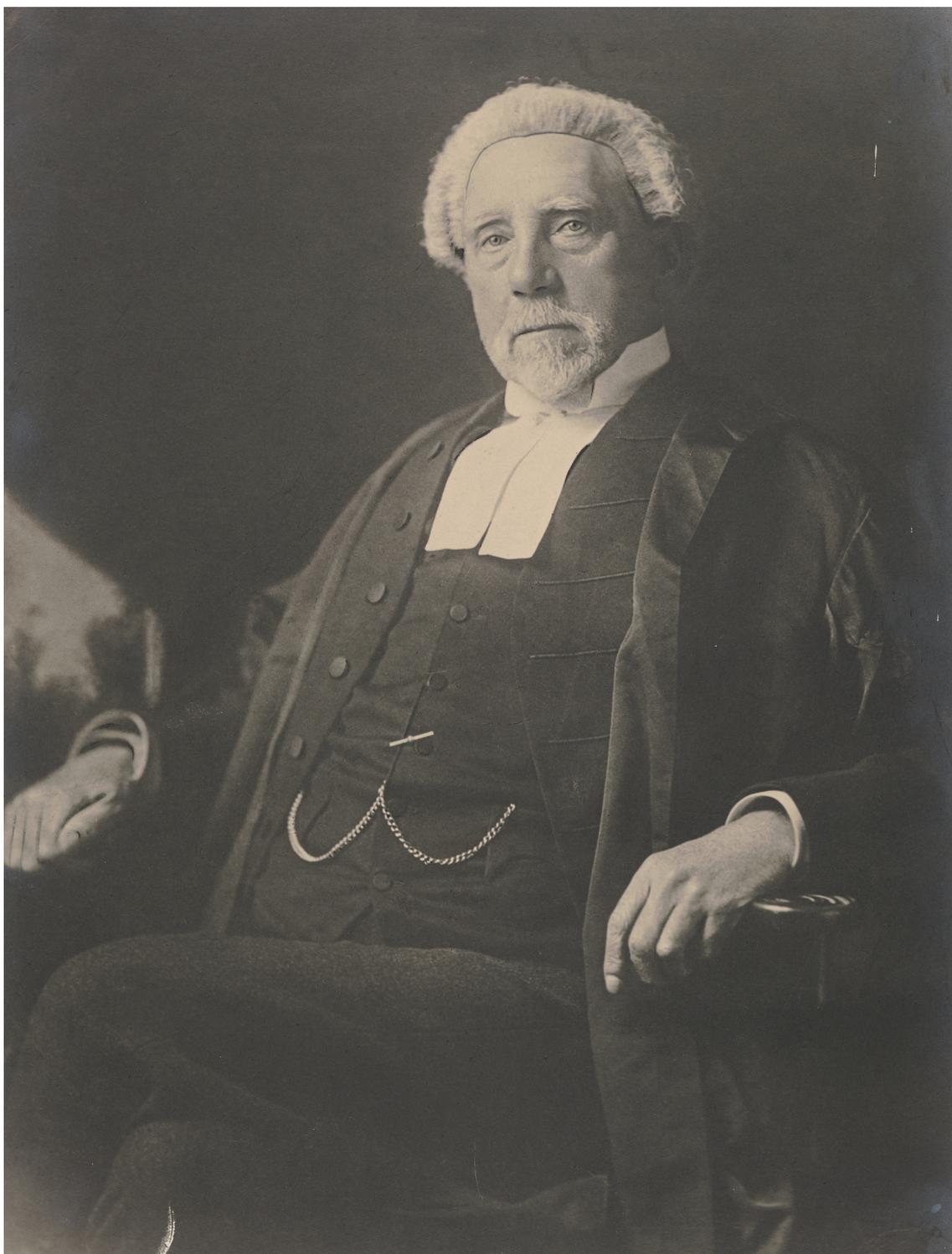


Figure 1: Sir Joshua Williams, first New Zealand Judge to sit on the Judicial Committee of the Privy Council, 1914-15. Judge of the Supreme Court 1875-1913.

The advice is also headed as ‘The Judgment of the Lords of the Judicial Committee of the Privy Council’ and the conclusion began ‘Their Lordships will humbly advise Her [or His] Majesty ...’. This practice continued, even when, as was frequently the situation, only some of the Judges were ‘Lords’. It also continued when Dame Sian Elias, Chief Justice of New Zealand, became the first woman Judge to sit on the Judicial Committee in 2001.⁸⁰

Another practice was to list the judges hearing an appeal in the order of precedence they held within the British Privy Council, as it was a British body to which all Privy Counsellors were appointed. This meant that New Zealand judges were usually listed last or second to last in the list of five judges determining an appeal, even if originally appointed to the Privy Council earlier than some other judges, because these other judges held a peerage as part of their judicial office. Lord Cooke moved up the order when appointed to the House of Lords, but it was not until 2013, when the first-New Zealand based judge was listed ahead on three British Privy Counsellors, who were members of Britain’s top court.⁸¹

New Zealand Appeals

The first New Zealand appeal to the Judicial Committee’s judgment was from a decision of the Supreme Court⁸² in the 1840s. Under the provisions of the Judicial

⁸⁰ See, for example, her first appeal, *Valentines Properties Limited & Anor v. Huntco Corporation Ltd & Anor*, [2001] 3 NZLR 305. Lady Hale (now Deputy President of the United Kingdom Supreme Court) was the second women Judge to sit, and on one occasion sat with Dame Sian Elias – see *Jennings v Buchanan* [2005] 2 NZLR 577.

⁸¹ Dame Sian Elias (appointed a Privy Counsellor in 1999) was listed second in *Lundy v R* [i.e. The Queen] [2014] 2 NZLR 273. The first-named judge was Lord Hope (appointed 1989); then Lords Kerr (2004); Reed (2008); and Hughes (2006). Lord Reed was listed ahead of Lord Hughes as he was appointed to the UK Supreme Court in 2012, ahead of Lord Hughes who was appointed in 2013. Elias was also listed second in *Selassie v R (Bermuda)* [2013] UKPC 29; and in *Pora v R* [2016] 1 NZLR 277. Elias was invited to sit on these appeals, with the first two heard in October 2013 and the last in November 2015.

⁸² The name of the Supreme Court was changed on 1 January 1981 to the High Court.

Committee Act 1844, an application for special leave to appeal was required. Special leave was granted on 6 July 1849, the appeal was heard on 5 October 1850, and judgment allowing the appeal was issued on 15 May 1851.⁸³ On 10 May 1860, Queen Victoria in Council made an Order making provisions for direct appeals from the Supreme Court of New Zealand.⁸⁴ A further Order was made in 1871 to recognise the Court of Appeal. Further revisions and/or replacements of the Rules were made in 1910,⁸⁵ 1957,⁸⁶ 1972,⁸⁷ and 1973.⁸⁸

Access to the Judicial Committee was regulated. Under the 1973 Rules, parties to civil proceedings in New Zealand had the right to appeal to the Judicial Committee from any final judgment of the Court of Appeal where the matter in dispute involved NZ\$5,000 (UK£500 before 1972). For any other judgment of the Court of Appeal, whether a final or an interlocutory⁸⁹ appeal, the Court could grant leave to appeal where the issue involved a matter of ‘great general or public importance,’ or otherwise ought to be submitted to Her Majesty in Council for decision. Similarly, the Supreme Court could grant leave to appeal from any final judgment

⁸³ *The Queen (by Her Attorney-General for New Zealand) v Clarke*, (1849-51) NZPCC 516.

⁸⁴ New Zealand Gazette, 3 October 1860, Numb.29, p164-166.

⁸⁵ The New Zealand (Appeals to the Privy Council) Order 1910.

⁸⁶ The Judicial Committee Rules 1957.

⁸⁷ The New Zealand (Appeals to the Privy Council) (Amendment) Order 1972.

⁸⁸ The Privy Council (Judicial Committee) Rules Notice 1973. (SR 1973/181).

⁸⁹ Essentially an interlocutory issue is a procedural issue. There are slight wording variations in the Judicature Act 1908 (s.2 applies to the High Court and Court of Appeal); Rule 1.3 of the High Court Rules; and the Supreme Court Act 2003. Section 4 of the Supreme Court Act defines interlocutory application as meaning ‘an application in a proceeding or intended proceeding for an order or a direction relating to a matter of procedure; or in the case of a civil proceeding, for some relief ancillary to the relief claimed in the pleading; and includes an application for a new trial; and includes an application to review a decision made on an interlocutory application.’ On occasions, an interlocutory appeal may proceed to the final appellate court, for example, in *A v Bottrill*, [2003] 2 NZLR 721, the Judicial Committee allowed an appeal (3:2) by patient A overturning the Court of Appeal’s dismissal of a High Court order for a new trial made when new evidence to support her claim for exemplary damages became available. [Although a new High Court trial was allowed, it is understood there was a subsequent out of court settlement.]

of that Court where the matter involved concerned great general or public importance or the magnitude of the interests affected or for any other reason ought to be submitted to Her Majesty in Council for decision. There was no right of appeal to the Judicial Committee on judgment in criminal proceedings;⁹⁰ or from the Native (later known as the Maori) Land or Appellate Courts; or the Vice-Admiralty Court. For appeals in these circumstances, a party could seek the exercise of the Royal prerogative by petitioning the Judicial Committee for special leave to appeal. Most petitions for special leave were refused. Parties in civil proceedings could also apply to the Judicial Committee for special leave to appeal. Where a petitioner was not worth UK £100, but had reasonable grounds for appeal, he or she could apply for special leave to appeal *in forma pauperis*, and, if granted, would be exempt from lodging sureties or paying Privy Council Office fees.⁹¹

Over the following years, until 2015, the Judicial Committee issued 314 separate judgments on New Zealand appeals, mostly from the judgments of the Court of Appeal. Of those appeals, which did not originate from the Court of Appeal, 27 were from the Supreme Court,⁹² two were from the Native Appellate Court, and

⁹⁰ Except for a brief period between 1946 and 1957, when one appeal was granted leave by the Court of Appeal. This appeal did not proceed to a hearing and no judgment was entered. The appeal was from the Court of Appeal's decision in *Woolworths (N.Z.) Ltd v Wynne*. The appeal represents the only time the Court of Appeal granted leave to appeal to the Judicial Committee in a criminal matter – under a provision of the Justices of the Peace Amendment Act 1946, which provided the Court with that power between 1946 and 1957. Subject to certain conditions, leave to appeal to the Judicial Committee was granted in June 1952. (The Court's decision on the application for leave to appeal to the Privy Council is reported at [1952] NZLR 496.) From Judicial Committee statistics, no appeal from New Zealand was entered in 1952, and just one appeal was entered in 1953 and that was dismissed without a hearing in 1954.

⁹¹ Two New Zealand appeals are identified in Appendix One as *in forma pauperis* appeals. These are *Chapple v Tongariro Timber Company Co Ltd and Others*, [1936] UKPC 48; and *Perkowski v Wellington City Corporation* [1959] NZLR 1. Both appeals were dismissed.

⁹² An interesting social history of the circumstances of an early appeal is provided by Bettina Bradbury, (2012), *Troubling Inheritances: An illegitimate, Māori daughter contests her father's will*

one from the Vice-Admiralty Court.⁹³ The last appeal from the Supreme Court was made in 1961, and this was an appeal from the Full Court (i.e. three judges) of the Supreme Court.⁹⁴

During the 1860s, New Zealand and the other Australasian colonies complained about the difficulties and delays in appealing to the Judicial Committee. On 26 August 1870, the Government of Victoria established a Royal Commission ‘To consider and report on the expediency of inviting the co-operation of the several colonies of Australasia - [on several matters, including] to establish a Court of Appeal.’ The Royal Commission’s first report, in April 1871, included ‘[s]uggestions for a Bill to be passed by the Imperial Parliament to enable the Colonies of Australasia to provide a uniform system of Intercolonial Legislation’, including, in Part V, a High Court of Appeal whose determinations ‘shall in all cases be final and conclusive.’⁹⁵ In London, on 20 July 1871, Henry Reeve, Registrar of the Privy Council, wrote to the Assistant Under-Secretary of State for the Colonial

in the New Zealand courts and the Judicial Review Committee of the Privy Council, available at <http://www.anzlhsejournal.auckland.ac.nz/papers/papers-2012.html>

⁹³ *Walter Turnbull and Others v the Owners of the Strathnaver*, [1875] UKPC 73. This unreported decision was unknown in New Zealand legal reports, and was not included in the collection of New Zealand Privy Council Cases decided before 1932. In 1874, Walter Turnbull, a Wellington merchant and the father of library benefactor, Alexander Turnbull, was the owner of the ‘Storm Bird’ a passenger steamship, with a cargo and 70 passengers, sailing from Wellington to Wanganui, when it saw the ‘Strathnaver’, with a cargo and 391 emigrants, heading for Barrett’s Reef at the entrance to Wellington Harbour. The Storm Bird went to alert and assist the Strathnaver from the its course. The subsequent legal dispute arose as to whether the parties associated with the Storm Bird were salvors or merely offering towage services. The Deputy Judge of the Vice-Admiralty Court held that the latter was more accurate, a view affirmed by the Judicial Committee. The Vice-Admiralty Court had, however, awarded demurrage to the owners of the Strathnaver against the Storm Bird interests. The Judicial Committee overturned this part of the Vice-Admiralty Court’s decision, and awarded costs related to that part of the overall action in the Vice-Admiralty Court to Mr Turnbull and his associates.

⁹⁴ *Australian Mutual Provident Society v the Commissioner of Inland Revenue*, [1962] NZLR 449.

⁹⁵ Royal Commission on Intercolonial Legislation and a Court of Appeal, First Report, April 1871, included in Papers presented to both Houses of Parliament by the Governor, Victoria, 1871.

Department responding to the Royal Commission's report. He noted that, between 1842 and 1871, one-third of the Australasian appeals 'have never been prosecuted at all' and that, in total, they were 'but a very small fraction of the business of the Privy Council.'⁹⁶ He also denied that there were delays in disposing of these appeals. Reeve stated the 'appellate jurisdiction ... exists for the benefit of the Colonies, not for that of the mother country.' While acknowledging the Colonial Legislatures could establish or remodel their Courts of Justice, he observed: 'the controlling power of the Highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any Judge in the Empire.' He concluded that it did not follow that Colonial Legislatures should enact laws to 'control the exercise of the prerogative of the Crown.'⁹⁷

Herman notes that during the 1870s Britain attempted 'to assert more control over the Imperial colonies.' In 1876, in response to Canadian attempts to legislate to abolish the right of appeal to the Judicial Committee, the Privy Council Office 'in a patronizing and slightly hysterical memorandum gave three reasons why appeals must be preserved': abolition would 'destroy one of the most important ties which still connect all parts of the Empire in common obedience to the source of law'; 'the colonial courts might overbear on political minorities' while Englishmen, including the Crown, had invested in the colonies 'in the belief that there was an ultimate appeal to the Judicial Committee'; and 'the ultimate judicial review of the constitutional division of powers [in the federal system] should lie abroad.'⁹⁸ 24

⁹⁶ Reeve's letter was forwarded by the Secretary of State for the Colonies to the Governor of Victoria, on 8 August 1871, and included in Papers presented to both Houses of Parliament by the Governor, Victoria, 1871. Reeve's memorandum includes a table listing all 112 appeals from the seven Australasian colonies lodged between 1842 and 1871. Of this total, five were from New Zealand: three were determined, in 1851, 1857, and 1862, respectively; and, in 1864, one was dismissed for non-prosecution, while the other was withdrawn by consent.

⁹⁷ *Ibid.*

⁹⁸ Michael John Herman, *The Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council*, *Ottawa Law Review*, Vol 8:7, Winter, (1976) 7-31, 21-22.

years later, many of these reasons for retaining appeals to the Judicial Committee were repeated in the debate about the Australian Constitution. Eventually the British Government decided that the Canadian legislative provision abolishing appeals was 'both inoperative and ineffective',⁹⁹ as the Canadian Parliament did not have the power to end the Royal prerogative.

For the balance of the nineteenth century, appeals continued to the Judicial Committee from the Australasian colonies. During the debate on the United Kingdom Parliament's enactment of the Australia Act 1900, which set out the Constitution for the new Commonwealth of Australia, one of the most hotly contested issues was over the future of appeals to the Judicial Committee.¹⁰⁰ The draft legislation, prepared in the Australian colonies, did not provide for the retention of appeals. Britain insisted that all colonies retain appeals to the Judicial Committee, with the result that Clause 74 was inserted into the legislation. New Zealand, which had been represented in the Conventions drawing up the Constitution over the preceding decade, was adamant that it wished to retain the right of appeal:

It is the earnest desire of the New Zealand Government that the present right which our colony and colonists enjoy of appealing to the Privy Council may not be taken away, diminished, or left in any doubt whatever.¹⁰¹

The Early Twentieth Century

In 1901, as a follow-up to the debate on the Australia Act, Joseph Chamberlain, British Under-Secretary of State for the Colonies, convened a conference in London to examine ways to strengthen the Judicial Committee, including by allowing colonial representation on the Judicial Committee, or by the establishment of a

⁹⁹ Ibid., 14.

¹⁰⁰ F.L.W. Woods & Miles Fairburn do not mention this issue in their respective articles on Australian Federation in the *New Zealand Journal of History* in 1968.

¹⁰¹ W. Reeves, New Zealand Agent-General, London, to the Under-Secretary of State for the Colonies, 19 June 1900.

separate colonial Court of Appeal. The New Zealand Government was represented by former Chief Justice, Sir James Prendergast, who agreed with most delegates to retain the *status quo*.¹⁰²

In 1903, the Judicial Committee's judgment in *Wallis and Others v Solicitor-General* resulted in an unprecedented protest of Bench and the Bar on Saturday 25 April 1903 at an adjourned sitting of the Court of Appeal in Wellington. The judgment made very strong criticisms of the Court of Appeal, and was seen as attacking its 'probity.' The Judicial Committee accused the Court as being in subservient to the Executive. Sir Robert Stout and Mr Justice Edwards were present and both made speeches of protest, and the Chief Justice read a protest prepared by Mr Justice Williams. The Chief Justice accused the Judicial Committee of being 'ignorant of New Zealand cases and ordnances.' Mr W.L. Travers, described as the 'doyen of the local Bar,' spoke on behalf of the profession, during which the large number of solicitors present in Court rose and remained standing for his speech, which endorsed the protests of the Appeal Court Judges.¹⁰³

The *Wallis* criticism left a strong shadow across New Zealand's relations with the Judicial Committee for several years, with Stout devoting his energies to publishing strong criticisms of the Judicial Committee and seeking an alternative appellate body. He believed the role of the Judicial Committee was 'an anomaly in our [i.e. the Colonies] Constitution.' He argued:

¹⁰² Grant Morris, *Prendergast – Legal Villain?* (Wellington: Victoria University Press, 2014), 189. See also Robin Cooke, QC, (ed.), *Portrait of a Profession – The Centennial Book of the New Zealand Law Society*, (Wellington: AH & AW Reed, 1969), 153.

¹⁰³ The speeches of the three judges and Mr Travers are recorded in the Appendix to *The New Zealand Privy Council Cases*, ed. by H.F. von Haast (1938), 730-760. See also *New Zealand Herald*, 27 April 1903, The Privy Council and the Appeal Court. For a more recent review of the origins of the case see David V Williams, *A Simple Nullity? The Wi Parata case in New Zealand law and history*. (Auckland: Auckland University Press, 2011). As Williams shows, the dispute over the grant of land at Whitereia by Ngati Toa to the Anglican Church for educational purposes dates from 1848, and featured in several leading New Zealand Court cases, notably *Wi Parata*, but also *Wallis*.

Seeing that the fullest rights of legislation and administration have been granted to the Colonies, it is illogical that the fullest rights of settling legal disputes should not also have been granted to them.¹⁰⁴

Stout was concerned at the costs and the delays in appealing to the Judicial Committee, and the limited familiarity and ignorance of colonial laws held by English advocates and judges. He proposed that either the current Court of Appeal, or a new Appellate Court become the final local Appellate Court for New Zealand. Later Stout attacked the Judicial Committee for a 1904 judgment allowing an appeal concerning the interpretation of liquor licensing legislation:

the Privy Council has, I think, gone beyond all rules that have been laid down for the interpretation of statutes, and has misapprehended the scope and intention of certain New Zealand Acts.¹⁰⁵

The *Wallis* shadow began to lighten with the appointment of Sir Joshua Williams to the Judicial Committee in 1913. Speculation began as soon as 1916, within a year of Williams' death, that Stout would be appointed a Privy Counsellor, but this did not occur until 1921. Stout sat on the Judicial Committee in 1926, during a visit to Britain, shortly before his retirement, and by which time his attitude had mellowed. In 1905, East Coast Maori petitioned Parliament objecting 'to the titles to their lands and their interests therein being referred to any court outside of New Zealand' following the Judicial Committee's allowance of three appeals against Maori interests.¹⁰⁶

¹⁰⁴ Robert Stout, Appellate Tribunals for the Colonies, *The Commonwealth Law Review*, September-October (1904), 3-13, 4.

¹⁰⁵ Robert Stout, Is the Privy Council a Legislative Body? *The Law Quarterly Review*, Vol 21, (1905), 9-22, 16. [Stout was an ardent prohibitionist.]

¹⁰⁶ *Assets Co. Ltd v Mere Roihi* (1904-05) NZPCC 275. Extracts of petition from Terence Arnold, Update on the Supreme Court, [Solicitor-General's speech to the Annual General Meeting of the Legal Research Foundation], 7 August 2003. Available at www.crownlaw.govt.nz

In 1922, under the Anglo-Irish Treaty, the Irish Free State became a Dominion of the British Commonwealth of Nations, and appeals were redirected from the House of Lords to the Judicial Committee. As the Irish were dissatisfied with its early decisions, the ability of Dominions to withdraw from the Judicial Committee's jurisdiction was raised at the 1926 Imperial Conference. In 1927, on the eve of the visit to New Zealand of the Duke and Duchess of York,¹⁰⁷ in a special supplement to London's *Times*, Prime Minister Rt. Hon. Gordon Coates described New Zealand as 'British to the core'.¹⁰⁸ In the same supplement, the Solicitor-General, Arthur Fair KC,¹⁰⁹ wrote:

although occasionally there has been some criticism of the decisions of the Privy Council as showing ignorance of local conditions and an inadequate appreciation of local legislation, it may be said that the legal profession and the general public of the Dominion desire that such a right of appeal should continue.

They appreciate the great advantage of having the capacity and learning of members of the Judicial Committee of the Privy Council available to decide difficult questions of law, and recognize the value of the Court as a link joining our loose knit Empire by inducing uniformity of interpretation of similar laws throughout the Empire.¹¹⁰

Fair's strong statement of support for the Judicial Committee can be seen as a reaction to the tenor of the discussions at the 1926 Imperial Conference. Fair prepared a briefing paper for the Attorney-General (Sir Francis Dillon Bell), and an abbreviated version was provided to Coates. The debate was to be resumed at the 1930 Imperial Conference. In August 1929 there was a strong outburst of editorial opinion throughout New Zealand, opposing plans, by the United Kingdom Labour

¹⁰⁷ The future King George VI and Queen Elizabeth.

¹⁰⁸ Gordon Coates, *The Times* [London], 22 February 1927.

¹⁰⁹ Solicitor-General 1925-1934. Later Sir Arthur Fair, Judge of the Supreme Court 1934-55.

¹¹⁰ Arthur Fair, *The Times* [London], 22 February 1927.

Government of Ramsay Macdonald, to introduce legislation to enable Dominions to abolish the right of appeals to the Judicial Committee.¹¹¹ The newspapers continued to report relevant international news stories on the topic. Some also published separate articles by R.M. Algie¹¹² and W.E. Leicester.¹¹³

Sir Robert Stout joined the debate, strongly defending the Judicial Committee and arguing that abolition of appeals would weaken the Empire.¹¹⁴ When challenged that he had changed his views from ‘the strong antipathy’ he had previously shown, he stated that the comment was ‘quite untrue.’ He also denied that he had ever suggested that ‘New Zealand’s Appellate Court was to be the final tribunal.’¹¹⁵ This last statement does not accord with the published text of his 1904 article. Stout’s general position for New Zealand to retain appeals to the Judicial

¹¹¹ The External Affairs Department file has clippings of editorials for 16 August 1929 from the Dominion, the Christchurch Press, and the Greymouth Evening Star; for 17 August from the Auckland Star, the New Zealand Herald, and the Christchurch Star; for 19 August from the Taranaki News; for 20 August from the Marlborough Express, and the [Gore] Ensign; for 22 August from the Otago Daily Times, and the Southland Times; for 23 August from the Wanganui Chronicle; for 26 August from the Timaru Post; and for 28 August from the [Ashburton] Guardian. All opposed the proposal. ACIE 8798 Box 1008 Archives New Zealand.

¹¹² R.M. Algie, (17 August 1929). The Privy Council – Appeal Court of Empire – Working and Constitution – Functions of Committee, *New Zealand Herald*. Professor Algie was the inaugural Professor of Law at Auckland University College (1920-1937). He was MP for Remuera 1943-1966, a Cabinet Minister, 1949-1957, and Speaker of the House of Representatives 1960-66. Ronald Algie (1888-1978) was knighted in 1964.

¹¹³ W.E. Leicester, (20 August 1929). Appeal to Privy Council – Importance to Dominions – Question of Abolition, *The Dominion*. Leicester was a Judge of the Supreme Court 1961-63.

¹¹⁴ Privy Council – Proposed Abolition – Would weaken the Empire - Sir R. Stout’s Views, (1929, 16 August). *The Evening Post*.

¹¹⁵ The contrasting positions involved Sir Robert Stout and Mr P.J. O’Regan, a Wellington lawyer, (and later a Judge of the Court of Arbitration, 1937-46) and were reported in the Evening Post. O’Regan quoted a 1916 publication by British constitutional lawyer, Dr A.B. Keith, who assessed Stout had shown a ‘strong antipathy’ to the Judicial Committee since the *Wallis* decision. See Privy Council Appeal – Suggested Abolition – Comments by Mr O’Regan, (23 August 1929). *The Evening Post*; Privy Council – New Zealand Appeals and Sir Robert Stout’s Reply, (26 August 1929). *The Evening Post*.

Committee, drew favourable comments, including editorial comment. On 28 August 1929, in response to a Parliamentary Question, the Prime Minister, Rt. Hon. Sir Joseph Ward, replied: [he had] ‘received no official communication on the subject. The Government have no intention of altering the present position.’¹¹⁶

In March 1930, prior to the Imperial Conference, the new Chief Justice, Sir Michael Myers,¹¹⁷ spoke briefly on the issue in his speech to the Dominion Legal Conference held in Dunedin:

I do not believe anyone in New Zealand wants to get rid of the Privy Council. I hope it will forever remain, and remain as it is. It is, I consider, the finest tribunal in the world, the greatest of all tribunals. You receive from it not only the judgment of the finest minds in the Empire ...¹¹⁸

He thought that the idea that ‘the Judicial Committee become an ambulatory tribunal going around the British Dominions ... would be a retrograde step.’¹¹⁹ For Myers, the value of the appeal was that it was made ‘to the fountainhead of justice, to the King himself. It is one of the last remaining tangible links between Great

¹¹⁶ Sir Joseph Ward, Supplementary Order Paper, House of Representatives, 28 August 1929.

¹¹⁷ Myers was appointed Chief Justice in May 1929. Earlier, in 1926, when a King’s Counsel, he had appeared before the Judicial Committee as Counsel for the appellant parties in five separate appeals – all of which were successful. As Myers reminded the Conference, in total, he appeared before 13 of the 16 judges able to sit on the Judicial Committee at that time. Hon. Peter Mahon later recounted his only conversation, out of court, with Sir Michael, in which Myers advised him to avoid English counsel at all costs, in any appeal to the Privy Council. According to Myers, English counsel ‘never sufficiently mastered the case to be able to give a satisfactory opinion, and if briefed for an appeal, did not trouble to read the brief until the day before, and were indifferent as to the result because they had nothing to gain from incurring the respect or displeasure of colonial solicitors, being only concerned to retain the goodwill of the English firms who brief their English cases.’ Extract from letter from Peter Mahon to David Williams, in Sam Mahon, *My Father’s Shadow – A Portrait of Justice Peter Mahon*, Dunedin: Longacre Press, 2008, 177.

¹¹⁸ Sir Michael Myers, Inaugural Address, (1930). *NZLJ*, 84.

¹¹⁹ *Ibid.*

Britain and the overseas Dominions.’¹²⁰ He urged the Conference to adopt a resolution supporting the retention of the Judicial Committee, as that would ‘strengthen the hands of the delegates to the next Prime Ministers’ conference.’¹²¹ Later, Mr J.B. Callan delivered a prepared paper.¹²² After a discussion, the conference resolved:

[t]hat the retention of the final right of appeal to His Majesty in Council is in the best interests of the Dominion of New Zealand and the administration of justice therein.¹²³

These discussions, especially the remarks of the Chief Justice, received good press coverage, including an editorial in the *New Zealand Herald*.¹²⁴

During the Second World War, the Judicial Committee delivered one of its most important judgments, if not the most important, on a New Zealand appeal. The unsuccessful appeal, *Te Heuheu Tukino v Aotea Maori Land Board*,¹²⁵ examined the legal effect of the Treaty of Waitangi, and held that the Treaty had no effect if not made part of municipal law.

The Post-Second World War Period

An exodus from the Judicial Committee began soon after the end of the Second World War and accelerated through the 1950s and 1960s, as many former colonies

¹²⁰ Ibid.

¹²¹ Ibid., 85.

¹²² J.B. Callan, (1930). The Appeal to the Privy Council, *NZLJ*, p 94-99. Callan was later a judge of the Supreme Court 1935-1951.

¹²³ *NZLJ*, (1930), 102.

¹²⁴ See, for example, *New Zealand Herald*, 23 April 1930, Value of Privy Council – The Greatest Tribunal – Views of the Chief Justice, and editorial A Vital Link of Empire; *The Christchurch Press*, 23 April 1930, Privy Council – Abolition not Favoured; *The Evening Post*, The Privy Council – Finest Tribunal in the World; and *New Zealand Herald*, 24 April 1930, Highest Appeal Court – Value of Privy Council – Strong Bond of Empire – New Zealand Support.

¹²⁵ [1941] *NZLR* 590.

gained their political independence from Britain. There were early warning signs before the War when Ireland departed, and Canada ceased criminal appeals in 1933, following the United Kingdom's enactment of the Statute of Westminster Act 1931. Canada had stopped allowing criminal appeals in 1888, but when this action was uncovered in 1926, it was halted for a brief few years.

Rohit De records¹²⁶ a 'secret' memorandum was prepared in 1943 by Lord Green, the Master of the Rolls – one of the senior Judges of England and Wales. Green proposed that 'the Judicial Committee become a 'peripatetic court' travelling through the British Empire.'¹²⁷ A few months later, the Lord Chancellor mentioned this possibility to High Commissioners from the Dominions. In his report to the New Zealand Prime Minister (Rt. Hon. Peter Fraser), the New Zealand High Commissioner (W.J. Jordan) identified that it was proposed that the New Zealand Chief Justice would be included in the peripatetic Judicial Committee.¹²⁸ Jordan advised that the proposal had yet to be considered by the British Government.¹²⁹ Burma departed from the Judicial Committee in 1947, Canada in 1949, followed by South Africa, India and Pakistan in 1950. British India, i.e. India and Pakistan, had been the major source of appeals, such that in the first half of the twentieth century, the Judicial Committee had maintained two appellate committees, with the second one solely devoted to determining the appeals from British India. By

¹²⁶ Rohit De (2014, November). A Peripatetic World Court Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council, *Law and History Review*, Vol. 32, No.4, 821-851.

¹²⁷ Ibid., 821.

¹²⁸ The Chief Justice was Sir Michael Myers. As noted earlier, Myers was a Privy Counsellor. There is a suggestion in the *NZLJ* that Myers was supportive of the discussions, especially to develop a Commonwealth Court of Appeal, as he came, reluctantly, to recognize the future of the Judicial Committee was doomed. [Hon Clifton Webb, in *The Late Sir Michael Myers – Tributes to his Worth and Work*, *NZLJ*, 2 May 1950, p 118-122, at 119.] During this period, Myers was involved in New Zealand's contribution towards the establishment of the United Nations, especially the International Court of Justice. It was for that reason that the Government extended Myers' term as Chief Justice for 12 months (s.2, Judicature Amendment Act 1945).

¹²⁹ W.J. Jordan to The Prime Minister, 8 January 1944, ABHS W4627 950 Box 3677, Archives New Zealand.

contrast, New Zealand continued to profess its commitment to the newly emerging British Commonwealth and to the Judicial Committee. This was highlighted when receiving several distinguished visitors, most notably Her Majesty Queen Elizabeth II and Prince Philip from December 1953 to January 1954. In January 1954, The Queen became the first reigning Monarch to hold a meeting of the Privy Council outside the United Kingdom.¹³⁰ The New Zealand Prime Minister was the Acting Lord President of the Privy Council.

The purpose of the meeting was to enable the newly appointed New Zealand Privy Counsellors, Chief Justice Sir Harold Barrowclough and Deputy Prime Minister, Mr Keith Holyoake, to be sworn in.¹³¹ This established a pattern, which was followed for the first eight of the Queen's ten visits to New Zealand.¹³² Similarly arranged meetings of the Privy Council were held in Australia in February 1954 and in Canada in 1957.

¹³⁰ In 1920, her uncle, the Prince of Wales, (later King Edward VIII, and, following his abdication, the Duke of Windsor), convened a Privy Council meeting in Wellington, attended by two New Zealand Privy Counsellors, the Prime Minister William Massey and the Leader of the Opposition, Sir Joseph Ward, to enable New Zealand's first Governor-General, Lord Liverpool, appointed a Privy Counsellor in 1917, to swear his Privy Counsellor's Oath, *Christchurch Press*, 10 May 1920.

¹³¹ Originally, The Queen had simply agreed with the Prime Minister, Rt. Hon. S G Holland, to hold a Privy Council meeting in Wellington, but no business had been identified. F.H. (Frank) Corner, then at the New Zealand High Commission, London, identified the need for a purpose, and, as it would be inappropriate for the Queen to assent to Government legislation at a meeting involving the Leader of the Opposition (Rt. Hon. W. Nash), suggested that the Deputy Prime Minister, Mr K.J. Holyoake, be appointed a Privy Counsellor. Two months before the Royal tour, the Chief Justice (Sir Humphrey O'Leary) died, and the Government appointed Harold Barrowclough as the new Chief Justice. Barrowclough's knighthood was conferred, separately, by the Queen during a Royal honours awards ceremony in the Wellington Town Hall.

¹³² Her Majesty The Queen has made ten visits to New Zealand. Privy Council meetings were convened on the first eight visits, in 1954, 1963, 1970, 1974, 1977, 1981, 1986, and 1990. No meetings were convened during the 1995 and 2002 visits as the respective Governments were actively considering withdrawing New Zealand from the jurisdiction of the Judicial Committee of the Privy Council.



Figure 2: Sir Michael Myers, Chief Justice of New Zealand, 1929-1946, wearing the Privy Counsellor's Civil uniform, with Court dress hat. The photograph was taken in 1936, when Sir Michael sat on two appeals at the Judicial Committee.

In January 1958, New Zealand hosted the British Prime Minister, Rt. Hon. Harold Macmillan. In his discussions with the New Zealand Cabinet, Mr Macmillan noted the changing nature of the Commonwealth that included ‘the development of a judicial system outside of the executive machinery of Government, which encouraged a proper respect for the law amongst its people.’¹³³ It was, however, the official visits by two United Kingdom Lord Chancellors¹³⁴ – Viscount Jowitt in 1951,¹³⁵ and Viscount Kilmuir in 1960¹³⁶ – that provided the best opportunities for New Zealand political, judicial and legal leaders to confirm New Zealand’s position on the role of the Judicial Committee. On 4 September 1951, the Bench and the Bar gathered in the main courtroom of the Wellington Supreme Court, where New Zealand’s Attorney-General, Hon Clifton Webb, reaffirmed New Zealand’s commitment to the Judicial Committee.¹³⁷ In addressing the Lord Chancellor,¹³⁸ he stated:

[a]s head of the Judicial Committee of the Privy Council, you are the very apex of our legal system in New Zealand. And may I say that, so far as New Zealand is concerned, we hope that that vital link which binds us to the Mother-country, and her to us, will never be broken. We regret that some other parts of the British Commonwealth have not taken the same view.¹³⁹

¹³³ Summary Record of Cabinet meeting [with Rt. Hon. Harold Macmillan], 23 January 1958. Cabinet Office Files, Prime Minister’s Department.

¹³⁴ In Britain, the Lord Chancellor (sometimes referred to as the Lord High Chancellor) outranked even the Prime Minister in the order of precedence.

¹³⁵ Lord Chancellor, 27 July 1945 – 26 October 1951.

¹³⁶ Lord Chancellor, 18 October 1954 – 13 July 1962.

¹³⁷ Thomas Clifton Webb (1889 -1962). Later Sir Clifton Webb.

¹³⁸ The Lord Chancellor was accompanied by England’s Master of the Rolls, the Rt. Hon. Sir Raymond Evershed, and the Chief Justices of Canada and India, the Rt. Hon. Thibaudeau Rinfret and the Rt. Hon. Sir Harilal Kania. All had travelled to New Zealand after attending the commemorations of the anniversary of the establishment of the High Court of Australia, as part of the 50th anniversary of the foundation of the Commonwealth of Australia.

¹³⁹ *NZLJ*, Vol. XXVII, 25 October 1951, 295. The full report of the proceedings is contained in 293-302. See also Sheila M. Belshaw, *Man of Integrity: A biography of Sir Clifton Webb*, (Palmerston North: The Dunmore Press, 1979). Belshaw was one of Webb’s two daughters.



Figure 3: Judges and the law profession greet the Lord Chancellor, Lord Jowitt, Wellington Supreme Court, 1951

A similar message was conveyed to Viscount Kilmuir when he visited in 1960. Mr David Perry, President of the New Zealand Law Society suggested the Lord Chancellor:

would be one with me when I suggest that any proposal to abolish our right of appeal to the Privy Council will be fought tooth and nail by the legal profession.¹⁴⁰

Such professions of loyalty were not confined to domestic expressions: in 1955, Mr Justice Gresson,¹⁴¹ leading the New Zealand delegation to the Commonwealth and Empire Law Conference held in London, suggested:

... that their Lordships of the Judicial Committee ... might sometimes come to us to hear appeals. We continue [to be] a faithful customer, as, too, does our sister Australia; and I think I speak for us both in saying we should welcome such visits.¹⁴²

From 1954, Kilmuir was concerned about the future of the Judicial Committee as former colonies withdrew upon attaining independence, or in the years shortly thereafter, even though most joined the British Commonwealth.¹⁴³ It was clear he was looking for allies. In 1957, the British Government insisted that Malaya continue to direct appeals to the Judicial Committee after gaining its political

¹⁴⁰ David Perry, Toast to the Judiciary, The Proceedings of the Dominion Legal Conference, Wellington, 19-22 April, 1960, *NZLJ*, 24 May 1960, Vol. XXXVI, No.9, 173.

¹⁴¹ Later Rt. Hon. Sir Kenneth Gresson. Appointed Supreme Court Judge 1947, and President of the New Zealand Court of Appeal 1957-63.

¹⁴² Quoted in D.I. Gledhill, (1955, 18 October). The Commonwealth and Empire Law Conference, 1955, *NZLJ*, 296. Mrs. Gledhill was Secretary of the New Zealand Law Society (1938-1959).

¹⁴³ The British Commonwealth, later renamed the Commonwealth, consisted only of independent former colonies. Initially this was the 'White' Dominions – Australia, Canada, Newfoundland, New Zealand and South Africa, although by convention, the Prime Minister of Rhodesia and Nyasaland also attended the Prime Ministers' Conferences chaired by the United Kingdom. The 1953 Conference was attended by eight nations, with India, Pakistan and Ceylon joining; by 1960, 11 countries were represented, and by 1965, even with South Africa's withdrawal, 21 countries were represented.

independence. As a concession, it was agreed that the Judicial Committee's decisions would be addressed to the Malayan Head of State, rather than the Queen. In 1957, the British Prime Minister sent a message to the New Zealand and Australian Prime Ministers seeking support for the British Government's position.

Macmillan argued that the retention of the Judicial Committee was important for the future development of the Commonwealth. Officials from the Department of External Affairs prepared the New Zealand Prime Minister's response, and discussed it with, and obtained the approval of, the Solicitor-General (H.R.C. Wild, QC,¹⁴⁴) and the Attorney-General (Hon. J.R. Marshall). In a handwritten file note, the Head of the Legal Division at External Affairs, A.B. Souter,¹⁴⁵ noted the response stressed 'the importance of complying with the wishes of the Malayan Government'; and did not share the UK Government's view about the importance of the Judicial Committee to the future development of the Commonwealth. Instead, the reply focussed on the constitutional issues. The file note also observed that the Judicial Committee was declining in strength, and it was 'significant that, ..., no article or paper on the Committee's future had been contributed to any of the reputable legal periodicals.' In his reply to the British High Commissioner, Prime Minister Holland states:

[t]he Judicial Committee ... is held in the very highest esteem by the Courts, by the legal profession, and by the general public of this country. The New Zealand Government, for its own part, most readily acknowledges the distinguished service ... rendered as a Court of final resort under the laws of New Zealand.¹⁴⁶

¹⁴⁴ Herbert Richard Churton Wild (1912-1978), known as Richard Wild, was Solicitor-General 1957-1966; and Chief Justice 1966-1978. He was knighted in 1966 and appointed a Privy Counsellor the same year.

¹⁴⁵ Now Dame Alison Quentin-Baxter.

¹⁴⁶ S.G. Holland to Sir Geoffrey Scoones, High Commissioner for the United Kingdom, Wellington, 29 January 1957.

The letter continued that New Zealand supported efforts to overcome the constitutional issues, if the Malayan Government wished to continue appeals to the Judicial Committee after achieving independence. New Zealand did not consider, however, it was possible to appoint Malayan judges to the Judicial Committee.

In 1958, the Solicitor-General, returned from appearing before the Judicial Committee and stated his belief that it should become peripatetic.¹⁴⁷ Mr Justice Turner¹⁴⁸ made a similar statement. Wild added that the Committee's membership should be broadened to include Commonwealth judges.¹⁴⁹ In 1960, the Lord Chancellor accepted the possibility of an expanded membership of the Judicial Committee, but did not believe it was possible for the Committee to travel, given the age of some British judges.

Broader Influential Developments

At the start of the 1960s, two broader developments were to influence the overall approach to New Zealand's policy on appeals to the Judicial Committee. The first broad development was Britain's position in the post-War world. The War, compounded by the Suez crisis, meant that Britain was in a serious economic situation. Britain could no longer maintain its Empire, even if it was allowed to do so. As that Empire evolved into a Commonwealth, Britain needed allies to support its bid to retain its influence. This provided an opportunity for New Zealand, as the most loyal of the old 'white' Dominions. Meanwhile, through the 1960s, Britain was to make three attempts to join the European Economic Community, and this posed a great threat to New Zealand's access for dairy products, especially butter, into Britain. New Zealand needed a strong relationship with the British Government if it was to secure future dairy access.

¹⁴⁷ *NZLJ*, 1958. 225

¹⁴⁸ Later Sir Alexander Turner. Appointed Supreme Court Judge 1953; Court of Appeal Judge 1962-1972, and President 1972-73.

¹⁴⁹ *NZLJ*, 1958, 225.

The second broad development was on the domestic legal scene. In 1957, Attorney-General Marshall successively overcame the longstanding opposition to the restructure of the Court of Appeal. This ended the peripatetic membership of the Court and, on 1 February 1958, the Court began with three judges, one of whom was the President, all sitting only in that Court, with the Chief Justice an *ex officio* member, but based in the Supreme Court.

More significantly, on the domestic legal scene, a debate began to emerge over the influence of the Appellate Committee of the House of Lords and its judgments on New Zealand's jurisprudence. The key discussants were professor A G Davis, dean of law at Auckland University College, and Dr Robin Cooke, a Wellington barrister. Since the 1876 reforms of the House of Lords Appellate Committee, the Law Lords, especially as their numbers grew, together with the Lord Chancellor,¹⁵⁰ provided the core membership of the Judicial Committee. The consequence was that key personnel, for example, de Villiers¹⁵¹ and Lord Haldane, spoke of the two Committees as divisions of the same Court. This was partly to rebuff earlier attempts by the Dominions, made against the background of the debate on Imperial Federation, to merge the two Committees into a single Court of Appeal. In 1911, the Imperial Conference resolved upon the two Committees as two divisions of the same Court of Appeal. In 1922, Haldane summarised the situation as:

[w]e sit in three divisions – three divisions of five apiece. One sits for Indian appeals, of which there are a great deal; the other for dominion and colonial appeals; and the third division, applying to a sitting in the House of Lords, hears appeals from, it may be, England, Scotland, or Ireland – the three parts of the Empire whose appeals go to the House of Lords.¹⁵²

¹⁵⁰ The Office of Lord Chancellor originated approximately 1,000 years ago. Until 2003, the Lord Chancellor was head of the judiciary, Speaker of the House of Lords, and a senior member of the British Cabinet.

¹⁵¹ See Walker, *Lord de Villiers.*, 119-120.

¹⁵² Lord Haldane, n.3 above, 148. Haldane (1856-1928) was Lord Chancellor between 1912-15, and again for most of 1924.

The importance of the judgments of the House of Lords Appellate Committee for the Empire was set out by Viscount Dunedin in a 1927 Judicial Committee judgment:

the House of Lords ... is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it.¹⁵³

In 1954 and 1955, Davis examined judicial precedent in New Zealand, concluding:

the New Zealand courts should, both in matters of procedure and in matters of substance, follow a decision of the House of Lords in preference to an earlier decision of the Privy Council, provided that, in the latter case, the House of Lords has expressly stated that the Privy Council has erred and in what respects it has erred. Any other course would only result in the law becoming unsettled and uncertain – consequences which are not in the best interests of the administration of justice.¹⁵⁴

In 1956, the New Zealand Court of Appeal, cited Davis' last article, and adopted Dunedin's description of the Appellate Committee as 'the Supreme Tribunal of the British Commonwealth.'¹⁵⁵ For that reason it preferred a decision of the House of Lords, rather than adhere to an earlier decision of its own. Cooke¹⁵⁶ challenged the automatic assumption that the Appellate Committee was to be preferred, pointing out that it 'has no jurisdiction over courts not within the United Kingdom.' He agreed with Davis' view that 'the House of Lords was the highest tribunal having the authority to lay down the principle of English law.' While acknowledging that

¹⁵³ *William Robins v The National Trust Company Limited and others* (Ontario) [1927] UKPC 14. Citation reported at [1927] AC 515, at 529.

¹⁵⁴ A.G. Davis, *Judicial Precedent in New Zealand*, *NZLJ*, (1954-55). I - Judgments of Courts of First Instance, 12 October 1954, 305-306; II - Supreme Court Practice, 23 November 1954 351-354; III - House of Lords and Privy Council, 22 February 1955, 42-45. Quote from the third article, 45.

¹⁵⁵ *Smith v Wellington Woollen Co.*, [1956] *NZLR* 491, at 500. Australia made a similar statement in 1943 recognizing the Judicial Committee's 1927 statement.

¹⁵⁶ R.B. Cooke, *The Supreme Tribunal of the British Commonwealth?* *NZLJ*, (1956) 233-236.

the New Zealand Court of Appeal might choose to follow the House of Lords, that was a question of judicial policy, and should not be taken without careful consideration. If adopted, this approach was not to be an ‘inflexible rule.’ In his case commentaries, Cooke’s criticisms of the deference to the House of Lords Appellate Committee remained an underlying theme. In 1959, for example, he observed:

although to a layman it might seem surprising that decisions of the House of Lords should still be treated as absolutely binding here, opinion in the [legal] profession is perhaps not yet ready for the Court of Appeal to take the logical step of declaring that, as the House of Lords is not part of the New Zealand judicial hierarchy, its decisions have no more than high persuasive authority in this country.¹⁵⁷

The main judicial test for this debate arose in 1962, when the Court of Appeal decided the case of *Corbett v Social Securities Commission*.¹⁵⁸ The proceedings commenced in the Supreme Court, but were removed to the Court of Appeal, for a hearing and first instance determination.¹⁵⁹ At the heart of the matter was a conflict between the judgments of the Judicial Committee given in 1931, and the House of Lords, given in wartime conditions in 1942, over a Minister’s powers to prevent the discovery of government documents for Court proceedings. To complicate the matter further, two of the Judicial Committee judges were members of the extended seven-judge Appellate Committee in the House of Lords. It was anticipated by the Court that the *Corbett* proceedings might go on appeal to the Judicial Committee, as Dunedin’s earlier judgment had held that where there was a difference between the Colonial Court and the House of Lords, that difference might be settled by the Judicial Committee. As noted, in this case the difference

¹⁵⁷ R.B. Cooke, *Dangerous Premises: Court of Appeal Decisions*, *NZLJ*, (1959), 117-123, at 122-123. [Judgment is reported at [1959] *NZLR* 642.]

¹⁵⁸ [1962] *NZLR* 868

¹⁵⁹ s.64, *Judicature Act 1908*, empowered the Supreme Court to order the transfer of the proceedings to the Court of Appeal, given the exceptional circumstances of the case.

was between the Judicial Committee and House of Lords. In separate judgments, delivered 14 months after the hearing of the case, the President, Sir Kenneth Gresson preferred the more recent House of Lords decision, which would support the Minister's decision to withhold the documents;¹⁶⁰ while Mr Justice North and Mr Justice Cleary preferred the Judicial Committee's precedent, which required the disclosure of the disputed file. This majority judgment was followed by the Supreme Court of Victoria later in 1962. Five years after the New Zealand decision, the House of Lords rejected its earlier precedent established in 1942, having announced in 1966, that, if necessary, it would not be bound by its own earlier decisions.

The case was seen as an important constitutional development. Reviewing the case a few months later, Cooke observed:

[t]he legal profession in New Zealand may indeed take some pride in the addition of the decision to our books, since it shows a degree of restrained independence of thought which might be felt appropriate to the highest Court in an independent member State of the Commonwealth.¹⁶¹

Legal historian, Peter Spiller, identifies *Corbett* as the first of six key cases 'illustrating the development of a New Zealand legal identity', and involving 'the gradual loosening of ties with English law and the emergence of a jurisprudence marked by practical justice considerations and an awareness of New Zealand's social and cultural realities.'¹⁶²

¹⁶⁰ Jeremy Finn argues that Gresson's position was misunderstood: in Gresson's view, the conflict of judicial authority '*required* the court to follow the House of Lords ...' [Finn's italics]. Jeremy Finn, Sir Kenneth Gresson: A Study in Judicial Decision-Making, *Canterbury Law Review*, Vol.6 1997, 481-498.

¹⁶¹ R.B. Cooke, The Board or the Lords? *NZLJ*, (1962) 463-467, and 534-538, at 538. (The 'Board' is another name for the Judicial Committee.)

¹⁶² Peter Spiller, *New Zealand Court of Appeal 1958-1996: A History*, (Wellington: Brookers, 2002) 382. *Corbett* is discussed at 382-386. Spiller is now a District Court Judge.

Commonwealth Judges Join the Judicial Committee

The question of role and membership of the Judicial Committee resurfaced at the Commonwealth Prime Ministers' Conference in 1960. Ceylon suggested a new Commonwealth Court of Appeal be developed as an alternative to the Judicial Committee, as this might be preferable for the newly independent countries. This new Court would have an added jurisdiction to determine disputes between Commonwealth member states. There was little enthusiasm for this proposal. The New Zealand Prime Minister (Rt. Hon. Walter Nash) said he would refer it to his legal advisers.¹⁶³ He reported to Cabinet that the 'proposition was not very clearly defined and perhaps, as a consequence, received little support.'¹⁶⁴ He forwarded the proposal to the Attorney-General (Hon. H.G.R. Mason, QC), who provided copies to the Solicitor-General and the Chief Justice (Sir Harold Barrowclough). None saw any merit in the proposal.

Following the change of Government after the 1960 general election, the proposal was raised with new Prime Minister Holyoake in February 1961, just before the meeting of Commonwealth Prime Ministers in London. The Prime Minister requested the views of his Attorney-General (Hon Ralph Hanan). Both the Chief Justice¹⁶⁵ and the Solicitor-General¹⁶⁶ reaffirmed their earlier views against the Ceylonese proposal for a Commonwealth Court of Appeal, but both favourably viewed the possibility of an increased Commonwealth representation on the Judicial Committee. The Chief Justice advised that Gresson was the most suitable

¹⁶³ Meeting of the Commonwealth Prime Ministers, Minutes of the Ninth Meeting (i.e. session), 11 May 1960, 8. ABHS W4627 950 Box 3699, Archives New Zealand.

¹⁶⁴ Sir Walter Nash, memorandum reporting on Meeting of Commonwealth Prime Ministers 1960. The 55-page memorandum, discusses Ceylon's proposal for Commonwealth Court at p36-37. ABHS W4627 950 Box 3699, Archives New Zealand.

¹⁶⁵ Rt. Hon. Sir Harold Barrowclough to Rt. Hon. K.J. Holyoake, re Judges sitting on the Judicial Committee of the Privy Council, 4-page letter, 24 February 1961. ABHS W4627 950 Box 3677. Archives New Zealand.

¹⁶⁶ H.R.C. Wild, QC to Hon. Ralph Hanan, 24 February 1961. ABHS W4627 950 Box 3699, Archives New Zealand.

appointee. He foresaw difficulties in providing a judge annually, as this was likely to mean an absence of four or five months, so suggested the arrangement be every second year, and to minimise the impact of the absence of either the Chief Justice or President, these visits should coincide with their sabbatical leave. Alternatively, he proposed ‘the appointment of someone who, towards the end of his judicial life, might be prepared to resign his post in New Zealand and accept an appointment in London for, say, four or five years.’¹⁶⁷ Holyoake met Kilmuir in London in March 1961. The Lord Chancellor proposed that New Zealand and Australian judges could sit on the Judicial Committee. Kilmuir followed up with a written proposal on 28 March, and Holyoake responded on 1 May 1961. On 15 June 1961, Kilmuir welcomed New Zealand’s ‘positive response.’ The British Government proposed that it would pay half the return travelling costs between Wellington and London, and a subsistence allowance to cover London living expenses, while the New Zealand Government would continue to pay the Judge’s salary. It was envisaged that each Judge appointed to the Privy Council would sit on the Judicial Committee during their sabbatical leave. Kilmuir did not favour the appointment of a permanent New Zealand judge for a fixed term.

Progress on the proposal stalled, as the Australian Government was not keen on the scheme, and was only revived in April 1962 when Gresson, wrote directly to the Lord Chancellor expressing the hope that he might be appointed to sit on the Judicial Committee, during the first half, if not the whole year, of 1963.¹⁶⁸ Gresson was due to retire in July 1963. On 30 July 1962, Cabinet agreed in principle to the proposal for the Chief Justice and judges of the Court of Appeal being appointed to

¹⁶⁷ Chief Justice, Sir Harold Barrowclough, to the Prime Minister, 24 February 1961. He assumed the salary and expenses would be paid by the New Zealand Government. ‘It would be rather embarrassing to the New Zealand Judge and I think, quite unworthy of this Dominion if the expenses were laid on the shoulders of the British taxpayer.’

¹⁶⁸ *NZLJ*, [1974], 512. See also Jeremy Finn, (1997). *Sir Kenneth Gresson*, 483; and Spiller, (2002) *The Court of Appeal*, especially 46-50. Spiller records in a footnote that Gresson was personally sworn in as a Privy Counsellor by the Queen herself – all 69 New Zealand Privy Counsellors were sworn in by the reigning Sovereign of the day.

and able to sit on the Judicial Committee of the Privy Council.¹⁶⁹ On 15 August 1962, in a letter drafted by the Solicitor-General, Prime Minister Holyoake wrote to his British counterpart, Harold Macmillan, restating his earlier message to the former Lord Chancellor, that

the Government of New Zealand firmly believed in the Judicial Committee not only for its importance in Commonwealth relations but also as the supreme appellate tribunal for Commonwealth countries. I said it was our wish that its position should be preserved and strengthened, that we felt the need to make its membership more representative, and that accordingly we should be happy to consider the proposal.¹⁷⁰

Holyoake confirmed the New Zealand Government's willingness for a New Zealand judge to be appointed to the Privy Council and to be able to sit on the Judicial Committee, while that judge was still a serving New Zealand judge.¹⁷¹ In other words, the ability to sit on the Judicial Committee would cease when the New Zealand Judge reached the New Zealand statutory retirement age (then set at 72 years).¹⁷² Holyoake identified Gresson, President of the Court of Appeal, as the

¹⁶⁹ Cabinet Minute, Appointment of New Zealand Judges to the Judicial Committee of the Privy Council, CM (62) 31, 1 August 1962. The Cabinet memorandum was CP (62) 671.

¹⁷⁰ Lord Kilmuir was replaced in July 1962 – one of the many Ministerial casualties in Macmillan's 'night of the long knives.'

¹⁷¹ Cabinet Minute, CM 62/31, 30 July 1962.

¹⁷² Until September 1903, there was no retirement age for judges of the Supreme Court. The Supreme Court Judges Act 1903 established 72 years as the statutory retirement age, but its provisions did not apply to serving Judges. These judges were Sir Robert Stout CJ, and Mr Justices Williams, Denniston, Conolly, Edwards and Cooper. (It was Conolly's failing health that prompted the legislation, which also provided for retirement benefits of serving judges who chose to retire after attaining the age of 72 years. [see especially Hon. Mr Pitt (Attorney-General) in the Legislative Council, 215-216, 2 September 1903, *NZPD*, Vol. CXXV.] Conolly, aged 81 years, resigned five days after the legislation received Royal assent.) On 1 January 1981, the statutory retirement age was reduced to 68 years for judges appointed from that date (s.2, Judicature Amendment Act 1980). On 6 March 2007, the statutory retirement age was increased to 70 years for all judges whether already serving or appointed from that date (s.4, Judicature Amendment Act 2007).

New Zealand Government's recommended appointee. If appointed, he would travel to London 'in about February 1963 to sit as a Member of the Judicial Committee up to 18 July 1963 when he will attain the age of 72 years.'

The proposal was discussed at the Commonwealth Heads of Government meeting in London. On 21 August 1962, the new Lord Chancellor, Viscount Dilhorne, responded to Holyoake reaffirming his commitment to his predecessor's arrangements, and mentioned that the Australian Prime Minister, Sir Robert Menzies, did not want to nominate individual judges, and instead proposed that all members of the High Court of Australia be appointed.¹⁷³ Britain agreed with this proposal, and suggested the same arrangement for New Zealand Court of Appeal judges. The Solicitor-General supported this proposal.¹⁷⁴ Cabinet agreed in principle that, in addition to the Chief Justice, all Court of Appeal Judges, would be appointed Privy Counsellors following their appointment to the Court.¹⁷⁵ Holyoake advised the Lord Chancellor, who agreed,¹⁷⁶ but it was not, however, until 1968 that this practice was adopted.

There was a further exchange of correspondence between Holyoake and Dilhorne in November 1962,¹⁷⁷ and Gresson's appointment to the Privy Council was announced on 21 December 1962. It was portrayed as being made 'in furtherance

¹⁷³ Sir Douglas Menzies, a first cousin of Sir Robert Menzies, was a Judge of the High Court of Australia (1958-74) and was among those appointed to the Privy Council in 1963.

¹⁷⁴ H.R.C. Wild, Solicitor-General to Attorney-General, Privy Council, 31 August 1962.

¹⁷⁵ Cabinet had earlier agreed that each Court of Appeal Judge would automatically receive a knighthood, following their appointment to the Court. Conferment of a knighthood and a Privy Counsellorship on appointment, mirrored appointment practices for judges of the Court of Appeal for England and Wales.

¹⁷⁶ K.J. Holyoake to Viscount Dilhorne, 18 September 1962; Viscount Dilhorne to Rt. Hon. Keith Holyoake, 21 September 1962.

¹⁷⁷ Prime Minister, Rt. Hon. K.J. Holyoake to Lord Chancellor, Viscount Dilhorne, 16 November 1962; and Viscount Dilhorne to Prime Minister Rt. Hon. K.J. Holyoake, 19 November 1962. Correspondence on External Affairs Department files, ABHS W4627 950 Box 3677, Archives New Zealand.

of the plan for the strengthening the Judicial Committee.¹⁷⁸ The Prime Minister indicated the arrangement was a ‘tremendously important milestone in the constitutional development of the British Commonwealth of Nations.’¹⁷⁹

Gresson’s action in writing directly to the Lord Chancellor was the catalyst for broadening the Commonwealth membership of the Judicial Committee.¹⁸⁰ He was among the first of the Commonwealth Judges appointed to, and the very first to sit on, the Privy Council under the new appointment arrangements. Gresson heard 12 appeals, and delivered the judgment in three of these appeals.¹⁸¹ Also in 1962, the Chief Justice of Trinidad and Tobago was appointed, and in 1963, the Chief Justice of Nigeria, and all the Judges of the High Court of Australia, (except the Chief Justice who was already a Privy Counsellor), were appointed.¹⁸²

¹⁷⁸ See, e.g. New Zealand Judge to Privy Council, *The Evening Post*, 21 December 1962; New Zealand Judge will Grace Privy Council, *The Dominion*, 27 December 1962.

¹⁷⁹ Mr Justice Gresson: Appointment to Privy Council, *NZLJ*, 1963,38.

¹⁸⁰ 65 years earlier, William Pember Reeves had been instrumental in broadening the membership of the Privy Council to include Empire politicians, with the appointment of the New Zealand Premier Richard John Seddon. See Keith Sinclair, *William Pember Reeves: New Zealand Fabian*, Oxford: Clarendon Press, 1965. 257-262. Seddon was sworn in on 7 July 1897 at Windsor Castle, along with the other first group of British Empire politicians, and two of the three first group of British Empire judges. All were in London for the Diamond Jubilee celebrations of Queen Victoria. Sir John Way, Chief Justice of South Australia, was sworn in earlier on 18 May 1897. [Source: *The London Gazette*, 21 May and 9 July 1897.]

¹⁸¹ On 15 April 1964, Gresson responded to an invitation from the Attorney-General for his opinion on the experience. Gresson believed a New Zealand judge should sit for at least one year, or possibly even longer, perhaps during retiring leave. Hanan was opposed to use of retiring leave for this purpose. In a subsequent letter on 29 May, Gresson added that ‘[e]xcept for the association with legal minds of the highest order, the value in sitting in the Judicial Committee contributes little to the discharge of Judicial duties in New Zealand.’ His April letter concluded with the observation that ‘I think the New Zealand Government exhibited a very parsimonious attitude in not contributing one penny to the cost of my term of service in the Privy Council.’ The last comment did not impress Hanan, Wild or Robson.

¹⁸² Subsequently, a further 23 senior New Zealand Judges were appointed between 1966 and 1999. As well, 10 Australian Judges were appointed between 1963 and 1979, and six other

In 1966, when Richard Wild became Chief Justice, he again encouraged the Government to accept the British Government's offer for all members of the Court of Appeal to be appointed Privy Counsellors. Within months of his appointment, Justices Turner and McCarthy of the Court of Appeal both wrote to him, 'the most scathing criticism of retention of appeals.'¹⁸³ Turner stated:

... there can be no room ... for continuing to submit appeals from New Zealand to a Court composed entirely of Judges of a different jurisdiction.¹⁸⁴

McCarthy had similar sentiments:

I think it is wrong and undignified for a country politically independent, as New Zealand is, to subject the judgments of its Courts to appeal to a body comprised of people who are neither legally nor emotionally part of the country. It is only in the field of law that we profess this immaturity and accept this subservience.¹⁸⁵

Commonwealth Judges were appointed between 1963 and 2004, to the Privy Council. A further 27 senior New Zealand politicians were also appointed between 1966 and 1999. In total, between 1894 and 1999, 69 New Zealanders were appointed Privy Counsellors – 29 of whom were Judges. Sir Charles Skerrett, Chief Justice 1926-29, was the only 20th century Chief Justice of New Zealand who was not appointed to the Privy Council. 21 of 23 20th century Prime Ministers (or Premiers) of New Zealand were appointed to the Privy Council. The two who were not appointed served only briefly (less than one year each). Appendix Four lists all New Zealand Privy Counsellors. Successive Prime Ministers Helen Clark (1999-2008) and John Key (since 2008) decided to make no further suggestions to the British Prime Minister for New Zealand appointments, and in 2010, the previous formal arrangements ceased. (see www.honours.govt.nz) At the same time, The Queen agreed to a proposal from Mr Key that New Zealand Governors-General, Prime Ministers, Chief Justices, and Speakers of the House of Representatives, be designated 'the Right Honourable', but they will not be members of the British Privy Council.

¹⁸³ J.L. Robson, to the Minister of Justice, Appeals to the Judicial Committee of the Privy Council, 5 April 1967. The quotes from McCarthy and Turner are taken from the Robson's memorandum.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

The new Chief Justice saw benefit in a judge sitting on the Judicial Committee and returning to judicial work in New Zealand. This view contrasted with that of his predecessor who believed that the New Zealand judge should only sit when he was nearing the end of his judicial career. Sir Alfred North, President of the Court of Appeal 1963-71, who was appointed to the Privy Council in 1966 along with Wild, sat on the Judicial Committee the following year.¹⁸⁶ North believed New Zealand was not ready to leave the Judicial Committee, but did consider that more Commonwealth judges join the English judges as often as possible. McCarthy sat in 1968, but objected to the British Government meeting his costs.

The benefits to New Zealand of the broadened membership of the Judicial Committee were highlighted in 1966 in the leading case of *Frazer v Walker & Others*,¹⁸⁷ an appeal from the New Zealand Court of Appeal. Sir Garfield Barwick, Chief Justice of Australia sat as a member of the Judicial Committee, and although he was not the principal author of the judgment, his role was acknowledged.¹⁸⁸ When the New Zealand Government sought information of the progress of the forthcoming judgment, the New Zealand High Commission in London replied it was advised 'it is with Barwick'.¹⁸⁹ The appeal,¹⁹⁰ which was dismissed, involved

¹⁸⁶ Sir Alfred North, The Privy Council [1967] *NZLJ* 487-488. In 1967 he sat on six appeals, including the very important *Australian Consolidated Press v Uren* [1969] 1 AC 590, which held that the High Court of Australia was not bound by decisions of the House of Lords Appellate Committee.

¹⁸⁷ [1967] *NZLR* 1069. The judgment, the case for the appellant (Mr Frazer), and the case for the first respondent (Mr Walker), and the record of proceedings in the lower Courts (with certain, less important, documents and exhibits omitted) are available on-line at www.bailii.org under Privy Council decisions for 1966.

¹⁸⁸ See, e.g., Mr R.J. Gilbert's comments to the 1972 Dominion Law Conference, in a session discussion a paper on New Zealand appeals to the Judicial Committee. Gilbert followed Sir Garfield Barwick as a commentator. *NZLJ* 1972, 511-512, 512.

¹⁸⁹ Cable from New Zealand High Commission London to Secretary of External Affairs, Wellington. ABHS W4627 950, Box 3677.

¹⁹⁰ The principal author was Lord Wilberforce, who delivered the judgment. Spiller (2002) records that the judgment unusually went through three drafts. All six counsel were graduates of Auckland University College, (five of whom were to be subsequently appointed to the Supreme/High Court).

the registration of land transfer, under the South Australian-developed Torrens title system. The wife of the appellant had fraudulently used Mr Frazer's signature to obtain a mortgage of £3,000 from the second respondents (Mr & Mrs Radomski), which had then been registered against the title of a small 10-acre block near Auckland. In a subsequent mortgagee sale, Mr Walker purchased the property. While it was recognised by all the Courts (the case began in the Magistrates Court, but was transferred to the Supreme Court for its first instance hearing, and then on appeal to the Court of Appeal and eventually to the Judicial Committee) adjudicating on the case that Mrs Frazer had no authority to mortgage Mr Frazer's interest in the land, the first and second respondents had acted lawfully and Mr Walker was entitled to the property. The case illustrated contrasting positions of the English common law and New Zealand statute law. Over time, and especially in the following decades, New Zealand statute law and judicial rulings thereon, were to become the predominant source of law. While much statute law codified provisions of the common law, key provisions of land law in New Zealand and Australia – so important for settler societies – were vastly different to the situation in England.

On the second day of hearings, one of the Judges, Lord Denning, wore an AUC tie, (given to him when he visited New Zealand the previous year,), to mark the passing of professor A.G. Davis, who had just died. [See D.S. Beattie, QC, Professor A.G. Davis, in R.B. Cooke (ed.), *Portrait of a Profession*, 197-199.] Two of the junior counsel (including W.D. (David) Baragwanath) were post-graduate students in England, and this was not an uncommon way in which some New Zealand lawyers gained their first experience of appearing before the Judicial Committee – as junior counsel. For an interesting profile of Lord Wilberforce, see, Peter Spiller, A Commonwealth of Legal Ideas: The Influence of Richard Wilberforce on New Zealand Law, *Oxford University Commonwealth Law Journal*, (2005) 29-62.

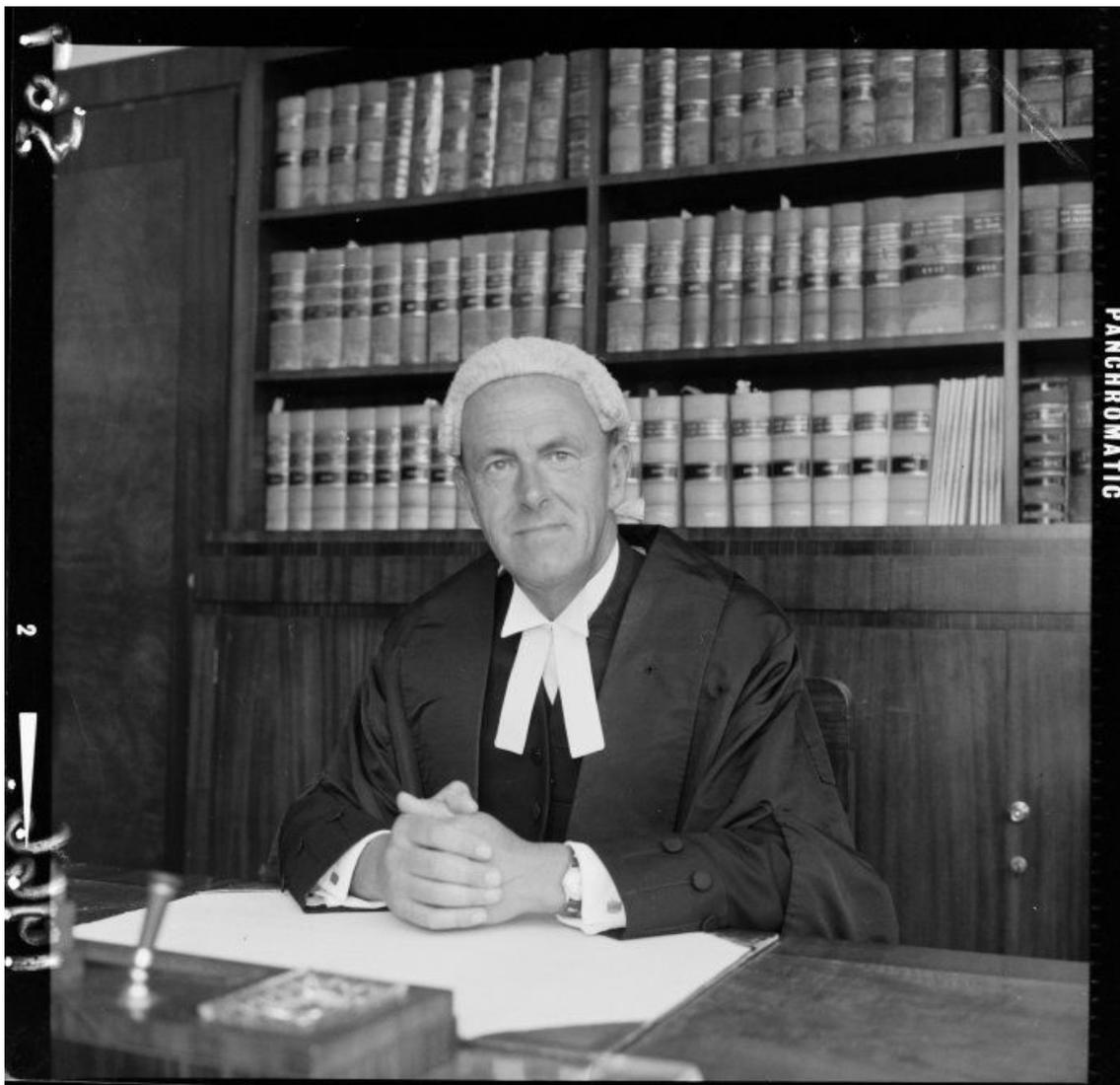


Figure 4: Sir Richard Wild, Chief Justice of New Zealand, 1966-1978. The Office is in the restored High Court building behind the new Supreme Court in Wellington. The building was opened in 1881, and was the principal office of all Chief Justices until the 1990s.

A New Commonwealth Court of Appeal?

Prior to the 1965 Commonwealth Prime Ministers' Conference, Malaysia raised with New Zealand, Australia, Ceylon and the United Kingdom, the possibility of a new Commonwealth Court, possibly based on a regional basis. The proposal was not supported by South Africa, Canada, India, Pakistan, Ghana, or Australia.¹⁹¹ Also in 1965, in a separate move and independent of the Commonwealth Prime Ministers' Conference, Lord Gardiner, the Lord Chancellor in Britain revived the proposal for a Commonwealth Court of Appeal, combining both the House of Lords Appellate Committee and the Judicial Committee.

The net effects were two separate proposals, neither of which was well developed, and both were discussed at meetings in Australia.¹⁹² Some insight to the New Zealand position for the Canberra meeting – in the event that the matter was raised – can be gained from a file note of a discussion between the Solicitor-General and R.Q. (Quentin) Quentin-Baxter, a key legal adviser at the Department of External Affairs.¹⁹³ The note acknowledged 'the great importance which the New Zealand Courts and legal profession attach to the Judicial Committee;' recognised that the Judicial Committee is in decline as the newer Commonwealth members see it as 'a relic of the old Imperial past;' noted New Zealand's contribution to broaden its judicial membership; and accepted that a regional court may have some advantages. They recognised that New Zealand's main interest was 'to secure continued access to an adequate form of Commonwealth appellate system.' New Zealand would need reassurance about the calibre of the

¹⁹¹ Meeting of the Commonwealth Prime Ministers, Minutes of the Thirteenth Meeting (i.e. session), 24 June 1965, p 5-7. ABHS W4627 950 Box 3699, Archives New Zealand.

¹⁹² At the Commonwealth and Empire Law Conference, held in Sydney, and in a subsequent Canberra meeting, involving senior Judges, Attorneys-General and other senior Government officials of selected Commonwealth countries. New Zealand sent a strong delegation to the Sydney conference, but the discussions did not impress. See *NZLJ* 1965.

¹⁹³ Proposed Commonwealth Court of Appeal, [Notes of a meeting], 19 August 1965. ABHS W4627 950 Box 3699, Archives New Zealand.

judiciary, and there would need to be widespread Commonwealth support for any change.

In 1966, following the change of Prime Minister, the Australian Government made the first of what was to be a three-stage process, conducted over 20 years, to end appeals to the Judicial Committee.¹⁹⁴

Prime Minister Holyoake addressing the 1966 Dominion Law Conference expressed his support for the proposed Commonwealth Court of Appeal but acknowledged that further work was required to develop the proposal.¹⁹⁵

The Future of New Zealand Appeals

Attorney-General Hanan, initially supported the continuation of New Zealand appeals to the Judicial Committee, including the 1965 proposal for a Commonwealth Court, but by the late 1960s he had become disillusioned and began to speak of the need for New Zealand to consider ending appeals to the Judicial Committee.¹⁹⁶ Hanan died shortly after his address, and different Ministers held the warrants of Attorney-General and Minister of Justice for the first time since 1935. Deputy Prime Minister Marshall, who had held the dual portfolios between 1954 and 1957, regained the role of Attorney-General, while Mr D.J. Riddiford was appointed as Minister of Justice.¹⁹⁷

¹⁹⁴ The Privy Council (Limitation of Appeals) Act 1966 excluded appeals on what was referred to ‘compactly, even at the expense of accuracy, as ‘federal matters.’ Sir Anthony Mason, *The Break with the Privy Council and the Internationalisation of the Common Law*, 66-81 in Peter Cane (ed.), *Centenary Essays for the High Court of Australia*, Lexis Nexis Butterworths, Chatswood, 2004.

¹⁹⁵ Rt. Hon. K.J. Holyoake, Opening Address, *NZLJ*, 1966

¹⁹⁶ Ralph Hanan, *Law Reform*, *NZLJ*, (1969) 365-371. See also B J Cameron, *Appeals to the Privy Council – New Zealand*, 2 *Otago Law Review*, (1970) 178.

¹⁹⁷ Later in 1971, as Marshall’s Overseas Trade Ministerial duties intensified, Riddiford was appointed Attorney-General.

In March 1970, Riddiford agreed to present a paper to Cabinet on ‘the value of retaining the system of appeals to the Privy Council.’¹⁹⁸ In a memorandum for Riddiford, Justice Secretary (E.A. Missen) confirmed the firmly held views of the department that New Zealand appeals to a ‘dying’ institution should end.¹⁹⁹ Missen believed that Riddiford supported the continuance of appeals. Riddiford prepared a response,²⁰⁰ but put this on hold, while he sought advice from his former colleague, Robin Cooke, QC. Cooke made several observations, including: a court of three judges is insufficient ‘given the ever-growing complexity and range of modern law;’ ending appeals would be ‘a step towards severing all links with the Crown;’ it provides ‘links between those who administer the common law’ and the ‘arguments for abolition are usually based, not on solid reasons, but on emotive invocations of New Zealand’s sovereignty, independence, and so forth.’ He concluded:

[w]hile the Court of Appeal consists of three Judges only, it is scarcely thinkable that the Privy Council appeal should be done away with. If and when the Court of Appeal is increased in numbers, experience of the working of the reconstituted Court could lead to a consensus in favour of making it the ultimate tribunal.²⁰¹

Riddiford’s finalised version was strengthened by material drawn from Cooke’s memorandum.²⁰² In June 1970, Riddiford met Sir Alfred North, President of the Court of Appeal to discuss the issue. Later that day, North confirmed he had seen

¹⁹⁸ P.J. Brooks, Cabinet Secretary, to Minister of Justice [D.J. Riddiford], 3 March 1970. Cabinet Office File, Archive Reference Number AAFD W4198 811 Box 22.

¹⁹⁹ E.A. Missen, Secretary for Justice to the Minister of Justice, Privy Council, 22 April 1970.

²⁰⁰ Minister of Justice to Secretary for Justice, Privy Council, 30 April 1970. Across the top corner of the three-page memorandum, is handwritten ‘Draft Retain here in the meantime.’ Copy on Department of Justice File.

²⁰¹ R.B. Cooke, Privy Council Appeals, Memorandum for the Honourable the Minister of Justice, 5 May 1970. Cooke observed that the membership of the present Court was better balanced than the initial permanent Court.

²⁰² Minister of Justice to Secretary for Justice, Privy Council, 20 May 1970.

the 1966 letters McCarthy and Turner sent to the Chief Justice. On the bottom of the file copy of his response, Riddiford hand writes that ‘Sir A. North is a retentionist on two principled grounds – (1) the desirability of retaining appeals to a Court completely independent of local pressures. (2) the matchless quality of the personnel of the P.C.’²⁰³ During his consultations with the Attorney-General, Marshall indicated that he did not want a New Zealand Judge sitting on a New Zealand appeal at the Judicial Committee until the Europa tax case had been resolved.²⁰⁴

Cabinet finally considered Riddiford’s brief information paper in February 1971. The paper outlined the history and present law; the frequency of New Zealand appeals – between none and three per year in recent years; identifying those other Commonwealth countries who had ceased and those who retained appeals; outlining the arguments for and against maintaining appeals; before concluding that:

if the Privy Council were to lose its importance because of events unconnected directly with New Zealand it might be expedient for us to abolish appeals rather than to cling to the shadow of a shade.²⁰⁵

The conservative approach of the Minister can be contrasted with the views of one of his key Departmental advisers, Jim Cameron. In 1970, Cameron published a paper on New Zealand appeals to the Privy Council, arguing that on both legal and

²⁰³ D.J. Riddiford to Rt. Hon. Sir Alfred North, 19 June 1970.

²⁰⁴ The first events involving New Zealand judges and New Zealand proceedings were in 1978 when Chief Justice Sir Richard Wild was a member of the Judicial Committee that, for lack of jurisdiction, refused to grant Arthur Allan Thomas special leave to appeal his convictions for the murders of Jeanette and Harvey Crewe, *Thomas v R.* [1978] 2 NZLR 1; and in 1985 when the President of the Court of Appeal, Sir Owen Woodhouse, was a member of the Committee on *Scancarriers A/S v Aotearoa International Ltd*, where the appeal involved contract formation and it was allowed, but a cross-appeal was dismissed, [1985] 1 NZLR 513.

²⁰⁵ Office of the Minister of Justice, [Hon. D.J. Riddiford], Appeals to the Privy Council, [Memorandum to] All Members of Cabinet, 13 October 1970. Cabinet Office, reference CP (70) 1141.

political grounds it was time for New Zealand to leave.²⁰⁶ He identified the view of the New Zealand Law Society that it was important to maintain a two-tier appellate system above the Supreme Court, as the principal reason for the profession wishing to retain the right of appeal to the Judicial Committee. Cameron's paper represents the first time in which the arguments for and against maintaining appeals to the Judicial Committee had been so clearly set out.

In February 1972, Holyoake resigned as Prime Minister, and was replaced by Marshall. The new Attorney-General and Minister of Justice was Sir Roy Jack. He, too, proposed a paper to Cabinet on the future of appeals, but did not do so before the General Election and the change of Government in November of that year. The Solicitor-General (R.C. Savage, QC) suggested that Judges should not be obliged to use their sabbatical leave to sit on the Judicial Committee. The Department of Justice did not agree. Jack, as Minister of both departments, sought 'a compromise' given the financial pressures on the Government.²⁰⁷

Meanwhile, Mr Justice Haslam presented a prepared paper to the 1972 Law Society Conference.²⁰⁸ A long-standing supporter of the *status quo*, he highlighted the history of, and benefits for, New Zealand appeals. In the subsequent discussion

²⁰⁶ B.J. Cameron, Appeals to the Privy Council – New Zealand, *2 Otago Law Review* (1970) 172-179. Cameron was Chief Legal Adviser at the Department of Justice, although he emphasized that the views expressed were the writer's personal views only. Cameron's article was one of a series of articles in *the Otago Law Review* examining the position of several Commonwealth countries – Australia, Fiji, Malaysia and Singapore – and their appeals to the Judicial Committee. The commissioned papers were a follow-up contribution to the 1969 New Zealand Law Society conference.

²⁰⁷ Solicitor-General to the Attorney-General, N.Z. Judicial Representation on Privy Council, 25 February 1972; Attorney-General, to Solicitor-General, N.Z. Judicial representation on Privy Council, 22 May 1972; Secretary for Justice to the Minister of Justice, Privy Council – Representation of New Zealand Judges, 21 July 1972; Solicitor-General to Attorney-General, Privy Council Representation of New Zealand Judges, 5 October 1972. Archives New Zealand.

²⁰⁸ Mr Justice Haslam, The Judicial Committee – Past Influence and Future Relationships, *NZLJ*, (1972) 542-549.

there was general agreement that the profession wanted to retain appeals, and that the main advantage was that it provided an opportunity for a second appeal. Cooke observed that the Judicial Committee was ‘a valuable part of our checks and balances making up our constitution and that ... we should take pride in this part of our heritage.’²⁰⁹ Chief Justice Wild, having returned from overseas, noted that, in a recent meeting with the Lord Chancellor, he had renewed his suggestion for the Judicial Committee to travel to New Zealand to hear appeals.²¹⁰ The Law Society wrote to Jack supporting the Chief Justice’s proposal, and renewed their message later in the year in a letter to the incoming Prime Minister (Hon. Norman Kirk).²¹¹ Kirk referred the correspondence to his Attorney-General.

As Attorney-General and Minister of Justice (1972-75), Dr Martyn Finlay was reported to have personally preferred to maintain appeals, ‘on both practical and professional grounds.’²¹² In 1973, Dr Finlay advised Parliament that he had ‘no immediate intention of recommending to the Government a change in our appellate structure.’²¹³ He noted that ‘this arrangement does not preclude further consideration, especially if Australia decides to abolish all rights of appeal to the Privy Council.’²¹⁴ He ‘could not argue’ with Sir John Marshall’s proposition that ‘the continuation of the right of appeal to the Privy Council is a valuable link in the Commonwealth chain which binds New Zealand to Britain.’²¹⁵ In concluding his response he observed:

²⁰⁹ R.B. Cooke, QC, Discussion [on Mr Justice Haslam’s paper], *NZLJ*, 5 December 1972, 552-553, 553.

²¹⁰ Sir Richard Wild, Discussion [on Mr Justice Haslam’s paper], *NZLJ*, 1972, 554.

²¹¹ Mr S.W.W. Tong, President, New Zealand Law Society, to the Hon. Norman Kirk, Prime Minister, 12 December 1972.

²¹² Memorandum from P.G. Millen, Secretary of the Cabinet, to the Attorney-General [Hon. P.I. Wilkinson] 4 May 1976. Cabinet Office File, AAFD W4198 811 Box 22, Archive New Zealand.

²¹³ *NZPD*, 4715, 2 October 1974.

²¹⁴ *NZPD*, 4716, 2 October 1974.

²¹⁵ *Ibid.*

... the three-tier appeal pattern has been well established, and one would be hesitant to change that to a two-tier structure, which would be the effect of making our Court of Appeal the final right of recourse, without careful consideration.²¹⁶

In December 1972, the President of the Court of Appeal, Sir Alexander Turner, proposed retiring five months earlier than his statutory retirement due in November 1973 and, using some of his accumulated leave, sitting on the Judicial Committee. He requested the Government meet his full expenses. The Secretary for Justice, E.A. Missen, advised the Minister that this would be a change in policy, and that Chief Justice Wild had sat during 1972. Missen did, however, suggest that, if the Government wanted to fund Turner's expenses, it might make a clear statement that this was a special case.²¹⁷ Finlay was, however, interested in the Chief Justice's suggestion that the Judicial Committee might hear appeals in New Zealand, and thought this might offer a chance to honour Turner. In 1973, Finlay was advised that, with Australia's determination to end appeals to the Privy Council, the Chief Justice's proposal was unlikely to be pursued.²¹⁸ Turner was succeeded, as President, by Mr Justice McCarthy, and during 1973-74, the services of the third member of the Court were provided by a succession of Supreme Court judges on short-term assignments, pending the appointment of a third permanent member.²¹⁹

²¹⁶ Ibid., Response to Mr Paddy Blanchfield, M.P.

²¹⁷ E.A. Missen, Secretary for Justice to the Minister of Justice, Judicial Committee of the Privy Council, 16 January 1973. Finlay responded that he had discussed the situation with Sir Alexander Turner and 'need say no more for the record than that no further action will be required.' Minister of Justice to the Secretary for Justice, 1 February 1973.

²¹⁸ B.J. Cameron for Secretary for Justice, to Minister of Justice, 2 May 1973. Copy of memo in the personal papers of Dr. A.M. Finlay, QC. ABAG W1704 24951 Box 16, Archives New Zealand.

²¹⁹ As Turner was on leave, it was not possible to appoint a replacement. Instead, the Judicature Amendment Act 1973 provided for an additional judge, drawn from the Supreme Court. A similar situation arose with Gresson's retirement in 1963, although in that case Mr Justice Nigel Wilson was appointed temporarily for nine months, from December 1962 to August 1963, and his

Finlay had acknowledged that if Australia departed from the Judicial Committee, he would ‘question whether a majority of practising lawyers would now be upset by the abolition of appeals.’²²⁰ In 1973, the Australian Government announced its intention to end appeals to the Judicial Committee. On the eve of his visit to London, the Australian Prime Minister, Mr Whitlam, confirmed his intention to raise the matter with British Prime Minister, Rt. Hon. Edward Heath. Whitlam’s proposal caused an angry outburst from State Premiers, and they announced their intention to go to London to make their own representations opposing the Federal Government’s proposal. On his return to Australia, Whitlam advised Cabinet that ‘there had been a British preference for a referendum, but an acceptance that Australia is entitled to make its own decisions about its highest court of appeal.’²²¹ Progress slowed, but eventually legislation was enacted in 1975 to end appeals from High Court to the Judicial Committee.²²² Appeals from certain State Supreme Courts and Courts of Appeal could still be made, and legislation ending these sources of appeals was enacted in 1986, and the final Australian appeal was determined in 1987.

appointed was retrospectively confirmed as a permanent appointment, s.2, Judicature Amendment Act 1963. Both Spiller (2002) and Bigwood (ed., 2009) overlook Wilson’s retrospective appointment, when listing the permanent judges of the Court of Appeal.

²²⁰ A.M. Finlay, Minister of Justice, to the Prime Minister, 18 January 1973. The Minister was commenting on a briefing paper prepared by B.J. Cameron of the Department of Justice, on Appeals to the Privy Council, for the New Zealand Prime Minister (Hon. N.E. Kirk) for his meeting in Wellington with the Australian Prime Minister, Hon. E.G. Whitlam, QC. Mr Whitlam was intending to abolish Australian appeals to the Judicial Committee. ABHS W4627 950 Box 3699, Archives New Zealand.

²²¹ Australian Cabinet Minute, Abolition of Appeals to the Privy Council, 1 May 1973, National Archives of Australia, available on-line. In 1983, Michael Kirby noted that Prime Minister Whitlam had suggested the establishment of ‘an entirely Australian Judicial Committee of the Privy Council ... to hear Australian Privy Council appeals, but this was rejected by the British authorities.’ See M.D. Kirby, CER, *Trans-Tasman Courts and Australasia*, *NZLJ*, September 1983.

²²² The Privy Council (Appeals from the High Court) Act 1975 (Cth.). This was the third of three Bills the Whitlam Government introduced to achieve its goal.

Finlay agreed to the renewed suggestion of the Solicitor-General that the terms and conditions for New Zealand judges serving on the Judicial Committee be revised and improved. Cabinet agreed that a serving Judge, who was a Privy Counsellor, could sit on the Judicial Committee 'at regular intervals of not greater frequency than once every two years, depending on the decision of the Chief Justice as to any congestion or delay their absence will create in Court calendars in New Zealand; at such time of the year as may be arranged with the Chief Justice and the Judicial Committee; that the time served would not be deducted from part of that judge's sabbatical leave; and that the New Zealand Government would pay the return first class airfares and reasonable expenses and a maintenance allowance for the judge and his wife.'²²³ Cabinet also added that the travel was to be funded by savings made elsewhere in the vote for the Department of Justice.

Through the 1960s and the 1970s there had been concern at the workloads of the Supreme Court and the Court of Appeal, especially on criminal matters. Part of the problem was that there was virtually no further appeal on criminal matters beyond the Court of Appeal. Any appeal required a successful petition for special leave to the Judicial Committee, requiring an exercise of the Royal prerogative, and despite a number of petitions, until 1974, only one appeal had been heard, and that, in 1897, was unsuccessful.

In 1974, Mr Edward Francis Nahkla was granted special leave to appeal the Court of Appeal's dismissal of his appeal against his conviction and sentence to nine months' imprisonment on a charge of frequenting a public place with felonious intent. Spiller (2002) uses this a short case study to highlight difficulties within the Court of Appeal – both generally and with this specific case. When the Court delivered its judgment in October 1973, one page was omitted and it was this page,

²²³ Cabinet Minute, CM74/25/10, 24 June 1974. In making its decision, Cabinet extended the Minister's recommendations concerning the travel and allowances provisions to apply to the Judge's wife as well. In 1962 Cabinet excluded the application to a Judge's wife, a position reaffirmed in 1966 when approving Sir Alfred North's attendance at the Judicial Committee in 1967 – Cabinet Minute, CM 66/49/39, 19 December 1966.

which addressed the issue of frequenting. When the omission was discovered the missing page was offered to Mr Nakhla's counsel, Mr Gazley, who rejected it. There then followed a series of events, which Spiller summarises.²²⁴ Spiller also records that Mr Nakhla's appeal to the Judicial Committee was successful²²⁵, and he was eventually awarded an *ex gratia* payment of \$14,000. Finlay's papers reveal that McCarthy requested that the Attorney personally lead the Crown's defence at the Judicial Committee; that Finlay sent a memo to Prime Minister Kirk, five days before the latter's death; and that Cabinet subsequently decided that the Solicitor-General should lead the Crown's defence. While Attorney-General Marshall had conducted two criminal appeals in the Court of Appeal in the mid-1950s,²²⁶ from the 1960s onwards, it was thought inappropriate for the senior Law Officer of the Crown (the Attorney-General, who was a politician) to appear in criminal proceedings, and that these powers should be always controlled by the junior Law Officer (the Solicitor-General, who was a civil servant). When McCarthy retired from the Court in 1976, he observed that it was time for New Zealand to withdraw from the Judicial Committee.

Successive review committees, each chaired by a senior judge, had examined the domestic situation for criminal appeals in 1962, 1972 and 1974. By 1975, Finlay was proposing to prepare a 'Green Paper' on the structure of the Courts. This was welcomed by the New Zealand Law Society, which provided a submission to the Minister. The Law Society did, however, consider a more formal inquiry was

²²⁴ See Spiller (2002), 33-35. A motion asking the Court of Appeal to set aside its judgment was heard and rejected in December 1973; Mr Gazley was found guilty of misconduct by the New Zealand Law Society's Disciplinary Committee and was fined and censured; and civil proceedings against Sir Thaddeus McCarthy on the basis that he had 'improperly determined' Mr Nakhla's case, were dismissed by the Court of Appeal in 1977.

²²⁵ Gazley briefed Paul Temm, QC, to argue the case before the Judicial Committee. See Gary Turkington, *William Vernon Gazley, 1921-2011, People in the law - Obituaries*, www.lawsociety.org.nz

²²⁶ John Marshall, *Memoirs: Volume 1 - 1912-1960*, (Auckland: Collins, 1983). The appeals were: *The Queen v Freeman* [1955] NZLR 718; and *In re Woodcock v Woodcock* [1957] NZLR 960.

required.²²⁷ In its 1975 Election Manifesto, the National Party proposed a Royal Commission instead. As the new Government set about implementing its proposal, there was a debate within Cabinet as to whether the terms of reference should require the Royal Commission to examine whether or not the right of appeal to the Judicial Committee should be abolished.²²⁸ Cabinet decided not to include this question in the terms of reference, instead requiring the Royal Commission to inquire into and report on, *inter alia*, the position of the Court of Appeal under two scenarios: either the Judicial Committee remains, or the Court of Appeal becomes, New Zealand's final appellate court.²²⁹

The Royal Commission, chaired by Mr Justice Beattie,²³⁰ reported in 1978.²³¹ Most of the Royal Commission's recommendations concerned the domestic courts, particularly the Supreme Court – to be renamed the High Court; and the Magistrates Court – to be renamed the District Courts with an expanded jurisdiction. In its recommendations concerning the place of the Judicial Committee, the report made 14 recommendations.²³² The report cautioned that 'the right of appeal to the Judicial Committee should not lightly be abolished'; but

²²⁷ New Zealand Law Society, First Submissions to the Royal Commission on the Courts, 1 March 1977, 1. Wellington: New Zealand Law Society.

²²⁸ P.G. Millen, Secretary of the Cabinet to the Attorney-General, 4 May 1976. Millen refers to Mr Gair's comments that he 'hoped the wisdom or otherwise of continuing with appeals to the Privy Council would be considered' and notes that Cabinet regarded the issue as a separate matter accepted that it would be considered.

²²⁹ Terms of reference for the Royal Commission on the Courts, as approved in Executive Council, 4 October 1976. Reprinted ix, *Report of Royal Commission on the Courts*, (1978) Government Printer, Wellington.

²³⁰ Later Sir David Beattie. A Judge of the Supreme Court 1969-80; then Governor-General, 1980-85.

²³¹ Report of the Royal Commission on the Courts, (1978). Part I provided a brief history of the Courts in New Zealand and was a condensed version of a submission prepared by Mr B.J. Cameron, Deputy Secretary for Justice.

²³² Three concerned the right of appeal to the Judicial Committee; eight concerned the constitution of the Court of Appeal in the event that the Judicial Committee was retained; and three if the Court of Appeal was to become the final appellate tribunal for New Zealand.

recognised that this may occur in time, and identified the need to use the intervening period to establish the best possible appellate system. It recommended the Court of Appeal have the right to grant leave to appeal to the Judicial Committee for both civil and criminal appeals, with the Judicial Committee able to grant special leave to appeal. The Report did not see the need for financial limits on civil appeals, but did encourage the granting of legal aid ‘with reasonable liberality.’ If the Court of Appeal was to be the final appellate court, the report did not see that it was possible to establish a two-tier appellate system, but did encourage the Court to sit as a panel of five judges for more important or difficult cases. The Government implemented many of the Royal Commission’s recommendations, but the policy and legislative settings for New Zealand appeals to the Judicial Committee remained unchanged. In 1981, the Labour Party proposed, as an election policy, to end appeals to the Judicial Committee, although not all Labour Party members supported this new policy.

The Beginnings of the Public Debate

In 1982, the Judicial Committee issued a judgment in the case of *Lesa v the Attorney-General*.²³³ As professor F.M. Brookfield noted: ‘few judgments in New Zealand’s legal history have had so much public impact or caused so much public controversy.’²³⁴ Samoan-born Ms Lesa had been convicted of being an overstayer. Ms Lesa appealed to the Judicial Committee arguing that she was a New Zealand citizen under legislation dating from the time when Western Samoa was ruled by New Zealand under a League of Nations mandate. This argument had been raised

²³³ [1982] 1 NZLR 165. Ms Lesa’s counsel was Dr George Barton. For his work on the *Lesa* case, Samoans honoured him with a *matai* title. In 1989 Dr Barton was appointed a QC. Dr Barton (1925-2011) was a member of the Faculty of Law at Victoria University of Wellington, 1953-1977. He appeared as counsel in 10 appeals before the Judicial Committee. On 6 July 2011, a special sitting of the High Court, presided over by Chief Justice Elias, was held to mark the death of Dr Barton and to pay tribute to his work. (Information from Sir Ivor Richardson, A Tribute to Dr George Barton, 43 *VUWLR*, (2012) 17-20.)

²³⁴ F.M. Brookfield, New Zealand Citizenship and Western Samoa: A Legacy of the Mandate, *Otago Law Review*, Vol 5 No 3, (1982), 367-396.

unsuccessfully by others in earlier proceedings before the New Zealand Court of Appeal, but the nature of those proceedings meant that that Court's ruling was final. Ms Lesa could, however, appeal to the Judicial Committee, which upheld her appeal. This caused a strong reaction both among Government circles and with the wider public. The public was concerned that the ruling would lead to a strong influx of Samoans to New Zealand. The personal papers of Sir Robert Muldoon hold more than 200 letters from members of the public mostly urging Government action to counter the judgment.²³⁵ The Government urgently consulted the Samoan Government, sending the Attorney-General and Minister of Justice, Hon Jim McLay,²³⁶ to Samoa. Although McLay did not have Ministerial responsibility for citizenship policy, he quickly introduced legislation to restrict the impact of the judgment, beyond the appellant parties.²³⁷ The Opposition supported this legislation.

In 1982, having completed the Government's immediate legislative responses to the Report of the Royal Commission on the Courts and to the Judicial Committee's *Lesa* decision, McLay began to raise the question of the future of New Zealand appeals to the Judicial Committee. He started with a memorandum to Cabinet in which he observed that abolition 'raised constitutional issues and should not be taken in haste.' He also recorded that the United Kingdom Government was concerned that New Zealand's withdrawal could 'considerably diminish' the international role of the Judicial Committee. He proposed to discuss the matter with the English Attorney-General, on 'a preliminary and non-committal basis.'²³⁸

²³⁵ AAXO 22138 W2956, Archives New Zealand.

²³⁶ Now Sir James McLay.

²³⁷ The responsibility lay with the Minister of Internal Affairs, Hon Allan Highet. The Citizenship (Western Samoa) Act 1982 clarified the citizenship status of those people affected; s. 5 declared Falema'i Lesa of Wellington to be a New Zealand citizen; and s.8 quashed certain convictions imposed before the Judicial Committee's decision.

²³⁸ Cabinet paper, Appeals to the Privy Council, J.K. McLay, Minister of Justice, CS (82) 1260 of 16 December 1982. The two Attorneys-General were to meet in February 1983, at the Commonwealth Law Ministers' conference in Sri Lanka.

In a follow-up memorandum in February 1983, McLay provided a short summary of 11 ‘cases which illustrate[d] the competing arguments for retention of appeals to the Privy Council’.²³⁹

In a February 1983 speech, McLay indicated that New Zealand should end appeals ‘in due course.’ This speech drew an editorial comment which observed that the ‘central issue for debate is ... whether resort to the council [i.e. the Judicial Committee] aids the discharge of perfect law.’²⁴⁰ McLay then published a newspaper article²⁴¹ in which he noted a poll, conducted in October 1982 in the aftermath of *Lesq*, had New Zealanders evenly split 40% for and against continuing appeals to the Judicial Committee, while 20% did not express an opinion or were undecided. He wanted to promote ‘an informed, restrained and non-political debate.’ In his view, only four of 32 decisions delivered by the Judicial Committee since 1960, had contributed to the development of New Zealand jurisprudence.²⁴² He canvassed the main arguments for and against retaining the Judicial Committee, and identified, but dismissed, several alternative options, such as a Regional Pacific Court of Appeal or a new Court based in New Zealand and sitting above the Court of Appeal. His preferred solution was for the existing Court of Appeal as discussed in the 1978 Report of the Royal Commission on the Courts.

In a speech at Waikato University, McLay discussed several constitutional topics.²⁴³ Acknowledging the recent public interest in the light of the *Lesq* decision, McLay emphasized that his views on ‘were not reached as a result of that or any other particular Privy Council decision.’ Noting Australia had just announced plans to terminate the remaining appeal rights to the Judicial

²³⁹ Cabinet paper, Appeals to the Privy Council, J.K. McLay, Minister of Justice, CS (83) 36, 3 February 1983.

²⁴⁰ Privy Council value, *The Dominion*, 10 February 1983.

²⁴¹ Hon Jim McLay, The Privy Council, *Te Mata Times*, 11 March 1983, 2.

²⁴² *Lee v Lee's Air Farming* [1961] NZLR 325; *Jefferies v New Zealand Dairy Board* [1967] NZLR 1057; *Farrier-Waimak Ltd v Bank of New Zealand* [1965] NZLR 426; and *Nakhla v R* [1975] 1 NZLR 393.

²⁴³ Indicating his continued support for the monarchy and for the role of the Governor-General

Committee, he believed it was time for New Zealand to end appeals. He canvassed the arguments both for and against retaining appeals to the Judicial Committee, listing six main points for each position. Reasons for retaining appeals included the comparatively small number of New Zealand Judges; the quality of the decisions made by the Judicial Committee; its detachment from local pressures; the unity of the common law; and the provision of at least two rights of appeal. Reasons against retaining appeals to the Judicial Committee included our own national identity; the quality of New Zealand judicial decisions; the lack of familiarity with New Zealand law and conditions at the Judicial Committee; 'the development of New Zealand law to suit our own local conditions is inhibited because the Privy Council's decisions are made largely against the backdrop of social developments in England;' the considerable expense and delay involved in appealing to London; and the fact that the unity of the common law is now a myth. McLay believed that 'the proper decision should only be made after widespread consultation and public debate.'

McLay's actions prompted several comments and responses. Australian Justice Michael Kirby noted that in the Post-War period, 'no real effort was made to modify the judicial institutions of the Empire.'²⁴⁴ Prime Minister Muldoon acknowledged that it was likely that, at some stage, New Zealand would end appeals to the Judicial Committee.²⁴⁵ In response to the Attorney-General, law professor, J.F. Northey, argued that the case for change had not been made. He believed that the Judicial Committee provided 'access to the very best legal talents of a much more numerous community.'²⁴⁶ Mr J.S. Henry, QC,²⁴⁷ debated the issue with McLay before the Medico-Legal Society; David Baragwanath, QC, who

²⁴⁴ M.D. Kirby, CER, *Trans-Tasman Courts and Australasia*, *NZLJ*. (1983), 5. Hon. Michael Kirby was the inaugural Chairman of the Australian Law Reform Commission, 1975-1984, and a Judge of the Federal Court of Australia, 1983-84; President of the New South Wales Court of Appeal, 1984-1996; and a Judge of the High Court of Australia, 1996-2009.

²⁴⁵ *Ibid.*

²⁴⁶ J.F. Northey, *Privy Council Appeals*, *NZLJ* (1983), 229.

²⁴⁷ Later Rt. Hon. Sir John Henry, a Judge of the Court of Appeal, 1995-2000, and Privy Counsellor.

supported the retention of appeals in an address to the Legal Research Foundation;²⁴⁸ and the Public Issues Committee of the Auckland District Law Society who argued ‘the right of appeal should not be abolished unless and until an acceptable alternative two-tier system is established.’²⁴⁹ In the meantime, they considered the best remedy was for a New Zealand judge to always sit on the Judicial Committee when it hears a New Zealand appeal. As well, they noted that the present facility is provided without expense to New Zealand.

In the post-Second World War era, several statutory measures were enacted to moderate the powers of the state over the citizen: in New Zealand, these included the establishment of the Office of the Ombudsman in 1962, and the replacement of the Official Secrets Act 1908 with the Official Information Act 1982. The powers of the Courts to judicially review administrative actions were strengthened with the Judicature Amendment Act 1972, and extended by the Judicature Amendment Act 1977, to statutory inquiries. In November 1979, New Zealand suffered its largest single peacetime tragedy when an Air New Zealand scenic flight to Antarctica, with 257 people on board, crashed into Mt Erebus. After a 75-day hearing, Royal Commissioner, High Court Justice Mahon, set aside the finding of the Chief Inspector of Air Accidents that the probable cause of the accident was pilot error, and found that the actions of Air NZ officials in changing the flight path coordinates was the main likely cause. Mahon exonerated the pilots. His central findings were never challenged. In his report, he stated that ‘the stance’ of the airline was ‘a pre-determined plan of deception’ and ‘an orchestrated litany of lies.’ He made a cost order of \$150,000 against the airline. Judicial review proceedings began in the High Court but were transferred to the Court of Appeal, following a successful appeal against the Justice Speight’s decision not to transfer the whole

²⁴⁸ W.D. Baragwanath, QC, The Privy Council, *Recent Law*, (1983), 414-420. He also noted that Peter Salmon, QC (later a Judge of the High Court), had suggested to Auckland Rotary Club, that the Government should subsidise travel of appellant parties to the Judicial Committee.

²⁴⁹ The Public Issues Committee of the Auckland District Law Society, *Proposals to abolish the right of appeal to the Privy Council*, 9 October 1983, 5-page mimeo.

proceedings to the Court of Appeal for a first instance hearing and determination.²⁵⁰

The five-member court issued two judgments: Cooke, Richardson and Somers JJ found that the Royal Commission lacked jurisdiction and acted contrary to natural justice in making the findings of deception; Woodhouse P and McMullin J also found there was a lack of jurisdiction and breach of natural justice in the findings, but were more critical. All agreed that the costs order should be quashed.²⁵¹ The events were quite acrimonious. Mahon was particularly stung by the minority judgment of Woodhouse and McMullin, and even more infuriated when he learnt that each judge had an adult child working for Air New Zealand. Mahon resigned as a High Court judge, and pursued an appeal to the Judicial Committee. It was the first time the Judicial Committee had examined an appeal with New Zealand's new judicial review legislation, and the hearing coincided with the general debate on the future of appeals. After an unprecedented 14-day hearing in July 1983, the Judicial Committee dismissed the appeal in October, finding that Mahon had breached the principles of natural justice. The judgment praised him for his conduct of the Royal Commission.²⁵² Despite the fact that his central findings were unchallenged, and the generally high regard with which he was held in 'the court of public opinion,' Mahon was shattered by the result, and died less than three years later. The recourse to the Judicial Committee was seen as demonstrating the advantage of detachment. The contrasting judgments were also identified as highlighting the value of the Judicial Committee, as its judgment provided the definitive New Zealand judgment on the principles of natural justice. While the Court of Appeal also delivered a considered judgment, its focus on the Royal Commission's lack of jurisdiction can be seen as identifying a basic flaw sufficient to do justice to the proceedings, and thereby avoiding answering all arguments put

²⁵⁰ *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*, [1981] 1 NZLR 614.

²⁵¹ *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)*, [1981] 1 NZLR 618.

²⁵² *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*, [1983] NZLR 662. David Baragwanath, QC, was Mahon's principal New Zealand counsel.

to the Court. When it issued its judgment in December 1981, the Court of Appeal was conscious that a related set of issues might be more appropriately addressed in the forthcoming appeal concerning the [Arthur Allan] Thomas Royal Commission to be heard in early 1982.²⁵³

Conclusion

The settlement of New Zealand as a British colony began shortly after reforms to the appellate machinery of the Privy Council, and in the subsequent period through to 1983, New Zealand became the strongest and most loyal supporter of the Judicial Committee. Although there were moments when it critically reacted to Judicial Committee decisions – most notably in 1903 with the *Wallis* judgment – New Zealand repeatedly took the opportunity to state its commitment to the Judicial Committee. In the latter part of the 1920s, New Zealand vehemently objected to the foreshadowed Statute of Westminster Act, which would empower Dominions to choose to end appeals.

In the post Second World War period, New Zealand earnestly supported reforms designed to renew the Judicial Committee's role: first by encouraging the Judicial Committee to travel to jurisdictions to hear appeals;²⁵⁴ and later by supplying New Zealand judges as part of a nominal Commonwealth augmentation of the membership of the Judicial Committee. These hopes and limited opportunities satisfied the legal profession who dominated any debate on the future of New Zealand appeals.

At the same time New Zealand was beginning to develop an independent, domestic appellate system: the Court of Appeal was restructured with a permanent membership, of three judges plus the Chief Justice (*ex officio*) in 1958, although it was not until 1979 when the Court was able to sit as a five-Judge panel, without awaiting the availability of the Chief Justice; the 1962 *Corbett* decision

²⁵³ *Re Thomas Royal Commission*, [1982] 1 NZLR 252

²⁵⁴ The Judicial Committee did not travel until 2006, when it held a hearing in the Bahamas.

demonstrated that the Court of Appeal was not completely bound by the House of Lords Appellate Committee decisions; and a debate started, against the prevailing preference of the profession, on the possible abolition of appeals to the Judicial Committee. Despite these beginnings of a national legal identity – the term was not used until the later 1980s – New Zealanders were firm believers in the value of retaining appeals to the Judicial Committee. To the majority the benefits were a second tier of appeals; access to eminent British Judges; the preservation of the common law; and it was free – at least for taxpayers.

Chapter Three – Who Wants Juristocracy?²⁵⁵

Introduction

This chapter examines the development and failure of the first major proposal for ending New Zealand appeals to the Judicial Committee of the Privy Council. While there was a firm commitment to retaining appeals to the Judicial Committee, key opinion leaders among the legal profession began to acknowledge an emerging national legal identity. In 1986, the Minister of Justice, Hon. Geoffrey Palmer, requested the development of a formal proposal to end Judicial Committee appeals, as part of a series of proposed constitutional reforms, which created a backdrop of a wider debate about whether increased power should be accorded to the domestic judiciary. This concern was amplified when the Court of Appeal, which it was proposed would become New Zealand's final appellate court, began to rule against central features of the Government's economic reform programme. This chapter argues that the resulting tension defeated the first major proposal for ending New Zealand appeals to the Judicial Committee.

Reforming the Constitution

The election of the Labour Government in 1984 ushered in an era of profound change for New Zealand. While the major set of changes related to the economy, and particularly to the role of the state in the economy, the Labour Government also implemented a major set of constitutional reforms, led by the new Deputy Prime Minister, Hon Geoffrey Palmer, whose main portfolios were those of Attorney-General and Minister of Justice. Palmer played the pivotal role in the Government's economic and constitutional reforms.²⁵⁶ In this he was unique

²⁵⁵ I acknowledge an earlier article, with the same title: John Smillie, *Who Wants Juristocracy?* *Otago Law Review*, Vol 11, No 2, (2006), 183.

²⁵⁶ Ray Richards cites Murray McLachlin's observation that Palmer could 'take the most credit for facilitating the passage of Rogernomics.' (Rogernomics was the term given to denote the Government's economic programme, with the name derived from the Hon Roger Douglas, the

among Labour's leadership team.²⁵⁷ Prior to his election to Parliament in 1979, Palmer was a law professor, publishing a book, which attempted 'to explain how the New Zealand system of government worked, and how it should be changed.'²⁵⁸ Many of the ideas in that book formed the platform for the new Government's constitutional reforms. The conduct of the defeated Prime Minister, Sir Robert Muldoon, in the immediate period after the election gave added momentum.²⁵⁹ The results of these reforms included a substantial revision of the *Cabinet Manual*,²⁶⁰ the overhaul of Parliament's procedures and, in 1986, the Parliamentary Select Committee system; and the enactment of a number of key statutes reshaping New Zealand's constitutional arrangements, principally: the Law Commission Act 1985; the Parliamentary Service Act 1985; the Treaty of Waitangi Amendment Act 1985; the Constitution Act 1986; the Imperial Laws Application Act 1988; and the New Zealand Bill of Rights Act 1990. Palmer also initiated the Royal Commission on the Electoral System, which was to recommend a change to the Mixed Member Proportional electoral system.²⁶¹ Most of these

Minister of Finance, 1984-88.) See Ray Richards, *Palmer: The Parliamentary Years*, Canterbury University Press, 2010, 303.

²⁵⁷ There is virtually no discussion of the constitutional reforms in the main accounts published by other members of the leadership team: see, e.g. David Lange, (2005), *My Life*; Roger Douglas and Louise Callan, (1987), *Towards Prosperity*; Margaret Wilson, (1989), *Labour in Government 1984-87*. (Wilson was Labour Party President 1984-87.)

²⁵⁸ Geoffrey Palmer, [1979], *Unbridled Power? An interpretation of New Zealand's constitution and government*. Wellington: Oxford University Press.

²⁵⁹ Cabinet established an officials' committee, drawn from relevant Government departments, chaired by Deputy Justice Secretary, Jim Cameron, with professor K.J. Keith. The Committee produced two reports: 'One concerned with the transfer of power and the other was of a general nature, together with the draft of a Constitution Bill.' Geoffrey Palmer, Preface to *Constitutional Reform, Reports of an Officials Committee*, (1986) Wellington: Department of Justice.

²⁶⁰ Including an Introduction by K.J. Keith. See the Rt. Hon. Sir Kenneth Keith, *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, 1990, updated 2008. Available at www.cabinetmanual.cabinetoffice.govt.nz

²⁶¹ The Royal Commission on the Electoral System, was established in February 1985, and reported in December 1986. Professor Keith was a member.

reforms were to have an impact on the development of Labour's policy on the future of New Zealand appeals to the Judicial Committee.

Palmer's central constitutional reform was the development and eventual enactment of the New Zealand Bill of Rights Act 1990.²⁶² Official work on the Bill of Rights legislative proposal began shortly after the Government was sworn in July 1984.²⁶³ A White Paper setting out the proposal was released in 1985 for public submissions to a Parliamentary select committee. The Paper proposed that the legislation be entrenched, i.e., that any amendment of the legislation require a 75 percent vote in favour in Parliament, or a majority at a referendum of electors; and proposed to incorporate both English and Maori texts of the Treaty of Waitangi.²⁶⁴

²⁶² More than 20 years earlier, the Hon. Ralph Hanan, the Minister of Justice, introduced legislation for a New Zealand Bill of Rights Act, modeled on the Canadian Bill of Rights 1960. This followed the National Party's 1960 election manifesto commitment. On 21 May 1963, the Solicitor-General, H.R.C. Wild, QC, advised the Attorney-General that the Bill was unnecessary as the common law already provided sufficient safeguards. [Archive Reference Number: J1 1471; Record number: 18/1/253; Part no. 1.] In 1964, the Constitutional Reform Committee of the House of Representatives recommended the bill not proceed, after hearing submissions. Among submitters opposing that bill were the Solicitor-General, (who reported the Lord Chief Justice of England opposed the bill); and K.J. Keith, a law lecturer at the Victoria University of Wellington. Here, too, the concern was whether the judiciary would be accorded greater powers. See A New Zealand Bill of Rights, with submissions, in L. Cleveland and A.D. Robinson (ed.), *Readings in New Zealand Government*, A.H. & A.W. Reed, Wellington (1972), 189-219. There is the briefest mention of the Bill of Rights proposal in *Report of the Constitutional Reform Committee 1964 on the petition of J B Donald and Others and on the Bill of Rights*, AJHR (1964) I 14, 6.

²⁶³ Justice Department officials, led by Deputy Secretary, B.J. (Jim) Cameron, worked with Palmer, who was assisted by his friend and former colleague, professor K.J. (Ken) Keith; Auckland Queen's Counsel, D.A.R. (David) Williams; and New Zealand-born, professor Peter Hogg, a leading expert on Canada's constitution. The New Zealand Bill of Rights Act 1990 is modelled on the Canadian Charter of Rights and Freedoms 1982. The 1982 Charter replaced the Canadian Bill of Rights 1960.

²⁶⁴ In 1963, Hanan, who was also Minister of Maori Affairs, corresponded with the New Zealand Maori Council, as Maori leaders had previously advocated the enactment of the Treaty as a statute of New Zealand. The Maori Council considered 'the bill would hardly be complete without some

The White Paper noted:

[t]he introduction of the Bill of Rights will make it necessary to decide whether the Judicial Committee of the Privy Council should be the final appeal authority in cases that come before the courts under the Bill. The draft Bill contains no provision relating to this.²⁶⁵

Labour faced a dilemma: in 1984, its justice policy for the election stated that it would:

retain the right of appeal to the Privy Council for the time being in order to provide a second step or tier to appeal jurisdiction while recognising the need for a practical and modern alternative.²⁶⁶

Shortly after the election Palmer restated the policy, adding that the task to find an alternative 'will take some considerable period. It is not an urgent task. We have no policy of wanting immediately to abolish appeals to the Privy Council, and we shall not be doing so.'²⁶⁷

The White Paper acknowledged that the Judicial Committee, including some New Zealand judges, had considerable experience in adjudicating on appeals from countries with Bills of Rights; but it considered that it was not appropriate for any tribunal, including the Judicial Committee, that was based outside New Zealand to adjudicate on the actions of the New Zealand Parliament. As any attempt to limit those appeals involving Bill of Rights issues to the jurisdiction of the Court of Appeal, while maintaining the general right of appeal to the Judicial Committee

reference to the Treaty, and to the obligations entered into by the Crown on that occasion.' The Government decided 'it would not be entirely appropriate to include such a reference.' The Maori Council wanted at least a reference to the Treaty included in the proposed legislation. See Cleveland and Robinson, *Readings*, 199-200, for extracts of the correspondence.

²⁶⁵ *White Paper: A Bill of Rights for New Zealand*, (1985) AJHR A.6, para 8.1, 59.

²⁶⁶ *Ibid*, para 8.7, 59.

²⁶⁷ Geoffrey Palmer, *Midday Report*, 5 September 1984.

was likely to ‘give rise to serious problems and anomalies,’²⁶⁸ work on the alternative envisaged in the election policy had commenced and was to be speeded up.²⁶⁹

In a critical review, legal academic Philip Joseph argued that the ‘right of appeal to the Privy Council was unnecessary and unresponsive to our national way of life and demeaning of our sovereignty.’²⁷⁰ He foresaw problems and uncertainties arising from the ‘inaccessible and innately paternalistic’ Judicial Committee,²⁷¹ and this would be exacerbated by a 1980 judgment in which ‘the Privy Council unilaterally declared Commonwealth appellate courts to be subject to the inflexible rule of *stare decisis*’ established on the English Court of Appeal by the House of Lords Appellate Committee in 1944.²⁷² The effect of the Judicial Committee ruling was that a Commonwealth Court of Appeal was bound by its earlier decision, even if the circumstances of a new appeal of a similar case led to a different interpretation of the law. Thus the consequent implication was that any correction of the law, as stated by the courts, could only be made by the Judicial Committee. The wider issue led to an on-going debate in New Zealand legal circles for many years, and would have implications for the debate on ending appeals to the Judicial Committee. The essential point, from Joseph, is that the Bill of Rights, as then proposed by the White Paper, and ‘if adopted, will demonstrate even greater need for judicial interpretations that accord with New Zealand’s social philosophies and public law needs. The credentials for such interpretations cannot be acquired’ from the Judicial Committee.²⁷³

²⁶⁸ Ibid., para 8.14, 60.

²⁶⁹ Ibid., para 8.15, 61.

²⁷⁰ Philip Joseph, Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights, (1985), *Canterbury Law Review*, Vol.2, 273-297, 273.

²⁷¹ Ibid.

²⁷² *Attorney-General of St Christopher, Nevis and Antigua v Reynolds* [1980] 2 WLR 171. Joseph also referred to a criticism of the decision by Christchurch lawyer, G.F. Orchard *Stare Decisis* in the Court of Appeal, [1980] *NZLJ*, 380.

²⁷³ Ibid., 296.

Parliament's Justice and Law Reform Committee received 431 submissions of which three-quarters were opposed, principally because of the increased power to be given to the judiciary, thereby redistributing power from elected, and therefore accountable, persons to persons appointed for life.²⁷⁴ This concern was to remain a strong undercurrent in the subsequent debates through to 1990. In a submission supporting the proposal, law professor and former Secretary for Justice, Gordon Orr, agreed there would be some transfer of power to the judiciary, but noted that judges already exercise some control over Parliament, for example by means of judicial review. Orr noted that the White Paper avoided value-laden rights, such as the right to liberty, thereby reducing large areas of uncertainty; and largely focussed on rights of, and freedoms of, a procedural, rather than substantive, nature and, in his view, judges were well suited to adjudicating on these.²⁷⁵ In its final report on the White Paper, the Select Committee considered: 'there is a limited public understanding of, and support for, the role of judiciary under a bill of rights.'²⁷⁶ On 10 October 1989 and three years later than intended,²⁷⁷ Palmer, now Prime Minister, introduced a formal legislative proposal incorporating most of the Select Committee's recommendations, including the removal of both the entrenchment provision and the incorporated Treaty of Waitangi. The Select Committee received 78 submissions. The New Zealand Bill of Rights Act 1990 received Royal assent in August 1990.

Another key constitutional reform was the creation of the Law Commission 'to promote the systematic review, reform, and development of the law of New

²⁷⁴ Interim Report of the Justice and Law Reform Select Committee, *Inquiry into White Paper: A Bill of Rights for New Zealand* (1987) AJHR I 8A 8-23.

²⁷⁵ *Ibid.*

²⁷⁶ Final Report of the Justice and Law Reform Committee, *On a White Paper on a Bill of Rights for New Zealand*, (1988) AJHR I 8C.

²⁷⁷ Joseph (1985) *Towards Abolition*, n.186, noted that Palmer had announced the draft bill would be formally introduced in 1986.

Zealand.²⁷⁸ This initiative followed similar initiatives in other Commonwealth countries.²⁷⁹ As in other jurisdictions, the Law Commission was established as a statutory body, with a formal membership, staff and budget, to replace existing ad hoc law reform committees.²⁸⁰ Five members were initially appointed.²⁸¹

²⁷⁸ s.3, Law Commission Act 1985.

²⁷⁹ Including, in 1955, the establishment of the Law Commission of India; in 1965, the Law Commission of England and Wales; also in 1965, the Scottish Law Commission; and, in 1975, the Australian Law Reform Commission.

²⁸⁰ The Law Revision Committee was initially established in 1936 by Attorney-General and Minister of Justice, the Hon H.G.R. (Rex) Mason, to advise on systematic law reform. Mason held these Ministerial posts between 1935-49 and 1957-60. The Committee was chaired by the Attorney-General, and also comprised the Solicitor-General, two representatives of the New Zealand Law Society, one representative from the Law Faculty of the University of New Zealand, the Under-Secretary for Justice, and the Parliamentary Law Draftsman. The Chief Justice chose to attend in an advisory capacity only. [J.L. Robson and J.W. Bain, *Legal Trends with New Zealand*, in J.L. Robson (ed.) *New Zealand: The Development of its Laws and Constitution*, (1st ed.) 1954, Stevens and Co, London, 339-357.] Subsequent impetus was given by Attorney-General the Hon Ralph Hanan (1960-69) and Secretary for Justice, Dr John Robson (1960-70). In 1965, Hanan made a Ministerial statement, *The Law in a Changing Society*, addressing the need for greater attention to law reform. He subsequently reformed the Law Revision Committee as a Law Reform Commission, with four standing committees. [J.L. Robson, *Legal Trends in New Zealand*, in J.L. Robson (ed.) *New Zealand: The Development of its Laws and Constitution*, (2nd ed., 1967, 477-502.] An account of one Committee during the Hanan-Robson years is provided by Sir Robin Cooke, *The Public and Administrative Law Reform Committee: The Early Years*, *New Zealand Universities Law Review*, 1989, 150-154. By 1983, advice on law reform was provided by the, now-named, Law Reform Council, and six standing committees: the Contracts and Commercial Law Reform Committee; the Criminal Law Reform Committee; the Evidence Law Reform Committee; the Property Law and Equity Reform Committee; the Public and Administrative Law Reform Committee; and the Torts and General Law Reform Committee. Committee reports often resulted in legislative changes.

²⁸¹ Rt. Hon Sir Owen Woodhouse, retired as President of the New Zealand Court of Appeal to become the inaugural President; Mr Jim Cameron, formerly Deputy Secretary of the Department of Justice; Miss Sian Elias, an Auckland barrister; Mr Jack Hodder, a Wellington lawyer; and law professor Ken Keith. Sir Owen Woodhouse (1916-2014) was a mentor to Geoffrey Palmer. He was appointed to the Supreme Court (now the High Court) in 1961; then to the Court of Appeal in 1973, becoming President in 1981. He retired two years before reaching the judicial statutory retirement age of 72 years, in 1986. In 2016, the Rt. Hon. Dame Sian Elias is now Chief Justice of New Zealand;

The Law Commission's first report examined imperial legislation still in force in New Zealand.²⁸² Palmer asked the Law Commission to review existing legislative proposals set out in a 1981 Bill, and the subsequent work of the Legislation Reform Council. The Law Commission's Report usefully identified relevant British Acts and Orders, (including those which still applied to New Zealand appeals to the Judicial Committee), and resulted in the Imperial Laws Application Act 1988.

On 29 April 1986, the Minister of Justice formally asked the Law Commission to review the structure of the New Zealand judicial system, especially in respect of the appellate business of the Courts, in the event that the Judicial Committee of the Privy Council ceases to be the final appellate tribunal for New Zealand. Still it was difficult to discern Palmer's final position, as evident from his response to a Parliamentary Question for written answer, nine months later, where he restated Labour's 1984 election policy and denied Labour had plans to abolish the right of appeal.²⁸³ Nevertheless, Palmer continued to discuss possible changes in the arrangements.

Mr Jack Hodder is a Queen's Counsel; and the Rt. Hon. Sir Kenneth Keith, is a retired Judge, having served on the International Court of Justice, 2006-2015, and the New Zealand Supreme Court, 2004-2005. In 1988, an additional Commissioner was appointed – Margaret Wilson, who served until 1989 when she moved to become Chief Adviser and Head of the Prime Minister's Office, 1989-90, following the appointment of Rt. Hon. Geoffrey Palmer as Prime Minister in August 1989. Wilson, who was a senior lecturer in Law at Auckland University, was President of the Labour Party, 1984-87. After her service with Palmer, Wilson became Professor of Law and founding Dean of the Law School at Waikato University. Wilson was to enter Parliament in 1999, and as Attorney-General, 1999-2005, led the final and, eventually successful, efforts to end New Zealand appeals to the Judicial Committee. Between 2005-08, Wilson was Speaker of the House of Representatives. In 2009, she returned to Waikato University, where she is now professor of law and public policy.

²⁸² New Zealand Law Commission, *Imperial Legislation in Force in New Zealand*, 1987.

²⁸³ Minister of Justice in response to Katherine O'Regan (Waipa), Order Paper, 3 February 1987.

Earlier, in October 1984, Mr Justice Tompkins²⁸⁴ provided Palmer with a copy of a short memorandum, elaborating on suggestions he had provided to the New Zealand Law Society 18 months earlier, during the debate raised by Attorney-General McLay. Tompkins preferred the status quo, but recognised change was inevitable at some stage, and suggested that to retain a three-tier court system (i.e. High Court and two levels of appeal above), a New Zealand Privy Council be established comprising New Zealand and overseas judges, with the latter group drawn primarily from serving United Kingdom Law Lords and Judges from the High Court of Australia, possibly augmented by judges from Canada, India and Malaysia.

In September 1986, Palmer raised with the Chief Justice, the President of the Court of Appeal, and the New Zealand Law Society, the possibility of holding a sitting or sittings of the Judicial Committee in New Zealand.²⁸⁵ Cooke stressed that it was ‘both undesirable and impractical’ for the entire Judicial Committee to sit in New Zealand.²⁸⁶ Like Justice Department officials,²⁸⁷ Cooke considered the costs would be considerable. He did, however, see ‘distinct merit’ in one or two Law Lords sitting with a majority of New Zealand judges, either in ‘an alternative, [or] ... a complete replacement ... Judicial Committee.’ A second option would be to make the Court of Appeal New Zealand’s final appellate court and invite Law Lords to join the Court to hear ‘a selection of appropriate cases.’ Cooke indicated his response were his personal views, but added he had discussed it with those available judicial colleagues who were opposed not only to the Judicial Committee

²⁸⁴ Later knighted. In 2003, by then retired from the High Court, Sir David Tompkins made a submission to the Justice and Electoral Committee supporting the abolition of New Zealand appeals to the Judicial Committee.

²⁸⁵ Minister of Justice to Acting Chief Justice, and President of the Court of Appeal, Judicial Committee of Privy Council, 4 September 1986.

²⁸⁶ Robin Cooke to Minister of Justice, Judicial Committee of Privy Council, 23 September 1986.

²⁸⁷ Department of Justice to Minister of Justice, Sittings of Judicial Committee of Privy Council in New Zealand, 26 August 1986.

sitting in New Zealand, but also to any form of combined court.²⁸⁸ The Chief Justice acknowledged Sir Robin's response, and added that retired New Zealand judicial Privy Counsellors should not sit.²⁸⁹ In December, Palmer confirmed that he had decided not to pursue the possibility further.²⁹⁰

The Court of Appeal Speaks

As the Law Commission settled into its review of New Zealand's court structure, there was to be a dramatic collision between the economic and the constitutional reforms of the Government. On the economic front, the Government moved to identify the trading functions of State agencies and place these assets into State-Owned Enterprises (SOEs), based on a company format, with two shareholding Ministers. Initially there were to be 14 SOEs, nine of which were new entities, covering the major State trading activities. At the same time, the Government had empowered the Waitangi Tribunal to examine and report on historic grievances arising from breaches of the Treaty of Waitangi since 1840.²⁹¹ The Waitangi Tribunal was concerned that the SOE reforms could constrain the ability of the Crown to use the assets, transferred to SOEs, as compensation for those breaches. The Tribunal made an interim report to the Government,²⁹² and the Deputy Prime Minister introduced a Supplementary Order Paper to the SOE legislation, then before Parliament, to require that:

²⁸⁸ Ibid.

²⁸⁹ Sir Ronald Davison to Rt. Hon. Geoffrey Palmer, Minister of Justice, 30 October 1986. The Chief Justice was overseas when Palmer wrote, but the Acting Chief Justice initiated consultations with other High Court Judges to assist the Chief Justice's response.

²⁹⁰ Department of Justice to Minister of Justice, Sittings of the Judicial Committee in New Zealand, 11 December 1986, includes a draft response to Sir Robin Cooke, which indicated Palmer was also advising the Chief Justice of his decision.

²⁹¹ The Treaty of Waitangi Amendment Act 1985.

²⁹² Waitangi Tribunal Interim Report to the Minister of Maori Affairs on State-Owned Enterprises Bill, 8 December 1986, in Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, 1988 (WAI 22), 289.

[n]othing in that Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.²⁹³

The Government's legislative response was informed by the Judicial Committee's 1941 judgment in *Te Heuheu v Aotea District Maori Land Board*,²⁹⁴ which addressed the place of the Treaty of Waitangi in New Zealand's domestic law. That judgment remains, arguably, the most important ever made by the Judicial Committee on a New Zealand appeal, held:

[i]t is well settled that any rights purporting to be conferred by such a treaty of cession [as the Treaty of Waitangi] cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.²⁹⁵

Despite Palmer's legislative move, Maori were not satisfied at the protections afforded. As the SOE reforms proposed the transfer of land covering some 10 million hectares (approximately 37% of New Zealand's land mass) to these SOEs, effective from 1 April 1987, the New Zealand Maori Council initiated judicial review proceedings in the High Court on 31 March 1987, but sought their transfer to the Court of Appeal for substantive determination, and sought interim relief affecting the Crown's ownership of all or any of the assets which were subject of any claim before the Waitangi Tribunal. The High Court granted the applications, and the full court of the Court of Appeal heard the case in the first week of May. On 29 June 1987, the Court issued its judgment in *New Zealand Maori Council v Attorney-General*, (commonly referred to as the '*Lands*' case).²⁹⁶ Unusually, all five judges authored judgments, (although the lengths varied). More importantly, all five judgments were unanimous in upholding the position of the New Zealand Maori Council, and in maintaining, as the Court's President later stated, that 'the

²⁹³ Now s.9, State-Owned Enterprises Act 1987.

²⁹⁴ [1941] NZLR 590.

²⁹⁵ *Ibid.*, 596-597. Judgment was delivered by the Lord Chancellor, Lord Simon. Appeal heard over six days in November 1940, during the Second World War, by only four Judges.

²⁹⁶ *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641.

State-Owned Enterprises Act had to be administered in such a way that Maori land claims were safeguarded.²⁹⁷

The Government's economic reform programme had placed more emphasis on the Court system in resolving the disputes that arose, both between the State and the public, and between private parties. In time, major disputes made their way through to the appellate Courts, principally to the Court of Appeal, and, on some occasions, to the Judicial Committee of the Privy Council. While the Government had been successful in overcoming most objections to its economic reforms from other sources, the judgment in the *Lands* case presented a more difficult challenge. Buoyed by their success, the litigants — the New Zealand Maori Council, led by its Chairman, Sir Graham Latimer — and other Maori interests were to return to the Courts, especially to the Court of Appeal, again and again, in a series of cases,²⁹⁸ challenging, often successfully, the Government's economic reforms, as they affected the access of Maori to natural resources. These judgments and their wider impacts disrupted the momentum to the Government's economic reform programme, which, in October 1987, was further disrupted by the global stock market crash.

As a party to these Court proceedings, the Government could always appeal the decisions of the Court of Appeal to the Judicial Committee, but this action would contradict Palmer's assertion that New Zealand was now mature enough to end all appeals to London. Alternatively, the Government could legislate to overturn the Court's decision, arguing that a Court's decision did not represent Parliament's intention. While such a course of action might be justified, it presented several difficulties. The prime difficulty was that, ideally, legislative action should only be taken after the final appellate court, which remained the Judicial Committee, had

²⁹⁷ Court of Appeal Minute, 9 December 1987, per Cooke P [1987] 1 NZLR 719.

²⁹⁸ Other key Court of Appeal judgments in this period (1984-90) were: *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, concerning forestry; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, concerning coal; *Te Runanga o Muriwhenua Inc. v Attorney-General* [1990] 2 NZLR 129, concerning fisheries.

spoken; and then, legislate only in a manner that did not deprive the successful party of their victory in the Courts.

The *Lands* decision was, arguably, the most important judgment issued by the Court of Appeal. Twenty years later, two of the Judges acknowledged that ‘many of those present in the court [for the *Lands* case] felt the emotions of the occasion and the long history of the Treaty of Waitangi.’²⁹⁹ Before issuing its decision, the five Judges, who heard the case, met regularly and there was not ‘a single discussion of the applicable legal tests going beyond standard statutory interpretation and well-established principles of judicial review.’³⁰⁰ Despite this legal orthodoxy, the judgments in the *Lands* and the related cases were not well understood, or appreciated, by those associated with progressing the Government’s economic reforms.

In 1989, ‘the Cabinet reacted instinctively and negatively’ to the Court of Appeal’s judgment in the *Coal* case.³⁰¹ Palmer, now Prime Minister, firmly stated the Government’s view of ‘the supremacy of Parliament over the Courts to decide Treaty of Waitangi issues.’³⁰² The Prime Minister went on the offensive, delivering a speech to the Wellington District Law Society, expressing his disagreement with the personal observations in the judgment of the Court’s President. Cooke later

²⁹⁹ Rt. Hon. Sir Ivor Richardson, *Deciding the Case: Recollections*, in Jacinta Ruru, (ed., 2008) In Good Faith – Symposium proceedings marking the 20th anniversary of the *Lands* case, 13-18, at 18. A similar view was expressed by Rt. Hon. Sir Maurice Casey, *Deciding the Case: Recollections*, 19-21.

³⁰⁰ Richardson, *Deciding the case*, 18. Casey confirmed Richardson’s recollection, 21. Richardson’s comment echoes Sir Robin Cooke’s view on the Court’s approach, given in 1986, 15 months before the *Lands* case was heard: ‘Administrative law litigation very commonly turns on statutory interpretation, undertaken against a background of principles or presumptions.’ Sir Robin Cooke, *The Struggle for Simplicity in Administrative Law*, in Michael Taggart (ed.) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, (1986).

³⁰¹ Matthew Palmer, (2008), *The Treaty of Waitangi in New Zealand’s Law and Constitution*, Wellington: Victoria University Press. 220.

³⁰² *Ibid.*, 263.

acknowledged the Government's reaction.³⁰³ In his memoirs, Palmer acknowledged that 'a big political backlash set in' as the government 'lost a string of high-profile Maori cases,' compounded by findings for Maori by the Waitangi Tribunal. The Government was seen as doing things for Maori but not for anyone else. The situation caused some disquiet among Government MPs including some Ministers. Ironically, Palmer later acknowledged that he, personally, did not believe in Parliamentary supremacy.³⁰⁴

National Legal Identity Revealed

Key opinion leaders among the legal profession were beginning to acknowledge an emerging national legal identity. This acknowledgement coincided with the first formal historical study of New Zealand's search for national identity³⁰⁵, although the author of that study – Keith Sinclair – and subsequent authors have placed the beginnings of that search much earlier in New Zealand's history.³⁰⁶ It is the contention of this thesis that, law being more conservative, the recognition of New Zealand's legal identity was lagged by comparison. Examples of this lag can be seen in the previous chapter by the debate between Davis and Cooke, and by the *Corbett* decision. A key theme of two of the general sessions of the 1987 triennial conference of the New Zealand Law Society was New Zealand's national legal identity. The pre-conference publicity asked several questions, including: 'has the colonial tie been cut? whether there is a distinctive New Zealand legal identity and

³⁰³ Sir Robin Cooke, *The Challenge of the Treaty of Waitangi Jurisprudence*, 2 *Waikato Law Review*, 1994, 1-11, 7-8.

³⁰⁴ Geoffrey Palmer, (2013), *Reform: A Memoir*, Wellington: Victoria University Press, 408-409. Palmer expanded on his discussion set out in *New Zealand's Constitution in Crisis: Reforming our Political System*, Dunedin: John McIndoe (1992).

³⁰⁵ Keith Sinclair, *A Destiny Apart: New Zealand's Search for National Identity*, (1986), Allen & Unwin, in association with Port Nicholson Press, Wellington.

³⁰⁶ Sinclair places the beginning of a national identity to the turn of the 20th century with New Zealand's commitment of troops to the Boer War and the debate about federating with the Commonwealth of Australia, whereas Ron Palenski, *The Making of New Zealanders*, (2012), drawing on the work of historians W.P. Morrell and D.O.W. Hall, places the beginnings to the 1880s.

what are its characteristics? [what is] the justification of a final right of appeal to the Privy Council in this context.’³⁰⁷

The keynote address was given by Sir Robin Cooke, attending his first conference since his appointment as President of the Court of Appeal the previous year; and just over three months after the Court’s judgment in the *Lands* case. Cooke’s paper comprised two parts: first, he surveyed key judicial decisions in the main fields of law, to contrast the New Zealand approach with the British approach, and acknowledged the increasing influence of other jurisdictions, notably the Canadian Supreme Court, on decision-making in the New Zealand Court of Appeal, all of which ‘demonstrat[ed] that there [was] a distinct New Zealand legal identity.’³⁰⁸ Secondly, Cooke asked ‘what should we do with the Privy Council?’³⁰⁹ He acknowledged his 1972 support for retaining the Judicial Committee.³¹⁰ Fifteen years on, ‘[p]ersonal experience of Privy Council work has taught some valuable lessons.’³¹¹ He now considered that ‘Privy Council appeals from New Zealand have been too sporadic to have much influence on the march of our law.’³¹² As a consequence, he had become increasingly aware of ‘the gulf in modern legal thinking between England’ and New Zealand, which had ‘caused me to undertake an almost agonising reappraisal.’³¹³ He concluded that we ‘must accept responsibility for our own national legal identity and recognise that the Privy Council appeal has outlived its time.’³¹⁴

³⁰⁷ [1987], *NZLJ*, 183.

³⁰⁸ Sir Robin Cooke, *The New Zealand National Legal Identity*, *Canterbury Law Review*, 1987, Vol.3, 171-183, 172.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*, 180.

³¹¹ *Ibid.*, 181.

³¹² *Ibid.*, 181.

³¹³ *Ibid.*, 182.

³¹⁴ *Ibid.*, 183.

Cooke's paper, coming as it was from a very senior judge – he was second only to the Chief Justice in order of judicial precedence – and from a known Anglophile at that, was very significant. Setting aside Chief Justice Sir Robert Stout's temporary calls, 80 years earlier, for New Zealand to end appeals, Cooke made the strongest public statement by a senior judge of support for ending appeals to the Judicial Committee. Cooke was already New Zealand's most experienced judicial Privy Counsellor, and would serve for another 14 years on the Judicial Committee, being only the second, and probably the last, Commonwealth judge to be appointed to the House of Lords in the United Kingdom. As a Queen's Counsel in 1972, and again as a Judge of the Court of Appeal in 1977, Cooke had publicly stated his view that New Zealand should retain appeals to the Judicial Committee. In 1983, Cooke refused to take sides in the debate initiated by Attorney-General McLay, noting only that it is 'impossible' and 'undesirable ... that the common law should be the same throughout the Commonwealth.'³¹⁵ Even in 1985, Cooke was still advocating retaining Privy Council appeals, noting its now quite extensive experience in interpreting Commonwealth Bills of Rights.³¹⁶ Cooke's 1987 paper demonstrated the development of his analysis, which recognised a degree of divergence between New Zealand and English judicial decisions, both sets of which were designed to address the needs of the respective societies served by those courts.

Six months later, Cooke was to strengthen his message:

[t]he stage has now been reached in which in virtually every major field of law New Zealand law is radically, or at least very considerably, different from English law.³¹⁷

Accompanying the publication of Cooke's 1987 paper was a separate assessment by Jim Cameron, now a Law Commissioner, in which he observed:

³¹⁵ Cooke, Sir Robin, *Divergences – England, Australia, and New Zealand*, [1983] NZLJ, 297, 299.

³¹⁶ Cited by Philip Joseph, *Readings*, (1985), n.1, 273.

³¹⁷ Sir Robin Cooke, *Fundamentals*, [1988] NZLJ 158.

[a]t a deep level the history of New Zealand law over the past 30 years or so is the story of legislative (and in a more modest degree judicial) emancipation from the stunting shadow of English.³¹⁸

He added that from the 1970s:

and notably under the presidencies of Sir Owen Woodhouse [1981-86] and Sir Robin Cooke [from 1986], the Court of Appeal has shown a much less inhibited approach to precedent and a greater readiness to use judicial reasoning to determine and develop the law.³¹⁹

Three decades earlier, in surveying early law reforms, Cameron had observed a contrasting situation:

[o]ne of the most immediately obvious features of our legal history is the weight of English influence and English precedent. This has affected legislators and their advisers almost as strongly as lawyers and the Courts.³²⁰

Further examination of New Zealand's legal identity was provided by Sean Baldwin in 1989, who observed that New Zealand's indigenous legal character was 'rather more overt' in 1987 than in 1983.³²¹ While overseas judicial decisions were still influential:

New Zealand law no longer defers blindly to powerful overseas authorities. ... but rather by a judgment ... as to what is required for New Zealand.³²²

Baldwin highlighted features of selected Court of Appeal judgments and extra-judicial writings, mainly delivered in the period 1983-87, to support the

³¹⁸ B.J. Cameron, *Legal Change over Fifty Years*, *Canterbury Law Review*, [Vol.3, 1987], 198-213.

³¹⁹ *Ibid.*, 211.

³²⁰ B.J. Cameron, *Law Reform in New Zealand*, [1956] *NZLJ* 72.

³²¹ Sean Baldwin, *New Zealand's National Legal Identity*, *Canterbury Law Review*, [Vol.4, 1989], 173-184, at 173.

³²² *Ibid.*, 173.

observation of Canterbury University law lecturer, John Caldwell, on ‘the decline of the black letter positivist approach to law over the New Zealand judiciary.’³²³ In administrative law, for example, the Court was more willing ‘to challenge the exercise of administrative power by administrative authorities,’³²⁴ and where ‘fairness, reasonableness and legality ... were considerations of paramount importance.’³²⁵ In Baldwin’s view, ‘the assertiveness of the New Zealand legal character has [also] been apparent in the work of the legislature.’³²⁶ The ‘prime concern’ of both branches of State has been ‘to make law serving New Zealand’s needs.’³²⁷ Baldwin concluded that it is time to end appeals to the Judicial Committee, as:

[t]he Privy Council is simply not in touch with New Zealand’s legal identity, characterised as it is by its simplicity, or the conditions which shaped that identity.³²⁸

Together these three authors can be seen to acknowledging that New Zealand law was becoming more ‘indigenous’, to use Baldwin’s term, and to realise that this change was becoming more pronounced right at the very time they were making their observations – the 1980s. Cameron – reflecting on his more than 30 years’ experience as a law reform adviser – placed more emphasis on the legislative source of this change; whereas Cooke, naturally, and Baldwin, placed more emphasis on the judicial source.

In the closing session Attorney-General Palmer also spoke to this theme,³²⁹ highlighting three critical matters: the important position of the Treaty of Waitangi, as shown by the ‘epoch making’ judgments of the Court of Appeal in the

³²³ Ibid, n.16, 175.

³²⁴ Ibid., 175.

³²⁵ Ibid., 176.

³²⁶ Ibid., 177.

³²⁷ Ibid., 177.

³²⁸ Ibid., 184.

³²⁹ Geoffrey Palmer, *New Zealand’s Legal Identity*, [1987] *NZLJ*, 314-315.

Lands case; the growing role of institutions and procedures, other than the courts, such as the Parliamentary committees; and appeals to the Judicial Committee. He asked ‘whether given the increasingly particular character of New Zealand law and given those small parts of it which happen to be settled by the Judicial Committee’ it was still appropriate to continue New Zealand appeals; and noted that only about 170 appeals had been decided in the past 147 years; and also identified the important questions of ‘the reasons for appeals, and especially for second appeals.’³³⁰ He announced ‘the Government [would] move to remove the right of appeal to the Privy Council in the term of this Government.’³³¹

The following day, in the set piece Address-in-Reply debate in Parliament, Palmer acknowledged the excellent contribution of the President of the Court of Appeal. He informed the House that appeals would be ended:

only after the Government has received the report of the Law Commission on the nature of the alternatives, and after a proper new structure is in place. However, by 1990 ... the right of appeal to the Privy Council will have gone.³³²

Two months later the Law Commission published a preliminary paper, *The Structure of the Courts*,³³³ which outlined the role of the courts and tribunals, and then set out the issues to be considered, interlaced with a series of questions – 23 in all – on which it invited public submissions. The Commission also indicated its willingness to meet with interested groups.

A new Chief Justice

In early 1989, the Chief Justice, Sir Ronald Davison, retired. Usually, the Chief Justice is appointed on the nomination of the Prime Minister, but David Lange left

³³⁰ Ibid., 315.

³³¹ Ibid., 315. The term of the Government was August 1987- November 1990.

³³² *NZPD*, 400, 6 October 1987.

³³³ The Law Commission, 7 December 1987, *The Structure of the Courts*, Preliminary Paper No.4.

this appointment to the Attorney-General. In his memoirs, Palmer reveals that Cooke approached him, arguing that he should be appointed Chief Justice, but he wanted to remain sitting in the Court of Appeal. Palmer's difficulty was that, although the Chief Justice did sit, on occasions, in the Court of Appeal, the Chief Justice:

traditionally sat in the High Court as a trial judge, and travelled all over New Zealand from time to time to try cases. This was thought by me to be an important feature of the system.³³⁴

While Palmer's point is valid, an alternative viewpoint is that Cooke's approach identified an early opportunity to merge the offices of Chief Justice and Court of Appeal President, as this was, in effect, what the Law Commission was to recommend. A further alternative would be to appoint Cooke as Chief Justice, and ask him to return to the High Court, as, like all appellate Judges, Cooke was also a Judge of the High Court.³³⁵ In Britain, there were several examples of judges moving from the top court (the House of Lords Appellate Committee) to the intermediate Court of Appeal of England and Wales to take up the distinguished offices of Lord Chief Justice of England and Wales, or Master of the Rolls.³³⁶ Given his formidable intellect and forceful legal argumentation, it is doubtful that some would have wanted Cooke as Chief Justice.

Cooke was a prolific writer, both judicially and extra-judicially.³³⁷ Some of his views were very forthright: while he acknowledged the respective roles of Parliament in setting policy and enacting laws, and of the Courts in upholding and respecting Parliament's role, he held that 'working out fundamental rights and

³³⁴ Palmer, Geoffrey, *Reform: A Memoir*, (2013), 311.

³³⁵ s.57(4), Judicature Act 1908. Cooke sat in the then named Supreme (now High) Court 1972-76.

³³⁶ The most notable was Lord Denning, a Lord of Appeal in Ordinary 1957-62, who moved back to the Court of Appeal to become Master of the Rolls, 1962-82.

³³⁷ The Social Science Research Network, www.ssrn.com identifies 87 extra-judicial papers authored by Cooke. This includes articles published in both refereered and non-refereered journals, lectures later published, and prefaces to books.

duties was ultimately a judicial responsibility.³³⁸ Moreover, he had also asserted that ‘some common law rights presumably lie so deep that even Parliament could not override them.’³³⁹ Later in 1989, Cooke gave a lecture as part of a series of lectures examining the recently introduced Crimes Bill.³⁴⁰ Although the judiciary did not like the Bill, Cooke emphasised that unless ‘otherwise indicated, his view was purely personal.’³⁴¹ He was quick to state the position the judiciary would adopt, if the Bill was enacted:

[s]ubject only to fundamental constitutional considerations not raised by the present Bill, what Parliament ordains it is the duty of the Courts to implement with full loyalty, indeed with constructive loyalty.³⁴²

Cooke provided a careful examination of the Bill’s proposals, including a contrast with the report and draft Bill, recently released by the Law Commission for England and Wales, on a proposed Criminal Code. Palmer was critical of Cooke’s public involvement in public discussion of legislation before the House.³⁴³

Palmer nominated Mr Justice Eichelbaum, a judge of the High Court, to become Chief Justice of New Zealand, instead. This was the first time a sitting judge had

³³⁸ Sir Robin Cooke, *Fundamentals*, *NZLJ*, 1988, 158-165, 165.

³³⁹ *Taylor v New Zealand Poultry Board* [1984] 1 *NZLR* 394, at 398. Although the case was about the regulation of the marketing of eggs, Cooke also identified the involvement of constitutional principles, hence the length of the judgment.

³⁴⁰ Sir Robin Cooke, *The Crimes Bill 1989: A Judge’s Response*, 1989 *NZLJ*, 235-243.

³⁴¹ *Ibid.*, 235. Cooke was always careful to distinguish between his judicial and extra-judicial writings, see, e.g. Cooke intonation when presenting one extra-judicial address: ‘Rule 2 is no Curial reminders.’ in Michael Taggart (ed.) *The Struggle for Simplicity in Administrative Law*, 1. Dr James Farmer, QC, relates that on one occasion Cooke turned his chair and faced the wall when one counsel would not desist. See Dr James A. Farmer, QC, *A Perspective from the Commercial Bar*, in Paul Rishworth (ed.), (1997), *The Struggle for Simplicity in the Law*, 63.

³⁴² *Ibid.*

³⁴³ Geoffrey Palmer, (2013), *Reform*, 332. Palmer did recognise Cooke’s helpful comments on his Bill of Rights legislation; and acknowledged that it may have been more appropriate to assign the task for reforming the Crimes Act to the Law Commission.

been appointed. Shortly before formally assuming the office, the Chief Justice-designate observed that he thought it ‘is inevitable we lose the Privy Council appeal.’³⁴⁴ He emphasized that discussions of court structure must focus on:

what is feasible in the New Zealand context. ... [While it is] ideal to have two rights of appeal, ... [for] High Court cases, we would have to create an extra layer of Judges and, given our small legal profession of which again only a small proportion practises regularly in the Courts, I just do not see where those resources are to come from.³⁴⁵

The Law Commission reports

On 20 March 1989, the Law Commission published its report.³⁴⁶ It had examined 63 submissions and held discussions with judges of the various courts; members of five District Law Societies; and representatives of the New Zealand Law Society. Advice was also received from judges, lawyers and administrators from Australia, England and Canada.³⁴⁷

The Law Commission recommended that there be three courts of general jurisdiction comprising the District Court (including the Family Court), the High

³⁴⁴ *Chief Justice: Interview with Mr Justice Eichelbaum on 12 January 1989*. [1989] NZLJ 47, at 52. The Judge became Sir Thomas Eichelbaum on 6 February 1989, the day on which he took office as Chief Justice.

³⁴⁵ *Ibid.*, 52. During his time as Chief Justice, 1989-1999, Sir Thomas was influential in broadening the recruitment base for judicial appointments. Appointments to the High Court during this period included the first women Judges, the first Maori Judges, the elevation of some Judges from inferior Courts (District Courts and Maori Land Court), solicitors (traditionally High Court Judges were selected from the ranks of Queen’s Counsels and barristers, who specialized in Court work), and academic lawyers. The influential role of successive Attorneys-General (Rt. Hon. Geoffrey Palmer; Rt. Hon. David Lange; Rt. Hon. Paul East, QC; and Rt. Hon. Sir Douglas Graham) in bringing about these changes must also be acknowledged: it is the Attorney-General who recommends the appointment of High Court Judges to the Governor-General.

³⁴⁶ The Law Commission, 20 March 1989, *The Structure of the Courts*, Report No.7.

³⁴⁷ *Ibid.*, Appendix A, Consultative Activities, Acknowledgements, 211-213.

Court, and the Supreme Court.³⁴⁸ The Report recommended an expanded jurisdiction for the District Court, with first appeals normally directed to the High Court. The Supreme Court would consist of the Chief Justice and up to six other judges. The Chief Justice would normally sit in the Supreme Court and a presiding Judge would be appointed to administer the High Court. First appeals to the Supreme Court would be a general appeal and be as of right. Second and leapfrog appeals from the District Court, to the Supreme Court would be usually limited to questions of law and be by leave, granted only by the Supreme Court. For appeals on interlocutory matters from the High Court, leave could be granted by either the High Court or the Supreme Court. The Law Commission recommended the enactment of a new Courts Act to repeal and replace the Judicature Act 1908 and the District Courts Act 1947.

The report was written on the basis of the Government's announcement that appeals to the Judicial Committee of the Privy Council were to be terminated.³⁴⁹ The proposals were for a simplified three-tier court structure, with the District Court enjoying an expanded jurisdiction, while the Court of Appeal was to be renamed as the Supreme Court. The expanded jurisdiction of the District Court, would result in a higher appellate role for the High Court, with a consequent reduction in appeals, especially in criminal matters, to the Supreme Court. Most of the appeals in the Supreme Court would be determined by panels of three judges, but it would be able to sit as a full court of five judges, drawn from its seven members.

The Government responds

On 22 March 1989, Attorney-General Palmer 'welcomed' the report as a 'thorough and comprehensive investigation.' He acknowledged that 'it was intended to end appeals to the Judicial Committee.' The report would provide the Government

³⁴⁸ The report did not examine the role of the specialist courts: the Labour Court; and the Maori Land Court and the Maori Appellate Court.

³⁴⁹ Law Commission, *The Structure of the Courts*, 2 (para 4).

with an excellent basis on which to make important decisions about the future of the court structure.³⁵⁰ Palmer, however, became Prime Minister in August 1989, following the resignation of David Lange. Lange became Attorney-General as a Minister outside Cabinet, while Hon. W.P. (Bill) Jeffries became Minister of Justice. The change of Prime Minister reflected the growing split within the Cabinet, the caucus and the wider Labour Party, over economic policy direction. The new Justice Minister inherited a major legislative reform programme; while the new Prime Minister, concentrated his legislative efforts, as noted above, on the New Zealand Bill of Rights Act 1990, and, as Minister for the Environment, on the massive legislative overhaul of resource planning laws, which, under the subsequent National Government, became the Resource Management Act 1991.

Jeffries took Ministerial responsibility for managing the Government's response to the Law Commission's Report, but he was opposed to ending appeals to the Judicial Committee. Earlier, on 26 October 1984, his brother, Mr Justice Jeffries,³⁵¹ highlighted the value of New Zealand judges sitting at the Privy Council, told a Wellington District Law Society dinner:

[t]he abolition [of the Privy Council as our final Appeal Court] is a proposal to which I am devotedly opposed, for I think it is a retrograde step in isolating ourselves from the mainstream of the western world.³⁵²

Early in 1990, in an Invercargill speech, the Minister of Justice announced he had reached some major conclusions about what changes should be made: 'Once Cabinet has approved the emerging scheme for the New Zealand Court system based on the Commission's report, I will announce the Government's intention and submit legislation to Parliament.'³⁵³ By April 1990, it was apparent that the abolition of appeals to the Judicial Committee was not proceeding. The Minister

³⁵⁰ Rt. Hon. Geoffrey Palmer, Minister of Justice, Press Statement 22 March 1989, Structure of the Courts, (mimeo).

³⁵¹ A High Court Judge, later Sir John Jeffries.

³⁵² [1984], *NZLJ*, 404.

³⁵³ Hon. W.P. Jeffries, 23 February 1990, reported in *The Capital Letter*, Issue 6, 2.

advised Cabinet that he favoured ‘an incremental approach to change, ... [in which [r]estructuring ... should proceed in advance of any final decision on the future availability of appeals to the Privy Council.’³⁵⁴ Following Cabinet consideration, the Justice Minister formally announced that the Government would not be pursuing the Law Commission’s recommendations on appeals to the Judicial Committee, but would pursue other recommendations. The Minister introduced the Courts Amendment Bill, which completed its Parliamentary passage, under the management of the new Minister, Hon. D.A.M. Graham, in July 1991.³⁵⁵

Conclusion

There has been little discussion of the reasons for the failure of Palmer’s initiative to end appeals to the Judicial Committee by 1990. Palmer himself merely states that he ‘was out of the Justice portfolio before that reform could be put in train,’³⁵⁶ while Wilson later observed that Justice Minister Jeffries was opposed to the proposal, and there was division within Cabinet which proved fatal.³⁵⁷ In a subsequent version of her account, Wilson added that ‘given the government’s

³⁵⁴ Cabinet Paper, Courts Restructuring, Minister of Justice, 5 April 1990, CAB (90) 191.

³⁵⁵ The Courts Amendment Bill changes took effect on 1 July 1992. This legislation included an expansion in both the civil (from \$50,000 to \$200,000 – before 1980 it was just \$3,000) and criminal jurisdiction of the District Court; enabled the jurisdiction on some family law matters to be shared concurrently between High Court and the Family Court (and usually commenced in the Family Court); and created a criminal appeals division, composed of at least one permanent judge and up to two High Court judges, in the Court of Appeal. One effect of the transfer of part of the jurisdiction of the High Court to the courts below (known, not pejoratively, as ‘inferior’ courts) was to remove the right of appeal to the Judicial Committee, following appeals to the High Court and/or the Court of Appeal. The Solicitor-General’s Report in 1994 (see next chapter) identified an uncertainty as to whether a party to the proceedings could still apply directly to the Judicial Committee for leave to appeal under the exercise of the Royal prerogative, see *Nunns v Licensing Control Commission*, NZLR [1968] 57, at 63 (per McCarthy J), where the question was left open by the Court of Appeal.

³⁵⁶ Palmer, *ibid.*, (2013), 593.

³⁵⁷ Margaret Wilson, *From Privy Council to Supreme Court: A Rite of Passage for New Zealand’s Legal System*, *Waikato Law Review*, Vol.18, (2010), 1-14, at 2.

economic reform programme, the abolition of appeals ... was not a political priority so valuable Parliament time could not be justified.³⁵⁸ Neither author offers any further insight.

Palmer's comment hides his disappointment on this issue. His law reform achievements, and overall contribution to the Labour Government's wider achievements through 1984-90, were phenomenal.³⁵⁹ His crowning achievement – the enactment of the New Zealand Bill of Rights Act 1990 – 'against almost universal opposition from caucus,'³⁶⁰ took longer, and was harder, than anticipated. Moreover, it made it difficult to progress related policy changes, like the ending of appeals to the Judicial Committee. Smillie dates the concerns over juristocracy from the enactment of the New Zealand Bill of Rights Act. My contention is that this concern was evident in the debates over that legislation, and that this concern spilled over into other policy issues during the later 1980s.

Wilson's comments diplomatically skip over the more fundamental problem. It was true that the heavy legislative programme and the economic and financial situation were not conducive to the reform of appeals and, as well, the drafting of a new Courts Bill and Parliamentary requirements for the reform meant that it would be a task taking at least three years, provided drafting resources could be freed from other, pressing, legislative priorities. Despite these difficulties, and the Justice Minister's personal preference to retain appeals to London, the Law Commission had prepared a report which met the Labour's Party's 1984 election manifesto policy objective of developing 'a practical and modern alternative'. Moreover, key opinion leaders – Palmer, Cooke, and new Chief Justice Eichelbaum

³⁵⁸ Margaret Wilson, *Establishing a Final Court of Appeal for New Zealand*, (2014), paper to *The New Zealand Supreme Court: The First 10 Years* Conference at the University of Auckland.

³⁵⁹ Reviewing Palmer's memoirs, John Dawson, observed 'probably no other New Zealander – except perhaps Sir John Salmond in the early twentieth century – has made a greater contribution to reform of our law, or a greater impact on our statute book.' *Book reviews: Reform: A Memoir*, *Otago Law Review* (2013), Vol.13, No 1, 197-201, 197.

³⁶⁰ Michael Bassett, *Working with David: Inside the Lange Cabinet*, Auckland: Hodder Moe, 2008, 514

– had begun the early preparation of a receptive climate for the Law Commission’s proposal. Although there was a general apprehension about increasing the power of the judiciary arising from the Bill of Rights debate, there were no interest groups voicing strong opposition to the Law Commission’s recommendations, unlike later efforts to end appeals. Instead the Law Commission’s proposal was rejected by the Government itself, because it would involve rebranding the Court of Appeal as New Zealand’s final appellate court. It was this Court, together with its powerful President, that Government Ministers and advisers perceived to have provided difficulties for the Government’s economic reform programme. Whether the Court was responsible for the Government’s difficulties, or whether, as more likely, they arose from the internal conflicts within the Government’s own policy settings, is strongly debatable. Regardless, the Government decided it was not going to transfer final appellate power to a renamed Court of Appeal. The perceptions about the Court of Appeal continued into the 1990s. The Labour Government was defeated in November 1990.

Chapter Four – The New Zealand Courts Structure Bill

Introduction

This chapter examines the development of the second major proposal for ending New Zealand appeals to the Judicial Committee of the Privy Council. During the 1990s, the National Government made a second, more developed, and almost successful, bid to depart the Judicial Committee, only to face strong opposition from Maori.

Initial position

Following the 1990 General Election the new National Government,³⁶¹ soon confirmed there would be no ending of the right to appeal to the Judicial Committee. This position was emphasised both in general correspondence by the new Minister of Justice, Hon. Douglas Graham, and in an interview and a formal speech by the new Attorney-General, Hon. Paul East. On 4 January 1991, the Minister of Justice stated that the Privy Council was unlikely to go in the short term. He considered '[t]he Privy Council played a 'valuable role as New Zealand's ultimate appeal court.' He did not consider that it was a breach of New Zealand's sovereignty, arguing it is an appeal right to Her Majesty who seeks the advice of the Privy Counsellors.'³⁶²

³⁶¹ The General Election was on 27 October 1990, and the new Ministry sworn in on 2 November 1990.

³⁶² An example of the Minister's then-standard response is shown by the following extract from a response to a member of the public on 17 September 1991: 'I am presently in favour of retaining the existing right of appeal to the Judicial Committee of the Privy Council. That right of appeal makes available to New Zealand litigants of the highest calibre. As members of the Judicial Committee are removed from local issues and pressures they are likely to provide a greater degree of detachment. Moreover in my view the right of appeal has a beneficial effect on the quality of judgments given in the Court of Appeal. The Judicial Committee of the Privy Council has served us well for many years, and this Government has no plans to abolish the right of appeal to the Privy Council at this stage.' [I have withheld the correspondent's name.] Archive Reference Number ABVP

In an interview in April 1991 the Attorney-General admitted:

... I believe that the Privy Council has served New Zealand well. ... I don't want to see the right of appeal removed at this stage.³⁶³

Addressing an Auckland audience on 4 June 1991, East expanded on his position:

I think we should retain the Privy Council as our final court of appeal at least in the foreseeable future. The court is objective, dispassionate and detached from the court structure beneath it. These are qualities which are difficult to achieve in a country with a country of our size.

I am sure that most of us acknowledge the benefit of a two-tier appeal structure. ...

...

I am sure both the Privy Council and our own judiciary have derived great benefit from having appellate judges from New Zealand sitting on the Privy Council. I note that this has not occurred since 1987 and I have accordingly raised this matter ...³⁶⁴

These examples illustrate common themes about the perceived value of the Judicial Committee: the quality of the Judges, their detachment from local issues, the existence of a two-tier appellate structure, and the benefits the New Zealand judges derive from sitting on the Judicial Committee.

W5682 7410 Box 164; Record Number LEG 8-5-28 Part No. 1, Legal – Civil Practices and Procedure – Topics – Privy Council – Appeals.

³⁶³ Attorney-General – Interview with Hon. Paul East Attorney-General of New Zealand and Leader of the House of Representatives, [1991] *NZLJ* 109-114, 113.

³⁶⁴ Hon. Paul East, Speech at the first sitting of the High Court on the reopening of the No.1 Courtroom in the High Court complex, [1991] *NZLJ* 226.

East's comment about the attendance of New Zealand Judges at the Judicial Committee reflected the confusion about the arrangements. In 1962, Cabinet agreed that New Zealand Judges would sit at regular intervals of not greater frequency than once every two years.³⁶⁵ In 1983, it was agreed that it would be inappropriate for a New Zealand judge to attend the Judicial Committee while the *Erebus* appeal was considered. In 1984 the postponed visit was held, and the normal pattern was resumed in 1985. When the Department of Justice advised the Court of Appeal that the next scheduled visit would then be 1987, Sir Owen Woodhouse wrote directly to Minister Palmer and secured his agreement for Mr Justice Richardson to sit in 1986. In 1987, it was agreed that Sir Duncan McMullin³⁶⁶ would sit as a special case ahead of the next scheduled visit in 1988, on the understanding that the next subsequent visit would be in 1990. Cooke and Sir Ivor Richardson both sat in 1986, with Richardson being the nominated judge.³⁶⁷ Cooke again sat in 1990, which the Justice Department recorded as the next scheduled visit, while a Visiting Fellow at Oxford University.³⁶⁸ The main

³⁶⁵ See Chapter 2 above. The terms were revised by Cabinet in 1974, with a resulting increase in the costs to the Department of Justice, which funded the costs from its departmental budget – there was no special financial appropriation or additional funding. Sir Maurice Casey's attendance in 1991 was estimated to cost \$71,000. Hon. D.A.M. Graham, Minister of Justice, in response to a Parliamentary Question for Written Answer, No.34, (lodged 20 June 1991), from. Hon David Caygill (St Albans), New Zealand Hansard Supplement, July 1991, Vol 9, 1566-1567. Each official visit required separate Cabinet approval for the expenditure.

³⁶⁶ McMullin, retired, then aged only 62, in April 1989. Duncan McMullin, *A Lawyer's Tale*, (2008), Auckland District Law Society, includes a brief personal account of his time sitting on the Judicial Committee.

³⁶⁷ Cooke in July, Richardson in October-December, 1987.

³⁶⁸ Details are drawn from the 28 July 1992 response of the Department of Justice to Mr Justice Hardie Boys. The Judge, who was interested in sitting, eventually got his opportunity in late 1995 – early 1996, during which time he received his first knighthood to become Sir Michael Hardie Boys. The memo also records that Sir Maurice Casey sat in 1991, and that Sir Thomas Eichelbaum was planning to sit in 1993. [The Justice Department memorandum records Cooke at Cambridge University. In 1990, Cooke was awarded an honorary Doctorate in Laws by Cambridge, and, in the following year, an honorary Doctorate in Civil Law by Oxford University – a rare double for any person, especially a Commonwealth judge.] *Archives Reference Number* ABVP W5682 7404 Box 6.

problem was that the frequency of sittings involving New Zealand judges had not been changed since 1974, even though between 1974 and 1991, 12 judges were appointed Privy Counsellors, including two Chief Justices.³⁶⁹ Three of these judges, including Chief Justice Sir Ronald Davison, never sat on the Judicial Committee, and the only occasion when Sir Gordon Bisson sat was in 1989.³⁷⁰ In the mid-1990s, it was agreed to increase the frequency of visits.³⁷¹

Rumblings

In May 1992, Bolger suggested that New Zealanders might question the appropriateness of the Privy Council ruling on questions, which went to the heart of New Zealand sovereignty, like issues associated with the Treaty of Waitangi. In general, he considered the courts were ‘a crude instrument for dealing with Treaty of Waitangi claims. The Government would prefer they were settled by negotiation.’ In particular, he considered the Judicial Committee ‘would have difficulty having a full feel for what is happening in New Zealand.’ His comments

Cooke was a frequent member of the Judicial Committee, between 1977 and 1996, while a member of the Court of Appeal, Cooke sat on the Judicial Committee in 1978, 1980, 1981, 1984, 1986, and 1990. He was a regular member of the Judicial Committee between 1996 and 2001. *Source:* data from judgments available at the Judicial Committee of the Privy Council Decisions, various years, available on-line at www.bailii.org He sometimes took leave from the Court of Appeal and other times sitting while in England, outside of the Government funded schedule. Spiller, (2002), *New Zealand Court of Appeal*, (145, n.15), records two occasions: May-July 1984 and May-July 1990; and also notes Cooke twice took leave to renew English academic links at Cambridge University in 1978, and at Oxford University in 1990 (145, n.16).

³⁶⁹ A further six judges were appointed Privy Counsellors between 1995 and 1999. While these replaced retiring judicial Privy Counsellors, it meant that by February 1996, when Sir Michael Hardie Boys resigned to become Governor-General, only the Chief Justice and the Court of Appeal President had sat on the Judicial Committee.

³⁷⁰ *The Yien Yieh Commercial Bank Limited v Kwai Chung Col Storage Co Ltd*, [1989] UKPC 28, an appeal from the Court of Appeal in Hong Kong. Bisson was one of two Judges who dissented on an aspect of the majority’s findings.

³⁷¹ There were some Committee hearings with two New Zealand Judges: Lord Cooke and either Sir Thomas Gault (1997), Sir John Henry (1999), or Sir Ivor Richardson (2000).

were sparked by news that the New Zealand Maori Council was proposing to appeal a Court of Appeal majority decision,³⁷² which would not stop Government proposals to transfer assets held to new SOEs - Radio New Zealand and Television New Zealand since they were corporatized on 1 December 1988. Mr Bolger was concerned at the delay. The National Government was encountering similar difficulties to its predecessor: actions to improve the economic and fiscal situation were being held up by Court proceedings over Treaty claims. He was supported by a Dominion editorial: 'It is absurd that a bevy of law lords in London should be asked to decide a peculiarly New Zealand issue.'³⁷³

Surprisingly, the Judicial Committee was very well able to grapple with the issues raised, and this was a good example of where the presence of a New Zealand judge – Chief Justice Eichelbaum – was helpful, as was New Zealand counsel – including Sian Elias, QC, for the Maori Council, and the Solicitor-General, John McGrath, QC, for the Government respondents. [Elias was not impressed, however, when the Senior Law Lord asked her if Maori “still” lived on reservations.³⁷⁴] The appeal was dismissed in December 1993. In its judgment, the Judicial Committee noted: '[t]he argument for the appellants was based entirely on s.9 of the State-Owned Enterprises Act 1987.'³⁷⁵ In considering the argument, the Judicial Committee examined not only the judgments of the Court of Appeal and the High Court in the specific proceedings, but also the judgments of the Court of Appeal on the *Lands*, the *Coal* and the *Fisheries* cases. The Judicial Committee found these other cases:

³⁷² *The New Zealand Maori Council v The Attorney-General*, [1992] 2 NZLR 576. The Court of Appeal split 3:1, with Cooke P dissenting. This case was determined by four judges – an unusual number as usually appellate courts sit with an odd number of judges. This could be seen as an example of what the Solicitor-General's 1994 Report highlighted as a general problem the resourcing difficulty of the Court to arrange a five-judge panel for important cases.

³⁷³ *The Dominion*, 2 June 1992.

³⁷⁴ Sian Elias, Address to the Australasian-Anglo Lawyers Association, 11 October 2005, Sydney, 2,

³⁷⁵ *The New Zealand Maori Council v The Attorney-General*, [1994] 1 NZLR 513. Commonly referred to as the '*Broadcasting Assets*' case.

collectively ... provided a valuable insight as to the manner in which section 9 has to be approached and as to what is meant by 'the principles' of the Treaty.³⁷⁶

Reviewing some of the main Judicial Committee decisions on New Zealand appeals made during his nearly four decades of experience since 1966, Sir David Baragwanath identified this judgment as a leading example of where the final appellate court dismissed the appeal but clarified and sharpened the jurisprudence of the courts below. The judgment 'lifted the Treaty jurisprudence of the Court of Appeal to a loftier plan' in stating that there could be grounds for a successful judicial review if the Government did not follow through on undertakings given during an earlier stage of the proceedings to take actions to preserve the Maori language.³⁷⁷ Despite this, Baragwanath was to conclude:

... [the Judicial Committee's] failure fully to acknowledge New Zealand's independent identity, seen most importantly in its refusal during five of its final six decades to acknowledge the true legal effect to the Treaty of Waitangi, delayed the evolution of a distinctive New Zealand jurisprudence.³⁷⁸

While Baragwanath's concluding observation is noteworthy, it could be contended that this case highlights the excesses of litigation, in the belief that courts can bring

³⁷⁶ *The New Zealand Maori Council v The Attorney-General*, [1994] 1 NZLR 513 - the 'Broadcasting Assets' case. The judgment was delivered by Lord Woolf, then one of 12 Lords of Appeal in Ordinary, i.e. one of the principal judges of the House of Lords Appellate Committee. In 1996, Woolf resigned to become the Master of the Rolls 1996-2000, and Lord Chief Justice of England and Wales 2000-2005. He continued to be eligible to sit on the Judicial Committee until 2008.

³⁷⁷ David Baragwanath, *The Later Privy Council and a Distinctive New Zealand Jurisprudence: Curb or Spur?* (2012) 43 *VUWLR* 147-162, 161. Sir David was a former Judge of the Court of Appeal.

³⁷⁸ *Ibid.*, 162.

about social change – what historian Gerald Rosenberg calls ‘the hollow hope.’³⁷⁹ Following the first stage of the High Court judgment in May 1991 (which only permitted the transfer of the radio assets), Cabinet developed a formal proposal to enhance Maori television broadcasting services to promote the Maori language. That proposal was accepted by the High Court in July 1991; and the High Court’s actions on the transfer of both sets of assets were upheld, by majority, in the Court of Appeal in April 1992.³⁸⁰ The subsequent litigation did not advance the substantive objective of the litigants.

Although the Government was satisfied with outcome of the *Broadcasting Assets* case, that result was still 18-months away when Bolger first raised doubts about continuing New Zealand appeals to the Judicial Committee. In that 18-months we see the first stirrings towards a change in the official position of the Government, and this also prompted media interest. In June 1992, a *Dominion* editorial acknowledged it was only a question of time before abolition of the right to appeal;³⁸¹ while a *Radio New Zealand* survey found 44% did not want the Privy Council to continue as New Zealand’s final appellate court, and in response to a separate question, 65% thought the judgments of the Court of Appeal should be final.³⁸² A Radio New Zealand ‘*Insight*’ programme canvassed the debate from various informed perspectives.³⁸³ Professor Whatarangi Winiata, who was involved in the *Broadcasting Assets* case, considered the issues – ‘the protection of indigenous language and a treaty between an indigenous people and a colonial government’ – required access to international judges rather than to ‘a group of

³⁷⁹ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991, rev. ed., 2008). See also Gerald Rosenberg and *the Hollow Hope*, Chapter 15 in *Conducting Law and Society Research*, in Simon Halliday and Patrick Schmidt (eds.) Cambridge University Press, 2009. 163-173.

³⁸⁰ *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576. Cooke P dissenting.

³⁸¹ *The Dominion*, 2 June 1992.

³⁸² Radio New Zealand, *Good Morning NZ*, 16 June 1992.

³⁸³ Neil Billington, Radio New Zealand *Insight*, 14 June 1992.

judges who are regrettably influenced by the politics of the day' and are more limited in their focus. Sir Kenneth Keith did not believe New Zealand would become more insular if the appeal right was abolished – he noted the growing influence of international legal requirements.³⁸⁴ The programme concluded with Justice Minister acknowledging that he had been a firm believer in 'retaining the Privy Council' but now recognised that 'its days were probably numbered' and expected change 'within the next ten years'.³⁸⁵

At the opening of the New Zealand Law Society Conference in March 1993, there is a slight change in the tenor of the Attorney-General's message, when he posed the question: 'can another Court in another country, in another hemisphere, have a true understanding of New Zealand society?'³⁸⁶

On 1 October 1993, the Prime Minister announced that the Government would examine ending the right of appeal to the Judicial Committee. A few days later, Law Commission President, Sir Kenneth Keith, followed up on a conversation with one of the Prime Minister's advisers, with an updated note on New Zealand appeals to the Judicial Committee.³⁸⁷ Keith also sent a copy to the President of the New

³⁸⁴ Sir Kenneth noted the example of a dispute between the New Zealand Government and the developer of the Mobil Synfuels project, which went to a World Bank international arbitral tribunal for determination. From the early 1960s, throughout his long career, Sir Kenneth has championed a common theme of the importance of international law and agreements on New Zealand law. He has estimated that approximately one-third of New Zealand's statutes reflect this international influence.

³⁸⁵ Doug Graham, *Insight*, 14 June 1992. The Supreme Court Act 2003 terminated appeals from 1 January 2004, although the transitional provisions permitted those with existing rights to exercise those rights.

³⁸⁶ Hon. Paul East, Address at the opening ceremony of the New Zealand Law Society Conference, [1993] *NZLJ* 83.

³⁸⁷ He included selected extracts from the 1979 Report of the Royal Commission on the Courts and the 1989 Law Commission Report on the Structure of the Courts. [Potter was later appointed a Judge of the High Court.] Over the next few months, Sir Kenneth continued his discussions with

Zealand Law Society, Judith Potter, and a few days later, forwarded copies to the Minister of Justice and the Attorney-General. In his letter to Potter, Keith explained the Law Commission's position:

[t]here is no general principled justification for a second appeal and certainly not a second right of appeal. ... A critical practical question is how the appellate work at the top of the court system is best organised to enable the final court properly to meet its responsibilities.³⁸⁸

On 23 November 1993, Cabinet 'noted that the time was right for New Zealand to begin work on moving away from using the Judicial Committee of the Privy Council as the final appeal tribunal for New Zealand.' It agreed that the Attorney-General and the Minister of Justice would begin work, in consultation with the Prime Minister.³⁸⁹

On 29 November 1993, the leaders of the five main accountancy firms wrote to the Prime Minister expressing their concern at the likely impact on their insurance arrangements sourced principally from London. The market advised that:

Government, especially with the Secretary for Justice, David Oughton, offering the assistance of the Law Commission, especially if a new Courts Act was to be developed. Extracts from Minutes of meetings of the Law Commission, dated 15 December 1993, and 19 January 1994. Earlier, in 1992, Keith had corresponded with a former student, who was a London based barrister that 'No one has yet successfully (so far as I am concerned) argued why that further tier is needed in New Zealand.' Sir Kenneth Keith to John McLinden, 23 June 1992. McLinden appeared as counsel before the Judicial Committee, see, e.g. *Grant Adams v The Queen*, [1994] UKPC 38. Although that appeal was dismissed, it was only the sixth criminal appeal, from New Zealand, granted leave to appeal.

³⁸⁸ K.J. Keith to Judith Potter, 7 October 1993. *Archives: ABQC 7958 23/ PRO CTS 12/5 Part 1 - Law Commission - Projects - Courts - Post Report - Privy Council.*

³⁸⁹ Information from Memorandum from Attorney-General and Minister of Justice to Cabinet Strategy Committee, Abolition of Right of Appeal to the Privy Council, 13 September 1994, CSC (94) 116.

in their view a New Zealand without the Privy Council substantially raises the level of risk and accordingly raises the price of their insurance cover (already in excess of \$NZ50,000 per partner) and potentially invites withdrawal from the NZ market.³⁹⁰

Their view is likely to have been also influenced by the Judicial Committee's recent decision allowing an appeal by Deloitte.³⁹¹

Law Leaders visit London

Chief Justice Eichelbaum sat on the Judicial Committee in October and November 1993, and provided some insights in an interview in March 1994. Although he was involved in overturning a 100-year-old authority of the English Court of Appeal,³⁹² Eichelbaum considered:

³⁹⁰ Letter, 29 November 1993, to The Rt. Hon. Mr J. Bolger, Prime Minister, and copied to the Hon. D.A.M. Graham, Minister of Justice, signed by Robin G. Hill, Chairman, Coopers & Lybrand; Michael S. Morris, Chairman, KPMG Peat Marwick; Graeme W. Bowker, Executive Chairman, Deloitte Touche Tohmatsu; Jeff Todd, Senior Partner, Price Waterhouse; and Richard A. Waddel, Chief Executive, Ernst & Young. *Archives Reference Number* ABVP W5682 7404 Box 6.

³⁹¹ *Deloitte Haskins & Sells v National Mutual Life Nominees Ltd*, [1993] 3 NZLR 1. The judgment was delivered on 10 June 1993. The appeal concerned the duties owed by auditors of a money market operating company to another company acting as trustee for unsecured depositors. The Judicial Committee held that a 'common law duty of care of greater scope should not be superimposed upon the statutory duty arising under s.50(2) of the Securities Act 1978 on an auditor for the borrower, towards the trustee under a trust deed.' (Description taken from Eichelbaum (1995), see below.)

³⁹² *Attorney-General for Hong Kong v Reid*, [1994] 1 NZLR 1. This was a New Zealand appeal, in which '[t]he courts of New Zealand were constrained by a number of precedents of the New Zealand, English and other common law courts. ... The reasoning of the [New Zealand] Court of Appeal, as their Lordships understand it, was ... in the absence of differentiating local circumstances the Court should follow a decision representing contemporary English law.' (per Lord Templeman). The New Zealand Court of Appeal judgment was overturned. The case involved a New Zealand National, Mr Reid, who was a Crown Counsel in Hong Kong, and was convicted of accepting bribes to obstruct the prosecution of certain criminals. He was sentenced to eight years'

The English legal system shows a stronger adherence to precedent, a higher emphasis on the value of precedent than is the case in New Zealand and in Commonwealth countries which have already broken away from the Privy Council.³⁹³

The Chief Justice observed that he was not ‘an abolitionist’ but considered it inevitable that New Zealand appeals to the Judicial Committee would be abolished. While ideally there should be two tiers of appeal, he considered the appeal system should be ‘adjusted to the size and resources of the particular community.’³⁹⁴

Eichelbaum was to elaborate on his insights in a subsequent essay.

The notion that a fully self-governing nation should send its litigation for final determination to a tribunal sitting in a ‘foreign’ State, composed of Judges lacking any intimate knowledge of the New Zealand way of life, has become increasingly quaint. Only a tiny proportion of cases actually finding their way to the Privy Council for a full hearing has enabled the incongruity to escape fuller attention and criticism.³⁹⁵

Reflecting on his time in the law,³⁹⁶ he believed:

imprisonment, and ordered to pay HK\$12.4 million (NZ\$2.5 million), but no payment had been made. Mr Reid’s assets included three freehold properties in New Zealand – two held by Mr & Mrs Reid, and one by Mr Reid’s solicitor (Mr Marc Molloy) – all three persons were respondents in the appeal.

³⁹³ Chief Justice at the Privy Council: Interview with Sir Thomas Eichelbaum on 2 March 1994, concerning the Privy Council and other topics, [1994], *NZLJ*, 86-91, 87

³⁹⁴ *Ibid.*, 88

³⁹⁵ Thomas Eichelbaum, *Brooding Inhibition: – Or Guiding Hand?* in Philip A. Joseph (ed.), *Essays on the Constitution*, 112-128.

³⁹⁶ German-born Eichelbaum came to New Zealand in 1938 as a child with his Jewish parents from Nazi Germany. He began his legal studies in 1949.

instances where the New Zealand Courts have lamented the fact that contrary to their own preferences, they have been forced to follow unsatisfactory English precedents, are few and far between.³⁹⁷

After reviewing a few older cases,³⁹⁸ he then reviewed cases over the previous 30 years (till the end of 1993) where the Privy Council reversed the Court of Appeal. He left aside the tax cases, which, in the main, turned on interpretation of specialised New Zealand legislation. His key findings included a set of seven cases ‘where the Privy Council differed from the Court of Appeal appear to reflect a greater reluctance to find or extend a duty of care, or to find a breach where a duty existed.’ This included the *Deloitte* case referred to above. On this set of cases, Eichelbaum wryly observes:

This rather formidable list of attempts at loss redistribution (which, but for the intervention of the Privy Council, which would have been successful) suggests that, without that restraining influence, the Courts (and defendants with deep pockets) could look forward to increasing volumes of such litigation.³⁹⁹

³⁹⁷ Ibid.

³⁹⁸ Including *Perkowski v Wellington City Corporation*, [1957] NZLR 39, in which the widow of a swimmer, who died after diving off a diving board at low tide, sued the corporation. The legal argument centred on the duties of the corporation as the ‘occupier’ of the diving board. (Eichelbaum, 119) Mrs Perkowski’s lawyers were Daniel Riddiford and Robin Cooke (although only Cooke travelled to London, to support an English QC). In 1966, as the Judicial Committee was announcing that dissenting judgments were permissible, one of the judges in this case, Lord Denning, informed the New Zealand Law Society Conference that he dissented on this judgment, and would have found the Corporation 20 percent responsible for the fatality, and Mr Perkowski 80 percent responsible. Lord Denning, *Recent Changes in the Law*, [1966] NZLJ 167, 169. The single judgment requirement had been controversial, with Australian judges refusing to sit on the Judicial Committee for nearly 50 years, until it was lifted. (D.B. Swinfen, *Imperial Appeal*, 1990).

³⁹⁹ Ibid., 123. In 1995, visiting Law Lord, Lord Griffiths, made a similar observation about the different approach of the New Zealand Court of Appeal with the British and Australian courts.

Eichelbaum concluded:

the effect of the restraint by the mere presence of the right of appeal to the Privy Council should not be underestimated. ... complete freedom to develop our own body of law and shape a separate New Zealand legal destiny will not be achieved until the Privy Council appeal is abolished.⁴⁰⁰

In April 1994, Mr East became the first serving New Zealand Attorney-General to appear before the Judicial Committee, when he took the role of an *amicus curiae*⁴⁰¹ on behalf of the House of Representatives, in the appeal of *Richard William Prebble v Television New Zealand*.⁴⁰²

⁴⁰⁰ Ibid., 127-128.

⁴⁰¹ Attorney-General East also appeared in this role in the High Court and the Court of Appeal proceedings.

⁴⁰² Mr Prebble was seeking to overturn the majority decision of the Court of Appeal staying his libel action against Television New Zealand (TVNZ), relating to his time as Minister for State-Owned Enterprises in the Labour Government. Mr Prebble alleged he had been defamed in a TVNZ programme broadcast in 1990. In its defence, TVNZ wanted 'to allege the allegedly defamatory statements made by them were true and ... [sought] to demonstrate such truth by relying on things said and acts done in Parliament.' Mr Prebble believed this reliance impinged Parliamentary privilege, and applied to have this part of the defence's statement struck out. The Attorney-General, together with the Clerk of the House and Crown Counsel, made a submission on behalf of the House, in support of this position. Mr East's submission related to Article 9 of the Bill of Rights Act 1688, which precludes any court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament. The High Court closely examined the claim and upheld Mr Prebble's application. The Court of Appeal agreed with the High Court. The majority (Cooke and Richardson, McKay dissenting) went further and held that, if TVNZ could not rely upon the Parliamentary materials, it would be unjust to allow Mr Prebble's action to proceed, unless and until privilege was waived by the House, and so stayed the proceedings. The House's Privileges Committee then decided it did not have the power to waive the privileges protected by Article 9. The Judicial Committee overturned the stay of proceedings, but otherwise agreed with the findings of the High Court and the Court of Appeal that certain Parliamentary materials could not be used by TVNZ in the way intended. *Richard William Prebble v Television New Zealand Ltd*, [1994] UKPC 25. I have relied upon this judgment's summary of the judgments of the High Court and the Court of Appeal. I

The Solicitor-General reports

Ministers continued to consider the future of appeals to the Judicial Committee. In January 1994, the Department of Justice advised its Minister that ‘very little by way of statutory amendment would be required and no modification to the Court of Appeal or the manner in which it operates would be necessary.’⁴⁰³ Two months later, Stephen Kos following up on a February meeting between the Minister and Law Society leaders, raised the possibility of reform to the arrangements for New Zealand appeals, including always ensuring that one or two New Zealand Judges sat on every New Zealand appeal, requiring the Judicial Committee to sit in New Zealand at least annually, and requiring all appeals seek leave to appeal.⁴⁰⁴

In September 1994, the Attorney-General and Minister of Justice presented a joint memorandum to the Cabinet Strategy Committee⁴⁰⁵ on the future of appeals to the

also acknowledge the permission of Rt. Hon. Paul East, QC to view and cite his personal file, held in National Archives, on these proceedings.

⁴⁰³ Department of Justice to the Minister of Justice, Abolition of Right of Appeal to Privy Council, 26 January 1994. Progress was slow through 1994, as the Department of Justice was reviewed, and in 1995, broken up into three new departments: the Ministry of Justice, the Department for Courts, and the Department of Corrections, with the public registry functions and some policy roles, e.g. most commercial law, divided among other Government departments. This meant senior staff were either reassigned to new roles, or found new careers.

⁴⁰⁴ J. Stephen Kos to Minister of Justice, Judicial Committee of the Privy Council, 9 March 1994. Mr Kos referred to the ‘invaluable’ presence of Sir Thomas Eichelbaum in *Attorney-General of Hong Kong v Reid and Others* (see below). Kos was counsel in these proceedings. On 22 July 2016, he became President of the Court of Appeal.

⁴⁰⁵ In New Zealand, detailed proposals are mainly examined by Cabinet Committees, which make recommendations for consideration and confirmation by Cabinet. For the Bolger Government, the Cabinet Strategy Committee was the most powerful, chaired by the Bolger himself, and comprising senior Ministers, including East and Graham. Other Ministers included Don McKinnon (Deputy Prime Minister, and Minister of Foreign Affairs), Bill Birch (Minister of Finance), and Doug Kidd (Minister of Maori Affairs, who had just overseen the enactment and implementation of Te Ture Whenua Maori Act 1993 – the Maori Land Act 1993 – which included the statutory provisions for the Maori Land Court and the Maori Appellate Court.

Privy Council. The paper proposed an implementation committee with formal terms of reference to oversee the ending of appeals. At the meeting, the paper was withdrawn and, next day, Bolger, East and Graham met with Solicitor-General, John McGrath, QC. On 17 October 1994, the Government formally announced the Solicitor-General was to report on issues relating to the availability of appeals to the Privy Council. The report was to ‘include the arguments for and against retention of the appeal and an evaluation of possible alternative structures if it were abolished.’

The report, which was finalised on 10 March 1995, identified that ‘there are now very substantial differences between New Zealand and British statute law. ... [which] ... lessens the scope for consistency in the case law of the two countries.’⁴⁰⁶ The report suggested four options for the new appellate structure, if appeals to the Judicial Committee were abolished. All four options proposed that the Court of Appeal become New Zealand’s final appellate court. The main distinction centred on whether there should be the opportunity for one or two appeals from first instance decisions of the High Court. The options were:

- Option 1 A single appeal from High Court decisions, heard by the Court of Appeal. This would entail no other change to the current appellate structure.
- Option 2 A single appeal from High Court decisions, with most appeals considered by three judges in a criminal or civil appeals division, comprising at least one permanent judge⁴⁰⁷ of the Court of Appeal, and up to two High Court Judges; while more complex appeals would be determined by five

⁴⁰⁶ Solicitor-General’s Report, para 41, 14.

⁴⁰⁷ The Chief Justice was, *ex officio*, a permanent member of the Court of Appeal. The divisional court was modelled on the existing Criminal Appeals Division of the Court of Appeal, which heard approximately 75 percent of all criminal appeals made to the Court of Appeal.

permanent judges. A divisional court could refer a case to the full court.

Option 3 The opportunity for two-tiers of appeal, with the first appeal heard by a division of the Court of Appeal (which could include up to two High Court Judges); with a second appeal, by leave, to the full court of five permanent judges.

Option 4 The opportunity for two-tiers of appeal, with the first appeal heard by an appellate division of the High Court; with a second appeal, by leave, to a divisional or full court of the Court of Appeal.

The Solicitor-General strongly questioned the need for a second appeal, given the very small volume of Judicial Committee appeals – less than 35 in the preceding five years – and for this reason favoured only one appeal.⁴⁰⁸ Preliminary consultations revealed, option 2 was also supported by the Chief Justice, and the President and Judges of the Court of Appeal. The High Court judges supported option 2 only as an interim reform, with an eventual move to either option 3 or 4, which provided for a two-tier appeal system. Options 3 or 4 were also favoured by the New Zealand Law Society and the New Zealand Bar Association.⁴⁰⁹ Although Cabinet requested the alternatives be fiscally neutral, the report warned that even if the Government decided not to end appeals to the Judicial Committee, it would need to increase the resources available to the Court of Appeal.

Examination of the report took nearly two months and five formal meetings⁴¹⁰, even though the report being released, on 5 May 1995, was unchanged. Indeed, officials were to describe it as ‘a very thorough report ... which will greatly inform public debate.’ The principal concern was how to manage consultation with Maori.

⁴⁰⁸ As did the Law Commission in 1989, and the Royal Commission on the Courts in 1979.

⁴⁰⁹ *ibid*, para 70, 21.

⁴¹⁰ By Cabinet Strategy Committee on 15 March and 5 April; and by Cabinet on 10 and 26 April, and 1 May 1995. [There was no Cabinet meeting in the week following Easter Sunday on 16 April 1995.]

The Minister of Justice conveyed officials' strong concern in a memorandum, which listed the pressures Government was facing on Treaty issues:⁴¹¹ The Government was in the midst of the largest ever Crown-Maori consultation - over the proposed 'fiscal envelope', which sought to limit the aggregate value of all Treaty settlements to \$1 billion.⁴¹² 'Related issues were the place of the conservation estate and natural resources in Treaty settlements, while other significant issues included the Waikato-Tainui settlement,⁴¹³ the Moutoa situation,⁴¹⁴ the developing debate on Maori self-determination, and pending litigation on the deliberation and appointment process for the Treaty of Waitangi Fisheries Commission.' Officials doubted that the consultations could be confined to the single issue of the future of appeals to the Judicial Committee. It was not until mid-May before Cabinet settled on seeking a formal submission from the Maori Committee of the Law

⁴¹¹ Minister of Justice to Cabinet Strategy Committee, Future of Appeals to the Privy Council: Consultation and Communications Strategy, 4 April 1995, CSC (95) 41.

⁴¹² A series of hui through February and March 1995 had been 'a public relations nightmare' according to Wira Gardiner, Chief Executive of Te Puni Kokiri. See Wira Gardiner, *Return to Sender: what really happened at the fiscal envelope hui*, Reed, 1996. See also, Richard S Hill, *Maori and the State: Crown-Maori relations in New Zealand/Aotearoa, 1950-2000*, Victoria University Press, 2009, p262-264. The proposal was to receive very strong and united opposition from Maori, including the first of three national hui convened by paramount chief, Sir Hepi te Heuheu at Hirangi. The three hui were held on January 1995, September 1995, and April 1996. They considered the fiscal envelope and other Treaty related issues, including, in time, the Government's proposal to end appeals to the Judicial Committee. A further indication of the pressure facing the government, is provided by the fact that at one stage Ngai Tahu alone 'had about 17 proceedings on the go against the Crown at one time.' [Chris Finlayson, *Ngai Tahu Negotiations, in the Bolger Years 1990-1997*, Margaret Clark, (ed.) 2008. Before entering Parliament, Finlayson was responsible for managing Ngai Tahu's litigation against the Crown. Since 2008, he has been Attorney-General and Minister in Charge of Treaty of Waitangi Negotiations.]

⁴¹³ Signed on 22 May 1995.

⁴¹⁴ Moutoa/Pakaitore gardens in Whanganui were occupied February to May 1995.

Commission;⁴¹⁵ in addition to the general call for submissions made when the report was released.

Reactions to the report

On 6 June 1995, the New Zealand Law Society issued a statement strongly advocating two levels of appeal,⁴¹⁶ through the establishment of a new intermediate appellate court between the High Court and the Court of Appeal. *The New Zealand Law Journal* included reactions from 24, mainly senior, legal practitioners. Only a quarter favoured one-tier of appeals.⁴¹⁷ The Chief District Court Judge, Ronald Young, preferred a wider focus on the whole court system, rather than just on the appellate courts.⁴¹⁸

The report was considered at the New Zealand Bar Association Conference, attended by approximately 60 people.⁴¹⁹ Donna Hall noted that ‘in Maori history the Privy Council debate goes back to the missionaries. ... [who] ... effectively portrayed the image of a higher law that stood above local politics. ... Thus ‘[r]ecourse to the monarch came to be represented in appeals to the Privy Council.’

⁴¹⁵ The Maori Committee was an advisory committee. Cabinet suggested the Committee be augmented by other Maori leaders. From the information available, it would appear that Archie Taiaroa and Denese Henare joined the Committee.

⁴¹⁶ [1995] *NZLJ* 205-6

⁴¹⁷ [1995] *NZLJ* 208-219

⁴¹⁸ R.L. Young, *The District Courts without the Privy Council: A View from Below*, [1995] *New Zealand Law Review*, 448-459. He acknowledged the expansion of the District Courts civil and criminal jurisdictions following the Law Commission’s 1989 report. He particularly argued for a further expansion of the criminal jurisdiction to that exercised by the Justices of the Peace, thereby enabling District Court judges to undertake more of the jurisdiction that was ‘middle-banded’, i.e. shared, between the High Court and the District Courts, but often started in the High Court. [He is now Sir Ronald Young.]

⁴¹⁹ The Bar Association: A two-part interview with the President Julian Miles, QC, 21 June 1995 and 16 August 1995, [1995] *NZLJ* 283-289. The conference was held 21-22 July 1995 in Queenstown.

She highlighted the need for an independent judiciary – ‘The politicians and judges are so close they can wave to each other from either side of Molesworth Street.’ If appeals to the Privy Council were to be abolished then there needed to be a better arrangement for Maori, with the following features:

First not just a higher court but a higher law – a constitution which protects the aboriginal and Treaty rights of indigenous people; and

Secondly a Maori option for recourse to an off-shore court, comprised of judges with experience in indigenous peoples issues and removed from the local body politic.

[Alternatively,] if only a domestic court is feasible, there should be provisions for Maori and overseas judges to be invited to sit on that court when Maori issues are in question.

Roger Kerr’s speech was described as ‘sparking a furore’ by the *Independent*,⁴²⁰ which published an edited version.⁴²¹ Kerr introduces himself as interested in the interplay between law and economics.⁴²² He was scathing of ‘examples of economic illiteracy’,⁴²³ coming from decisions of the Court of Appeal; and saw the fact that 50 percent of that Court’s recent judgments being overturned by the Judicial Committee as illustrative of the real issue, the quality of judicial services in New Zealand. The commercial community was the major user of the Privy Council,

⁴²⁰ *The Independent*, 28 July 1995, 9.

⁴²¹ Roger Kerr, Judging the Judges: Dump the Privy Council at our peril, *The Independent*, 28 July 1995, 9-10.

⁴²² He favourably cites the work of Richard A. Posner. Posner (b.1939) is a judge of the United States Court of Appeals for the Seventh Circuit in Chicago (i.e. the Federal appellate level below the US Supreme Court), and is a Senior Lecturer in Law at the University of Chicago. Posner’s key text, *Economic Analysis of Law*, was first published in 1973, and is now in its ninth edition (2014), and is a standard text for the study of law and economics. Sir Ivor Richardson was the inaugural Patron (for ‘the best part of 20 years’) of the Law and Economics Association of New Zealand, and gave a lecture at its inaugural meeting in 1993, and again in 2014.

⁴²³ Notably *Brighouse v Bilderbeck*, [1995] 1 NZLR 158, an employment law case concerning redundancy, which could not be appealed to the Judicial Committee, because it originated in the Employment Court.

and it required restraint and predictability in judicial decision-making. He observed:

At its most fundamental, these difficulties appear to reflect the dominance of an ‘activist’ judicial philosophy within the Court of Appeal. Developing in New Zealand only in the last decade or so, this is a judicial perception of the Court of Appeal’s role as consciously shaping the law.

In my view, law-making should be the preserve of Parliament.

The Business RoundTable’s 20-page written submission was more measured in tone, but just as forthright in criticising ‘the credibility and quality of decision making by the Court of Appeal.’ It considered ‘the case for the abolition of appeals ... has not been made out.’ Part 2 of the submission identifying some of the leading decisions of 1993 and 1994, which gave rise to their concerns. In several cases the Court had ‘sought to apply rules based on torts (duties of care) and/or equity (duties to avoid conflicts of interest) to produce results different from those yielded by a straightforward contractual analysis.’ In Part 3, the submission identified other elements to improve judicial decision-making, including the way:

[s]uccessive governments have encouraged an activist approach insofar as they have enacted legislation which, in effect, trusts the judges to exercise very wide discretions to fill in the gaps.

Other elements included established appointment criteria – assessing a candidate’s ‘respect for certainty in commercial transactions’ – and amending the judicial oath to this effect; supplementing, educating and informing the bench; and requiring annual reports and select committee oversight. Part 4 addressed the structure of the courts and suggested that all appellate decisions on final judgments of the High Court and the Employment Court should be automatically subject to appeal to the Privy Council; while intending appellants from other Court of Appeal decisions (including appeals originating from a tribunal appeal) should be required to seek leave. If appeals were to be abolished, the submission urged that ‘two rights of appeal should be retained, ...; there should be a generous transition period; and the

other proposals ... should be advanced expeditiously.’ As well, the Business RoundTable wanted ‘serious consideration given to establishing a panel of overseas judges who could supplement New Zealand’s final court of appeal.’

Sir Kenneth Keith, QC, argued for the abolition of appeals, focussing on three matters: the wider international context in which our legal system is to be seen; issues relating to Maori and the Treaty of Waitangi; and three public law cases decided in recent decades. He noted Sir Maurice Casey’s observation at his retirement that the ‘Law Lords find it all the more strange that we do still have the appeal to London.’ He acknowledged the importance Maori placed on retaining appeals to the Judicial Committee, and mentioned the Law Commission was facilitating ‘discussions and consultations on the issues.’ While acknowledging the importance of some Judicial Committee decisions which were important to Maori, he noted a significant feature of the litigation over the past decade was that ‘many of these important decisions in the Court of Appeal have been decided at first and last instance. There has, in many of the cases, been no appeal.’ In the final part of his speech, he highlighted unsatisfactory elements of the Judicial Committee’s judgments in three public law cases. ‘The *Lesa* case shows a court completely out of touch with the law in its historical context.’ ‘The *Erebus* case includes an unnecessary and confusing elaboration of the law.’ And in the *Jeffs* case ‘the short and superficial reasoning ... does not do justice to the complex issues raised.’ He also emphasised that ‘the issues which arise in these major cases are often capable of being argued with real force in either direction.’

Patsy Reddy,⁴²⁴ a commercial law litigator, supported the abolition of appeals. Speaking from her involvement in five cases before the Judicial Committee in the past four years, she noted:

⁴²⁴ Now Dame Patsy Reddy, Governor-General-designate.

There were impressive displays of intellect from some ... But, ..., they were making decisions out of context – far removed from the place where the disputes arose and largely ignorant of our patterns of behaviour, our generally-held beliefs, our social culture and our conventions.

Acknowledging that two tiers of appeal refines the issues in dispute, she was concerned that in that process ‘the lawyers take control and a sense of commercial reality is lost.’ Reddy thought there were more important issues to improve the quality of judicial decision-making, through better appointments; a better system for making appointments; better training of judges; a better system for allocating judges to cases; a finite term of appointment for judges; and more judicial resources.

There was an interesting discussion involving the two judges with Justice Tipping⁴²⁵ strongly supporting two tiers of appeal; while Sir Ivor Richardson⁴²⁶ supported the Solicitor-General’s Option two. Tipping’s speaking notes⁴²⁷ argue

⁴²⁵ Later Rt. Hon. Sir Andrew Tipping, a founding Judge of the Supreme Court, serving 2004-2014.

⁴²⁶ Rt. Hon. Sir Ivor Richardson (1930-2014), was appointed to the Court of Appeal in 1977, and would succeed Sir Robin Cooke as President in 1996. He retired in 2002, but was an Acting Judge of the Supreme Court for 2004-05.

⁴²⁷ A copy of Tipping’s speaking notes was supplied by Sir John White, former Judge of the High Court (1970-83) and former Solicitor-General (1966-70), to Deputy Prime Minister, Rt. Hon. Donald McKinnon. White and McKinnon continued an exchange of correspondence on the issue between June 1994 and June 1996. White suggested that if a two-tier appeal process was not possible, then the abolition of appeals to the Privy Council should be postponed. (White to McKinnon, 11 August 1995) White also corresponded directly with John McGrath, and reported McGrath’s response that he did not ‘take the view that a two-tier system is impracticable’ and the difference in cost between option 2 and Option 3 was ‘not huge.’ (White to McKinnon, 18 September 1995) White later reiterated his view that ‘the Judiciary needs to assist the Executive by answering the question whether it considers two tier system, ..., is a practicable alternative.’ He noted that Sir Ivor Richardson had stated publicly ‘a second tier of appellate jurisdiction above the High Court will be logical and desirable at some stage. ... Sir Ivor said the Court of Appeal Judges in 1988 and again in

for a principled approach. He acknowledged that initially the volume of second appeals to a new court would be relatively small at the outset. He suggested the need to review and improve the appellate role of the High Court in considering appeals from District Court decisions. He understood the concern in commercial circles about ending appeals, but considered this was partly because the new arrangements would see the final appellate court working under pressure as the Court of Appeal currently does. He thought that replacing the Privy Council with the hybrid, and possible interim, solution (Option2), at the same time as MMP was introduced may 'do us more harm commercially and economically than the comparatively tiny expense of structural respectability.' He also considered that there were a significant number of occasions when the second appeal was really only the first appeal because of the way a case had developed, for example, where a trial judge had set aside some factual issues.⁴²⁸ Tipping revealed that he prepared a paper for a Committee of High Court judges, which developed the four options. The Committee favoured Option 4, and at one stage a clear majority of the High Court Judges appeared to do so as well but when the views of the Chief Justice and the Court of Appeal were added some revised their approach.⁴²⁹

The President of the Bar Association, Julian Miles, indicated most of the conference attendees favoured Option 4. The Bar Association was 'very disturbed at the option [Option 2] the Government seems to be promoting. ... [and was] very concerned at the lack of resources in the Court of Appeal.'⁴³⁰ The Association was

1995 had difficulty in justifying it in the near future, having regard to the population, the likely case load and the available resources of judicial personnel.' (White to McKinnon, 1 February 1996) Personal Papers of Rt. Hon. Donald McKinnon, *Archives Reference Number* ABHF W5112 6846 Box 3. I acknowledge the permission of Rt. Hon. Sir Donald McKinnon to view and cite this material.

⁴²⁸ He instanced 'the apparently controversial decision of the Court of Appeal in *Fleming v Beevers* [1994] 1 NZLR 385, on which I sat'.

⁴²⁹ Justice Tipping, *Post Privy Council Appellate Structure*, Notes for Bar Association Conference, Queenstown.

⁴³⁰ The Bar Association: A two-part interview with the President Julian Miles, QC, 21 June 1995 and 16 August 1995, [1995] NZLJ 283-289.

also very concerned at how the Courts would be run under the new Department for Courts.⁴³¹

The Solicitor-General's report was also the subject of a critical editorial in *the New Zealand Law Journal*.⁴³² It noted the Government's determination to abolish the right of appeal, and was particularly concerned at the fiscal limitations imposed in the search for a suitable replacement. It noted that New Zealand did not have a written constitution, a second legislative chamber, and the introduction of MMP was 'likely to circumscribe the single-chamber legislature, if not emasculate the decision-making process altogether.' It foresaw a more significant policy-making role for the courts, and believed that 'the structure of our court system and the restraints imposed on judicial political activism by a particular form of appeals, become therefore of special importance.'⁴³³

Dr James Farmer, QC,⁴³⁴ argued that the proposal for only one level of appeal was far more 'perilous' than the question of where final appeals should be dealt with. He also argued that a comparison of the performance of the Court of Appeal and the Judicial Committee needed to take into account their relative workloads.⁴³⁵

⁴³¹ In 1995, the Government announced the breakup for the Department of Justice, with the creation of a small policy Ministry of Justice; a new Department for Courts to administer the courts and tribunals; and a Department of Corrections to run the public prisons. The public registries functions were reassigned to the Department of Internal Affairs, the Ministry of Commerce, and Land Information New Zealand.

⁴³² P.J. Downey, *Post-Privy Council appeals*, NZLJ 21 July 1995, 205-206.

⁴³³ *Ibid.*, 88

⁴³⁴ James Farmer graduated with a Ph.D. in law from Cambridge University. He was a PhD student in 1978, when Sir Robin Cooke was there on sabbatical there. See the reminiscences of fellow Ph.D. student, and later dean of law at Victoria University of Wellington, A.T.H. (Tony) Smith, *Lord Cooke and Cambridge*, (2008) 39 VUWLR 27-37.

⁴³⁵ In the year ended 30 June 1995, the Court of Appeal dealt with 182 civil appeals and 537 criminal appeals (including 213 criminal appeals on the papers), whereas final appellate courts typically dealt with only about 50 appeals, all of which had been the subject of a leave application.

New Zealand's final appellate court should have a similar workload, to enable it to more carefully on the hard or important cases.⁴³⁶

In 1996, Auckland litigation solicitor, Ronald Pol, suggested a regular 'judicial exchange' programme with other common law jurisdictions, with a senior overseas judge joining the New Zealand court.⁴³⁷

The views of Maori

In 1994, the Government encountered a challenge to the proposed arrangements for the Maori Electoral option, conducted to determine the number of Maori electorate seats, for the first MMP general election to be held in 1996.⁴³⁸ Because of the importance and urgency of the question, the Court of Appeal sat as a panel of seven judges,⁴³⁹ and Cooke P delivered the unanimous decision dismissing the appeal on 23 December 1994.⁴⁴⁰ In March 1995, the Court of Appeal, sitting with

⁴³⁶ J. Farmer, QC, letter in *The Independent*, 4 August 1995, reprinted in (1995) NZLJ, 265.

⁴³⁷ Ronald Pol, *Privy Council Appeals – The Alternatives*, (1996) NZLJ, 94-97.

⁴³⁸ Originally the Royal Commission on the Electoral System had recommended the abolition of the Maori seats, but iwi leaders, acting through the newly formed National Maori Congress, had defeated that proposal in 1990. From 1993, Maori voters had to choose whether they would be registered on the general or the Maori electoral roll. Previously voters identifying as Maori electors were obliged to enrol on the Maori roll. In 1994, if all eligible Maori voters chose the Maori electoral roll there would be more Maori seats – up to seven. While Maori leaders were hopeful of at least six electorates, only five were established, following the results of the Maori electoral option.

⁴³⁹ Including Sir Gordon Bisson, who had retired in 1990, but was an acting judge.

⁴⁴⁰ *Taiaroa v Minister of Justice* [1995] 1 NZLR 411. Mr Atawhai (Archie) Taiaroa, (later Sir Atawhai), Convenor of the National Maori Congress, led this representative action, which included several Knights and one Dame from Maori, sought a judicial review of the Government's conduct of the exercise of the Maori option. Sian Elias, QC, was counsel for Mr Taiaroa and the other appellant parties. The results of the Maori option increased the number of seats from four to five. Subsequently the number has continued to rise, and at the 2015 general election there were seven Maori electorates.

the same bench of seven judges, refused an application for leave to appeal to the Judicial Committee.⁴⁴¹

The Maori Committee of the Law Commission made a submission on the Solicitor-General's report.⁴⁴² The submission concluded that 'abolishing appeals to the Privy Council cannot be considered in isolation from other constitutional questions raised by Maori.' The Government moves were seen 'as yet a further, and a very significant, action in eroding the Treaty of Waitangi and the guarantees it provides to Maori.' In the Government's view as later expressed by the Attorney-General, it 'made considerable efforts to obtain the Maori perspective', through widespread distribution of the Solicitor-General's report in early May 1995, as well as making 2,000 copies of a summary leaflet available through the offices of Te Puni Kokiri.⁴⁴³ Submissions were invited by 30 June 1995, a date extended to 15 September. The Maori Committee's submission was received on 6 December, and only after then did Cabinet consider the issue.

The submission was finalised following a hui of Maori leaders on issues affecting constitutional change, convened at Hirangi by Sir Hepi te Heuheu on 16-17 September 1995. Working parties were appointed and a further hui was planned

⁴⁴¹ *Taiaroa and Others v The Minister of Justice*, [1995 2 NZLR 1. The appellants did not have an automatic right of appeal to the Judicial Committee (Rule 2(a) of the Privy Council (Judicial Committee) Rules Notice 1973, required the matter to involve at least \$5,000.] Under Rule 2(b), the Court of Appeal had a discretion to grant leave, if it considered 'the case as a whole was of great general or public importance.' Under Rule 2(c) the appellant parties were still able to apply for special leave to appeal directly from the Judicial Committee.

⁴⁴² Appeals to the Privy Council: Discussion Paper on Behalf of the Maori Committee of the Law Commission, (1995). [Referred to as the '*Maori Committee Submission*.'] The Maori Committee comprised Rt. Reverend Manuhaia Bennett, Chief Judge E.T. Durie, Judge Michael Brown, Professor Mason Durie, Mrs Hepora Young, Mrs Whetu Wereta, Ms Denese Henare and Mr Archie Taiaroa. The Secretary for Justice provided \$40,000 to assist their work, on the understanding that this money was to be shared with other Maori organisations, if they sought assistance.

⁴⁴³ Maori and the Privy Council, Office of the Attorney-General.

for January 1996.⁴⁴⁴ The Maori Committee considered further Government consultation with Maori was required, and did not believe that the future of appeals to the Judicial Committee could be considered in isolation from other constitutional issues.⁴⁴⁵ They believed the Privy Council was important to Maori 'because it is technically a means of access to the Sovereign.'⁴⁴⁶ The submission contrasted the comparative 'historical irrelevance' of the Treaty for most European New Zealanders, until the present decade, including in a series of historical judgments from domestic courts, with the approach of the Privy Council which has always sought to protect indigenous rights' as illustrated in a series of five African appeals.⁴⁴⁷ The submission noted that the effect of two Maori appeals to the Judicial Committee was negated by the Native Land Act 1909.⁴⁴⁸ The report acknowledged the progress that had been made in the past decade but repeated the reservation of Professor Mason Durie:

Maori are not content to depend on the goodwill of successive Governments or to be exposed to inconsistent policies developed to suit the needs of Pakeha. Progress in one decade all too frequently must be revisited a decade later. Despite repeated calls for the Treaty to be entrenched as a constitutional document, it dangles precariously in front of Governments who have other agendas and often little sympathy with Maori aspirations ...

Until that occurs, Maori identity and security will forever run the risk of being compromised.⁴⁴⁹

⁴⁴⁴ Information from *Maori Committee Submission*.

⁴⁴⁵ *Ibid*, paragraph 1.7, 2.

⁴⁴⁶ *Ibid.*, paragraph 3.2 18.

⁴⁴⁷ *Ibid.*, paragraphs 3.10 and 3.15, 19 and 21.

⁴⁴⁸ *Nireaha Tamaki v Baker* (1901) NZPCC 371, and *Wallis v Solicitor-General* (1903) NZPCC 23.

⁴⁴⁹ M.H. Durie, Proceedings of a Hui held at Hirangi Marae, Turangi, (1995) 25 *VUWLR* 109, 116, as quoted in Maori Committee Report paragraph 4.3, 23. Professor Durie (later Sir Mason Durie) was a member of the Maori Committee of the Law Commission.

The report observed there were no Maori members of the either of the superior courts, and non-Maori judges would face a long and steep learning curve in dealing with Treaty and indigenous issues.⁴⁵⁰

Personnel Changes at the Court of Appeal

On 28 November 1995 it was announced that Sir Robin Cooke had been appointed to the House of Lords – only the second,⁴⁵¹ [and probably the last], Commonwealth judge to be appointed – and would take up his appointment in early 1996. While Cooke’s appointment can be seen as removing him from the domestic scene, it did enhance his ability to sit on the Judicial Committee,⁴⁵² as well as enabling him to hear United Kingdom domestic appeals made to the House of Lords Appellate Committee, Britain’s top Court.

⁴⁵⁰ *Maori Committee Submission*, Paragraph 4.28, 30.

⁴⁵¹ Some suggest there was a third Empire/Commonwealth judge, Lord Sinha from India. Lord Sinha, Indian-born and a London-trained lawyer, held several political roles in India and in the United Kingdom. He was appointed to the House of Lords in 1919, when he was appointed the Parliamentary Under-Secretary for Indian Affairs, 1919-20, in the United Kingdom Government – a position that entitled him to appointment as a Privy Counsellor. He was then appointed a Provincial Governor in India, 1920-21. In 1926, he was appointed to the Judicial Committee, and heard more than 50 appeals from British India, before his death in March 1928. Sinha’s career has a parallel with Lord Hobhouse (1819-1904) who was the first Briton, having served in British India, who was appointed to the House of Lords, and following legislation was able to sit on the Appellate Committee, although he spent most of his time on the Judicial Committee. Hobhouse was a close friend of de Villiers, and his appointment to the House of Lords was important in opening up that appointment opportunity for de Villiers.

⁴⁵² Including on appeals from the New Zealand Court of Appeal. Over the next five years in London, Cooke sat on approximately one-quarter of New Zealand appeals determined during that period, as well as many appeals to the Judicial Committee.

Richardson succeeded Cooke as President of the Court of Appeal. Sir Kenneth Keith was appointed to fill the resultant vacancy.⁴⁵³ These changes were part of the unprecedented turnaround in the membership of the Court of Appeal between 1987 and 1997, with five retirements (including Cooke) and six new appointments in an expanded court of seven permanent judges, plus the Chief Justice (who also changed in 1989).⁴⁵⁴ The change in membership is even more unprecedented over the wider period from the time Cooke joined the Court in 1976 until the end of the Richardson Presidency in 2002. Nevertheless, these two appellate judges – the first two judges with doctorates in law appointed to the Court of Appeal – with their contrasting, ‘distinctive approaches to judging’⁴⁵⁵ – served contemporaneously for 19 years.⁴⁵⁶ Sir Geoffrey Palmer was later to observe that initially he thought the Court seemed to be ‘more collegial’ under Richardson, but

⁴⁵³ Keith’s appointment was only the third direct appointment since the Court of Appeal was restructured with effect from 1 February 1958. In 1957, Attorney-General, Hon John Marshall, had expected that most appointments to the Court of Appeal would be from the Supreme (now High) Court, and in exceptional circumstances directly from the bar. Most – 12 out of 16 – Attorneys-General adopted a similar practice to that acknowledged by Geoffrey Palmer, of only appointing an existing judge. Those Attorneys-General who made direct appointments (named appointment noted) were: John Marshall (Timothy Cleary); Paul East (Ian McKay and Sir Kenneth Keith, QC); Margaret Wilson (John McGrath, QC); and Michael Cullen (Terence Arnold, QC, and Bill Wilson, QC). (McGrath and Arnold were serving Solicitors-General.)

⁴⁵⁴ Megan Richardson, (1997) *The Privy Council and New Zealand*, *International and Comparative Law Quarterly*, Vol.46, October 1997, 908-918, at 913, n.42. At the time, Richardson was a senior lecturer in law at Melbourne University, where she is now a professor. Richardson, a daughter of Sir Ivor Richardson, was a senior legal research officer at the Law Commission and worked on the Law Commission’s 1989 Report.

⁴⁵⁵ Peter Spiller, *The Court of Appeal*, *ibid.*, 142.

⁴⁵⁶ Cooke was appointed to the Supreme (now High) Court in 1972, and to the Court of Appeal in 1975 as an acting judge and as permanent judge in 1976. After his retirement from the Court of Appeal in 1996, he continued to serve on the Judicial Committee until 2001. Richardson was appointed a Judge of the Supreme (now High) Court in 1976, and to the Court of Appeal in 1977, serving until 2002. Cooke’s doctorate was from Cambridge University, and Richardson’s from the University of Michigan. Richardson and Cooke were New Zealand’s longest serving judicial Privy Counsellors, although Richardson only sat for two periods - in 1986 and again in 2000.

by late 1997 there were signs of ‘a court that is heavily fractured, full of dissent, and contains quite spirited disagreements between the judges.’⁴⁵⁷

Cooke’s powerful intellect and forceful articulation of his views certainly challenged many, especially those who did not have a legal background. Even those knowledgeable in the law clashed with his views. One of the strongest clashes was with the authors – two of whom were senior judges – of Australia’s leading textbook on equity.⁴⁵⁸ Reflecting on a century-long debate, the authors did not believe that law and equity are ‘fused’, and commented:

[i]n New Zealand, the prospect of any principled development of equitable principle seems remote short of a revolution on the Court of Appeal. The blame is largely attributable to Lord Cooke’s misguided endeavours. That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error.⁴⁵⁹

Cooke’s views on equity reflected a contrasting position in the longstanding debate in legal and judicial circles. In April 1997, a conference was held in Auckland to honour Lord Cooke.⁴⁶⁰ Professor Julie Maxton rejected the view of a ‘fusion’

⁴⁵⁷ Geoffrey Palmer, Holy deadlock: 13 January 1998, in *Constitutional Conversations: Geoffrey Palmer talks to Kim Hill on National Radio, 1994-2001*, 248. [The discussion was reviewing the Court of Appeal’s decision in *Quilter v Attorney-General*, [1998] 1 NZLR 523, which concerned same-sex marriage and the Marriage Act.]

⁴⁵⁸ R.P. Meagher, J.D. Heydon, and M.J. Leeming, *Equity: Doctrines and Remedies*, (4th. ed.), Sydney: Butterworths LexisNexis, 2002. In 2002, Meagher and Heydon were judges of appeal of the Supreme Court of New South Wales. Heydon later served on the High Court of Australia, 2003-2013. Leeming was appointed to the Supreme Court of New South Wales in 2013. All three authors had originally held academic positions.

⁴⁵⁹ *Ibid.*, Preface, xi.

⁴⁶⁰ Leading judges, practitioners and academics, from New Zealand and overseas, delivered prepared studies, which provided ‘a professional and disciplined assessment of what has happened in our law in the past 25 years in light of Lord Cooke’s contribution and influence.’ Justice

articulated by Meagher et al, and instead saw the Court of Appeal pursuing a ‘confluence’ in which law and equity ‘intermingled’, as anticipated by a 1977 House of Lords decision.⁴⁶¹ While acknowledging that the historical division between equity and law had yet to be overcome, Maxton saw the New Zealand Court of Appeal decisions as contributing towards the development of ‘a coherent law of civil obligations.’ Other essays, examining other law subjects, also confirmed the strong, positive contribution of Cooke to the development of the law. For example, Farmer rejected the criticisms of the New Zealand Business RoundTable noting that, in commercial cases, Cooke had ‘formulated a guiding principle of the need to give effect to reasonable expectations.’⁴⁶²

Further insights into the changing role of the judiciary were provided by Palmer.⁴⁶³ In 1993, he observed the New Zealand judiciary had, in recent decades, exercised a

Robertson, Preface, in Paul Rishworth (ed.), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon*, Wellington: Butterworths, 1997. xv.

⁴⁶¹ Julie K. Maxton, Equity and the Law of Civil Wrongs, p 91-104, in Paul Rishworth (ed.), *The Struggle for Simplicity in the Law*, Maxton’s reference to Meagher et al, was to the third edition of their text, published in 1992.

⁴⁶² James A. Farmer QC, Lord Cooke and Judicial Decision-making: A Perspective from the Commercial Bar, 53-70, in Rishworth (ed.) *The Struggle for Simplicity in the Law*. Farmer was quoting from an article by professor John Smillie, who was otherwise critical of Cooke’s approach.

⁴⁶³ Following his retirement from Parliament in 1990, Palmer returned to academic life, before practising law and contributing to public affairs through commentary, and undertaking public inquiries. He continued his prolific publications’ output, including updates of his principal study of the New Zealand constitution, now in its fourth edition and called *Bridled Power*, (2004), Oxford University Press. The book’s title changed from *Unbridled Power* to *Bridled Power* at its third edition in 1997, when Geoffrey was joined by son Matthew as co-author. Matthew, a former senior public servant (Deputy Secretary for Justice, 1995-2000; Deputy Solicitor-General, 2008-2012) and former academic (Dean of Law at Victoria University of Wellington, 2001-2006) is now a High Court judge. The Drs Palmer are both QCs, and have continued their joint authorship of *Bridled Power*. The book has grown from 185 pages (1st ed.) to reach 412 (larger size!) pages. Other publications by Geoffrey Palmer include: *New Zealand’s Constitution in Crisis: Reforming our political system*, (1992) John McIndoe Limited; *Judicial Selection and Accountability: Can the New Zealand System Survive?* Chapter 1 in *Courts and Policy: Checking the Balance*, B.D. Gray and R.B.

greater law-making role, primarily because statute law was less detailed and offered more scope for judicial interpretation. Other factors were the growth in judicial review, aided by the Judicature Amendment Act 1972; the Treaty of Waitangi jurisprudence; and the New Zealand Bill of Rights Act 1990.⁴⁶⁴

The Government Decides to end Appeal Rights to the Judicial Committee

In October 1995, Cabinet decided it would aim to make a decision on the future of appeals by the end of the year and directed officials to report in December.⁴⁶⁵ Two memoranda were provided to the Cabinet Strategy Committee in December 1995. The first provided a summary of submissions of the 34 submissions received,⁴⁶⁶ with the seven speeches given at the Bar Association conference also considered as submissions. Some submissions, principally from judges and lawyers, did not express a view on abolition or retention of appeals, and the remaining 28 submissions were equally divided on the question. The second identified two sets of relevant objectives to assist the decision-making: national identity in the international world; and high quality of judicial decision-making. As the Maori Committee submission had just been received, it was, unusually, distributed in full to all Ministers on the Committee.⁴⁶⁷ As it was not possible to examine the Maori

McClintock (ed.) (1995), *Brookers; Constitutional Conversations: Geoffrey Palmer talks to Kim Hill on National Radio, 1994-2001*, (2002), Victoria University Press.

⁴⁶⁴ Sir Geoffrey Palmer, *Judicial Selection and Accountability*, in *Courts and Policy*, 20-21.

⁴⁶⁵ Queen Elizabeth visited in November. As the future of appeals to the Judicial Committee was under consideration, for the first time there was no meeting of the Privy Council. The Queen gave her Royal assent to the Waikato Raupatu Claims Settlement Act 1995, on 3 November 1995.

⁴⁶⁶ 11 from the legal profession, three from the business community (including one supporting abolition from leading businessman, Hugh Fletcher, husband of Sian Elias QC), 14 from the general public, and six from Maori (all but one of whom supported retention).

⁴⁶⁷ Normally, submissions are not distributed, especially when a summary of the submissions is available. Copies of submissions would be available on request. The Maori Committee's 1995 submission was distributed to the Parliamentary Justice and Electoral Committee when considering the Supreme Court Bill in 2003.

Committee submission, officials recommended that both papers be held over until 31 January 1996.

On 29 January 1996, the Cabinet Strategy Committee considered a suite of five papers: a covering memorandum, which included specific recommendations on communicating the Government's decisions; the earlier two papers; and two new papers, one of which addressed the Maori Committee's submission.⁴⁶⁸ The paper carefully summarised the submission for Cabinet to see the key points raised; highlighted the process of consultation with Maori since May 1995, and noted the general issue had been the subject of debate for 25 years; considered that concerns about the place of the Treaty of Waitangi in New Zealand's constitution should be directly, rather than through such issues as the future of appeals to the Judicial Committee. The Attorney-General did not favour the appointment of overseas judges, as the jurisprudence of overseas appellate courts was already available. In addition, the selection difficulties would make 'the proposal impractical.' It was recommended that appeals from decisions of the Maori Appellate Court should be directed to the Court of Appeal.⁴⁶⁹ The overview paper recommended that a letter be sent to all submitters explaining the Government's decision. It specifically highlighted key messages to answer Maori concerns.

Over February and March, Cabinet's Strategy Committee and Cabinet considered various aspects of the policy settings, before the Committee finally agreed on the detailed recommendations on 20 March 1996. Cabinet initially deferred consideration, but finally confirmed the detailed policy settings to end New Zealand appeals to the Judicial Committee over two Cabinet meetings on 1 and 9 April 1996. During this long period, the Attorney-General undertook consultations

⁴⁶⁸ The recommendations in the last two papers superseded the recommendations in the December memoranda.

⁴⁶⁹ Attorney-General to Cabinet Strategy Committee, Future of Appeals to the Privy Council: Submission by the Maori Committee, CSC (96) 7, 29 January 1996.

with other Parliamentary parties. While he reported orally to the Cabinet Strategy Committee and to Cabinet throughout this period, there is no information on the results of these consultations in the documentary records, we can see from other sources that the consultations were not progressing as well as the Government might hope.

On 21 February 1996, in his Prime Minister's Statement to Parliament, Bolger said work on ending New Zealand appeals to the Judicial Committee was well advanced.⁴⁷⁰ In a subsequent comment, outside the House, the Attorney-General said 'he was seeking unanimity given the significance of such a measure.'⁴⁷¹ The following day, news media reported that other Parliamentary Parties did not support the proposal.⁴⁷² The Government's difficulties were compounded by the establishment of new Parliamentary Parties, as, in the lead up to the first MMP election, both National and Labour faced defections as MPs moved to address their future electoral prospects.⁴⁷³

Cabinet's decision on 9 April enabled the Attorney-General to announce, that day to the New Zealand Law Society's Conference, that the Government was to end appeals to the Judicial Committee. Later in the month, East explained:

⁴⁷⁰ NZPD 21 February 1996,

⁴⁷¹ Government seeks all-party yes to appeal abolition bid, *New Zealand Herald*, 21 February 1996.

⁴⁷² Labour's shadow Attorney-General (David Caygill) Labour would await the legislation before taking a final decision, but noted that 'many Labour MPs had strong reservations about it, ... and were concerned that it was a step towards 'a republic' without proper public debate.' New Zealand First and the Alliance Party were reported as being 'flatly opposed' to the move. See, e.g., Graeme Speden, Move to scrap Privy Council appeal snags on opposition, *Dominion*, February 23, 2. Audrey Young, Uphill battle for Govt. on Privy Council plans, *New Zealand Herald*, 22 February 1996.

⁴⁷³ The main set of defections involved seven MPs who defected from National and Labour to form United New Zealand, and who formed a Coalition with National in 1996.

the decision we have taken is primarily influenced by the view that retention of appeals to the Privy Council is inconsistent with New Zealand's national independence.⁴⁷⁴

Noting the question of Privy Council appeals had been on the political agenda for 25 years, he emphasised the Government would move slowly, as indeed it had during consultations over the past 18 months. Mr East did not believe that abolishing appeals would 'affect the place of the Treaty ... [as] it is the Court of Appeal over the past 10 years, more than any other court, that has advanced the interests of Maori through Treaty of Waitangi litigation.'⁴⁷⁵

The New Zealand Courts Structure Bill was introduced to Parliament in June 1996 and received its first reading on 25 June. The Bill proposed to abolish the right of appeal to the Privy Council from any judgment of any court in New Zealand and establish the Court of Appeal as New Zealand's the final appellate court.⁴⁷⁶

⁴⁷⁴ Hon. Paul East, Address to the AIC Conference on Administrative Law, April 23, 1996, Wellington.

⁴⁷⁵ Ibid.

⁴⁷⁶ See General Purpose Statement of the New Zealand Courts Structure Bill. New Zealand Historical Bills dated between 1949 and 2008 are now available freely on-line from the New Zealand Legal Information Institute (www.nzlii.org/nz/legis/hist_bill/). The site can also be accessed via the Parliamentary Counsel Office (PCO) website (www.legislation.govt.nz). The site enables the progress of any bill to be followed, as each version of a bill is available. All Government bills have a unique numeric identifier indicating the order in which they were first introduced, as at the year of introduction, and they retain that number through their Parliamentary passage, even if they conclude their passage in a subsequent calendar year. This number, (set out in brackets), is followed by a suffix denoting the version of the bill: as introduced (version -1), as reported back from the select committee (version -2), and as reported from the committee of the whole House (version -3). Where the bill was referred to a select committee – as most bills were from 1986 - the second version of a bill, includes the committee's report. Legislation as enacted in any year between 1841 and 2007, as well as the current official version of any statute, are also available PCO's website. The New Zealand Courts Structure Bill did not proceed beyond its first reading.

Originally, National had intended the Bill to be passed before the Election, but by May had decided that it would only be possible to introduce the legislation.⁴⁷⁷ The Deputy Prime Minister expected the Bill would be before a Parliamentary select committee and alive at the time of the election.⁴⁷⁸ The proposed commencement date was 1 July 1997, at which time the Court of Appeal would become New Zealand's final appellate court. The transitional provisions in the Bill enabled proceedings, already commenced, to continue to the Judicial Committee. In a brief editorial comment accompanying its summary of the Bill, *the Maori Law Review* observed 'the bill completely ignores concerns raised by the report of the Maori Committee of the Law Commission on this restructuring.'⁴⁷⁹

After the 1996 election

Later in 1996, New Zealand's first general election held under the Mixed Member Proportional electoral system resulted in the two main parties negotiating with the New Zealand First Party, led by Hon. Winston Peters, to form a coalition government. New Zealand First won four of the five Maori electorate seats. A key plank for the New Zealand First Party was that appeals to the Judicial Committee were to be continued. In other words, the legislation removing the right of appeal to the Judicial Committee would not proceed. The National Party agreed with this policy. The Bill sat untouched on the Order paper, and in 1998 was discharged, on the motion of the Minister for Courts, Hon. Georgina te Heuheu. Some of the Bill's other legislative proposals, unrelated to the future of Judicial Committee appeals, were included in another Bill – the Statutes Amendment Bill (No.2) 1997. This included new provisions concerning the composition of the Court of Appeal.⁴⁸⁰

⁴⁷⁷ Cabinet Minute, Privy Council: Court of Appeal – Proposed features, CAB (96) M 17/9 of 13 May 1996.

⁴⁷⁸ Rt. Hon. Don McKinnon to Sir John White, 5 June 1996.

⁴⁷⁹ New Zealand Courts Structure Bill 1996, *The Maori Law Review*, July 1996, 12.

⁴⁸⁰ ss.58 and 58A-58G were inserted into the Judicature Act 1908 by s.5 of the Judicature Amendment Act 1998, on 1 August 1998. One amendment prevented retired judges from being appointed as acting judges. This was seen as a legislative response to the situation, which arose in

In 1997, Megan Richardson observed that both historically and in more recent times, 'New Zealand had indicated an ambivalent attitude to the Privy Council.'⁴⁸¹ She noted the failure of the initiatives of Geoffrey Palmer and of Jim Bolger to end appeals. Although Richardson acknowledges the two efforts failed for different reasons, she does identify that just before the respective decisions to abandon the cessation of appeals to London, there were timely judgments of the Privy Council overturning judgments of the Court of Appeal. At the first attempt, two decisions favoured the Government;⁴⁸² while at the second, the decision 're-established the

the controversy over the *Brighouse* case. *Brighouse Limited v Bilderbeck* [1995] 1 NZLR 158. As this case involved an appeal from the Employment Court, there was no further appeal beyond the Court of Appeal. In a majority decision (3:2), the Court of Appeal dismissed the appeal. The decision itself was controversial, and that controversy was heightened when it was observed that Sir Gordon Bisson, a retired Court of Appeal Judge, who was serving as an acting judge, was a member of the majority, sitting at a time when another permanent judge, Justice McKay, (later Sir Ian McKay) did not sit. Whether Justice McKay recused himself or was otherwise unavailable, or, alternatively, whether President Cooke had deliberately by-passed him, to 'stack' the court, was not clear. On occasions, when there is an unfavourable appellate judgment, the unsuccessful party, or even an interested observer, may challenge the decision by focusing on the composition of the court and the status of each judge. Later in 1998, the Court of Appeal overturned that judgment, when it sat as a seven-Judge court with Richardson and Gault, the minority judges in *Brighouse*, being joined by four more judges in a 6:1 majority judgment. *Aoraki Corporation Limited v McGavin*, [1998] 3 NZLR 276. The majority judges were Richardson P, Gault, Henry, Keith, Blanchard and Tipping JJ. Thomas J dissented in part. *Aoraki* demonstrated a feature of appellate justice – it is possible to revisit the principal holdings of a judgment, when similar issues come up on a subsequent appeal.

⁴⁸¹ Megan Richardson, (1997) *The Privy Council and New Zealand*, op. cit.

⁴⁸² *Commissioner of Inland Revenue v Databank Systems Ltd* [1990] 3 NZLR 385. This concerned the newly introduced Goods and Services Tax, and the Judicial Committee overturned the Court of Appeal majority decision (of 3:2, Richardson and McMullin JJ dissenting) in a 4:1 majority decision delivered in July 1990. *Minister of Energy v Petrocorp Exploration Ltd* [1991] 1 NZLR 641. This case involved judicial review of the decisions of the Minister of Energy (Hon. David Butcher) made in May 1988, concerning prospecting and mining licences for petroleum in the Taranaki. In August 1990, in a 4:1 majority decision (Richardson J dissenting), the Court of Appeal overturned a High Court 1989 decision. The Judicial Committee heard the appeal in February 1991 and delivered its judgment the following month. Mary Scholtens, who as a Crown Counsel had been involved in the litigation for the preceding three years, later wrote: 'witnessing five fresh and remarkable minds

Privy Council in its historical role as the guardian of traditional Maori interests.⁴⁸³ Richardson sees these actions as ‘reinforcing the thesis that the Privy Council ... [was] foster[ing] its continuing links with New Zealand even if this was not its deliberate purpose.’⁴⁸⁴ In the Maori fisheries allocations decision, the Judicial Committee were ‘very conscious of the important role played by the Courts of New Zealand, and by the Court of Appeal in particular, in relation to claims by Maori under the Treaty of Waitangi.’⁴⁸⁵ Richardson did not think this thesis was inconsistent with the drop in the proportion of successful appeals to the Judicial Committee, from half (17 out of 33) in the period 1990-94, to less than one-quarter in 1995-96 (4 out of 16).⁴⁸⁶

While the Business RoundTable’s views did not gain widespread support from within the legal profession, and did not stand up to critical scrutiny of legal experts,⁴⁸⁷ some of the ideas raised, supported in part by Patsy Reddy, were to find

gather and sift, in [six and half days], the information and arguments ... I believe our legal system is enriched by the contribution of such experienced and disciplined intellects.’ [Wellington Women Lawyers’ Newsletter, June 1991, extracts reprinted in [1991] NZLJ 296.]

⁴⁸³ Megan Richardson, (1997) *The Privy Council and New Zealand*, 910. The case, involving three appeals heard together, was *Treaty Tribes Coalition v Urban Maori Authorities*, [1997] 1 NZLR 513, (Commonly referred to as the *Maori fisheries allocations* cases). The Court of Appeal unanimous judgment was delivered by Lord Cooke, i.e. after Cooke’s appointment to, but before his departure for, the House of Lords.

⁴⁸⁴ Megan Richardson, (1997) *The Privy Council and New Zealand*, 910. Richardson was drawing on two articles addressing the Privy Council and Canada in the 1890s, and the Privy Council and the Asia-Pacific region, where the authors ‘both appear to claim that the Privy Council had deliberately ... acted in those jurisdictions to preserve its role as the final appellate tribunal.’

⁴⁸⁵ *Treaty Tribes Coalition*, per Lord Goff of Chieveley, 522.

⁴⁸⁶ These statistics include two reported applications for leave to appeal, of which one was granted in the period 1990-92. Applications for leave to appeal are not appeals. For a fuller summary of the statistics of New Zealand and the Judicial Committee see Appendix Two.

⁴⁸⁷ One of Britain’s most distinguished judges of recent decades, dismissed the Business RoundTable’s view that ‘judges should not assume a law-making role’ as part of the declaratory view of the judicial function, which had by and large melted away among the judiciary. Lord

responses in succeeding years. In the 14 months when he held both portfolios of Minister of Justice and Attorney-General, Sir Douglas Graham,⁴⁸⁸ overhauled the judicial appointments process to improve transparency. He transferred responsibility for nominating District Court Judges from the Minister of Justice to the Attorney-General, to merge the principal Ministerial responsibilities for judicial appointments into the hands of the Attorney-General. He also established the Attorney-General's Judicial Appointments Unit, based in the Ministry of Justice, and published information about judicial appointments, including advertising for expressions of interest for appointment as a judge.⁴⁸⁹ Efforts were made to improve the diversity of appointments to judicial office in the higher courts, one effect of which was to strengthening the intellectual talent in the Court of Appeal. The first judges of Maori descent were appointed to the High Court - Lowell Goddard, QC, in 1995 and Eddie Durie in 1998.⁴⁹⁰ Also in 1995, two of the leading counsel for many of the Treaty jurisprudence cases, David Baragwanath QC and Sian Elias QC, were appointed to the High Court. In 1999, Justice Elias was appointed Chief Justice of New Zealand. As well, following his appointment to the Court of Appeal, Sir Kenneth Keith initiated the practice of preparing an annual report providing statistical information of the Court's work and summarising features of key judgments.⁴⁹¹

Bingham, *The Judge as Lawmaker: An English Perspective*, in Paul Rishworth (ed.) *The Struggle for Simplicity in the Law*, 4. Bingham was then Lord Chief Justice of England and Wales, 1996-2000, and then became Britain's Senior Law Lord, 2000-2008.

⁴⁸⁸ Rt. Hon. Sir Douglas Graham was Minister of Justice from 2 November 1990 to 1 February 1999, and Attorney-General from 5 December 1997 to 5 December 1999.

⁴⁸⁹ The Solicitor-General advises the Attorney-General on the appointment of higher Court judges, while the Secretary for Justice advises the Attorney-General on the appointment of District Court Judges.

⁴⁹⁰ Lowell Goddard, QC, (now Dame Lowell Goddard) was deputy Solicitor-General and, in 1988 along with Sian Elias, was the first woman to be appointed a Queen's Counsel. Eddie Durie (now Sir Edward Taihakurei Durie) was appointed a judge of the Maori Land Court in 1974, and Chief Judge in 1980. He was also Chairman of the Waitangi Tribunal 1980-2004.

⁴⁹¹ Martha Coleman and Justice Keith, *Court of Appeal Report for 1997*. Annual issues for the years 1997-2008 are available from the website www.courtsofnz.govt.nz. The report series was later

Conclusion

The failure of National's efforts to end appeals to the Judicial Committee is usually attributed to electoral politics, as a key condition for the formation of the coalition government after the first MMP election, held in 1996, was the abandonment of the relevant repeal provisions in the legislation already before the Parliament. This abandonment was seen as reflecting the combined force of the opposition of key groups – the legal profession, the business community, and Maori; together with continued concern about an 'activist' Court of Appeal, especially under Sir Robin Cooke; and the disquiet about the loss of the two-tier appellate system. While these factors were undoubtable influential, this chapter has identified the main, if not the sole, reason for the defeat of National's proposal was the strong opposition from Maori.

Ironically, Maori's success came just as the decade-long development of 'the Treaty jurisprudence' by the courts, especially the Court of Appeal, was ending. More than a dozen cases had been determined by the Court of Appeal – several as first instance decisions after their transfer to that Court.⁴⁹² The Crown did not appeal any of the Court of Appeal decisions, while the Judicial Committee overturned the Court of Appeal on only one occasion – in the dispute between different Maori groups over the allocation of fisheries assets. Maori had been emboldened by Labour's legislative reforms and National's early settlements, together with the

discontinued. More recently the High Court and the District Court have published annual reports, and also reported relevant statistics on the Courts' workload and timeliness of decision-making.

⁴⁹² In March 1995, Sir Robin Cooke collated 14 judgments and other decisions of the Court of Appeal determined between 1987 and March 1995, relating to the Treaty of Waitangi and legislation concerning the Treaty. Two of these related to the *Lands* case, and a further two related to the *Broadcasting Assets* case. David Baragwanath, QC, Sian Elias, QC, and the late Martin Dawson were, each, counsel in eight of these cases, not necessarily always together. Cooke was involved in two further Treaty cases, where he delivered the judgments of the Court of Appeal: *Ngai Tahu Maori Trust Board v Director-General of Conservation*, [1995] 3 NZLR 553, 'the Whale Watching Permit' case; and the Maori electoral option case, *Taiaroa v Attorney-General*, referred to above.

progress of Waitangi Tribunal hearings, all of which enabled the Courts, especially the Court of Appeal, to strengthen their claims. This success, supported by a united sense of purpose arising from opposition to the abolition of the Maori electorates and to the National Government's 'fiscal envelop' policy proposal to contain the financial cost of Treaty settlements, and major constitutional hui convened by paramount chief, Sir Hepi te Heuheu, found political expression in the contest for Maori seats in the first MMP general election in 1996. The New Zealand First Party won 17 seats, including all five Maori electorate seats.

Nevertheless, National's attempt to end appeals was remarkable. After changing its own position to adopt the position proposed and then rejected by its Labour predecessor - not an easy action of itself - National overcame, or was at least able to set aside, most of the factors of opposition - the views of the legal and business communities; concerns over the Court of Appeal; and the debate over the need for two tiers of appeals from first instance High Court decisions.

Chapter Five – Finally, a new Supreme Court

Introduction

This chapter examines the development of the eventually successful third major proposal for ending New Zealand appeals to the Judicial Committee. Previous proposals involved the elevation of the Court of Appeal to be New Zealand's final appellate court. This was re-offered by Labour's Attorney-General in 2000. Once again, the issues, interests and actors (or their successors) participated in this further round of debate, but with different comparative influences. Once again, the options clashed with the competing view that the opportunity for two tiers of appeal, conducted in separate courts, was required for first instance judgments of the High Court. This competing view eventually prevailed and a revised proposal led to a Cabinet agreement in 2002 to establish a new Supreme Court, above the Court of Appeal, as the alternative to appeals to London.

Opening proposal

The 1999 general election resulted in a coalition Government between Labour and the Alliance, supported by the Green Party.⁴⁹³ Labour proposed to abolish appeals to the Judicial Committee. Hon Margaret Wilson, the new Attorney-General, moved 'with cautious haste' to act on the policy.⁴⁹⁴ A draft memorandum to the Cabinet Policy Committee was circulated on 18 September 2000. The Acting Solicitor-General advised that the Attorney-General proposed to seek agreement for the abolition of appeals to the Privy Council. There would be public consultation, over a 12-month period, on restructuring the appellate system in which the New

⁴⁹³ The 1999 general election was held on 27 November 1999, and the new Administration was sworn in on 5 December 1999.

⁴⁹⁴ As soon as she had achieved Labour's priority legislation on employment relations. Ms Wilson was also Minister of Labour. The Employment Relations Act 2000 received Royal assent on 19 August 2000. See the Act, Legislative History, 577. It repealed and replaced the Employment Contracts Act 1991. The description of 'cautious haste' is Wilson's, Wilson (2010).

Zealand Court of Appeal would become the final appellate system. Legislation would then follow and take effect one year after enactment.⁴⁹⁵ The draft memorandum outlined the history of the discussions for change, and recommended abolition 'in light of the comprehensive consultation already undertaken over the previous 5 years' on the report by Solicitor-General McGrath. The paper comprised two parts: first, abolition of appeals; and secondly, principles of restructure of the appellate system, drawn from those identified by the 1978 Royal Commission on the Courts and the later work of the Law Commission in 1986. On 27 November 2000, Deputy Solicitor-General France provided the Department for Courts with a draft discussion paper, which the Attorney-General was putting to Cabinet Policy Committee on 30 November 2000. France understood this was a preliminary paper, and advised that a further version to be supplied for 'consultation with you in the new year, in accordance with Cabinet Minute POL (00) M28/4.'⁴⁹⁶ Cabinet approved the release of the discussion paper on 7 December 2000.⁴⁹⁷ On 11 December 2000, the Attorney-General publicly issued a discussion paper, and distributed a commercially printed version two days later.⁴⁹⁸ Clearly, the Attorney-General was determined to get the matter before the public before the end of the year.⁴⁹⁹

⁴⁹⁵ Ellen France, Acting Solicitor-General, to Wilson Bailey, Chief Executive Officer, Department for Courts, 18 September 2000. John McGrath, QC was appointed a Judge of the Court of Appeal earlier in the year. Ellen France was Acting Solicitor-General 28 June – 15 October 2000 pending the appointment of Terence Arnold, QC. Dame Ellen France was appointed to the Supreme Court on 22 July 2016.

⁴⁹⁶ Ellen France, Deputy Solicitor-General to Jonathan Petterson, Department for Courts, 27 November 2000.

⁴⁹⁷ Margaret Wilson, *From Privy Council to Supreme Court: A Rite of Passage for New Zealand's Legal System*, *Waikato Law Review*, Vol.18, (2010), 1-14, 6.

⁴⁹⁸ *Reshaping New Zealand's Appeal Structure*, Office of the Attorney-General, December 2000.

⁴⁹⁹ The final version of the discussion paper had a signed Introduction from the Attorney-General, and a historic photograph of several gentlemen outside a court was removed from the cover.

In her discussion paper, Wilson acknowledged the Privy Council was originally appropriate for New Zealand as ‘our young colony did not have the judicial or legal resources to establish a local court of final appeal’,⁵⁰⁰ but:

it now seems inappropriate to rely upon a British court, which is largely unfamiliar with our own society, to be our final legal decision-maker.⁵⁰¹

Building on earlier reports and extensive consultation undertaken by previous governments, the discussion paper summarised the arguments for and against appeals to the Judicial Committee, and then set out options for reform. Public submissions were invited and the discussion paper specifically recognised that Maori have particular issues, which the Government respect and will work to ensure the new structure adequately addresses.⁵⁰² The paper revealed estimates of the cost to the Crown and to legal aid of appealing to the Judicial Committee.⁵⁰³ The paper also addressed several other issues which had arisen in earlier consultations, noting, for example, that, in 1999, the Court of Appeal decided 508 cases, whereas the Judicial Committee decided only 10 appeals from New Zealand;⁵⁰⁴ and, for Maori, it was ‘the New Zealand [domestic] courts that have made the most substantial contributions to the development of the law on Maori issues.’⁵⁰⁵ Paragraphs 42 to 53 (of a 55 paragraph paper) identified options to address Maori issues, in response to the matters raised in the 1995 submission of the Maori Committee of the Law Commission. This included greater representation of Maori within the justice system through increasing the number

⁵⁰⁰ Wilson, (2001) 2.

⁵⁰¹ Ibid., Introduction by the Attorney-General.

⁵⁰² Ibid.

⁵⁰³ Ibid. paragraph 13, 3. ‘The average cost for the Crown to take a civil appeal to the Privy Council is approximately \$100,000 compared with \$20,000 to take a similar case to the Court of Appeal. Typically, the costs incurred by private litigants in these Courts will be higher, probably double.’ It added that legal aid payments for 10 cases over 1998/99 and 1999/2000, ranged from \$30,000 to slightly more than \$100,000. [It is likely that these cases included the costs for both petitions for leave to appeal (the lower end of the range), and substantive appeals (the upper end of the range).]

⁵⁰⁴ Ibid., paragraph 9, 2.

⁵⁰⁵ Ibid., paragraph 22, 4.

of Maori appointed to judicial office; processes to give the Court of Appeal access to expert advice on Maori issues; and the possible inclusion of overseas judges on the appellate bench. The three structural options offered were the same as those offered by Options 2 to 4 in the Solicitor-General's 1994 Report. In essence, the discussion paper continued the earlier proposals. Two significant differences can be detected between the original draft Cabinet Policy Committee memorandum recommending abolition of appeals and the final discussion paper: the discussion paper strengthened the arguments to address the concerns of Maori, while the draft memorandum gave greater recognition to the likelihood of a second appeal process.

For National, the former Minister of Justice and then Justice spokesperson, Hon. Tony Ryall, welcomed the Government's move, observing its previous position, 'blocked' National's legislation in 1996.⁵⁰⁶ Later, in 2001, a change in justice spokesperson brought a change in policy position and National opposed Labour's policy proposal.

The discussion paper attracted 70 submissions, which were equally split (32 each) between support for, and opposition to, ending appeals. The Attorney-General followed up these submissions with targeted consultations with Maori, legal and business interests usually in her office, although she also conducted three regional meetings and one national meeting with Maori. A clear consensus emerged that if appeals to the Judicial Committee were to be ended, there needed to be a replacement appellate court sitting above the Court of Appeal.⁵⁰⁷ The New Zealand Maori Council supported a two-tier appeal structure, with overseas judges. It also argued for the judiciary to 'have access to independent expert advice on issues concerning Maori', for 'greater incorporation of Maori principles into the

⁵⁰⁶ Hon. Tony Ryall, *National welcomes Privy Council discussion*, Press statement, 19 December 2000. Ryall was Minister of Justice 1 February to 5 December 1999.

⁵⁰⁷ Terence Arnold, QC, *Update on the Supreme Court*, Address to the Legal Research Foundation Annual General Meeting, 7 August 2003, 4. Available at www.crownlaw.govt.nz

substantive law', and for Maori to be better represented among the judiciary, including in the High Court and the Court of Appeal. As well, the Council's support for reform was 'conditional upon an undertaking to develop a Pacific Court of Human Rights.'⁵⁰⁸

In March 2001, about 60 Auckland senior lawyers attended a meeting, called by the Auckland District Law Society and chaired by James Farmer, QC. The lawyers rejected all three proposed options but did, however, agree to work with the Attorney-General on developing a new final appellate court to replace the Judicial Committee. One speaker was reported as saying:

[t]his is only a discussion paper at the moment. Rather than be seen to be opposing the Attorney-General's discussion paper it would be better for the profession to engage her directly on the issue and to specify our concerns as soon as possible.⁵⁰⁹

The meeting believed it was essential that the new court have the following features: independence from the High Court and the Court of Appeal; full and adequate funding; its own permanent judges; access only by leave to ensure appeals were restricted to cases of general or public importance; and include visiting judges from the final appellate courts of the United Kingdom, Australia, and Canada.⁵¹⁰ In a subsequent article, Farmer identified fundamental problems with the existing appellate services provided by both the Privy Council and the Court of Appeal.⁵¹¹ He claimed 'even those lawyers who support retention of the Privy Council are not, generally speaking, entirely satisfied with how the appellate

⁵⁰⁸ Sir Graham Latimer, New Zealand Maori Council submission to the Crown Law Office on Reshaping New Zealand's Appeal Structure, 10 April 2001. (mimeo).

⁵⁰⁹ Meeting over Privy Council access sought with Attorney-General, *Law News*, weekly newsletter of the Auckland District Law Society, March 30, 2001.

⁵¹⁰ *Ibid.*, See also, Jock Anderson, Briefs qualify support to abandon Privy Council, *The National Business Review*, March 23, 2001, 11

⁵¹¹ James Farmer, No simple solution to replacing appeals to the Privy Council, *The National Business Review*, March 23, 2001, 21.

system was operating.’ From the Privy Council, ‘we are not receiving a reasonable body of guidance and precedent across many important areas of New Zealand law,’ as the costs of taking a case there were too high. And the Court of Appeal, partly because of the need for ‘an ‘authoritative’ statement of the law,’ ‘has increasingly departed from its role of as an intermediate or first-level appellate court’ to become ‘a de facto final appellate court.’ Neither arrangement, in his view, could fulfil New Zealand’s requirements. The ideal solution was to have ‘a resident Privy Council’ but that was unlikely. Until a separate new court, containing the essential features identified by the lawyers, was established, appeals to London should be maintained.

One of the most consistent critics of the proposal to end appeals to the Judicial Committee was Bernard Robertson, editor of *the New Zealand Law Journal*. An informed and perceptive, if sometimes strident, commentator, Robertson’s comments were to reveal, or, in some cases, lead, public responses to the changing arguments and the formal proposals. In February 2001, he was concerned not only with the move to abolish appeals, but also the arguments used to justify it, asserting that ‘claims that Judges need to be more conscious of social conditions in New Zealand’ denied ‘the fundamentals of a legal system’, which was designed to ‘ensure individuals are protected by a body of rules from the vagaries of public opinion.’⁵¹² In April 2001, he doubted that New Zealand could match the pool of judicial talent available in the United Kingdom, noting that New Zealand already had twice as many High Court and Court of Appeal Judges per capita as England.’ With the change, we will ‘end up with a Court distinctly inferior to and distinctly more expensive than the Privy Council.’⁵¹³ In May 2001, Robertson believed that

⁵¹² *Agenda 2001*, [2001] NZLJ 1. This was the first issue of the *Law Journal* after the release of the Attorney-General’s discussion paper.

⁵¹³ *One in Five Million*, [2001] NZLJ 89. The title derives from the fact that the United Kingdom with a population of approximately 60 million has 12 appointed judges in the House of Lords Appellate Committee - its final appellate Court. Those judges also serve on the Judicial Committee. While they provide the majority in both Courts, they are supplemented by eligible, retired judges.

abolition 'would only fuel greater uncertainty about legal outcomes;' and would increase the costs of doing business globally.⁵¹⁴

Developments in the United Kingdom

In the United Kingdom in 1997, the 18-year run of the Conservative Government ended and a Labour Government set about to 'modernise' Britain. The new programme included major constitutional reforms, implemented in stages, over the Government's three terms between 1997 and 2010. An early set of reforms involved devolution of powers to the newly created Scottish Parliament, the National Assembly for Wales, and the restored Northern Ireland Assembly. The jurisdiction of the Judicial Committee was expanded to hear appeals on devolution disputes with Scotland, as, unlike Scottish civil appeals, it would be inappropriate for devolution appeals to be directed to Britain's top court, located as it was in the House of Lords of the British Parliament.⁵¹⁵ It was, however, agreed that only British Judges would hear these appeals. In other words, Commonwealth Judges, including Lord Cooke, were ineligible to hear these appeals. The constitutional reform programme attracted considerable commentary and research, principally from academics, but also from other interests. This included scrutiny of the location and role of Britain's top courts – the House of Lords Appellate Committee and the Judicial Committee of the Privy Council – as well as the role of the Lord Chancellor. Le Sueur and Cornes asked what do top courts do,⁵¹⁶ and Le Sueur also focussed on the Judicial Committee.⁵¹⁷ There was also criticism, including from senior Judges, of Britain's top Court being located within Parliament, and the Judicial Committee being located within a department of State. In 1999, Britain's top judge, Lord Browne-Wilkinson, criticised the amount of time Britain's Law

⁵¹⁴ Mark Story, *Tug of Law*, Management, May 2001, 22-25, at 23.

⁵¹⁵ Of Britain's 12 Lords of Appeal in Ordinary, traditionally two are from Scotland, and another is a former Lord Chief Justice of Northern Ireland.

⁵¹⁶ Andrew Le Sueur and Richard Cornes; *The Future of the United Kingdom's Highest Courts* (2001).

⁵¹⁷ Andrew Le Sueur, *What is the future for the Judicial Committee of the Privy Council* (2001). He noted that certain Caribbean countries were planning to withdraw from the Judicial Committee.

Lords were spending on Judicial Committee appeals, especially those involving criminal appeals, many against the death penalty, from the Caribbean.⁵¹⁸ In 2003, the Department of Constitutional Affairs issued a consultation paper on a proposed Supreme Court. The Constitutional Reform Act 2005 created the Supreme Court, although the Court did not begin until 1 October 2009, when suitable premises were available. The Judicial Committee's jurisdiction to hear devolution appeals from Scotland was transferred to the Supreme Court, and some of the Committee's remaining domestic jurisdiction to hear appeals from professional disciplinary committees was transferred to the High Court of England and Wales.

One of the problems for the Judicial Committee was finding sufficient judges to serve on the Judicial Committee.⁵¹⁹ Increasingly through the 1990s, the Judicial Committee was relying upon retired judges, mostly from the Court of Appeal for

⁵¹⁸ 'Browne-Wilkinson slams City lawyers,' available at www.thelawyer.com/browne-wilkinson-slams-city-lawyers/90337.article The Senior Law Lord estimated that one-quarter of the 12 Judges' workload was taken up with the Caribbean appeals. If the Judicial Committee overturned any death penalty, they were unpopular back in the Caribbean. New Zealand Privy Counsellor, Sir Edmund Thomas, declined to sit on the Judicial Committee because of the possibility that he might have to uphold a death penalty sentence. In September 2009, Lord Phillips, Britain's top judge and President of the Supreme Court, also complained about the disproportionate time Britain's Supreme Court judges were spending on Judicial Committee appeals. See www.ukscblog.com 11 October 2009.

⁵¹⁹ In 2003, when advising the Justice and Electoral Committee examining the Supreme Court Bill, the Ministry of Justice was asked for a list of eligible judges. It contacted the Registrar of the Judicial Committee, who advised that he did not have a complete list. He supplied contact details in the Courts in Scotland and Northern Ireland where some information could be obtained. With that information, information from the website for the senior judges of the United Kingdom, and of England and Wales, and the latest (2003) annual issue of *Whittaker's Almanack*, the Ministry was able to calculate that approximately 103, of 518 Privy Counsellors, had held high judicial office and were under the age of 75 years, and were therefore eligible to sit on the Judicial Committee. This included eligible New Zealand judges. In practice, most of these 100 judges were not able to sit on the Judicial Committee because of their regular judicial duties. Only 31 judges were usually able to sit. This included 14 retired judges, and five New Zealand judges. Information from Ministry of Justice advice to Justice and Electoral Committee, 2003.

England and Wales, to supplement the two, three or, usually, four Lords of Appeal in Ordinary available to hear appeals. Even when there was a good complement of Britain's top serving judges, leading New Zealand lawyer and legal affairs commentator, Jack Hodder, was to observe that they were not necessarily putting the same effort into determining Judicial Committee appeals, as they were into United Kingdom appeals.

Lord Cooke

As noted in the previous chapter, in 1996, Lord Cooke was appointed to the House of Lords in the United Kingdom enabling him to sit on the Appellate Committee, the highest court for United Kingdom appeals, as well as continuing to sit on the Judicial Committee.⁵²⁰ He was a member of the Judicial Committee for approximately one-quarter of the New Zealand appeals determined between 1996 and his retirement in 2001. Lord Cooke's last case was the New Zealand appeal of *McGuire v Hastings District Council*.⁵²¹ At the end of the hearing, counsel for both parties paid tribute to Lord Cooke. Sir Geoffrey Palmer, who represented the respondent Council, observed:

[i]t must be recognised that Lord Cooke is the greatest Judge that New Zealand has produced and his qualities have been recognised far beyond New Zealand's shores. ... he had unusual juridical ability. ... Lord Cooke has

⁵²⁰ Lord Cooke sat in the House of Lords Appellate Committee between 1996 and 2001, and heard 40 appeals, in addition to his continuing service on the Judicial Committee of the Privy Council. Of the 40 House of Lords judgments, Lord Cooke, concurred on 15; added his observations on the appeal on 22 (7 of some length); dissented twice; and delivered the principal judgment once, on his last judgment. He was never the senior-most judge in any appeal he heard in either the House of Lords or the Judicial Committee.

⁵²¹ *McGuire & Anor v Hastings District Council & Anor*, [2002] 2 NZLR 577. The case concerned a proposed road, which would run through Maori land when linking Hastings and Havelock North. The case involved the relationship between the Resource Management Act 1991 and Te Ture Whenua Maori Act 1993. The Maori Land Court had issued an interim injunction, but this was overturned in a judicial review in the High Court, which was upheld by the Court of Appeal.

always been able to see the human and social consequences of legal rules and not to be afraid to be robust and bold on occasion.⁵²²

Palmer then conveyed messages of goodwill from the President of the New Zealand Law Society, Christine Grice, and from Attorney-General, Margaret Wilson. Paul Majurey, lead counsel for Mrs McGuire, then addressed the Committee in Maori, before fully endorsing Sir Geoffrey's comments. He then conveyed 'the appreciation and love of the Maori people to Lord Cooke. His is a lofty position in the world of Maori.' He was then joined by his co-counsel, Christian Whata, and tangata whenua of Karamu, Hastings in singing *E Toru Nga Mea*.⁵²³ Lord Bingham of Cornhill, Britain's senior most Judge, acknowledged Lord Cooke's contribution and the tributes, noting he was 'very easily the longest serving member' of the Judicial Committee, and adding:

[w]e have valued more than I can say his erudition which has marked him out as one of the outstanding jurists of the common law world.⁵²⁴

Lord Cooke, speaking initially in Maori,⁵²⁵ thanked the speakers for their tributes and for the singing. He also informed those present that he had 'a useful collection of reserved judgments the composition of which will sustain me into the summer.'⁵²⁶ He delivered his last judgment, *McGuire*, on 1 November 2001, dismissing the appeal. In all, Cooke served on the Judicial Committee from 1978 until 2001, hearing 88 appeals and delivering 14 judgments.

⁵²² Ibid., 584.

⁵²³ Ibid., 586. Whata is now a High Court Judge.

⁵²⁴ Ibid., 586.

⁵²⁵ Cooke, (2001) When a judicial colleague asked him later what he said in Maori, Cooke observed 'it was tempting to deceive him that the fate of the appeal had been revealed.'

⁵²⁶ *McGuire*, ibid., 586.

Criminal appeals

As noted in Chapter Two, the Judicial Committee was reluctant to hear appeals on criminal matters. This reflected the English situation, where it was only in 1907 that a statutory scheme for criminal appeals was enacted. Except for one brief period in the 1950s, the New Zealand Court of Appeal did not have the power to grant leave to appeal, and this meant that all appellants had first to apply directly to the Judicial Committee for special leave to appeal. Very few petitions for leave were successful. In total, only 15 appeals were heard by the Judicial Committee, and of these, only 10 were determined before the Supreme Court was established.⁵²⁷ All but one of these 15 appeals involved an individual appellant.⁵²⁸

It is the single exception, covering the circumstances of 12 individuals, which highlighted the value of a second appeal, away from the Court whose procedures are being scrutinised. In the late 1990s, the processes for granting legal aid for criminal appeals to the Court of Appeal and the determination of those appeals came under critical scrutiny. Two judgments – one by the Court of Appeal on the granting of legal aid, and the other by the Judicial Committee on two consolidated criminal appeals – highlighted practices that were inconsistent with statutory requirements.⁵²⁹ For the appeals, while it was recognised that the Court was seeking:

⁵²⁷ By way of contrast, in the twelve months to 31 December 2015, the New Zealand Supreme Court determined seven criminal appeals and 35 applications for leave to appeal on criminal matters.

⁵²⁸ Of the 15, six were allowed, although in three cases a new trial was ordered. One of the cases where the conviction was quashed was *Ramstead v R*, [1999] 1 NZLR 513. The appeal was allowed because of a procedural error by the trial judge, which, in the view of the majority (3:2) of the Judicial Committee, made the conviction unsafe. The case illustrates a paradoxical feature of appellate justice. Five judges of the Court of Appeal upheld the conviction (on one of three counts of manslaughter by the surgeon), as did two of the five judges of the Judicial Committee. Three Privy Counsellors allowed the appeal, and they prevailed over the seven other appellate judges. This point is made by Robert Lithgow and Aroha Puata, *Criminal Practice: Ramstead Explained*, (1999) NZLJ 25.

⁵²⁹ First, *Nicholls and Tikitiki v the Registrar of the Court of Appeal* [1998] 2 NZLR 385. This case began the fresh look at the procedures of the Court of Appeal. It was heard by Chief Justice

to find a practical and just way of disposing of unmeritorious appeals. ... [Nevertheless] ... The system acted arbitrarily. Certainly, it was contrary to fundamental conceptions of fairness and justice.⁵³⁰

Legislative and procedural changes followed,⁵³¹ and the appellants before the Judicial Committee had their appeals remitted to the Court of Appeal for a rehearing, while everyone else who was affected by the previous practice, was able to write seeking their appeals be reheard by the Court of Appeal. All appellants could seek legal aid. Soon after the judgment was delivered, leading criminal defence lawyer, Robert Lithgow, commented that the decision was ‘an unambiguous humiliation for the Court of Appeal.’⁵³² In 2015, Chief Justice Elias acknowledged:

[t]hat case [*Taito*] exposed the fact that judges of the Court of Appeal – some of the best judges we have ever had – took their eye off the ball in order to process the work.⁵³³

The Ministerial Advisory Group

In May 2001, the Attorney-General asked the Law Commission to ‘consider and report upon the structure of all state-based adjudicative bodies for New Zealand (apart from the Court of Appeal and Privy Council or institutions in substitution

Eichelbaum, and Justices Tipping (recently appointed to that Court) and Smellie (a High Court Judge). Secondly, *R v Taito*, [2003] 3 NZLR 577. The Judicial Committee hearing and judgment determined two combined appeals, *Fa’afete Taito v R*, and *James McLeod Bennett and 10 others v R*.

⁵³⁰ *Taito*, 600

⁵³¹ The General Policy Statement of the Crimes (Criminal Appeals) Amendment Bill 2000 notes that that ‘the aim of the Bill is to reform and clarify the case management procedure for dealing with criminal appeals in the Court of Appeal. ... [while] the Legal Services Act 2000 will remove the processing of legal aid applications from th[at] Court.’ [Historical bill available at www.nzlii.org]

⁵³² Robert Lithgow, *Criminal Practice Section: When Good Courts go Bad*, [2002] NZLJ, 149.

⁵³³ The Rt. Hon. Dame Sian Elias, *Judgery and the Rule of Law*, Faculty of Law Otago University, 7 October 2015, 7-8. Speech notes available at www.courtsofnz.govt.nz

therefore).⁵³⁴ Shortly thereafter it became apparent that the current alternatives to ending appeals to the Judicial Committee would not provide an acceptable solution to persistent calls for the opportunity for two tiers of appeal, conducted in separate courts, above the High Court. The existing approach had largely followed the practice of most Commonwealth countries, which placed reliance upon their existing domestic court structures, once Judicial Committee appeals were abolished. An alternative model was provided by Hong Kong, which established a new Court of Final Appeal, when British rule ended in 1997. It was this model that attracted the attention of the meeting of Auckland lawyers earlier in the year.⁵³⁵ Lord Cooke, who was a judge of Hong Kong's Final Court of Appeal, was to highlight features of this court in a forthcoming lecture, which he delivered at Victoria University of Wellington on 12 December 2001.⁵³⁶

On 13 August 2001, Cabinet agreed that further consultations be 'directed toward the structure of a new final Court of Appeal,' and, on 8 October 2001, Cabinet approved the establishment of an advisory group to this end.⁵³⁷ The previous week, the Attorney-General informed a panel discussion on appeals to the Judicial Committee at the New Zealand Law Society Conference that a supreme court was being considered by a new advisory group.⁵³⁸ Her views that the government was to end appeals and establish a supreme court were confirmed by the Prime Minister, Rt. Hon. Helen Clark, following Cabinet's decision.

⁵³⁴ Law Commission, (2004) *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report 85, 344.

⁵³⁵ The model of a new final court of appeal was also adapted by certain Caribbean countries seeking to end their appeals to the Judicial Committee to form a regionally-based Caribbean Court of Appeal.

⁵³⁶ Lord Cooke of Thorndon, *Final Appeal Courts: Some Comparisons*, Occasional Paper 7, Faculty of Law, Victoria University of Wellington, December 2001. Available at www.victoria.ac.nz

⁵³⁷ Wilson (2010), 6.

⁵³⁸ Lord Cooke backs cutting links with Privy Council, *The Dominion*, Tuesday October 9, 2001, 9.

At the October panel discussion, Justice Tipping reiterated his 1995 position, adding that it had been ‘reinforced’ by his experience of being a judge of the Court of Appeal for the past four years. His principal reasons were ‘to reflect the different functions of intermediate and final appellate courts’ – error correction primarily by the former, policy and principle primarily by the latter; and ‘to give the final appellate tier sufficient time for full consideration of the big issues.’⁵³⁹ Tipping also noted that issues are refined as they progress through the justice system, and may include matters which did not arise at trial ‘or have taken on a substantially new dimension on appeal.’ On the same panel, Bill Wilson QC observed that ‘a number of the reasons [for abolishing appeals to the Judicial Committee] advanced lack validity.’ In his view, ‘the only real argument in favour of retention was maintaining access from a small remote country to the best judges in London, one of the world’s great legal centres.’ He considered there were two reasons for abolition: ‘New Zealand cases should finally be decided by New Zealand judges’, as at:

the second level of appeal, there is usually no right or wrong answer but a choice between alternative approaches which can both be justified.

Secondly, the Court of Appeal is required to combine the roles of intermediate and final appellate court. For some matters, for example, employment and family law cases, statutes state that the Court’s judgment is final, while many matters, especially criminal cases, rarely reach the Judicial Committee. He believed a new final appellate court was required.⁵⁴⁰

National’s justice spokesperson, Dr Wayne Mapp, criticised the statements of the Prime Minister and the Attorney-General, observing that National had reviewed its position and it was clear that the principal users of the senior courts did not want change for three main reasons: existing ‘access to world-class expertise, judicial

⁵³⁹ Justice Tipping, Notes for Privy Council panel discussion, held on 5 October 2001, (mimeo).

⁵⁴⁰ W.M. Wilson, QC, Replacing the Privy Council, New Zealand Law Society Conference, October 2001. (mimeo, copy in possession of author.)

detachment, and certainty in the law.’ He acknowledged that improvements could be made, including a suggestion that the Privy Council determine leave applications in New Zealand.⁵⁴¹

In November 2001, the Attorney-General formally announced the formation of a Ministerial Advisory Group to advise her on ‘the purpose, structure, composition and role of a final court of appeal.’⁵⁴² The formal terms of reference included how the Court ‘will reflect te ao Maori in its establishment, structure and processes.’⁵⁴³ The Advisory Group was chaired by the Solicitor-General, Terence Arnold, QC, and mainly comprised leading representatives of the legal profession and the Maori community. Justice Robertson, President of the Law Commission, was also a member to provide links with the Law Commission’s project, while Sir Ivor Richardson, President of the Court of Appeal was a special adviser. The Group, which was serviced by officials from the Crown Law Office and the Ministry of Justice, met regularly over subsequent months to consider prepared papers, addressing various features of the terms of reference. Members also tabled their own papers. As well, the Advisory Group considered key points made by submitters on the Attorney-General’s earlier discussion paper.

The Attorney-General’s disclosure sparked a round of news media commentary, including opinion pieces from various sides. In its business section, the New Zealand Herald published three articles supporting the change, from Rt. Hon. Ted Thomas, QC, recently retired from the Court of Appeal. In his first article, Thomas argued that only ‘large corporations and wealthier individuals could afford to appeal ... to London. For small businesses and ordinary individuals there is, in effect, no right of appeal.’ He also identified a common claim that ‘many more appeals or applications to appeal ... are lodged than are heard ... in order to

⁵⁴¹ Dr Wayne Mapp, Privy Council: world of expertise, *The Christchurch Press*, 17 October 2001.

⁵⁴² Hon. Margaret Wilson, Foreword to Report of the Advisory Group, *Replacing the Privy Council: A new Supreme Court*, 2002, Office of the Attorney-General.

⁵⁴³ Advisory Group Report, *ibid.*, Appendix B, 57.

negotiate a more favourable outcome.’⁵⁴⁴ In other words, a party successful in the Court of Appeal may discount their award to avoid the costs of defending an appeal in London. In his second article, Thomas considered that ‘all too often the English approach is unduly legalistic, literal or mechanical.’⁵⁴⁵ In his final article,⁵⁴⁶ he argued for a new court, just as he had when presenting the New Zealand Law Society’s submissions to the Beattie Royal Commission in 1977.

Michael Barnett, chief executive of the Auckland Chamber of Commerce, did not agree with Thomas. In his view:

The key question is whether the commercial and legal expertise of the Privy Council and the independence and intellectual rigour with which the Law Lords approach cases can be replicated in a New Zealand court.

I do not believe it can, and the fact that the proposed Supreme Court of New Zealand would apparently need to be supplemented by overseas judges underscores that.⁵⁴⁷

The Advisory Group was ‘not asked to comment on the desirability of abolishing appeals to the Judicial Committee’, but did believe that a new court could ‘improve accessibility’; ‘increase the range of matters considered’; and ‘improve the understanding of local [New Zealand] conditions’.⁵⁴⁸ The report observed that ‘it was generally accepted in New Zealand that there should be at least two opportunities for appeal (i.e. by right or by leave) on substantive matters to distinct and independent judicial bodies.’ It noted the purposes of appeals were to correct errors; and to clarify and develop the law. Quoting from the earlier

⁵⁴⁴ Ted Thomas, Law lords only for those who can pay, *New Zealand Herald*, 5 December 2001. [Now known as Sir Edmund Thomas.]

⁵⁴⁵ Ted Thomas, UK court ignores the way things are, *New Zealand Herald*, 6 December 2001.

⁵⁴⁶ Ted Thomas, Final court to reign supreme, *New Zealand Herald*, 7 December 2001.

⁵⁴⁷ Michael Barnett, Imported judges can’t replace London’s skills, *New Zealand Herald*, 7 December 2001.

⁵⁴⁸ Advisory Group Report, paragraphs 1.1 and 1.2, 7.

submission of the Auckland District Law Society, it observed that a second tier was necessary ‘to consider the larger and wider legal questions of public interest, and keep the law in step with applicable international developments.’

One of the most contentious suggestions throughout the long debate on ending appeals to the Judicial Committee, was the suggestion that overseas judges be appointed to the Court. As noted above, the Attorney-General’s earlier discussion paper had identified the possibility. The idea had some strong proponents, including Lord Cooke in 2001 and again before the Parliamentary Committee examining the subsequent legislation, and earlier from Maori, the Auckland District Law Society, senior Auckland lawyers (as noted above), Ronald Pol,⁵⁴⁹ Bill Wilson, QC,⁵⁵⁰ and Dr James Farmer, QC.⁵⁵¹ Farmer suggested that, if a new court was established, two distinguished overseas judges, drawn from final appellate courts in the United Kingdom, Canada and Australia, should be allowed to sit. Lord Cooke first suggested that one or two overseas judges join the New Zealand final court of appeal at April 2000.⁵⁵² In his 2001 lecture, drawing on his experience as a Judge of the Hong Kong Court of Final Appeal, he observed that an overseas judge ‘has had a decisive influence’ in some cases, because they ‘bring a wider perspective. ... It is a matter of breadth of outlook and antecedents, of avoiding the danger of excessive local conformity and habits of thought.’⁵⁵³ Cooke acknowledged that serving judges might not be available, but there were other retired or part-time senior appellate judges who could make a valuable contribution.⁵⁵⁴ Interestingly, one opponent of the appointment of overseas judges was Bernard Robertson. He, too, doubted serving judges would be available, adding that retired judges, in their seventies, would be expensive. He expected ‘the

⁵⁴⁹ Pol [1995], *NZLJ*.

⁵⁵⁰ W.M. Wilson, QC, (2001), *ibid*.

⁵⁵¹ Farmer, (2001), *op cit*.

⁵⁵² Lord Cooke, in Colin James (ed.) *Building the Constitution*, Institute of Policy Studies, Victoria University of Wellington, (2000).

⁵⁵³ Cooke (2001) *o cit*. 19.

⁵⁵⁴ *Ibid.*, 20.

sole criterion for appointment to any particular case [would] rapidly become availability.’⁵⁵⁵ Tipping (2001) did not favour overseas judges, and asked if ‘we need overseas help, should we really be leaving the Privy Council.’

New Zealand judges, both current and retired judges from various courts, and senior New Zealand lawyers have served and continue to serve on courts throughout the Pacific, where they are often joined by Australian judges, and occasionally by judges from the United Kingdom or other Pacific Island countries.⁵⁵⁶ On occasions, New Zealanders also serve on international courts and tribunals. Hong Kong’s experience in involving overseas judges was perhaps unique in that it was to maintain links with the common law, and maintain confidence in Hong Kong as a financial centre.⁵⁵⁷ The Court of Final Appeal comprised four Permanent Judges, including the Chief Justice, and two lists of Non-Permanent Judges. The Court hears and determines appeals as a bench of five judges, i.e. it includes at least one Non-Permanent Judge. One list of Non-Permanent Judges is of retired Hong Kong Judges, who serve whenever a Permanent Judge is unavailable. The other list comprises overseas judges. Initially there were nine judges: three serving Law Lords from the United Kingdom; three retired judges from Australia; and three retired judges from New Zealand, including Lord Cooke.⁵⁵⁸ Overseas judges serve on a rotational basis for one month at a time.

⁵⁵⁵ *One in five Million*, [2001] NZLJ 89.

⁵⁵⁶ See Maurice Casey, *New Zealand Judges Overseas Courts*, in Sir Ian Barker and Graham Wear (ed.) *Law Stories: Essays on the New Zealand Legal Profession 1969-2003*, LexisNexis, 2003, for a useful short summary of New Zealand judges serving in the Pacific.

⁵⁵⁷ See, Lord Cooke (2001). See also, Hon. Mr Justice Bokhary, *Hong Kong’s Legal System: The Final Court of Appeal*, Occasional Paper 13, Faculty of Law, Victoria University of Wellington, November 2002. Available at www.victoria.ac.nz

⁵⁵⁸ As at 26 April 2016, there were 10 overseas judges, seven from the United Kingdom, including two serving Judges from the Supreme Court; and three retired judges from Australia. www.hkcfa.hk

The Advisory Group carefully considered the issue, and unanimously concluded it was not desirable to appoint judges from overseas jurisdictions. The report identified several problems: practicality, relevant expertise, age limits, and availability. While judges from Canada might have good insights into indigenous rights, they might not have strong insights into commercial issues, whereas judges from England might have expertise in the opposite areas. Judges from Australia would have little experience with Bill of Rights issues. This could lead to selecting a judge on a case-by-case basis to secure the relevant expertise and this would conflict with principles of judicial independence. The Group also observed that as overseas judges are likely to sit irregularly it would be difficult to see how they 'could have a significant impact on decisions of the Court.'⁵⁵⁹ Although not addressed in the Group's report, judges of final appellate courts in Canada and Australia are prevented from taking any other paid office within their respective countries.⁵⁶⁰

There was a remarkable degree of consensus, although one member opposed the inclusion of criteria for leave to appeal in legislation, preferring for the new Court to develop its own criteria, 'perhaps with the assistance of the discussion' in the Group's Report.⁵⁶¹ From the discussions, key features for the design of the court were identified and agreed. The Group's Report, totalling 80 pages including five appendices,⁵⁶² was presented to the Attorney-General on 13 March 2002, and published in April 2002, following Cabinet's consideration.

⁵⁵⁹ Advisory Group Report, paragraphs 116. 35.

⁵⁶⁰ s.7, [Canadian] Supreme Court Act 1985, 'No judge shall hold any other office of emolument under the Government of Canada or the government of a province.' s.10, High Court of Australia Act 1979, 'A Justice is not capable of accepting or holding any other office of profit in Australia.'

⁵⁶¹ *Ibid.*, paragraph 153, 46.

⁵⁶² The Appendices included information on selected overseas jurisdictions, which had withdrawn from the Judicial Committee; and an updated list of New Zealand appeals to the Judicial Committee.

Cabinet decides

The Attorney-General quickly moved to inform Cabinet of the Advisory Group's report and recommendations, and to secure Cabinet's agreement to ending appeals to the Judicial Committee. On Monday 15 April, Wilson announced the Government had 'decided to establish a new Supreme Court of New Zealand and end appeals to the Privy Council.'⁵⁶³ Wilson expected drafting of the legislation to begin soon, to enable the introduction of legislation before the general election. The new Court would not begin, however, until at least 2004. In its editorial, *The Dominion* identified two problems with the proposal: the cost of the new Supreme Court was not known; and 'adding a rarefied new tier ... will do nothing to give relief to the thousands of people caught in log-jams at the bottom of the courts system.'⁵⁶⁴ *The Dominion's* view about the need for reform to lower litigation costs and improve timeliness was supported by a survey of 28 corporate organisations conducted in July and August 2002 by law firm Buddle Findlay. 65% of respondents favoured the retention of appeals to the Judicial Committee.⁵⁶⁵

Subsequent developments

The disintegration of Labour's Coalition partner, the Alliance Party, meant an early general election held on 27 July 2002, and it was not possible to prepare legislation for introduction before then. Labour did not draw attention to the proposal to end appeals to the Judicial Committee during the campaign. After the election, the Labour and Progressive Parties were reluctant to coalesce with the Green Party, and instead signed a Confidence and Supply Agreement with United Future on 8 August 2002, enabling the formation of a Labour/Progressive Government. The Agreement included a clause stating:

⁵⁶³ Margaret Wilson, New Supreme Court of New Zealand planned, Press release, 15 April, 2002. Available on www.beehive.govt.nz A similarly worded statement was issued on 16 April.

⁵⁶⁴ Justice starts at the bottom, *The Dominion*, Thursday April 18, 2002.

⁵⁶⁵ Sarah Katz, Buddle Findlay surveys business opinion on justice system. 30 September 2002. Katz is now a High Court Judge.

support for particular legislative measures which do not relate to confidence or supply will be negotiated on a case by case basis.⁵⁶⁶

The Supreme Court Bill, based largely on the Advisory Group's report, was introduced on 9 December 2002 and, following its First Reading on 17 December, was referred to the Justice and Electoral Committee for examination and public submissions. In addition, on the initiative of the United Future member, the select committee asked submitters to address specific questions, including the central issue as whether 'the right of appeal to the Privy Council should be abolished, maintained or extended.' The bill attracted 312 submissions, 40 percent of whom supported and 54 percent opposed the establishment of the Supreme Court and the abolition of appeals to the Judicial Committee.⁵⁶⁷ Several former judges appeared before the select committee.⁵⁶⁸ During the select committee stage, a petition seeking a citizens initiated referendum was launched, and the Leader of New Zealand First, together with the justice spokespersons for National and ACT, held a joint press conference on 1 May 2003 endorsing the petition. The petition failed to secure the required number of signatures to require the conduct of a referendum. After an extended period of nine months,⁵⁶⁹ the Bill was returned to the House, with amendments recommended by a majority of the Committee. The New Zealand National, New Zealand First and ACT New Zealand Parties all wrote

⁵⁶⁶ Agreement for Confidence and Supply between Labour/Progressive Government and the United Future Parliamentary Caucus, signed 8 August 2002, by Rt. Hon. Helen Clark, Prime Minister, and Peter Dunne, Leader of United Future.

⁵⁶⁷ Supreme Court Bill, as reported, in 2003, from the Justice and Electoral Committee, 5. Available on-line under New Zealand Historical Bills at www.nzlii.org. Six percent did not express an opinion on the question of abolition of appeals.

⁵⁶⁸ The list included Lord Cooke, whose hearing was marked by the additional attendance of Minister of State, Hon. Dover Samuels; the Leader of the Opposition, Hon. Bill English; and the Leader of New Zealand First, Rt. Hon. Winston Peters. Rt. Hon. Sir Thomas Eichelbaum and Rt. Hon. Sir Ivor Richardson attended at the specific invitation of the Committee, as did Sir Tipene O'Regan.

⁵⁶⁹ Under Standing Order 295(1), a select committee must finally report to the House on a bill within six months of the bill being referred to it or by such other time as fixed by the House or the Business Committee.

minority reports. The United Future Party voted with New Zealand Labour, the Green Party and the Progressive Party for all the amendments to be adopted by the House, but otherwise voted against the bill at the Second and Third Readings. Although the Government, with the Green Party vote, only had a majority of six votes in the House of Representatives, at the Third Reading the Supreme Court Bill was passed by a majority of ten votes, as four ACT MPs did not record their votes.⁵⁷⁰

On 19 June 2003, while the Bill was before the select committee, the Court of Appeal issued its long-awaited judgment which recognised the possibility that Te Ture Whenua Maori Act 1993 would lead to private ownership of the foreshore and seabed.⁵⁷¹ The judgment was issued on a Friday, and the following Monday at her post-Cabinet press conference, the Prime Minister, Rt. Hon. Helen Clark, announced the Government would legislate to address the situation. The purpose of the Foreshore and Seabed Bill was to clarify ‘the status of the foreshore and seabed and [to] provide for the recognition and protection of customary rights and interests in the public foreshore and seabed.’⁵⁷² The effect of the Prime Minister’s statement was to divert the attention of Maori away from debating the ending of Judicial Committee appeals. On 18-20 July 2003, a national hui was held at Taupo, convened by Tuwharetoa, to discuss the Law Commission’s review of the structure

⁵⁷⁰ NZPD, Vol.612, 9096, 14 October 2003.

⁵⁷¹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643. The judgment was issued 51 weeks after the hearing of the appeal concluded. The judgment overturned a long-standing decision of the Court of Appeal, *In Re Ninety-Mile Beach* [1963] NZLR 461. In 1963, the unsuccessful party in those proceedings were unable to raise the £2,500 to prepare an appeal and send counsel to London to argue it before the Judicial Committee. Nin Tomas and Kerensa Johnston, Ask the Taniwha who owns the Foreshore and the Seabed of Aotearoa, *Te Tau Haruru – Journal of Maori Legal Writing*, Volume 1, October 2004.

⁵⁷² General Policy Statement, Foreshore and Seabed Bill 2004, 2. Available at New Zealand Historical Bills at www.nzlii.org Legislation was introduced on 8 April, and on 24 November 2004 received the Royal assent. Following the 2008 general election the National and Maori Parties agreed to a Relationship and Confidence and Supply Agreement, which included a provision to conduct a review of the legislation, and this review led to its eventual repeal.

of the courts.⁵⁷³ It included a workshop on the proposed Supreme Court and ending of Judicial Committee appeals. More than 250 people attended, including 22 MPs.⁵⁷⁴ Law Commissioners and officials from the Law Commission, Ministry of Justice and Te Puni Kokiri made presentations to a series of workshops, with each workshop facilitated by Maori leaders. The proceedings were, however, overshadowed by strong and vigorous debate over the Government plans to legislate over the foreshore and seabed.

The appointment of the first set of judges to the Supreme Court was one of the main issues of contention throughout the discussions on ending appeals to the Judicial Committee. There was an apprehension that one or more inappropriate appointments might be made, thereby blighting the start of the new arrangements. The appointment of the Chief Justice was determined in the legislation,⁵⁷⁵ and this involved her moving from her role as an adjudicating judge in the High Court and in the Court of Appeal. The other four positions were filled by the four senior judges of the Court of Appeal, all of whom, like the Chief Justice, were Privy Counsellors – the last five serving New Zealand judicial Privy Counsellors. Their appointments were widely welcomed, including from Opposition Parties who had opposed the establishment of the Supreme Court. Since then all further appointments have come from the Court of Appeal.

The Supreme Court Act 2003 commenced on 1 January 2004, although the Court was not able to hear appeals until 1 July 2004, but could undertake preliminary business, including determining applications for leave to appeal.⁵⁷⁶ A ceremonial sitting was held on 1 July, with speeches from the Attorney-General and leaders of the law profession, together with a response from the Chief Justice. Margaret Wilson observed:

⁵⁷³ Ruth Berry, Hui looks at parallel justice for Maori, *New Zealand Herald*, 17 July 2003.

⁵⁷⁴ Information from Supreme Court Bill as reported from the Justice and Electoral Committee, Commentary, 25. Available at New Zealand Historical Bills at www.nzlii.org

⁵⁷⁵ s.17(1)(a), Supreme Court Act 2003.

⁵⁷⁶ s.55, Supreme Court Act 2003.

Now, for the first time in our history, New Zealand has an indigenous final appellate court, sitting at the apex of our justice system, providing an overview in the clarification and development of all New Zealand law. An onerous task, requiring our finest legal minds.⁵⁷⁷

In response, acknowledging the good wishes offered by all the previous speakers, the Chief Justice, Dame Sian Elias, commented:

The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice [on which the nation was founded at Waitangi]. To date, we have secured the benefit of second tier appeal only for a very small number of cases. In part, that has been because of geographical inaccessibility and associated costs, but it has also been because statutory rights of appeal to the Privy Council have been limited. There have been many areas of law of great importance to the lives of New Zealanders where second tier appeal has not been available except by the uncertain route of petition for special leave. That has been damaging to the integrity and coherence of the legal system as a whole.⁵⁷⁸

Her speech also provided reassurance:

Those who worry about upheaval in our law may not understand how conservative judicial method must be even in a common law system.

⁵⁷⁷ Hon. Margaret Wilson, Address of the Attorney-General on the first sitting of the Supreme Court, 1 July 2004. Available at www.courtsofnz.govt.nz

⁵⁷⁸ Chief Justice, the Right Honourable Dame Sian Elias, Speech at the Special Sitting of the New Zealand Supreme Court, 1 July 2004. Available at www.courtsofnz.govt.nz

The New Zealand Herald

National edition

Thursday, October 9, 2003

Monday - Friday \$1.20
Standard subscription: 37 weeks
RD fees may apply

Labour's legal steamroller

- A far-reaching change to New Zealand's legal system has begun its crucial stages in Parliament.
- Labour is abolishing appeals to the Privy Council and ignoring calls for a referendum.
- With the help of the Greens the Government intends to enact the Supreme Court Bill by a bare 63 votes out of 120.
- Opposition parties staged a last-ditch debate last night but an amendment seeking a referendum was defeated.
- The bill could be law next week.

by Helen Turnham and Ruth Berry

The Government is defying heated opposition and an appeal from a supporter of change to take a "deep breath" and hold a referendum as it moves closer to abolishing the right of appeal to the Privy Council.

Former National Party Attorney-General Sir Douglas Graham, who also tried to scrap ties to the London court, said Labour should not press on with only a slim majority in Parliament and with no clear popular support for the change.

"I hold strongly to the view that constitutional matters should have strong support in the House before they are passed," he told the *Herald*.

"I think they should take a deep breath. If you've got a majority of three on a constitutional issue, then it should go to a referendum."

But Prime Minister Helen Clark yesterday remained unapologetic about passing ahead.

"If this country, 153 years after formal colonisation, is not ready to run its top court of appeal, when will it ever be ready?"

"I do not believe that a change in the court structure requires a referendum. If a constitutional change gives more New Zealanders better access to justice in their own country, I think that is well worth pursuing."

Labour, backed by the Progressive Coalition and the Greens, intends to pass the Supreme Court Bill quickly, perhaps by early next week.

It will not slow passage of the bill, which scraps appeals to the British Privy Council and sets up a supreme

ALSO TODAY

Having dealt to knight-hoods and the Privy Council, the next step would be removal of the Union Jack from the New Zealand flag.
— John Armstrong, A5

court with local judges as the final appeal court, despite opposition from Maori and business interests, and the concern of at least one of its own MPs.

Te Tai Hauauru MP Tariana Turia was yesterday voting with her Labour colleagues, but said through a spokesman she still thought a Supreme Court should be delayed because many Maori wanted a constitutional review first.

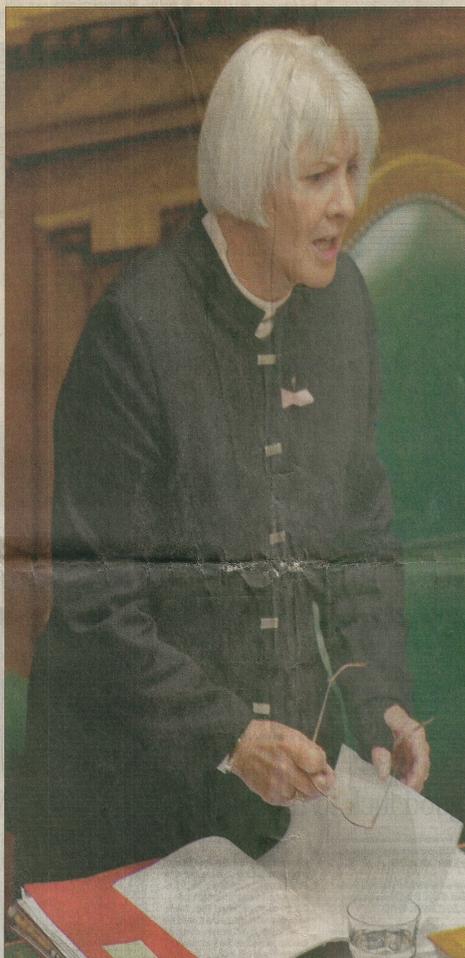
"The various iwi hold their original submissions. She will continue to advocate their point of view," her spokesman said.

He could not say if Mrs Turia would vote against the bill later.

The three parties supporting the law change (total 63 MPs out of the 120 in Parliament).

Although court changes are not technically constitutional issues, National, New Zealand First, Act and United Future say the abolition of Privy Council appeals is so significant that it should be approved by 75 per cent of MPs, or by the public through a referendum.

Continued on A5



DETERMINED: Attorney-General Margaret Wilson in Parliament last night.

PICTURE / MARK MITCHELL



The New Zealand Herald
Editorial

Stop this stunning abuse of power

THIS passage through Parliament of the Supreme Court Bill must be stopped in its tracks. To pass it into law would be an act of breathtaking arrogance. To assume that a wafer-thin majority is sufficient to enact fundamental changes to the legal and constitutional fabric of New Zealand is nothing short of an abuse of power.

No minority Government can assume, without broad mandate, the right to create a new court with standing second only to Parliament itself and responsibility to act as a check on Executive power.

That is what this legislation is really about. Abolition of the right of appeal to the Privy Council is only one of the issues. Equally important is the intention to create a new "supreme" court, one conceived by this Government and peopled in its entirety by judges that this Administration finds acceptable.

And these judges will be there long after this Parliament has run its course.

The Government has tried to characterise the court as merely an administrative extension of the appeal process. It will be much more than that. It will be an institution with the ability effectively to mould law by interpretation and, if it has the complexion of Supreme Courts in other jurisdictions, those sitting on it will collectively colour the direction in which the law is interpreted.

It is for these reasons that the creation of a Supreme Court is too important to be left in the hands of a minority Government and a minor support party. A 50 to 50 vote majority simply does not give anything remotely approaching an acceptable mandate.

Has the Government given any thought to what this lack of authority will do to the standing of the court in the eyes of the public? It will not take long for people to do the numbers: six votes and six judges. It does not represent an overwhelming parliamentary endorsement of their office. Almost half the House does not think they should be there. Add to that the experience of the select committee that considered the bill. It reported back that 54 per cent of

public submissions opposed the law change while 39 per cent backed the new Supreme Court. Three out of every four Maori submissions were against the change and only one-out of 86 local bodies wanted Privy Council appeals abolished.

Again, where is the mandate? When Canada and Australia decided to abolish appeals to the Privy Council and created their own Supreme Courts, the path to constitutional change was vastly different. In both cases the federal nature of their government acted as checks and balances. In the case of Australia in 1988, the enactment of the Australia Act was the final one of seven acts of the seven Australian Parliaments needed for a constitutional change to the whole federation.

New Zealanders will be denied any of those constitutional restraints if the Government persists in its determination to rush the Supreme Court Bill through.

An erstwhile ally sent the clearest of signals that it should rethink its strategy. United Future leader Peter Dunne summed it up: "Our concern all along has been that a major constitutional change of this type should occur only with significant public support."

There may well be sufficient public support for waving goodbye to the Privy Council, which is changing in ways that make it less and less relevant. But, as Mr Dunne belatedly suggests, this is not the way to do it.

What should happen is this: the bill should be dropped down the order paper and should stay there until an all-party constitutional conference (with Opposition parties doing more than playing politics) can consider ways in which it can be modified to gain the support of 75 per cent of the House. That might be achieved if the method of selecting judges was more broadly based and transparent and those appointments also required endorsement by three-quarters of our members of Parliament. The price of support may also be a referendum.

This is a crucial test of the Labour Government. A test of its ability to use its power wisely.

On separate occasions, both the Supreme Court and the Court of Appeal have found it necessary to make statements on the relevance of previous decisions of the Judicial Committee. In 2005, in *Chilton v R*, the Court of Appeal acknowledged that it was bound by an earlier decision of the Judicial Committee unless the Supreme Court had overruled that judgment.⁵⁷⁹ Conversely, in 2010, in *Couch v Attorney-General (No.2)*, the Supreme Court overturned, by a 4:1 majority, the precedent established in an earlier Judicial Committee judgment on a New Zealand appeal, *A v Bottrill*, (decided by a 3:2 majority), on a procedural issue concerning exemplary damages.⁵⁸⁰ This was the first time that the Supreme Court overturned a Judicial Committee finding, and the only occasion in its first decade. In separate judgments, all five judges unanimously emphasised that the lower Courts of New Zealand remained bound by the previous judgments of the Judicial Committee on New Zealand appeals unless those judgments were subsequently overturned by the Supreme Court; and also emphasised that the Supreme Court was not bound by earlier decisions of the Judicial Committee, but should depart from those decisions only in rare occasions, where it considered there was good reason to do so.⁵⁸¹

Ironically one of the first appellants to appear before the Supreme Court was the ACT Party.⁵⁸² The Court has addressed a much larger volume of appeals, and a

⁵⁷⁹ *Chilton v R*, [2006] 2 NZLR 341, 364-365, paragraph 111. The judgment also references its statement, earlier in 2005, in *Shannon v Shannon* (2005) 17 PRNZ 587 at paragraph [40].

⁵⁸⁰ *Couch v Attorney-General (No.2) (On appeal from Hobson v Attorney-General)* [2010] 3 NZLR 149, overturned *Bottrill v A*, [2003] 2 NZLR 721.

⁵⁸¹ *Couch*. See Elias CJ paragraph 32; Blanchard J paragraph 51; Tipping paragraphs 104-105; McGrath J paragraph 207; and Wilson J paragraph 251. Elias CJ dissented, as she did not believe it was necessary to set aside *Bottrill*.

⁵⁸² *Awatere Huata v Prebble*, [2005] 1 NZLR 289. Judgment given on 18 November 2004. Mrs Awatere Huata had been suspended from the ACT Party caucus, and subsequently she allowed her membership of the ACT Party to lapse. The Party wanted her seat made vacant, and for her to be replaced 'with the unelected candidate who stood highest on the ACT list.' Mrs Awatere Huata obtained an interim injunction preventing the Party's action, and this decision was upheld on appeal by a majority of the Court of Appeal. The Supreme Court allowed the appeal by Mr Prebble, ACT's leader, and other senior members of ACT. It must be acknowledged that despite its

wider range of law, than its predecessor. Some matters, which previously would have had an automatic right to appeal to the Judicial Committee, have been refused leave to appeal as they did not raise a question of general or public importance. In the year to 30 June 2015, the Supreme Court disposed of 174 applications for leave to appeal (26 applications, 11.9 percent, of which were granted), and disposed of 41 appeals, 27 of which were allowed. In January 2010, Prince William formally opened the new Supreme Court building on Lambton Quay in central Wellington. Linked to the building is the restored old High Court building, which is still used. The Chief Justice's office in the Supreme Court building is just a few metres from where all her predecessors, from Sir James Prendergast in 1881 onwards, once had their office.

Some of the Supreme Court's decisions have attracted adverse comments. Acknowledging he has been critical of at least two judgments, in 2012, Farmer commented:

many (by far the majority) of the Court's judgments ... have been accepted by the legal profession as being soundly based.

... it was always going to take some time for the new Supreme Court here to work out its appropriate role in the judicial system.⁵⁸³

The completion of the Supreme Court's first decade was marked by the publication of two books, containing assessments prepared by senior judges, leading academics and senior legal practitioners.⁵⁸⁴ There have also been academic

opposition to the creation of the Supreme Court, ACT was entitled to appeal because the Supreme Court had become New Zealand's final appellate court.

⁵⁸³ James Farmer, QC, Criticism of Supreme Court needs to be put in context, *New Zealand Herald*, 11 May 2012, 9. Available at www.jamesfarmerqc.co.nz

⁵⁸⁴ Andrew Stockley and Michael Littlewood (ed.), *The New Zealand Supreme Court: The First Ten Years*, Wellington: LexisNexis NZ Limited, 2015. Wellington. This book contained the edited papers presented earlier at a conference hosted by the Law School of Auckland University in November 2014. Mary-Rose Russell and Matthew Barber (ed.) *The Supreme Court of New Zealand, 2004-13*, Thomson Reuters, Wellington.

articles in university law reviews, and well as case commentaries. As well, from the beginning, the Court and its decisions have provided material for student research papers and post-graduate theses. Already, the analysis and awareness of the Supreme Court's work greatly outweighs the analysis and awareness of the Judicial Committee when it was New Zealand's final appellate court.

Conclusion

Margaret Wilson attempted to continue the line of proposals that had emerged from earlier considerations of ending New Zealand appeals to the Judicial Committee. While Wilson was more willing to consider the option of two tiers of appeal for first instance decisions of the High Court, her initial proposal was essentially the same as all previous considerations dating back to the 1979 Royal Commission on the Courts: the Court of Appeal would become New Zealand's final appellate court. Wilson was, however, an astute politician. As she was later to acknowledge, the separation of the two issues – abolition of appeals to the Judicial Committee and the establishment of a new final Court of Appeal – was critical: '[w]hile agreement may not be gained on the first issue, it may be gained on the second.'⁵⁸⁵

In my view, while her initial discussion paper carefully addressed key stakeholder interests – especially Maori, but also business and the legal profession – her subsequent proposal, consideration of a new final appellate court, recognised that the powerful stakeholding interest was now the legal profession. The legal profession was still divided in its views, but it became more constructive in its approach and was willing to work with the Attorney-General on the alternative. The legal profession was still insisting, as it had always done, that a replacement court was required. Relevant features were identified, as for example, from the March 2001 meeting of senior Auckland lawyers. Wilson set up an advisory group, chaired by the Solicitor-General, with strong representation from the legal

⁵⁸⁵ Wilson, (2010), *ibid.*, 6.

profession, while maintaining good representation from the Maori community. The Advisory Group's report provided a clear blueprint for the design of the new Supreme Court. The only feature, promoted by the legal profession and supported by Maori and the business community, which was not accepted, was the proposal for overseas judges to be appointed to the Supreme Court. As discussed above, on this issue there was some cross-over of opinion: for example, Lord Cooke favoured the use of overseas judges, Bernard Robertson did not.

The legal profession remained divided in its opinion on ending appeals throughout 2002 and 2003 during the development and passage of the legislation to establish the Supreme Court and to end appeals to the Judicial Committee. More than a decade later, the change is now well accepted. For Maori, the Courts, including the Judicial Committee, were no longer as important as in the heady decade of the development of the Treaty jurisprudence by the 'Cooke' Court of Appeal. The Government's reaction to the *Ngati Apa* case concerning the seabed and foreshore, diverted Maori political interest in mid-2003 from the debates over the Supreme Court Bill, and, eventually, led to the electoral consequences for the Maori seats. Business interests and the general public continued to be apprehensive over the change, and many made their views known, especially to the Parliamentary select committee examining the legislation. Most submitters to the select committee opposed the change. For the Government, Cabinet's decision in April 2002, and confirmation in November 2002, held, although there were anxious moments, because of the general election results, which narrowed the Parliamentary arithmetic, and the expression of strong divisions within the community over the policy change.

CONCLUSION

*'Historical events were always multicausal.'*⁵⁸⁶

In 2014, Andrew Stockley, dean of law at the University of Auckland observed:

the Supreme Court has been well established and provides a much more accessible second appeal. The Court's leadership role in clarifying and developing the law is well understood. The judges are well placed to provide a superior quality of adjudication informed by greater reflection and dialogue than was previously possible.⁵⁸⁷

While Stockley also had some critical comments, largely relating to issues of judicial method, for example, the desire for a single judgment, his generally positive assessment was strongly endorsed by other commentators examining specific areas of law.

Given this beneficial outcome, why then did New Zealand not withdraw from the Judicial Committee earlier. That is the central question this thesis has sought to address. As this thesis has found, there was no single explanation: rather there were a number of factors. An initial set of explanations related to New Zealand's loyalty to Britain – we were 'British to the core' as Prime Minister Coates informed the British people in 1927. Of the Dominions, New Zealand was the strongest supporter for merging the House of Lords Appellate Committee and the Judicial Committee into an Imperial Court of Appeal in 1901, or a Commonwealth Court of Appeal in 1965. New Zealand cautiously accepted British proposals to expand the membership of the Judicial Committee to enable senior New Zealand judges to sit there occasionally – it took the direct action of the President of the Court of Appeal, Sir Kenneth Gresson, to achieve this, initially for himself, and eventually for other

⁵⁸⁶ Gerda Lerner, *A Life of Learning*, Charles Homer Haskins Lecture for 2005, American Council of Learned Societies, Occasional Paper No.60, 11.

⁵⁸⁷ Andrew Stockley, *The Role of the Supreme Court: A Comparative Perspective*, in Andrew Stockley and Michael Littlewood (ed.), *The Supreme Court: The First Ten Years*.

Commonwealth judges – and the Government was initially reluctant for New Zealand judges to adjudicate on New Zealand appeals. New Zealand initiatives to enhance the Judicial Committee, particularly those championed by Richard Wild for two decades, such as the Judicial Committee sitting in other Commonwealth countries, fell on deaf ears in London. Curiously, these proposals were briefly considered by Attorneys-General Finlay in 1973, McLay in 1979, Palmer in 1986; and raised by others including Auckland lawyers in 1983, Stephen Kos in 1994, and Dr Wayne Mapp MP in 2001. It was not until 2006 that the Judicial Committee travelled beyond London to sit in the Bahamas.⁵⁸⁸

A second set of factors, and the principal issue, was whether to, and if so, how to, provide an opportunity for a second tier of appeals beyond first instance decisions of the High Court. From the earliest stages of the debate on leaving the Judicial Committee, the legal profession had strongly argued for a new appellate court above the Court of Appeal. This was a principled argument. Cox identified the contrasting principled versus pragmatic approaches.⁵⁸⁹ In the context of the times, the pragmatic approach had merit. As Judith Bassett observed in the early design of the structure of New Zealand's courts in the 1840s, there was always a strong element of pragmatism.⁵⁹⁰ Pragmatism was also evident in the proposals, albeit for slightly different reasons in the 1978 Royal Commission Report, the 1989 Law Commission Report and the 1995 Solicitor-General's Report: initially, the availability of judicial resources, and supplemented later by constraints on financial resources. Others, for example, Eichelbaum, supported the pragmatic

⁵⁸⁸ Lord Neuberger, *The Judicial Committee of the Privy Council in the 21st Century*, 11 October 2013, available at www.supremecourt.uk In recent years, the Judicial Committee has also travelled to the Bahamas on more than one occasion.

⁵⁸⁹ Noel Cox, *The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism*, 20(2) *NZULR* (2002), 220-238

⁵⁹⁰ Judith Bassett, *The New Zealand Legal System*, in Rick Bigwood (ed.) *Legal Method in New Zealand*, *op. cit.*

approach.⁵⁹¹ Attorney-General Wilson began her quest to end appeals with the pragmatic proposal designed in 1995, but twelve months on, realised that a principled approach, establishing a new final court of appeal, was required.

A third set of factors was the limited understanding of the role of the judiciary in law-making. After the Second World War, executive Government had increased its power considerably. Several measures were developed to provide checks on the misuse of that power, most notably through the enactment of legislation like the Judicature Amendment Act 1972, which provided a statutory basis for the judicial review of administrative action. During this period, it was also recognised that the courts, especially final appellate courts, had a law-making role, as they clarified and developed the law in cases brought before the courts. Geoffrey Palmer's proposed Bill of Rights aimed to enhance the courts' powers in protecting citizens, but the protracted debate surrounding this measure raised apprehensions about the power of the judiciary. Coinciding with that debate, the development of a Treaty of Waitangi jurisprudence by the Court of Appeal disrupted the Government's economic reform programme for state-owned enterprises.

The fourth set of factors relates to the Treaty of Waitangi. As successive Governments sought to enhance the place of the Treaty in the New Zealand constitution and to address past breaches, Maori looked for mechanisms to safeguard their interests against imposed solutions. To many, the Judicial Committee provided that safeguard, as its decisions on appeals were presented to the Queen for finalisation. Solicitor-General McGrath, drawing on Claudia Orange's study of the Treaty of Waitangi,⁵⁹² identified the view that an appeal directly to the Sovereign in Council offered safeguards, as a long-standing view with Maori, dating back to the nineteenth century. Despite the clear evidence that there was no doubt that the Sovereign would always give effect the outcome of any appeal decided by

⁵⁹¹ Thomas Eichelbaum, Brooding inhibition or Guiding Hand? in P.A. Joseph (ed.), *Essays on the Constitution*, op. cit.

⁵⁹² Claudia Orange, *The Treaty of Waitangi*, Wellington: Allen and Unwin, 1987.

the Judicial Committee, some Maori continued to hold this view throughout the long debates.⁵⁹³ In reality, for Maori, it was the domestic New Zealand courts, especially the Court of Appeal, which had provided the strongest safeguards.

In the period between the 1978 Report of the Royal Commission on the Courts and the commencement of the Supreme Court in 2004, the debate on ending appeals to the Judicial Committee excited a lot of passion. Abolitionists and retentionists could point to a small number of judgments which, in their view, confirmed their positions. In those conclusions they were probably all right: there were cases where the New Zealand courts, especially the Court of Appeal, got it wrong; and there were cases where the Judicial Committee clearly lacked the local knowledge that could have better informed its decision. There were also cases which could not be appealed to London, which gave rise to apprehensions about the quality of local decision-making; while there were cases where the Judicial Committee deferred to the New Zealand-based courts. Many of the arguments, on both sides were hard to refute, for example, the comparative legal strength of the London judges compared with New Zealand, largely because of the history, settings and sheer size of the respective judiciaries; or the comparative benefits of having appeals determined locally. Generally, however, where the Judicial Committee overturned the judgment of the Court of Appeal, the main conclusion that can be drawn was that the two courts simply took different views, and often, the cases were open to either view.

Second-tier appellate courts do have the benefits of previous judgments which refine the matters in dispute, together with a larger number of experienced judges; and, generally, more time to focus on the specific proceedings. The Judicial Committee was never a full service final appellate court, and was unlikely to ever become to provide that service to New Zealand.

⁵⁹³ *British Coal Corporation v King* [1935] AC 500, 512-3, per Lord Sankey. See discussion above on pages 18 and 20.

The patriation of responsibility for final appeals to the Supreme Court of New Zealand, has enabled a wider range of cases to be considered than the final appeal stage, has enhanced access to justice for court users, and has increased the transparency of these proceedings. Despite these benefits, most court proceedings, at all levels of the court system, are of limited interest to parties beyond those immediately involved.

For the general historian there are a number of insights. Court records, especially judgments, but also the supporting papers, provide another source of documentary resources for researching New Zealand's history. The nature of court proceedings is such that there is an automatic sifting process, supported by growing sources of case commentaries and academic analyses, which assist in identifying the more relevant matters. For New Zealand's history, there is a wealth of documents now available in London, some of which is on-line. Moreover, there are growing international networks of historians and other researchers, which include New Zealanders. There is a renewed international interest in the role of the Judicial Committee as it 'played a pivotal role in the homogenization of local legal cultures through the application of precedents from communities and contexts across the [British] Empire.'⁵⁹⁴ In order to be able to contribute to that renewed interest, it is important to uncover our own story first. To assist that uncovering, the Appendices set out, in large part for the first time, information listing all 314 judgments by the Judicial Committee on New Zealand appeals, including details of how they may be accessed; a statistical overview of the appeals; a summary table listing the New Zealand judicial Privy Counsellors, and their involvement, if any, as a member of the Judicial Committee; and a full list of all 69 New Zealanders who were appointed to the Privy Council between 1894 and 1999, when the last appointments were made.

⁵⁹⁴ Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court*, 2013, Oxford University Press, 5.

In addition, the findings of this thesis include the discovery of a ‘lost case’ determined by the Judicial Committee,⁵⁹⁵ to add to the list compiled by the New Zealand Lost Cases Project once further research has been undertaken;⁵⁹⁶ the insight that Sir Kenneth Gresson’s initiative in writing directly to the Lord Chancellor offering his services to the Judicial Committee, was the catalyst to broadening of the Commonwealth judicial representation. This followed William Pember Reeves’ initiative 65 years earlier, which resulted in the broadening of Privy Council appointments to include some British Empire politicians.⁵⁹⁷ Other key findings are the forthright internal debate in 1966 between newly appointed Chief Justice Wild and two Court of Appeal judges, Justices Turner and McCarthy, over the future of New Zealand appeals to the Judicial Committee; and the comparative free and frank exchange of views between the Justice Ministers Hanan and Riddiford and their Justice Department officials Robson and Cameron.

Another insight is that the relative strengths of the interests of key groups differed over time. Even though the debate was seen as vigorous and at times ‘corrosive’, especially for the judiciary, criticisms did have results: our judiciary is now more diverse, like the rest of our public office holders. Finally, it needs to be acknowledged that, for 50 years, one New Zealander, Robin Cooke, regularly made significant contributions to the debate on New Zealand’s relationship with the Judicial Committee, and became only the second Empire/Commonwealth judge to be appointed to the House of Lords.

⁵⁹⁵ *Walter Turnbull and Others v the Owners of the Strathnaver*, [1875] UKPC 73. See n.67 above.

⁵⁹⁶ www.victoria.ac.nz/law/nzlostcases/

⁵⁹⁷ See Keith Sinclair, *William Pember Reeves*. (Auckland: Oxford University Press, 1965). Gresson disclosed his action in an *NZLJ* interview in 1974, and both Finn (1997) and Spiller (2002) record this action, but none appear to be aware of its full significance.

Source of Figures

Figure 1: Sir Joshua Williams, Alexander Turnbull Library.

Figure 2: Sir Michael Myers, Te Papa Museum.

Figure 3: Supreme Court judges welcome Lord Chancellor, Lord Jowitt. Photograph taken circa 7 Sep 1951 by an Evening Post staff photographer. Part of the Evening Post Collection, Alexander Turnbull Library.

Figure 4: Sir Richard Wild, Alexander Turnbull Library.

Figure 5: New Zealand Herald's front page editorial, 9 October 2003.

Appendix One: Judicial Committee Judgments on NZ Appeals

This Appendix lists all judgments made by the Judicial Committee on New Zealand appeals. Each judgment may be found on-line at www.bailii.org by searching through the judgments for the United Kingdom for the Privy Council judgments. The judgments are listed by the year they are delivered – as listed in the UKPC Reference column.

The Citation column lists the principal citation, usually a New Zealand citation. [Further work to compare this list with the United Kingdom Appeal Cases record will be undertaken.]

The Comment column includes most occasions when a British Empire/Commonwealth judge, including any New Zealand judge, was a member of the Judicial Committee for this appeal. **AP** = symbolises the ability to view the other main documents for this case, via the BAILII website. The Comments column also identifies when the appeal is from a judgment of a Court other than the Court of Appeal (CA) – usually the Supreme Court (SC), as the High Court (HC) was formerly known.

This Appendix does not include cases where the appeal was withdrawn, e.g. *Bunny v Hart*, (1857) NZPCC 15; nor does it record the small number of reported decisions on applications for special leave to appeal, e.g. *Re Matua's Will* [1908] AC 148 (PC), or *Thomas v R* [1978] 2 NZLR 1.

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
1	15 May 1851	The Queen (by Her Attorney-General for New Zealand) v Clarke	[1851] UKPC 10	(1849-51) NZPCC 516	Land claims and Crown prerogative	Allowed	From the Supreme Court
2	11 February 1862	Bunny v The Judges of the Supreme Court of New Zealand	[1862] UKPC 28	(1862) NZPCC 302	Law practitioners – suspension	Dismissed	From the Supreme Court

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
3	9 May 1874	Maclean & Another v MacAndrew & Others	[1874] UKPC 35	(1874) NZPCC 349	Mining - cancellation of pastoral lease	Dismissed	
4	8 December 1875	Walter Turnbull & Others v The Owners of the Strathnaver	[1875] UKPC 73	Unreported	Salvage costs	Allowed in part	From Vice- Admiralty Court of NZ
5	11 March 1876	Bell v Receiver of Land Revenue of Southland	[1876] UKPC 16	(1876) NZPCC 216	Application to purchase rural land	Dismissed	
6	19 November 1879	Pearson & others, Commissioners of the Waste Lands Board of Southland, & others v Spence	[1879] UKPC 56	(1879) NZPCC 222	Application to purchase rural land	Dismissed	From the Supreme Court
7	22 February 1881	Daniell v Sinclair	[1881] UKPC 7	(1881) NZPCC 140	Reopening of accounts under mortgage	Dismissed	
8	8 March 1882	Rhodes v Rhodes & Others	[1882] UKPC 15	(1882) NZPCC 708	Construction of a will	Allowed	From the Supreme Court
9	11 July 1883	Ward v National Bank of New Zealand Ltd	[1883] UKPC 38	(1883) NZPCC 551	Guarantee - release of surety	Dismissed	From the Supreme Court
10	9 April 1884	The Queen v Williams	[1884] UKPC 23	(1884) NZPCC 118	Crown suit - negligence	Dismissed	
11	25 June 1884	Plimmer & Another v Wellington City Corporation	[1884] UKPC 29	(1884) NZPCC 250	Compensation for public taking of land	Allowed	
12	30 April 1890	Shaw Savill & Albion Co. Ltd. v Timaru Harbour Board	[1884] UKPC 20	(1889-90) NZPCC 180	Liability of Harbour Board	Dismissed	From the Supreme Court
13	4 July 1891	Donnelly & Others v Broughton	[1891] UKPC 24	(1891) NZPCC 566	Validity of a will	Dismissed	
14	21 May 1892	Buckley (Attorney- General for New Zealand) v Edwards	[1892] UKPC 23	(1892) NZPCC 204	Power to appoint Supreme Court Judges	Allowed	
15	25 April 1893	Cameron & Another v Nystrom	[1893] UKPC 18	(1893) NZPCC 436	Negligence - employer's liability	Dismissed	
16	17 June 1893	Ashbury v Ellis	[1893] UKPC 27	(1893) NZPCC 510	Validity of Supreme Court Code rule	Dismissed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
17	16 December 1893	Black v Christchurch Finance Co Ltd	[1893] UKPC 60	(1893) NZPCC 448	Negligence - liability of principal	Allowed	
18	3 February 1894	Union Steam Ship Co Ltd v Claridge	[1894] UKPC 9	(1894) NZPCC 432	Negligence - employer's liability	Dismissed	
19	10 May 1895	Barre Johnston & Co. v Oldham	[1895] UKPC 23	(1895) NZPCC 101	Contract	Dismissed	
20	19 November 1897	Annie Brown v Attorney-General for New Zealand	[1897] UKPC 44	(1897) NZPCC 106	Criminal law - party of offence - defence of marital control	Dismissed	
21	5 March 1898	Eccles & Others v Mills & Others	[1898] UKPC 2, 3, 4	(1897-98) NZPCC 240	Landlord & tenant - lessor's covenant	Allowed	Three identical judgments issued; eight judges.
22	8 March 1898	Southland Frozen Meat & Produce Export Co. Ltd. v Nelson Bros. Ltd.	[1898] UKPC 8	(1898) NZPCC 77	Contract construction	Dismissed	
23	22 June 1898	Union Bank of Australia Ltd. v Murray-Aynsley	[1898] UKPC 33	(1898) NZPCC 9	Banking, knowledge of character of customer's trust account	Allowed	
24	3 August 1898	Barker v Edger & Others	[1898] UKPC 51	(1898) NZPCC 422	Jurisdiction to rehear case under Native Court Act 1886	Allowed in part; judgment varied	
25	26 November 1898	(1) Dilworth & Others v Commissioner of Stamps; (2) Dilworth & Others v Commissioner for Land & Income Tax	[1898] UKPC 61 & 62	(1898) NZPCC 578	Tax, exemption from death duties & land tax	Both appeals allowed	Two appeals heard together; identical judgments issued.
26	17 February 1900	Coates (Receiver for debenture-holders of the New Zealand Midland Railway Co. Ltd.) v The Queen	[1900] UKPC 2	(1900) NZPCC 651	Railway debentures - construction	Dismissed	Six judges
27	15 May 1900	Wasteneys v Wasteneys	[1900] UKPC 24	(1900) NZPCC 184	Deed of separation - provision for annuity	Allowed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
28	27 June 1900	Fleming v Bank of New Zealand	[1900] UKPC 29	(1900) NZPCC 525	Principal & agent	Allowed	From the Supreme Court; de Villiers.
29	11 July 1900	Allan v Morrison & Others	[1900] UKPC 37	(1900) NZPCC 560	Probate of lost will	Dismissed	de Villiers.
30	21 July 1900	Jellicoe v Wellington District Law Society	[1900] UKPC 50	(1900) NZPCC 310	Law practitioners - suspension of solicitor	Dismissed	From the Supreme Court
31	11 May 1901	Nireaha Tamaki v Baker	[1901] UKPC 18	(1901) NZPCC 371	Native Land Court - cognizance of Maori customary law	Allowed	de Villiers
32	9 November 1901	Te Teira Te Paea & Others v Te Roera Tareha & Another	[1901] UKPC 50	(1901) NZPCC 399	Native lands - confiscation by the Crown	Dismissed	
33	18 April 1902	Wellington City Corporation v Johnston & Others; Wellington City Council v Lloyd & Another	[1902] UKPC 15 & 16	(1902) NZPCC 644	Public works - compensation for taking land	Both appeals dismissed	Two appeals heard together; identical judgments issued.
34	23 July 1902	Commissioner of Trade & Customs R Bell & Co. Ltd.	[1902] UKPC 41	(1902) NZPCC 146	False trade description - forfeiture by Customs	Allowed	
35	10 February 1903	Wallis & Others v Solicitor-General	[1903] UKPC 1	(1902-03) NZPCC 23	Charitable trust	Allowed	
36	1 May 1903	Jackson v Commissioner of Stamps	[1903] UKPC 26	(1903) NZPCC 592	Tax, death duties	Dismissed	From the Supreme Court
37	23 March 1904	D Henderson & Co. Ltd. (in liquidation) v Daniell & Others	[1904] UKPC 12	(1904) NZPCC 48	Company law - arrangement with creditors	Dismissed	
38	14 May 1904	Smith v McArthur & Others	[1904] UKPC 27	(1904) NZPCC 323	Licensing, polls & elections	Allowed	From the Supreme Court
39	22 June 1904	Lodder & Another v Slowey	[1904] UKPC 39	(1904) NZPCC 60	Termination of contract - power of re-entry & seizure - quantum meruit	Dismissed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
40	26 July 1904	Wellington City Corporation v Lower Hutt Borough	[1904] UKPC 51	(1904) NZPCC 354	Municipal Corporations Act 1900, contribution to costs of a bridge	Dismissed	
41	5 August 1904	Heslop v Minister of Mines	[1904] UKPC 65	(1904) NZPCC 344	Compensation for land injured by mining	Dismissed	
42	8 February 1905	Riddiford v The King	[1905] UKPC 3	(1904-05) NZPCC 109	Surrender of land to the Crown, adverse possession	Dismissed	
43	1 March 1905	Assets Co. Ltd. v Mere Roihi	[1905] UKPC 10, 11, & 12	(1904-05) NZPCC 275	Irregularities in Native Land Court; effect on registration under Land Transfer Act	All appeals allowed	Three appeals heard together; identical judgments issued.
44	12 May 1905	Graham & Others v Callaghan	[1905] UKPC 24	(1905) NZPCC 330	Licensing laws, regulation of local elections	Allowed	
45	25 May 1905	New Zealand Loan & Mercantile Agency Co. Ltd. v Reid	[1905] UKPC 30	(1905) NZPCC 82	Contract – fraud	Allowed	
46	1 December 1905	Clouston & Co. Ltd. v Corry	[1905] UKPC 70	(1905) NZPCC 336	Master & servant, wrongful dismissal	Allowed; new trial ordered	
47	25 July 1906	Commissioner of Taxes v Eastern Extension Australasia & China Telegraph Co. Ltd.	[1906] UKPC 52	(1906) NZPCC 604	Income tax	Dismissed	
48	5 February 1907	Ward Bros. v Valuer-General of Land for New Zealand	[1907] UKPC 1	(1907) NZPCC 174	Power of Supreme Court to control Valuer-General	Dismissed	From the Supreme Court
49	31 July 1907	Lyttelton Times Co. Ltd. v Warners Ltd.	[1907] UKPC 47	(1907) NZPCC 470	Nuisance, construction of building resulting in noise	Allowed	
50	31 October 1907	Lovell & Christmas Ltd. v Commissioner of Taxes	[1907] UKPC 57	(1907) NZPCC 611	Income tax, profits from goods sold in London	Allowed	From the Supreme Court

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
51	23 July 1909	Commissioner of Stamps v Townend, in re Moore (deceased)	[1909] UKPC 36	(1909) NZPCC 597	Tax, death duties	Dismissed	
52	18 March 1910	Hamilton Gas Co. Ltd. v Hamilton Borough	[1910] UKPC 10	(1910) NZPCC 357	Purchase of gas works & plant by Borough Council, price	Allowed	From the Supreme Court
53	18 March 1910	Greville & Another v Parker	[1910] UKPC 14	(1910) NZPCC 262	Lease, option for renewal	Allowed	
54	27 July 1911	Allardice & Another v Allardice & Others	[1911] UKPC 61	(1911) NZPCC 156	Family protection	Dismissed	
55	17 May 1912	Massey v New Zealand Times Co. Ltd.	[1912] UKPC 38	(1912) NZPCC 503	Defamation	Dismissed	
56	22 July 1912	Samson v Aitcheson	[1912] UKPC 59	(1912) NZPCC 441	Negligence - employer's liability	Dismissed	
57	1 July 1913	Manu Kapua & Others v Para Haimona & Another	[1913] UKPC 29	(1913) NZPCC 413	Native lands, title	Dismissed	From Native Appellate Court
58	10 July 1913	Kauri Timber Co. Ltd. v Commissioner of Taxes	[1913] UKPC 31	(1913) NZPCC 636	Income tax, deduction of capital	Dismissed	
59	19 March 1914	Equitable Life Assurance Society of the United States v Reed	[1914] UKPC 20	(1914) NZPCC 190	Life insurance policy, surrender value	Dismissed, subject to a variation of judgment appealed from	
60	9 March 1915	Union Steam Ship Co. of New Zealand Ltd. v Wellington Harbour Board	[1915] UKPC 15	(1915) NZPCC 176	Exemption from Harbour Board duties	Dismissed, subject to a variation of judgment appealed from	
61	8 July 1915	Rutherford v Acton-Adams	[1915] UKPC 36	(1915) NZPCC 688	Vendor & purchaser	Dismissed	
62	26 July 1915	The King v Broad	[1915] UKPC 45	(1915) NZPCC 658	Railways - negligence - effect of statutory restriction on public right of way	Dismissed	

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63	9 May 1916	Mangaone Oilfields Ltd. v Herman & Weger Manufacturing & Contracting Co. Ltd.	[1916] UKPC 38	(1916) NZPCC 21	Building contract	Dismissed	
64	22 June 1916	Ridd Milking-Machine Co. Ltd. v Simplex Milking-Machine Co. Ltd.	[1916] UKPC 51	(1916) NZPCC 478	Patent - infringement	Dismissed	
65	16 November 1916	Gillies v Gane Milking-Machine Co. Ltd.	[1916] UKPC 99	(1916) NZPCC 490	Patent - infringement	Dismissed	From the Supreme Court
66	26 January 1917	McCaul v Fraser	[1917] UKPC 11	(1917) NZPCC 152	Family trust to divide estate	Dismissed	
67	27 March 1917	Attorney-General for New Zealand v Brown & Others, in re Knowles (deceased)	[1917] UKPC 32	(1917) NZPCC 698	Construction of a will	Dismissed	
68	4 June 1918	Marsh & Another v St Leger	[1918] UKPC 50	(1918) NZPCC 232	Lands Act 1892	Dismissed	
69	22 July 1919	Hineiti Rireire Arani v Public Trustee of New Zealand	[1919] UKPC 71	(1919) NZPCC 1	Maori adoption	Dismissed	Consolidated appeals from Native Appellate Court
70	6 February 1920	Tarbutt & Others v Nicholson & Long	[1920] UKPC 5	(1920) NZPCC 703	Construction of a will	Allowed	
71	12 February 1920	Union Steam Ship Co Ltd v Robin	[1920] UKPC 6	(1920) NZPCC 131	Death by accident, amount recoverable by dependent	Dismissed	
72	16 November 1920	Gerrard v Crowe & Another	[1920] UKPC 94	(1920) NZPCC 691	Riparian owners, right to erect embankment against flood	Dismissed	
73	14 February 1922	Thornes v Brown	[1922] UKPC 16	(1922) NZPCC 534	Principal and agent - exchange of land - negligence of agent acting for both parties	Dismissed	From the Supreme Court
74	16 November 1922	Ward & Co. Ltd. v Commissioner of Taxes	[1922] UKPC 90	(1922) NZPCC 625	Income tax	Dismissed	

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75	28 November 1922	A. Hatrick & Co. Ltd. v The King	[1922] UKPC 95	(1922) NZPCC 159	Government railways - Minister's power to exact sorting charges	Allowed	
76	1 March 1923	Snushall v Kaikoura County	[1923] UKPC 13	(1923) NZPCC 670	Control by County Council of paper roads	Dismissed	
77	2 July 1923	Smallfield v National Mutual Life Association of Australasia Ltd.	[1923] UKPC 55	(1923) NZPCC 197	Life insurance - truth of statements	Allowed	
78	18 December 1923	Auckland Harbour Board v The King	[1923] UKPC 92	(1923) NZPCC 68	Constitutional law - authority for payment from consolidated fund	Dismissed	From the Supreme Court
79	30 June 1925	Waimiha Sawmilling Co. Ltd. (in liquidation) v Waione Timber Co. Ltd.	[1925] UKPC 55	(1925) NZPCC 267	Land Transfer Act 1915 - unregistered interest	Dismissed	
80	28 July 1925	Peddle v McDonald	[1925] UKPC 81	(1925) NZPCC 138	Easement - assignment of right to use tram line	Dismissed	
81	12 July 1926	Wright v Morgan & Others	[1926] UKPC 69	(1926) NZPCC 678	Trusts - assignment of option given under will to co- trustee	Judgment varied; CA upheld in the main; part returned to SC.	
82	20 July 1926	Bisset v Wilkinson & Another	[1926] UKPC 73	(1926) NZPCC 93	Contract for sale of land - misrepresentation	Allowed	
83	21 January 1927	Doughty v Commissioner of Taxes	[1927] UKPC 9	(1926-27) NZPCC 616	Tax, death duties	Allowed	
84	21 January 1927	Gardner v Hirawanu	[1927] UKPC 10	(1929) NZPCC 365	Native land - covenant by lessee to cultivate	Allowed	
85	27 January 1927	Crown Milling Co. Ltd. & Others v The King	[1927] UKPC 12	(1927) NZPCC 37	Commercial Trusts Act 1910	Allowed	
86	17 November 1927	Watson v Haggitt & Others	[1927] UKPC 103	(1927) NZPCC 474	Construction of deed of partnership	Dismissed	

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87	22 January 1929	Finch v Commissioner of Stamp Duties	[1929] UKPC 4	(1929) NZPCC 600	Tax, death duties	Allowed	
88	13 June 1929	Burnard v Lysnar	[1929] UKPC 59	(1929) NZPCC 538	Principal & surety	Allowed	
89	24 January 1930	Wanganui Sash & Door Factory & Timber Co. Ltd. v Maunder	[1930] UKPC 9	(1929) NZPCC 484	Patent - infringement	Allowed	
90	24 April 1931	Scales v Young & Others	[1931] UKPC 49	(1931) NZPCC 313	Licensing districts	Dismissed	
91	9 June 1932	Benson v Kwong Chong	[1932] UKPC 40	(1932) NZPCC 456	Negligence - function of jury	Allowed	
92	27 July 1932	Aspro Ltd. Commissioner of Taxes	[1932] UKPC 52	(1932) NZPCC 630	Income tax	Dismissed	
93	27 July 1933	New Plymouth Borough v Taranaki Electric-Power Board	[1933] UKPC 59	[1933] NZLR 1128	Municipal Corporations Act 1920	Dismissed	
94	28 July 1933	Brooker v Thomas Borthwick & Sons (Australasia) Ltd. & Others	[1933] UKPC 61	[1933] NZLR 1118	Workers compensation	All appeals allowed	Four appeals, consolidated
95	12 October 1933	Gould & Others v Commissioner of Stamp Duties	[1934] UKPC 67	[1934] NZLR 32	Tax, death duties	Dismissed	From the Supreme Court
96	24 January 1935	Lysnar v National Bank of New Zealand Ltd.	[1935] UKPC 5	[1935] NZLR 129	Contract – formation	Allowed	Judgment substituted f
97	22 February 1935	In re Rhodes (deceased), Barton & Others v Moorhouse & Others	[1935] UKPC 12	[1935] NZLR 152	Construction of a Private Act	Allowed in part; judgment varied	
98	9 December 1935	Trickett v Queensland Insurance Co. Ltd. & Others	[1935] UKPC 87	[1936] NZLR 116	Motor vehicle insurance policy - construction	Dismissed	
99	19 December 1935	Public Trustee v Lyon	[1935] UKPC 90	[1936] NZLR 180	Life insurance	Dismissed	

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100	6 July 1936	Chapple v Tongariro Timber Company Co. Ltd. & Others	[1936] UKPC 48	Unreported	Mortgagee rights	Dismissed	From the Supreme Court; in <i>forma pauperis</i> appeal
101	15 October 1936	Attorney-General for New Zealand v New Zealand Insurance Co.Ltd. & Others	[1936] UKPC 71	[1937] NZLR 33	Validity of a will	Dismissed	
102	15 October 1936	Vincent v Tauranga Electric- Power Board	[1936] UKPC 72	[1936] NZLR 1016	Breach of implied contract & statutory duty	Dismissed	
103	26 January 1937	Auckland City Corporation & Auckland Transport Board v Alliance Assurance Co. Ltd.	[1937] UKPC 2	[1937] NZLR 142	Local authority debentures - currency of payment	Dismissed	
104	12 February 1937	Macleay v Treadwell & Another, in re Macleay (deceased)	[1937] UKPC 19	[1937] NZLR 230	Construction of a will	Allowed	
105	18 October 1937	Mt Albert Borough v Australasian Temperance & General Mutual Life Assurance Society Ltd.	[1937] UKPC 86	[1937] NZLR 1124	Local body loan - application of Victorian statute	Dismissed	From the Supreme Court
106	14 February 1938	De Bueger v J Ballantyne & Co. Ltd.	[1938] UKPC 13	[1938] NZLR 142	Contract - currency of payment	Allowed	Only 2 Lords
107	27 April 1939	Wright & Others v New Zealand Farmers' Co- operative Association of Canterbury Ltd.	[1939] UKPC 30	[1939] NZLR 388	Mortgage - mortgagee's obligations on sale	Dismissed	
108	5 April 1940	Stewart v Hancock	[1940] UKPC 18	[1940] NZLR 424	Negligence - evidence	Allowed	
109	3 April 1941	Te Heuheu Tukino v Aotea District Maori Land Board	[1941] UKPC 6	[1941] NZLR 590	Legal effect of the Treaty of Waitangi	Dismissed	
110	8 April 1941	Dillon v Public Trustee & Others, in re Dillon (deceased)	[1941] UKPC 11	[1941] NZLR 557	Family Protection Act 1908	Allowed	

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111	19 January 1942	Guardian, Trust, & Executors, Co. of New Zealand Ltd. v Public Trustee	[1942] UKPC 1	[1942] NZLR 294	Will - withdrawal of probate	Dismissed	
112	5 July 1944	Sidey v Perpetual, Trustees, Estate, & Agency Co. of New Zealand Ltd. & Another	[1944] UKPC 24	[1944] NZLR 891	Construction of a will	Allowed	
113	10 October 1946	Auckland Electric Power Board v Public Trustee, & Another	[1946] UKPC 38	[1946] NZLR 279	Electric Supply Regulations 1935, Electric Wiring Regulations 1935, ultra vires	Allowed	
114	26 June 1947	Australian Provincial Assurance Association Ltd. v E.T. Taylor & Co. Ltd.	[1947] UKPC 44	[1947] NZLR 793	Contract - formation	Allowed	
115	6 February 1956	National Mutual Life Association of Australasia Ltd. v Attorney-General	[1956] UKPC 3	[1956] NZLR 422	Government debentures - currency of payment	Dismissed	From the Supreme Court AP
116	14 February 1956	Ward & Others v Commissioner of Inland Revenue	[1956] UKPC 4	[1956] NZLR 367	Death duties	Dismissed	AP
117	15 February 1956	Commissioner of Stamp Duties	[1956] UKPC 5	[1956] NZLR 335	Death duties	Dismissed	AP
118	26 July 1956	McKenna & Another v Porter Motors Ltd.	[1956] UKPC 32	[1956] NZLR 845	Tenancy - landlord's possession	Dismissed	AP
119	2 October 1958	Maori Trustee v Ministry of Works, in re Whareroa 2E Block	[1958] UKPC 18	[1959] NZLR 7	Public works - compensation for taking land	Dismissed; judgment appealed from varied	AP
120	14 October 1958	Perkowski v Wellington City Corporation	[1958] UKPC 21	[1959] NZLR 1	Negligence - liability of local authority	Dismissed	in <i>forma pauperis</i> appeal AP
121	20 October 1958	Mouat v Betts Motors Ltd.	[1958] UKPC 23	[1959] NZLR 15	Customs & price control restrictions on sale of imported car	Dismissed	AP
122	26 July 1960	Truth (NZ) Ltd. v Holloway	[1960] UKPC 24	[1961] NZLR 22	Defamation - jury verdict	Dismissed	AP
123	11 October 1960	Lee v Lee's Air Farming Ltd.	[1960] UKPC 33	[1961] NZLR 325	Company law	Allowed	AP

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124	20 November 1961	Australian Mutual Provident Society v Commissioner of Inland Revenue	[1961] UKPC 48	[1962] NZLR 449	Income tax	Dismissed	From the Supreme Court AP
125	20 November 1962	Miller v Minister of Mines	[1962] UKPC 30	[1963] NZLR 560	Land transfer - mining privilege	Dismissed	AP
126	7 May 1963	Truth (NZ) Ltd. v Howey	[1963] UKPC 11	[1963] NZLR 775	National Expenditure Act 1932	Dismissed	AP
127	9 March 1964	Morgan v Khyatt	[1964] UKPC 10	[1964] NZLR 666	Nuisance - encroachment of roots	Dismissed	AP
128	22 July 1964	Attorney-General, ex. rel. Lewis & Another v Lower Hutt City	[1964] UKPC 37	[1965] NZLR 116	Municipal corporations' powers	Dismissed	AP
129	5 October 1964	Farrier-Waimak Ltd. v Bank of New Zealand	[1964] UKPC 42	[1965] NZLR 426	Land transfer - priorities of mortgage & contractor's liens	Allowed	AP
130	14 December 1964	J.M. Construction Co. Ltd. v Hutt Timber & Hardware Co. Ltd.	[1964] UKPC 57	[1965] NZLR 797	Mutual trading - rebate as creditor	Allowed	AP
131	13 October 1966	Jeffs & Others v New Zealand Dairy Production & Marketing Board & Others	[1966] UKPC 22	[1967] NZLR 1057	Administrative law	Allowed	AP
132	7 December 1966	Frazer v Walker & Others	[1966] UKPC 27	[1967] NZLR 1069	Land transfer - registration	Dismissed	Sir Garfield Barwick (Australia) AP
133	21 February 1967	Boots the Chemists (New Zealand) Ltd. v Chemists' Service Guild of New Zealand (Inc.) & Another	[1967] UKPC 5	[1969] NZLR 78	Statutory limitations on persons owning or controlling pharmacy business	Appeal allowed; cross-appeal dismissed	AP
134	11 December 1969	Loan Investment Corporation of Australasia v Bonner	[1969] UKPC 33	[1970] NZLR 724	Contract - specific performance	Dismissed	AP
135	21 October 1970	Mangin v Commissioner of Inland Revenue	[1970] UKPC 23	[1971] NZLR 591	Income tax - interpretation	Dismissed (4:1)	Sir Frank Kitto (Australia) AP

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136	21 October 1970	Commissioner of Inland Revenue v Associated Motorists Petrol Co. Ltd.	[1970] UKPC 24	[1971] NZLR 660	Income tax - assessable income	Dismissed	Sir Frank Kitto (Australia) AP
137	21 October 1970	Commissioner of Inland Revenue v Europa Oil (NZ) Ltd.	[1970] UKPC 25	[1971] NZLR 641	Income tax - deductions	Allowed (3:2)	Sir Frank Kitto (Australia) AP
138	23 February 1971	Bateman Television Ltd. (in liquidation) & Another v Coleridge Finance Co. Ltd.	[1971] UKPC 8	[1971] NZLR 929	Company law - hire purchase agreements	Dismissed	AP
139	23 October 1972	Hansen & Others v Commissioner of Inland Revenue	[1972] UKPC 19	[1972] 1 NZLR 483	Income tax - assessable income	Dismissed	AP
140	13 November 1972	Furnell v Whangarei High Schools Board	[1972] UKPC 22	[1972] 2 NZLR 705	Administrative law - natural justice	Dismissed	AP
141	7 March 1973	New Zealand Netherlands Society "Oranje" Inc. v Kuys & The Windmill Post Ltd.	[1973] UKPC 7	[1973] 2 NZLR 163	Secretary of an association - fiduciary duty	Dismissed	AP
142	25 February 1974	New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd.	[1974] UKPC 1	[1974] 1 NZLR 505	Shipping - contract between shipper & carrier - stevedores' rights	Allowed	AP
143	6 May 1974	Holden v Commissioner of Inland Revenue; Meneer v Commissioner of Inland Revenue	[1974] UKPC 9	[1974] 2 NZLR 52	Income tax - assessable income	Both appeals allowed	AP
144	24 October 1974	Fahey v M.S.D. Speirs Ltd.	[1974] UKPC 27	[1974] 1 NZLR 240	Guarantee & indemnity	Dismissed	AP
145	27 January 1975	Nakhla v The Queen	[1975] UKPC 5	[1975] 1 NZLR 393	Criminal law - Police Offences Act 1927	Allowed	AP
146	9 July 1975	Ashton & Another v Commissioner of Inland Revenue	[1975] UKPC 18	[1975] 2 NZLR 717	Income tax - interpretation	Dismissed	AP

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147	13 January 1976	Europa Oil (N.Z.) Ltd. v Commissioner of Inland Revenue	[1976] UKPC 1	[1976] 1 NZLR 546	Income tax - assessable income	Appeal allowed; cross- appeal dismissed (4:1)	Sir Garfield Barwick (Australia) AP
148	5 April 1976	Hannaford & Burton Ltd. v Polaroid Corporation	[1976] UKPC 9	[1976] 2 NZLR 14	Trademark - rectification of register	Allowed	AP
149	11 October 1976	Haldane v Haldane	[1976] UKPC 27	[1976] 2 NZLR 715	Matrimonial property	Allowed	AP
150	28 June 1977	Taupo Totara Timber Co. Ltd. v Rowe	[1977] UKPC 10	[1977] 2 NZLR 453	Sale of land	Dismissed	AP
151	20 July 1977	Goode v Scott	[1977] UKPC 12	[1977] 2 NZLR 466	Sale of land	Dismissed	AP
152	15 November 1977	Ross v Henderson	[1977] UKPC 19	[1977] 2 NZLR 458	Sale of land	Dismissed	Sir Garfield Barwick (Australia) AP
153	5 October 1978	Dickens v Neylon	[1978] UKPC 36	[1978] 2 NZLR 35	Sale of land	Dismissed	AP
154	28 January 1981	Lilley v Public Trustee	[1981] UKPC 4	[1981] 1 NZLR 41	Testamentary promises	Dismissed	AP
155	20 April 1982	Reid v Reid	[1982] UKPC 11	[1982] 1 NZLR 147	Matrimonial property	Both appeal & cross- appeal dismissed	Local courts better placed; Mr Reid conducted own appeal AP
156	28 July 1982	Lesa v Attorney- General	[1982] UKPC 30	[1982] 1 NZLR 165	New Zealand citizenship	Allowed	AP
157	12 April 1983	Wiseman v Canterbury Bye- Products Co. Ltd.	[1983] UKPC 12	[1983] NZLR 184	Meat Act 1939 - by-law & rule- making power	Dismissed	AP
158	14 April 1983	McDonald v The Queen	[1983] UKPC 13	[1983] NZLR 252	Criminal law - murder, offer of immunity	Dismissed	Sir William Douglas, CJ Barbados (1965- 86); PC since 1977. AP
159	30 October 1983	Mahon v Air New Zealand Ltd., re Erebus Royal Commission	[1983] UKPC 29	[1983] NZLR 662	Administrative law - powers of Royal Commissions of inquiry, judicial review	Dismissed	AP
160	21 November 1983	Lowe v Commissioner of Inland Revenue	[1983] UKPC 34	[1983] NZLR 416	Income tax	Dismissed	AP

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161	1 May 1984	Kaitamaki v The Queen	[1984] UKPC 15	[1984] 1 NZLR 385	Criminal law - rape, legal aid	Both appeals dismissed	AP
162	22 May 1985	Hart v O'Connor	[1985] UKPC 1	[1985] 1 NZLR 159	Contract - sale of land	Allowed	Oral decision on 22 April AP
163	18 July 1985	Scancarriers A/S v Aotearoa International Ltd.	[1985] UKPC 26	[1985] 1 NZLR 513	Contract - formation	Appeal allowed; cross-appeal dismissed	Sir Owen Woodhouse (NZ); first NZ appeal with NZ judge.
164	20 October 1986	Commissioner of Inland Revenue v Challenge Corporation Ltd.	[1986] UKPC 22	[1987] 2 WLR 24	Income tax - tax avoidance	Allowed (4:1)	
165	30 March 1987	Taylor v Rotowax Trading Ltd.	[1987] UKPC 9	[1988] 1 NZLR 674	Contract - restraint of trade	Dismissed	
166	14 September 1987	Brown v Heathcote County Council	[1987] UKPC 28	[1987] 1 NZLR 720	Negligence - liability of local authority	Dismissed	
167	30 November 1987	Rowling (Minister of Finance) & Attorney-General v Takaro Properties Ltd.	[1987] UKPC 34	[1987] 2 NZLR 700	Negligence - duty of care	Allowed	
168	4 May 1988	New Zealand Meat Industry Association & Others v Accident Compensation Corporation	[1988] UKPC 3a	[1988] 1 NZLR 1	ACC	Dismissed	
169	31 October 1988	Chase Securities Ltd. v GSH Finance Pty. Ltd.	[1988] UKPC 23	Unreported	Contract	Dismissed	
170	31 October 1988	Savill & Savill v Chase Holdings (Wellington) Ltd. & Chase Corporation Ltd.	[1988] UKPC 24	Unreported	Contract	Dismissed	Reference to 1946 judgment about concurrent findings of fact in courts below
171	4 May 1989	Barber v Barber	[1989] UKPC 19	[1989] 2 NZLR 641	Property law	Dismissed	
172	23 May 1989	Vujnovich v Vujnovich	[1989] UKPC 21	[1989] 3 NZLR 513	Company law	Dismissed	
173	12 July 1989	Cheah Theam Swee v Equiticorp Finance Group Ltd.	[1989] UKPC 25	[1989] 3 NZLR 1	Practice & procedure	Dismissed	

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174	18 July 1989	Green v Broadcasting Corp. of New Zealand	[1989] UKPC 26	[1989] 3 NZLR 18	Copyright	Dismissed	
175	27 July 1989	Money v Ven-Lu- Ree Ltd.	[1989] UKPC 30	[1989] 3 NZLR 129	Contract	Dismissed	
176	21 May 1990	Kuwait Asia Bank EC v National Mutual Life Nominees Ltd.	[1990] UKPC 23	[1990] 3 NZLR 513	Company law	Allowed	Oral decision on 30 November 1989
177	5 June 1990	Meates, & Rowe & Co. (New Zealand) Ltd. v Westpac Banking Corporation Ltd. & Attorney-General	[1990] UKPC 27	[1991] 3 NZLR 385	Guarantee & indemnity	Dismissed	
178	2 July 1990	Re Welch	[1990] UKPC 30	[1990] 3 NZLR 1	Testamentary promises	Dismissed	Sir Robin Cooke (NZ); delivered judgment
179	23 July 1990	Holt v Holt	[1990] UKPC 34	[1990] 3 NZLR 401	Matrimonial property	Dismissed	
180	23 July 1990	Databank Systems Ltd. v Commissioner of Inland Revenue	[1990] UKPC 37	[1990] 3 NZLR 385	G.S.T.	Dismissed (4:1)	
181	25 July 1990	Republic Resources Ltd. V NZI Leasing Corporation Ltd.	[1990] UKPC 39	Unreported	Contract, company insolvent	Dismissed	
182	22 October 1990	Elders Pastoral Ltd. v Bank of New Zealand	[1990] UKPC 45	[1991] 1 NZLR 385	Property law	Dismissed	
183	3 December 1990	Apple Fields Ltd. & Styx Mill Orchard Partnership No.6 v NZ Apple & Pear Marketing Board, & NZ Fruitgrowers Federation	[1990] UKPC 51	Unreported	Commerce Act 1986, levies under the Apple & Pear Marketing Act	Allowed	
184	18 March 1991	D.J. Butcher (Minister of Energy) v Petrocorp Exploration Ltd.	[1991] UKPC 10	[1991] 1 NZLR 641	Administrative law	Allowed	
185	18 March 1991	DFC Financial Services Ltd. v Coffey & Roberts	[1991] UKPC 11	[1991] 2 NZLR 513	Company law	Allowed	

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186	19 June 1991	Lloyds Bank Export Finance Ltd. v Commissioner of Inland Revenue	[1991] UKPC 23	[1992] 2 NZLR1	Income tax	Allowed	
187	1 July 1991	New Zealand Stock Exchange; & the National Bank of New Zealand Ltd. v Commissioner of Inland Revenue	[1991] UKPC 26	[1992] 3 NZLR1	Income tax	Dismissed	
188	13 November 1991	Cheah Theam Swee v Equiticorp Finance Group Ltd. & Another	[1991] UKPC 39	[1992] 1 NZLR 641	Company law	Dismissed	
189	25 November 1991	Earthquake & War Damages Commission v Waitaki International Ltd.	[1991] UKPC 41	[1992] 1 NZLR 513	Insurance	Allowed	
190	19 November 1992	Downsview Nominees Ltd.; & J.G. Russell v First City Corporation Ltd. & First City Finance Ltd.	[1992] UKPC 34	[1993] 1 NZLR 513	Negligence	Dismissed; Cross-appeal allowed in part	
191	1 March 1993	Hadlee; & Sydney Bridge Nominees Ltd. v Commissioner of Inland Revenue	[1993] UKPC 8	[1993] 2 NZLR 385	Income tax	Dismissed	
192	10 June 1993	Deloitte Haskins & sells v National Mutual Life Nominees Ltd.	[1993] UKPC 24	[1993] 3NZLR 1	Negligence	Allowed	
193	4 October 1993	Clark Boyce v Dorothy Dean Mouat	[1993] UKPC 34	[1993] 3NZLR 641	Negligence	Allowed	
194	1 November 1993	Attorney-General for Hong Kong v C.W. Reid & J.M. Reid; & Marc Molloy	[1993] UKPC 36	[1994] 1 NZLR 1	Constructive trust, judicial precedent	Allowed	Sir Thomas Eichelbaum (NZ CJ)

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195	15 November 1993	Ryde Holdings Ltd. v Rainbow Corporation Ltd.	[1993] UKPC 40	Unreported	Equity	Appeal allowed; in part cross-appeal dismissed	
196	16 November 1993	Citibank N A v Stafford Mall Ltd.	[1993] UKPC 42	Unreported	Banking	Allowed	Sir Thomas Eichelbaum (NZ CJ)
197	13 December 1993	New Zealand Maori Council & Others v Attorney-General & Others	[1993] UKPC 44	[1994] 1 NZLR 513	Constitutional law, Treaty of Waitangi - Maori language & broadcasting	Dismissed	Sir Thomas Eichelbaum (NZ CJ)
198	28 February 1994	Mercury Energy (successor co. of the Auckland Electric Power Board) v Electricity Corporation of NZ	[1994] UKPC 6	[1994] 2 NZLR 385	Administrative law	Dismissed	
199	16 May 1994	Mossman v Chilcott; Chatfield; & Bank of New Zealand	[1994] UKPC 16	Unreported	Banking - debenture security	Dismissed	
200	25 May 1994	Re Goldcorp (in receivership); Kensington v Liggett	[1994] UKPC 18	[1994] 23NZLR 385	Sale of goods	Allowed	Sir Thomas Eichelbaum (NZ CJ)
201	27 June 1994	Richard William Prebble v Television New Zealand Ltd.	[1994] UKPC 25	[1994] 3 NZLR 1	Parliamentary privilege	Allowed	
202	19 October 1994	Telecom Corporation of NZ Ltd & Others v Clear Communications Ltd.	[1994] UKPC 36	[1995] 1 NZLR 385	Commerce Act 1986, telecoms. interconnection	Allowed	
203	31 October 1994	Grant Adams v The Queen	[1994] UKPC 38	[1995] 1 WLR 52	Crime - fraud	Dismissed	
204	14 November 1994	Masport Ltd. v Morrison Industries Ltd.	[1994] UKPC 39	[1995] BCC 496	Commercial - sale of business	Dismissed; cross-appeal allowed in part	
205	15 November 1994	Motor Vehicle Dealers Institute Inc. v UDC Finance (1991) Ltd.	[1994] UKPC 41	(1995) 5 NZBLC 105, 583	Commercial law - fidelity guarantee fund	Allowed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
206	17 November 1994	Mosgiel Ltd. v Mutual Life & Citizens Assurance Co. Ltd.; & Brierley Investments Ltd.	[1994] UKPC 43	Unreported	Company law - preference shares	Allowed	
207	17 November 1994	New Zealand Guardian Trust Co. Ltd. v K.S. Brooks & Others	[1994] UKPC 44	[1995] 1 WLR 96	Vicarious liability	Dismissed	
208	9 May 1995	Amax Gold Mines New Zealand Ltd. & Another v Moore & Others	[1995] UKPC 18	Unreported	Contract	Dismissed	
209	9 May 1995	Norwich Union Life Insurance Society v Attorney-General	[1995] UKPC 19	Unreported	Leases	Dismissed	
210	12 June 1995	New Zealand Forest Products v Accident Compensation Corporation	[1995] UKPC 23	[1995] 3 NZLR 257	ACC	Allowed	
211	26 June 1995	Meridian Global Funds Management Asia Ltd. v Securities Commission	[1995] UKPC 26	[1995] 3 NZLR 7	Securities	Dismissed	
212	27 June 1995	Colonial Mutual General Insurance Co. Ltd. v ANZ Banking Group	[1995] UKPC 28	[1995] 3 NZLR 1	Mortgages	Dismissed	
213	3 October 1995	Commissioner of Inland Revenue v Mitsubishi Motors NZ Ltd.	[1995] UKPC 38	[1995] 3 NZLR 513	Taxation	Dismissed	
214	16 November 1995	Pupuke Service Station v Caltex Oil	[1995] UKPC 44	Extract reported in [2000] 3 NZLR 318, at 338	Arbitration	Dismissed	
215	30 November 1995	Rama v Miller	[1995] UKPC 49	[1996] 1 NZLR 257	Fiduciary relationship, damages	Allowed	
216	12 February 1996	Invercargill City Council v Hamlin	[1996] UKPC 56	[1996] 1 NZLR 513	Negligence	Dismissed	Sir Michael Hardie Boys (NZ)

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
217	8 May 1996	Collier v Creighton	[1996] UKPC 7	[1996] 2 NZLR 257	Fiduciary duty	Dismissed	
218	14 May 1996	Lion Nathan Ltd. & Others v Coca- Cola Bottlers Ltd. & Others	[1996] UKPC 9	[1996] 2 NZLR 385	Company law - liability of vendor of shares	Dismissed	
219	23 May 1996	Goss v Chilcott	[1996] UKPC 17	[1996] 3 NZLR 385	Contract	Dismissed	Lord Cooke (NZ)
220	24 June 1996	Board of Trustees of the National Provident Fund v Brierley Investments Ltd.	[1996] UKPC 22	[1997] 1 NZLR 1	Property law - leases	Dismissed	
221	14 October 1996	Brannigan & Others v Davison	[1996] UKPC 35	[1997] 1 NZLR 140	Evidence	Dismissed	
222	2 December 1996	Rangatira v Commissioner of Inland Revenue	[1996] UKPC 47	[1997] 1 NZLR 129	Taxation	Allowed	Lord Cooke (NZ)
223	16 December 1996	Culverden Retirement Village Ltd. v Registrar of Companies	[1996] UKPC 50	[1997] 1 NZLR 257	Commercial law - Securities Act 1978	Dismissed	
224	17 December 1996	Melanesian Mission Trust Board v Australian Mutual Provident Society	[1996] UKPC 53	[1997] 1 NZLR 391	Leases	Allowed; appln. for declaration dismissed; referred back to HC.	
225	16 January 1997	Treaty Tribes Coalition, Te Runanga o Ngati Porou, & Tainui Maori Trust Board v Urban Maori Authorities & Others	[1997] UKPC 70	[1997] 1 NZLR 513	Treaty of Waitangi - fisheries allocation	Allowed in part; remitted to trial judge	Three consolidated appeals
226	11 February 1997	Sunflower Services v Unisys New Zealand Ltd.	[1997] UKPC 7	[1997] 1 NZLR 385	Leases	Allowed	
227	4 March 1997	Pen Aun Lim v McLean & Wiley	[1997] UKPC 10	[1997] 1 NZLR 641	Contract law - fisheries	Allowed (3:2)	
228	21 July 1997	NZ Forest Products Ltd. v NZ Insurance Co. Ltd.	[1997] UKPC 37	[1997] 3 NZLR 1	Insurance	Allowed	Justice Henry (NZ)
229	7 October 1997	Lewis v Hyde	[1997] UKPC 45	[1998] 1 NZLR 12	Company law - bankruptcy	Dismissed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
230	30 October 1997	BNZ Finance v Commissioner of Inland Revenue	[1997] UKPC 51	[1998] 1 NZLR 1	Income tax	Dismissed	Mr Justice Gault (NZ)
231	30 October 1997	Madden v UDC Finance	[1997] UKPC 52	Unreported	Commercial law	Dismissed	Mr Justice Gault (NZ)
232	20 November 1997	Cussons (NZ) Pty. Ltd. v Unilever Plc & Unilever NZ Ltd.	[1997] UKPC 56	[1998] 1 NZLR 396	Intellectual property - trademark	Dismissed	Lord Cooke (NZ)
233	24 November 1997	Countrywide Banking Corp. v Dean	[1997] UKPC 57	[1998] 1 NZLR 385	Company law - winding up	Dismissed	Mr Justice Gault (NZ) - delivered judgment
234	8 December 1997	Nippon Credit Bank Ltd. v Air NZ Ltd.	[1997] UKPC 60	[1998] 2 NZLR 1n	Contract law - interpretation	Dismissed (3:2)	
235	23 March 1998	Auag Resources Ltd. v Waihi Mines Ltd.	[1998] UKPC 15	Unreported	Contract law	Dismissed	
236	30 July 1998	Roussel UCLAF Australia Pty. Ltd. v Pharmaceutical Management Agency Ltd.	[1998] UKPC 36	[2001] NZAR 476	Administrative law	Dismissed	
237	29 October 1998	Golden Bay Cement Co. Ltd. v Commissioner of Inland Revenue	[1998] UKPC 42	[1999] 1 NZLR 385	Income tax	Dismissed	
238	29 October 1998	Commissioner of Inland Revenue v Wattie & Lawrence	[1998] UKPC 43	[1999] 1 NZLR 529	Income tax	Dismissed	
239	2 December 1998	Ramstead v The Queen	[1998] UKPC 47	[1999] 1 NZLR 513	Criminal law	Allowed (3:2)	
240	19 January 1999	"W" v "W"; "J" v Bell	[1999] UKPC 2	[1999] 2 NZLR 1	Practice & procedure - exemplary damages	Dismissed	
241	8 March 1999	Attorney-General v Horton & Campbell	[1999] UKPC 9	[1999] 2 NZLR 257	Administrative law - Public Works Act	Dismissed	
242	21 July 1999	Manukau City Council v Ports of Auckland Ltd. & others	[1999] UKPC 38	[2000] 1 NZLR 1	Administrative law	Allowed	Lord Cooke (NZ) - delivered judgment

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
243	4 October 1999	Tangiora v Wellington District Legal Services Committee	[1999] UKPC 42	[2000] 1 NZLR 17	Legal aid	Dismissed	
244	28 October 1999	Lange v Atkinson	[1999] UKPC 49	[2000] 1 NZLR 257	Tort - defamation	Allowed & remitted to CA for rehearing	Lord Cooke (NZ)
245	1 December 1999	Arklow Investments Ltd. & Christopher Mark Winter v I D Maclean & Others	[1999] UKPC 51	[2000] 2 NZLR 1	Equity - fiduciary duty	Dismissed	Mr Justice Henry (NZ) - delivered judgment
246	23 March 2000	Gilrose Finance Ltd. v Ellis Gould	[2000] UKPC 14	[2000] 2 NZLR 129	Practice & procedure	Dismissed	
247	13 April 2000	Robert Francis Phipps v Royal Australasian College of Surgeons	[2000] UKPC 18	[2000] 2 NZLR 513	Judicial review	Order of the CA varied; otherwise dismissed	
248	12 June 2000	Commissioner of Inland Revenue v NZ Forest Research Institute Ltd.	[2000] UKPC 22	[2000] 3 NZLR 1	Income tax	Allowed	Mr Justice Blanchard (NZ)
249	14 June 2000	Auckland Gas Co. Ltd. v Commissioner of Inland Revenue	[2000] UKPC 24	[2000] 3 NZLR 6	Income tax	Dismissed	Lord Cooke (NZ)
250	29 June 2000	Ernest John Fifield & Another v W & R Jack Ltd.	[2000] UKPC 27	[2000] 3 NZLR 129	Arbitration	Dismissed	Lord Cooke (NZ), & Mr Justice Henry (NZ)
251	20 November 2000	Far Eastern Shipping Co. Public Ltd. v Scales Trading Ltd. & Another	[2000] UKPC 44	[2001] 1 NZLR 513	Commercial guarantees	Allowed	Oral decision announced on 3 October.
252	24 January 2001	Commissioner of Inland Revenue v Auckland Harbour Board	[2001] UKPC 1	[2001] 3 NZLR 289	Income tax	Dismissed	Lord Cooke (NZ)
253	7 March 2001	Dilworth Trust Board v (1) Counties Manukau Health Ltd. & (2) Attorney-General	[2001] UKPC 9	[2002] 1 NZLR 433	Commercial - compulsory acquisition of land	Dismissed	Lord Cooke (NZ) - delivered judgment

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
254	29 March 2001	Valentines Properties Ltd. v Huntco Corporation Ltd.	[2001] UKPC 14	[2001] 3 NZLR 305	Contract - specific performance	Allowed	Dame Sian Elias (NZ)
255	10 April 2001	O'Neill & Others v Commissioner of Inland Revenue	[2001] UKPC 17	3 NZLR 316	Income tax	Dismissed	Dame Sian Elias (NZ)
256	10 April 2001	Harley v McDonald	[2001] UKPC 18	[2002] 1 NZLR 1	Law practitioners - cost awards against counsel	Both appeals allowed; petition to cross- appeal refused	Dame Sian Elias (NZ)
257	3 May 2001	Wrightson Ltd. v Fletcher Challenge Nominees Ltd.	[2001] UKPC 23	[2002] 2 NZLR 1	Company superannuation schemes	Dismissed	
258	5 June 2001	(1) Richard Dale Agnew & (2) Kevin James Bearsley v (1) Commissioner of Inland Revenue, & (2) Official Assignee for the estate in bankruptcy of Bruce William Birtwhistle & Mark Leslie Birthwhistle	[2001] UKPC 28	[2002] 1 NZLR 30	Company law	Dismissed	
259	2 July 2001	(1) Manukau Urban Maori Authority & (2) Reuben Brian Perenare v Treaty of Waitangi Fisheries Commission & Others	[2001] UKPC 32	[2002] 2 NZLR 17	Maori Fisheries Act 1989	Both appeals dismissed	
260	1 November 2001	(1) M.A. Maguire & (2) F. P. Makea v (1) Hastings District Council; & (2) Maori Land Court	[2001] UKPC 43	[2002] 2 NZLR 577	Resource management	Dismissed	Lord Cooke (NZ) - delivered judgment - last case

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
261	27 November 2001	Kena Kena Properties Ltd. v Attorney-General	[2001] UKPC 51	[2002] 2 NZLR 597	Statutory interpretation - GST, the nature of government subsidies	Dismissed (3:2)	
262	4 December 2001	Commissioner of Inland Revenue v Colonial Mutual Life Assurance Society Ltd.	[2001] UKPC 54	[2002] 3 NZLR 1	Income tax - interpretation of legislation	Dismissed	Sir Kenneth Keith (NZ)
263	11 December 2001	(1) John Andrew Bagnall; & (2) Andrew John Maher v Mobil Oil New Zealand Ltd.	[2001] UKPC 57	Unreported	Contract - liability of guarantors	Dismissed	Sir Kenneth Keith (NZ) - delivered judgment
264	18 December 2001	(1) Colin Joseph Brazier & (2) Brazier Scaffolding Ltd. v (1) Bramwell Scaffolding (Dunedin) Ltd. & (2) Bruce Harvey & (3) Bramwell Scaffolding Ltd.	[2001] UKPC 59	Unreported	Restraint of trade covenant	Dismissed	
265	4 February 2002	Christchurch Pavilion Partnership No.1 & Others v Deloitte & Tohmatsu Trustee Co. Ltd.	[2002] UKPC 4	[2002] 3 NZLR 289	Securities Act 1978 - duties of statutory supervisors	Dismissed	
267	28 February 2002	Ancare New Zealand Ltd. v (1) Fort Dodge New Zealand Ltd., & (2) Nufarm Ltd.	[2002] UKPC 8	[2002] 2 NZLR 721	Patent law - application to revoke patent	Dismissed	Oral decision on 6 February.
268	28 February 2002	(1) G.J. Hamilton; & (2) M.P. Hamilton v (1) Papakura District Council; & (2) Watercare Services Ltd.	[2002] UKPC 9	[2002] 3 NZLR 308	Claims in contract & negligence against local council for contaminated water supply	Dismissed (3:2)	Sir Kenneth Keith (NZ) - delivered judgment
269	23 May 2002	Progressive Enterprises Ltd. v (1) Foodstuffs (Auckland) Ltd.; & (2) Commerce Commission	[2002] UKPC 25	[2004] 1 NZLR 145	Commerce Commission clearance for business acquisition	Allowed	Oral decision on 29 April; Mr Justice Tipping (NZ) - delivered judgment

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
270	29 May 2002	Man O'War Station Ltd. & Another v Auckland City Council (formerly Waiheke City Council) & Another - Judgment no.1	[2002] UKPC 28	[2002] 3 NZLR 577	Allegation of judicial bias	Dismissed	Oral decision on 7 May.
271	17 June 2002	Man O'War Station Ltd. & Another v Auckland City Council (formerly Waiheke City Council) & Another - Judgment no.2	[2002] UKPC 32	[2002] 3 NZLR 584	Property law - registration of land, indefeasibility of title	Dismissed	
272	15 July 2002	Canterbury Golf International Ltd. v Hideo Yoshimoto	[2002] UKPC 40	[2004] 1 NZLR 1	Contract	Allowed	Mr Justice Tipping (NZ)
273	6 September 2002	"A" v Michael Bernard Bottrill	[2002] UKPC 44	[2003] 2 NZLR 721	Interlocutory - exemplary damages	Allowed (3:2); new High Court trial ordered	Oral decision on 9 July
274	7 October 2002	Rodney District Council & Others v Attorney-General	[2002] UKPC 47	[2003] 3 NZLR 721	Valuation	Allowed	
275	7 October 2002	Haines v Carter	[2002] UKPC 49	[2003] 3 NZLR 605	Property settlement - mediation	Allowed (3:2) - referred back to mediators	Oral decision on 15 July; Mr Justice Tipping (NZ)
276	7 October 2002	Dymocks Franchise Systems (NSW) Pty. Ltd. v John Todd & Alicia B Todd & Others	[2002] UKPC 50	[2003] 3 NZLR 740	Franchise agreement	Allowed	
277	11 November 2002	Rokas Karpavicius v The Queen	[2002] UKPC 59	[2004] 1 NZLR 156	Criminal law	Dismissed	The Rt. Hon. Justice Tipping (NZ)
278	5 March 2003	Opua Ferries & Another v Fullers Bay of Islands Ltd.	[2003] UKPC 19	[2003] 3 NZLR 740	Commerce Act; transport licensing	Dismissed	
279	17 March 2003	"R" v Her Majesty's Attorney-General for England & Wales	[2003] UKPC 22	[2004] 2 NZLR 577	Contract	Dismissed; one judge dissenting on one issue	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
280	19 March 2003	William Alexander McLennan & Others v Attorney- General	[2003] UKPC 25	Unreported	Public Works Act 1981	Dismissed	
281	14 April 2003	Vela Fishing Ltd. v Commissioner of Inland Revenue	[2003] UKPC 32	[2004] 1 NZLR 313	Income tax	Dismissed	
282	19 May 2003	B & Others, & Another v Auckland District Law Society & Another	[2003] UKPC 38	[2000] 1 NZLR 326	Law Practitioners Act - privilege	Allowed	
283	19 June 2003	Robert Edward Jones v Attorney- General (sued on behalf of NZ Police)	[2003] UKPC 48	[2004] 1 NZLR 433	High Court Rules	Allowed; case to proceed to High Court trial	
284	30 June 2003	Waikato Airport & Others v Attorney- General (on behalf of the Director- General of Agriculture & Forestry)	[2003] UKPC 50	[2004] 3 NZLR 1	Biosecurity Act; Government charges	Allowed	
285	7 July 2003	Newport Farm & 22 Others v Damesh Holdings & Others	[2003] UKPC 54	[2004] 1 NZLR 721	Property law	Dismissed	
286	14 July 2003	BNZ v Board of Management of BNZ Officers' Provident Fund	[2003] UKPC 58	[2004] 1 NZLR 577	Superannuation	Dismissed	
287	16 July 2003	"B" & Others v Attorney-General	[2003] UKPC 61	[2004] 3 NZLR 145	Negligence	Allowed in part; HC & CA judgments varied; returned for HC trial	
288	1 December 2003	Pratt Contractors Ltd. v Transit New Zealand	[2003] UKPC 83	[2005] 2 NZLR 433	Contract - damages	Dismissed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
289	25 February 2004	Sir Graham Latimer & Others - Trustees for the Crown Forest Rental Trust v Commissioner of Inland Revenue	[2004] UKPC 13	[2004] 3 NZLR 157	Income tax	Allowed	Sir Kenneth Keith (NZ) - heard 23 November 2003.
290	20 May 2004	Dairy Containers Ltd. v Tasman Orient Line CV	[2004] UKPC 22	[2005] 1 NZLR 433	Contract	Dismissed	Dame Sian Elias (NZ)
291	25 May 2004	Robert Gary Hirst & Another v George Vousden & Another	[2004] UKPC 24	(2004) 6 NZCPR 135	Lease	Dismissed	
292	14 July 2004	Owen Robert Jennings v Roger Edward Wyndham Buchanan	[2004] UKPC 36	[2005] 2 NZLR 577	Parliamentary privilege, defamation	Dismissed	Dame Sian Elias (NZ)
293	14 July 2004	Carter Holt Harvey Building Products Group Ltd. v Commerce Commission	[2004] UKPC 37	[2006] 1 NZLR 145	Commerce Act 1986 - s.36	Allowed (3:2)	
294	21 July 2004	Dymocks Franchise Systems (NSW) Pty. Ltd. v John Todd & Alicia B Todd & Others (No.2)	[2004] UKPC 39	[2005] 1 NZLR 145	Petition for an order against a non-party	Allowed	Dame Sian Elias (NZ)
295	22 July 2004	Arthur John Bolton Potter v Louisa Jane Potter	[2004] UKPC 41	[2005] 2 NZLR 1	Property law	Dismissed	
296	22 July 2004	Glenharrow Holdings Ltd. v (1) Attorney-General; & (2) Te Runanga o Ngai Tahu	[2004] UKPC 42	[2005] 2 NZLR 289	Mining Act	Dismissed	
297	26 July 2004	Edgewater Motel Ltd. & Others v Commissioner of Inland Revenue	[2004] UKPC 44	[2005] 3 NZLR 289n	G.S.T.	Dismissed	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
298	26 July 2004	(1) New Zealand Meat Board & (2) New Zealand Meat Industry Association v Paramount Export Ltd. (in receivership), & Another	[2004] UKPC 45	[2005] 2 NZLR 447	Meat export contracts	(1) Meat Board dismissed (3:2); (2) Meat Industry Association Allowed (5:0)	
299	10 November 2004	Thomas Cook (New Zealand) Ltd. v Commissioner of Inland Revenue	[2004] UKPC 53	[2005] 2 NZLR 722	Unclaimed Monies Act 1971	Dismissed	
300	14 December 2004	The Trustees in the C.B. Simkin Trust & Another v Commissioner of Inland Revenue	[2004] UKPC 55	(2005) 22 NZTC 19,001	Depreciation allowance	Dismissed	
301	16 December 2004	Miles Roger Wislang v Medical Council of New Zealand & Others	[2004] UKPC 59	[2005] NZAR 670	Medical registration	Dismissed	
302	28 February 2005	Richard Dale Peterson v Commissioner of Inland Revenue	[2005] UKPC 5	[2006] 3 NZLR 433	Income tax	Allowed (3:2)	
303	23 March 2005	Contact Energy Ltd. v Attorney- General	[2005] UKPC 13	Unreported	Contract	Dismissed	
304	18 July 2005	Marlborough Acquaculture Ltd. v Chief Executive of the Ministry of Fisheries & Another	[2005] UKPC 29	(2005) 12 ELRNZ 1	Resource management	Dismissed	
305	19 July 2005	Bruce Thomas Howse v The Queen	[2005] UKPC 31	[2006] 1 NZLR 433	Criminal law - Bill of Rights	Dismissed (3:2)	
306	14 November 2005	P.F. Sugrue Ltd. Attorney-General	[2005] UKPC 44	[2006] 3 NZLR 464	Wild Animal Control Act 1977	Dismissed	
307	4 May 2006	Norbrook Laboratories Ltd. v Bomac Laboratories Ltd.	[2006] UKPC 25	[2006] BCL 396	Contract	Allowed; case returned to HC for hearing on all identified issues	

No.	Date	Case Name	UKPC Reference	Citation	Type of law	Result	Comment
308	23 May 2006	Alastair Stuart McLachlan & Ava Marie McLachlan (as trustees of the Waituruturu Trust) & Another v Mercury Geotherm Ltd. (in receivership) & Others	[2006] UKPC 27	(2006) 7 NZCPR 135	Lease	Dismissed	
309	21 June 2006	Michael David Stemson v AMP General Insurance (NZ) Ltd	[2006] UKPC 30	[2007] 1 NZLR 289	Insurance	Dismissed	
310	30 October 2006	Ngati Apa Ki Te Waipounamu Trust v Attorney-General & Others	[2006] UKPC 49	[2007] 2 NZLR 80	Iwi representation	Dismissed	
311	10 May 2007	David Cullen Bain v The Queen	[2007] UKPC 33	(2007) 23 CRNZ 71	Criminal law	Allowed; new trial ordered	
312	8 July 2009	John Robert Barlow v The Queen	[2009] UKPC 30	Unreported	Criminal law	Dismissed	
313	7 October 2013	Mark Lundy v The Queen	[2013] UKPC 28	[2014] 2 NZLR 273	Criminal law	Allowed; new trial ordered	Dame Sian Elias (NZ)
314	3 March 2015	Teina Pora v The Queen	[2015] UKPC 9	[2016] 1 NZLR 277	Criminal law	Allowed; submissions invited on retrial. S-G decided no new trial	Dame Sian Elias (NZ)

Appendix Two: A Statistical Overview of New Zealand Appeals

Table One (on the next page) provides statistics on the number of appeals entered (i.e. registered) from New Zealand, and shows their disposal. In the past, the Lord Chancellor's Department, and its successors, the Department of Constitutional Affairs, and the United Kingdom Ministry of Justice, provided an annual publication, *Judicial Statistics*, for all the Courts of England and Wales, as well as for the appellate Courts, including the JPC. In 2003, during the development and passage of the Supreme Court Bill, the New Zealand Ministry of Justice sought the assistance of the Clerk of the Judicial Committee for a time series of the summary statistics on appeals and on the number of petitions for special leave to appeal. The Clerk supplied copies of the tables for the Judicial Committee for appeals from 1950 to 2000, and for special leave petitions from 1981 to 2000. [The Judicial Committee's set of statistics were destroyed in the Second World War bombing of London.] Drawing on the supplied information, and including statistical information from other sources for the earlier periods, provides an overview of the number of appeals entered and their disposal, as shown in the following table.

Several conclusions can be drawn from these statistics. First, there is the change in the rate of appeals: there was a doubling of the number of appeals lodged in the decade 1981-1990, over the rate experienced in the earlier decades of the 20th century; and this was followed by a further trebling of the rate in the decade 1991-2000. Even as New Zealand moved to end appeals the 15-year period after 2000 saw the second largest number of appeals lodged, although, as expected, most were lodged and determined in the period 2001-2004. In other words, there was a rapid growth in demand for a further round of appeals, beyond the Court of Appeal, and this occurred just as the debates and formal proposals for ending appeals was beginning. Secondly, the proportion of appeals allowed, at 31.06%, was consistent with general experience that approximately one-third of appeals will be allowed. Thirdly, there was a significant number (53) of appeals dismissed without a hearing. This is because the appeals were either withdrawn by the parties, dismissed by the Judicial Committee, or otherwise disposed of by the Judicial Committee. There are several possible reasons for this situation: the appellant may have achieved a satisfactory compromise modifying the result of the Court of Appeal's judgment; the appellant may not be able to afford to pursue the appeal before the Judicial Committee; additional or new legal advice may have counselled against pursuing the appeal; or the appellant may simply decide not to pursue their appeal. Lastly, it will be noted that there

Table One: Number and results of New Zealand Appeals to the Judicial Committee

Time period	Number entered	Appeals disposed of					
		After a hearing			Without a hearing	Total	% allowed of total
		Dismissed	Varied	Allowed			
1841-1900	25	15	0	9	1	25	36.00
1901-1950	90	50	3	35	0	88	39.77
1951-1960	16	7	1	1	5	14	7.14
1961-1970	18	9	1	5	2	17	29.41
1971-1980	19	10	0	6	4	20	30.00
1981-1990	37	21	0	9	4	34	26.47
1991-2000	114	41	1	27	25	94	28.72
2001-2015	59	41	0	22	12	75	29.33
Total	378	194	6	114	53	367	31.06

Sources: 1841-1950, *New Zealand Privy Council Cases 1851-1932*, and *New Zealand Law Reports, 1933-1950*; *Judicial Statistics*, annual publication of the Lord Chancellor's Department, then renamed as the Department of Constitutional Affairs, and more latterly, the United Kingdom Ministry of Justice.

is a difference between the total number of appeals entered (378) and the total disposed (367). This is because some appeals involve both an appeal and a cross-appeal, whereby the unsuccessful party in the Court whose judgment is being appealed, lodges an appeal to the Judicial Committee, and the respondent party may also lodge another appeal about a specific aspect of the same judgment. As well, two or more appeals may be consolidated because they involve the same or similar issues.

Table One suggests that there should be 314 judgments on New Zealand issued by the Judicial Committee.⁵⁹⁸ In a separate exercise, a search of the Judicial Committee's judgments on New Zealand appeals on the British and Irish Legal Information Institute (BAILII) on-line database for the Judicial Committee of the Privy Council Decisions between 1809 and 2015,⁵⁹⁹ has identified 314 judgments on New Zealand appeals. In earlier years when the Judicial Committee was hearing more than one appeal on the same or a substantially similar matter, it would issue two or more judgments. It did this on four occasions: twice it involved two judgments (in 1898 and 1902); and twice it involved three judgments (in 1898 and 1905). [Later, it would issue only a single judgment, even when hearing more than one appeal, or an appeal and a cross-appeal. For example, in 1933, it heard four consolidated appeals, but issued only one judgment.] Adjusting for the four sets of multiple judgments, a list of 314 judgments, is provided in Appendix One. The New Zealand Law Commission's 1989 report contains a list of New Zealand appeals. This list was updated in the Solicitor-General's 1994 Report. Both sources include decisions on some petitions for special leave to appeal. The 2002 Report of the Ministerial Advisory Group contains a list, which updated the earlier lists, and checked all references against those contained in the *New Zealand Privy Council Cases 1851-1932* and the *New Zealand Law Reports* since then. The material from these sources has been updated in this study and used to cross-check the material from BAILII on-line database.

The adjusted figure of 314 judgments from the most reliable source, short of examining the entire archive, at least from 1840, of all Judicial Committee decisions in the British National Archives in London. The list includes the date the judgment was issued; the principal Law Report reference, if the judgment was reported; the result of the appeal; and whether a New Zealand or other Commonwealth Judge was a member of the Board. Of the 314 judgments, 284 involved appeals from judgments of the Court of Appeal; 27 appeals were appeals from decisions of the Supreme Court⁶⁰⁰; two were from decisions of the Native Appellate Court⁶⁰¹; and one from the Vice-Admiralty Court of New Zealand.⁶⁰² Since

⁵⁹⁸ The disposal total of 367, minus 53 appeals dismissed without a hearing.

⁵⁹⁹ The search was conducted over a week commencing 7 August 2015. The search was on the term "New Zealand", yielding 527 results, each of which was then examined to determine whether it involve a Judicial Committee judgment on a New Zealand appeal.

⁶⁰⁰ Known as the High Court since 1 April 1980, (s.2, Judicature Amendment Act 1979).

⁶⁰¹ Known as the Maori Appellate Court since 1 April 1954, (s.37 Maori Affairs Act 1953).

⁶⁰² *Walter Turnbull and Others v the Owners of the Strathnaver*, [1875] UKPC 73, (unreported). This judgment was unknown in previous New Zealand reports of decisions of the Judicial Committee.

the membership of the Court of Appeal was reconstructed with permanent Judges on 1 February 1958, there was only one appeal from the Supreme Court.⁶⁰³

As noted above, the procedure for some appeals, notably appeals involving matters of criminal law, required the appellant to petition for special leave to appeal, and it was only if the Judicial Committee granted leave, that an appeal could be entered and pursued. Between 1981 and 2004, 107 petitions for special leave were lodged. Of these 24 were granted leave, but not all successful parties continued with their appeals. The decisions on the petitions are rarely reported: the New Zealand Privy Council Cases 1851-1932 and the New Zealand Law Reports since then, report just 15 decisions – nine of these before 1980. One significant, unsuccessful petition for special leave, which was reported, was that of Mr Arthur Allan Thomas, where the Judicial Committee determined it lacked jurisdiction to hear his appeal.⁶⁰⁴

Finally, I have not been able to locate a public record of those appellants who applied to Court of Appeal for leave to appeal.

⁶⁰³ *Australian Mutual Provident Society v Commissioner of Inland Revenue*, [1962] NZLR 449. The appeal was against the decision of the Full Court (i.e. three Judges) of the Supreme Court, which itself had heard ‘a case stated by way of appeal against the determination of the Magistrates Court at Wellington on appeal from an assessment made by the respondent Commissioner.’ (Opening sentence of Supreme Court’s judgment, per Barrowclough CJ).

⁶⁰⁴ *Thomas v R*, [1978] 2 NZLR 1. Mr Thomas was subsequently pardoned by the Government following the Report of the Royal Commission to inquire into and report upon the circumstances of the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe.

Appendix Three: New Zealand Judicial Privy Counsellors

Judicial Committee Activity					
No.	Judge	Sat	Year	Hearings	Delivered judgment
1	Sir Joshua Williams	Yes	1914-15	18	0
2	Sir Robert Stout (CJ)	Yes	1921	6	1
3	Sir Michael Myers (CJ)	Yes	1936	2	0
4	Sir Humphrey O' Leary (CJ)	No	n.a.	n.a.	n.a.
5	Sir Harold Barrowclough (CJ)	No	n.a.	n.a.	n.a.
6	Sir Kenneth Gresson	No	1963	12	3
7	Sir Richard Wild (CJ)	Yes	1969, 1972, 1977	8	1
8	Sir Alfred North	Yes	1967	6	0
9	Sir Thaddeus McCarthy	Yes	1968-69, 1975	5	0
10	Sir Alexander Turner	Yes	n.a.	n.a.	n.a.
11	Sir Clifford Richmond	Yes	1979	5	0
12	Sir Owen Woodhouse	Yes	1981, 1985	22	3
13	Lord Cooke of Thorndon	Yes	1978, 1980, 1981, 1984, 1986, 1990, 1996-2001	88	14
14	Sir Ronald Davison (CJ)	No	n.a.	n.a.	n.a.
15	Sir Ivor Richardson	Yes	1986, 2000, 2001	19	2
16	Sir Duncan McMullin	Yes	1987	7	0
17	Sir Edward Somers	No	n.a.	n.a.	n.a.
18	Sir Maurice Casey	Yes	1991	11	1
19	Sir Gordon Bisson	Yes	1989	1	0
20	Sir Thomas Eichelbaum (CJ)	Yes	1993-94	9	1
21	Sir Michael Hardie Boys	Yes	1995-96	13	3
22	Sir Thomas Gault	Yes	1993, 1997-98, 2002	30	5
23	Sir Ian McKay	No	n.a.	n.a.	n.a.
24	Sir John Henry	Yes	1997, 1999, 2000	8	3
25	Sir Edmund Thomas	No	n.a.	n.a.	n.a.
26	Sir Kenneth Keith	Yes	2001, 2002, 2003, 2004	14	4
27	Sir Peter Blanchard	Yes	2000	5	1
28	Sir Andrew Tipping	Yes	2002, 2003	14	3
29	Dame Sian Elias (CJ)	Yes	2001, 2004, 2013, 2015	17	1
TOTAL		22		325	46

CJ = Chief Justice.

Appendix Four: New Zealand Privy Counsellors

No.	Appointment	Name	Type	Life
1	30/4/1894*	Sir George Grey	Politician	1812-1898
2	7/7/1897*	Richard John Seddon	Politician	1845-1906
3	1906	Sir Joseph Ward	Politician	1856-1930
4	22/11/1913	Sir Joshua Williams	Judge	1839-1915
5	21/1/1914	Sir William Massey	Politician	1856-1925
6	10/6/1921*	Sir Robert Stout	Judge ⁶⁰⁵	1844-1930
7	1/2/1926	Sir Francis Bell	Politician	1851-1936
8	1/2/1926	Gordon Coates	Politician	1878-1943
9	27/10/1930*	George Forbes	Politician	1869-1949
10	17/12/1931	Sir Michael Myers	Judge	1873-1950
11	30/4/1936	Michael Joseph Savage	Politician	1872-1940
12	1940	Peter Fraser	Politician	1884-1950
13	1/1/1946	Sir Walter Nash	Politician	1882-1968
14	1/1/1946	Sir William Jordan	Politician	1879-1959
15	1/1/1948	Sir Humphrey O'Leary	Judge	1886-1953
16	1950	Sir Sidney Holland	Politician	1893-1961
17	1/1/1954	Sir Keith Holyoake	Politician	1904-1983
18	13/1/1954*	Sir Harold Barrowclough	Judge	1894-1972
19	1962	Sir Kenneth Gresson	Judge	1891-1974
20	4/11/1966	Sir John Marshall	Politician	1912-1988
21	4/11/1966	Sir Richard Wild	Judge	1912-1978
22	4/11/1966	Sir Alfred North	Judge	1900-1981
23	19/8/1968	Sir Thaddeus McCarthy	Judge	1907-2001
24	19/8/1968	Sir Alexander Turner	Judge	1901-1993
25	1973	Sir Clifford Richmond	Judge	1914-1997
26	1973	Norman Kirk	Politician	1923-1974
27	16/10/1974	Sir Owen Woodhouse	Judge	1916-2014
28	1974	Sir Wallace (Bill) Rowling	Politician	1927-1985

⁶⁰⁵ Although Sir Robert Stout was originally a politician, including a former Premier, he is recorded as a Judge, because he was Chief Justice at the time of his appointment.

No.	Appointment	Name	Type	Life
29	1974	Hugh Watt	Politician	1912-1980
30	1976	Sir Robert Muldoon	Politician	1921-1992
31	17/1/1977	Sir Brian Talboys	Politician	1921-2012
32	17/1/1977	Lord Cooke of Thorndon	Judge	1926-2006
33	31/5/1978	Sir Ronald Davison	Judge	1920-2015
34	31/5/1978	Sir Ivor Richardson	Judge	1930-2014
35	31/5/1978	John (Peter) Gordon	Politician	1921-1991
36	30/4/1980	Sir Lancelot Adams-Schneider	Politician	1919-1996
37	30/4/1980	Duncan MacIntyre	Politician	1915-2001
38	30/4/1980	Sir Duncan McMullin	Judge	1927-
39	1981	David Thomson	Politician	1915-1999
40	1981	Sir Edward Somers	Judge	1928-2002
41	30/10/1984	David Lange	Politician	1942-2005
42	23/12/1985	Sir Geoffrey Palmer	Politician	1942-
43	23/12/1985	Robert Tizard	Politician	1924-2016
44	23/12/1985	Fraser Colman	Politician	1925-2008
45	25/11/1986	Sir Maurice Casey	Judge	1923-2012
46	15/9/1987	Francis O'Flynn	Politician	1918-2003
47	15/9/1987	Sir Gordon Bisson	Judge	1918-2010
48	17/4/1989	Sir Thomas Eichelbaum	Judge	1931-
49	1/11/1989	Jonathan Hunt	Politician	1938-
50	1/11/1989	Sir Michael Hardie Boys	Judge	1931
51	9/2/1990	Helen Clark	Politician	1950-
52	9/2/1990	Michael Moore	Politician	1949-
53	16/4/1991	James Bolger	Politician	1935-
54	8/4/1992	Sir Donald McKinnon	Politician	1939-
55	8/4/1992	Sir William Birch	Politician	1934-
56	8/4/1992	Sir Thomas Gault	Judge	1938-2015
57	8/4/1992	Sir Ian McKay	Judge	1929-2014
58	19/11/1996	Sir John Henry	Judge	1932-
59	19/11/1996	Sir Edmund Thomas	Judge	1934-
60	21/5/1998	Dame Jenny Shipley	Politician	1952-
61	21/5/1998	Winston Peters	Politician	1946-

No.	Appointment	Name	Type	Life
62	21/5/1998	Sir Douglas Graham	Politician	1942-
63	21/5/1998	Paul East	Politician	1946-
64	21/5/1998	Sir Kenneth Keith	Judge	1937-
65	21/5/1998	Sir Peter Blanchard	Judge	1942-
66	21/5/1998	Sir Andrew Tipping	Judge	1942-
67	24/11/1999	Wyatt Creech	Politician	1946-
68	24/11/1999	Dame Sian Elias	Judge	1949-
69	14/12/1999	Simon Upton	Politician	1958-

* Denotes date sworn as Privy Counsellor. The swearing in usually took place one or more months (or even years) after the announcement of the appointment. For some appointments, the date of announcement has yet to be identified.

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