Customary rights and Crown claims: *Calder* and other Canadian contributions to the revival of the doctrine of aboriginal title in Aotearoa New Zealand

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"Let Right Be Done: *Calder*, Aboriginal Rights and the Treaty Process: Looking Forward, Looking Back"

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Radical title, aboriginal title and Maori customary rights

In February 1840 officials representing the British Crown entered into treaty negotiations with chiefs of the indigenous Maori tribes of the islands now generally known in the Maori language as Aotearoa.[1] A treaty, written in Maori and known as the Treaty of Waitangi, was agreed between the Crown and many of those chiefs. It offered the Queen's protection to Maori and certain guarantees of their rights to land and important treasures. An English translation clearly asserted that the chiefs were ceding their sovereignty to the Crown, but the Treaty itself was not clear on that point. Some Maori remain of the view that the Treaty affirmed the prior power, prestige and authority of Maori and invited the Crown to govern only the European settlers who had already begun to arrive in the territory.[2] Such

[1] Aotearoa was applied by Maori speakers to part of, but not all of, the islands of New Zealand in the nineteenth century. It became the most used Maori language name for the whole country during the twentieth century (including in the Maori text of the national anthem now commonly in use, and in numerous Maori and Government publications).
[2] See Orange, C *The Treaty of Waitangi*, Wellington, Allen & Unwin/Port Nicholson Press, 1987; Durie, M *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination*, Auckland, Oxford University Press, 1998.

discrepancies did not bother colonial officials, nor were they concerned by the fact that not all tribes adhered to the Treaty. The entire territory of New Zealand was proclaimed to be a British colony and all Maori people were deemed to be British subjects regardless of whether they belonged to signatory or non-signatory tribes.[3] That point was emphasised later by the Native Rights Act 1865.

When the colonial state of New Zealand was established, it was plain as a matter of imperial policy that New Zealand was to be a settlement colony and that European settlers needed land to be made available to them. Land policy and immigration were therefore crucial to imperial and colonial officials. On the other hand, the cultural and spiritual relationships and interconnections between land and people were central to the precepts of the indigenous systems of customary law, known generally as *tikanga Maori*. The notion of sharing resources with incomers, under arrangements that involved an ongoing commitment to mutually beneficial and reciprocal outcomes, were entirely possible under *tikanga Maori*. In many parts of the country there had been a number of European sealers, whalers, traders and missionaries who had lived under customary law regimes in the fifty years of contact prior to 1840. The notion of permanent alienation of land, or even of 'ownership' of land as such, was not imaginable however. Hohepa, now Maori Language Commissioner, wrote about 'whenua' – the Maori word for land – in this way:[4]

> For Maori, whenua has an added meaning, being the human placenta or afterbirth. Through various birth ceremonies the placenta is returned to

[3] Williams, DV 'The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?' (1985) 2 *Australian Journal of Law & Society* 41.

> the land, and that results in each Maori person having personal, spiritual, symbolic and sacred links to the land where their whenua (placenta) is part of the whenua (land). The words "nooku teenei whenua" (This is my land) is given a much stronger meaning because of the above extensions. Having ancestral and birth connections the above is also translated as "I belong to this land, so do my ancestors, and when I die I join them so I too will be totally part of this land".

The paradigms of land tenure written by the Colonial Office in instructions to governors as implemented by the Land Claims Ordinance 1841 were very different. The Ordinance declared that 'all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain Lands of Her Majesty'. This was an assertion of the radical title of the Crown to all land. The question then arose as to whether, in order to provide land for settlers, Maori customary rights had first to be extinguished in respect of <u>all</u> land, or only in respect of land actually occupied and cultivated at the time (in a fashion that John Locke might understand) by Maori tribes. Earl Grey's 1846 instructions to a new governor, Grey (not a relative), were avowedly based on the opinions of the historian Arnold:

> [So] much does the right of property go along with labour, that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages – countries which have been hunted over but never subdued or cultivated.

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[4] Hohepa, P & Wiliams, DV *The Taking into account of Te Ao Maori in relation to the Reform of the Law of Succession*, Wellington, Law Commission, 1996, p 10. See Royal, TAC (ed) *The Woven Universe: Selected Writings of Rev Maori Marsden*, Otaki, Te Wananga-a-Raukawa, 2003.

Earl Grey strongly dissented from the notion that aboriginal inhabitants are the proprietors of every part of the soil of any country. For him civilised [ie European] men had a right to step in and take possession of vacant territory: '[All] lands not actually occupied in the sense in which alone occupation can give a right of possession ought to have been considered as the property of the Crown'. The governor was expressly empowered to depart from the strict application of these principles if it would be impracticable to enforce that policy.[5]

To clarify the land policy for the colony, in view of his predecessor's policy to waive Crown pre-emption and thus permit settlers to engage in direct purchasing of land from Maori, Grey initiated a test case in the Supreme Court. In *Queen v Symonds* in 1847 the judges of the Supreme Court asserted the paramount importance of the Crown's pre-emptive monopoly right to purchase lands from Maori. Nevertheless, relying on Supreme Court judgments of Marshall CJ and the commentaries of Kent and Story in the United States of America, they took a more liberal view of the scope of aboriginal title than Earl Grey had:[6]

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be

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[5] Earl Grey to Grey, 23 December 1846, *British Parliamentary Papers/Colonies New Zealand*, Shannon, Irish University Press, 1969, vol 5, pp 523-5. See Williams, DV *'Te Kooti tango whenua': The Native Land Court 1864-1909*, Wellington, Huia, 1999, pp 108-114. [Earl Grey (then Lord Howick) was the author of a House of Commons Committee report in 1844 arguing for the settlement of waste lands in the colony without undue deference to the 'injudicious proceedings' of the Treaty of Waitangi.]

[6] *Queen v Symonds* (1847) *NZ Privy Council Cases, 1840-1932*, Wellington, Butterworth, 1938, p 390 (Chapman J). See Williams, DV '*Queen v Symonds* Reconsidered', (1989) 19 *Victoria University of*

extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it.

Customary rights rejected

Thirty years later the settler population had grown larger than the indigenous population and imperial armed might had broken the resistance of those Maori tribes who sought to retain their autonomy, albeit with considerable difficulty during a period of warfare lasting 12 years.[7] The Supreme Court, now comprised of judges appointed by the settler government, resiled from its fulsome recognition of aboriginal title rights in 1847. In *Wi Parata v Bishop of Wellington* the court reinterpreted the reasoning of *Queen v Symonds*. The radical title of the Crown to all lands was emphasised and the court took the view that it had no jurisdiction to avoid a Crown grant of land, or in any way to go behind a Crown grant and inquire into the extinguishment or otherwise of any prior rights. In the judgment of Prendergast CJ and Richmond J, delivered by the Chief Justice, the 1841 Ordinance was said to 'express the well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes.' The Treaty of Waitangi was dismissed 'as a simple nullity. No body politic existed capable of making a cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*,

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Wellington Law Review 385. The *Symonds* approach was affirmed in *Re Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41, p 49.

[7] Belich, J *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Penguin, 1996.

vested in and devolved upon the Crown'. Nor did a provision in the Native Rights Act 1865 make a difference. That Act speaks, the judges wrote, 'of the "Ancient Custom and Usage of the Maori people," as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being.' Rather, 'in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.'[8]

The *Wi Parata* approach replaced legal obligations to respect indigenous customary rights with an unenforceable and non-justiciable moral obligation on the executive branch of government to deal with those rights as they saw fit. The proclamation of British sovereignty and the concomitant radical title of the Crown to all land was to be supported by the courts refusing to permit the impeaching of Crown grants. A number of aspects of the *Wi Parata* judgment attracted criticism from the Privy Council in later cases. In *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General* the Judicial Committee pointed to the incontrovertible statutory recognition of the existence of customary Maori rights and the capacity of Maori tribes to enter into legal transactions.[9] The colonial judges, however, showed little inclination to distance themselves from *Wi Parata* and to respect the admonitions of the final appellate court for the Empire.[10] Nor did they need to, because the legislature had no compunction about intervening to reverse inconvenient Privy Council decisions and even to bar further litigation by a

[8] *Wi Parata v Bishop of Wellington* (1877) 3 *NZ Jurist (New Series) Supreme Court* 72, pp 77-80. See McHugh, PG 'Tales of Constitutional Origin and Crown Sovereignty in New Zealand', (2002) 52 *University of Toronto Law Journal* 69, pp 77-82.
[9] *Nireaha Tamaki v Baker* [1901] AC 561; *Wallis v Solicitor-General* [1903] AC 173.
[10] *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA).

successful Maori litigant such as Nireaha Tamaki.[11] On one extraordinary occasion the judges in Wellington publicly lambasted the Privy Council, not only for insinuating that the colonial judges were beholden to the executive but also for their Lordships' palpable ignorance, as the colonial bench viewed it, of laws and practices concerning Native land issues. Consistent with the reasoning of *Wi Parata*, Stout CJ's protest included the assertion that 'All lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant.'[12]

It was the understandings of the chief justices, Prendergast and Stout, rather than the advice of the Privy Council, that were codified into the Native Land Act 1909. This was drafted by the famous jurist, and long serving Solicitor-General, Salmond. The non-justiciability of Maori claims asserting that customary title rights had not been properly extinguished was most explicitly dealt with by sections 84 to 87 of the 1909 Act. These sections were re-enacted in the 1931 and 1953 consolidations of Salmond's code, and they remained in force until the passage of Te Ture Whenua Maori Act 1993 [Maori Land Act 1993]. Salmond's private explanation of those provisions in his Bill to Ngata, an eminent Maori member of Parliament, was as follows:[13]

> The intention is that when a dispute arises between Natives and the Crown as to the right to customary land, the dispute shall be settled by Parliament and not otherwise. The Native race will have nothing to fear from the decision of that tribunal, and to allow the matter to be fought out

[11] Land Titles Protection Act 1902; Maori Land Claims Adjustment and Laws Amendment Act 1904, s 4.
[12] 'Protest of Bench and Bar, 25 April 1903', appendix to *NZ Privy Council Cases, 1840-1932*, p 732.
[13] Frame, A *Salmond: Southern Jurist*, Wellington, Victoria University Press, 1995, p 114 (citing Salmond to Ngata, 22 December 1909, Crown Law Office, Wellington, *Case File* 84).

in the Law Courts would not, I think, be either in the public interest or in the interests of the Natives themselves.

His explanatory memorandum accompanying the Bill made it clear that, in his view, customary title only existed on the basis of the radical rights of the Crown:

> Customary land, since it has never been Crown-granted, belongs to the Crown. It is in a wide sense of the term Crown land, subject, however, to the right of those Natives who by virtue of Maori custom have a claim to it to obtain a Crown grant (or a certificate of title under the Land Transfer Act in lieu of a grant) on the ascertainment of their customary titles by the Native Land Court. This right of the Natives to their customary lands was recognised by the Treaty of Waitangi in 1840. In its origin it was merely a moral claim, dependent on the good will of the Crown, and not recognisable or enforceable at law.

Salmond went on to argue that whether or not legislative recognition of Maori custom had created a legal right enforceable against the Crown 'was left an open question by the Privy Council in *Nireaha Tamaki v Baker*'. On the other hand, 'it is settled' by *Wi Parata* that once a Crown grant has been issued then 'the validity of the title so obtained cannot be questioned on the ground that the antecedent Native title to that land had not been lawfully extinguished'.[14] Hence the definition in s 2 of the 1909 Act was that '

[14] Salmond, J 'Memorandum. Notes on the History of Native-Land Legislation'. Much of this memorandum was published with the 1931 consolidation: *The Public Acts of New Zealand (Reprint) 1908-1931*, vol VI, pp 87-94. The words quoted above were omitted there, but are in Bassett, H, Steel, R & Williams, DV *The Maori Land Legislation Manual*, Wellington, Crown Forestry Rental Trust, 1994, Appendix C, pp 95-6.

"Customary land" means land (vested in the Crown) held by Natives under the customs and usages of the Maori people'.[15]

By 1911 the area of dry land not yet investigated by the Native Land Court, with the consequent extinguishment of customary title, was tiny.[16] Just when the government thought that all customary land issues had been taken care of, however, Maori customary claims to the land comprised in the beds of inland lakes proved a thorny problem for Crown policy. The Court of Appeal affirmed the right of Te Arawa plaintiffs to have the Native Land Court investigate their title to the bed of Lake Rotorua: *Tamihana Korokai v Solicitor-General*. Salmond as Solicitor-General engaged in indignant arguments that the judges had failed to understand the nature of the Crown's right to prevent customary title issues being justiciable. The government worked hard to ensure that this and other lakebed issues was not litigated in the Native Land Court. By negotiations, the government persuaded Maori tribes to accept the Crown's assertion of ownership in return for various forms of compensation, sometimes including a proportion of the fishing licence revenues for fishing in those lakes.[17] For Salmond 'It could never have been the intention of the Legislature to recognise and give legal effect to any Native claim to the exclusive ownership of the great navigable waters of the Dominion.'[18]

Aboriginal title revives: fisheries cases

[15] A full list of statutory definitions of land in the Native Land Acts 1862 to 1909 is set out in Williams, 'Te Kooti tango whenua', appendix 3, pp 255-9.
[16] Williams, 'Te Kooti tango whenua', p 59.
[17] *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321; Frame, pp 115-28
[18] Frame, p 127. See also *In Re the Bed of the Wanganui River* [1962] NZLR 600 (CA); Haughey, EJ 'Maori Claims to Lakes, River Beds and the Foreshore' (1966) 2 *NZ Universities Law Review* 29.

One might have been assumed that the *Wi Parata* doctrine and its statutory codification had led to the total demise of aboriginal title as a concept relevant to law in New Zealand. The Maori cultural renaissance of the 1970s, however, led to a strong questioning of many of the assumptions of assimilation and integration policies pursued by successive governments over many decades.[19] Furthermore, within governing circles hesitant steps were being taken away to move away from the colonial settler picture of New Zealand as a Better Britain in the South Seas and the most loyal of the British Dominions, to New Zealand as an independent nation in the South Pacific.[20] Some scholars speak of the emergence of 'post-colonialism' at this time. This is unhelpful, in my view, as constitutional structures derived from colonial times firmly remained in place - even if from time to time some British imperial and monarchical trappings have been shed. Yet there was indeed a renewed political focus on the Treaty of Waitangi as the foundation of the New Zealand nation. Waitangi Day became the country's national day of commemoration (and also the focus of political protests led by Maori nationalists). There was also an emerging awareness of the position of indigenous peoples in other countries who also had become a minority population in their own land. Unlike the peoples of most imperial territories, being de-colonised with the vigorous support of the United Nations at that time, first nation peoples in the Americas, the Pacific Rim, Scandinavia and elsewhere were not being offered the right of self-determination.

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[19] Ward, A *A Show of Justice: racial 'amalgamation' in nineteenth century New Zealand*, Auckland, Auckland University Press, 1995; Adams, P *Fatal Necessity: British Intervention in New Zealand 1830-1847*, Auckland, Auckland/Oxford University Press, 1977; Williams, DV *Crown Policy Affecting Maori Knowledge Systems and Cultural Practices*, Wellington, Waitangi Tribunal, 2001.

[20] See Belich, J *Paradise Reforged: a History of the New Zealanders from the1880s to the year 2000*, Auckland, Penguin, 2001.

In the 1980s the focus of action to promote the Maori cultural renaissance moved from protests, petitions, occupations and marches to litigation As a result legal scholars and practitioners began to craft arguments that would advance Maori causes. Most of that effort was directed towards an enhanced status for the guarantees to Maori contained in the Treaty of Waitangi and enhanced powers for the Waitangi Tribunal created by the Treaty of Waitangi Act 1975. This was consistent with the long history of Maori seeking the ratification of the Treaty as an enforceable legal instrument. These efforts included many court cases, petitions to Parliament, petitions to the British monarch and resolutions of autonomous Maori parliaments and other independent Maori political movements and churches. I was one of the scholars who argued for an enhanced legal status for the Treaty of Waitangi. This was a consensual solemn compact between Crown and Maori, whereas the so-called 'common law' doctrine of aboriginal title was a doctrine of imperial law that did not contest the framework of British sovereignty claims. Moreover, that doctrine permitted the Crown to extinguish customary title by overriding Acts of Parliament - including confiscation without compensation and other forms of extinguishment without the explicit consent of the indigenous people.[21] On the other hand, those Maori willing to resort to the courts of the state legal system, not surprisingly, were less concerned with ideological purity and more concerned with favourable practical outcomes. This is where the decisions of Canadian courts came to play a significant role in the development of a new New Zealand common law.

[21] Williams, DV 'Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua?' in Kawharu, IH (ed) *Waitangi*, Auckland, Oxford University Press, 1989, pp 84-9.

The impact of *Calder* and other Canadian decisions

The landmark judgments in the decision of the Supreme Court of Canada concerning the Nisga'a nation, *Calder v Attorney-General of British Columbia* are the focus of our attention in this gathering. They were not a clear-cut victory for the indigenous plaintiffs.[22] Nevertheless, for Maori litigants and their lawyers the doctrine of aboriginal title discussed in *Calder* hinted at the possibility of favourable outcomes for Maori. With such slim pickings available in New Zealand's own legal history, this possibility was seized upon by courts and the Waitangi Tribunal in the 1980s. The Tribunal's first substantive report was published in 1983 and it concerned potential contamination of a coastal fishing ground of great importance to a Maori tribe. The Tribunal, chaired by Chief Judge Durie, wrote:[23]

> Nonetheless the approach of the New Zealand Courts, and of successive Governments, does not compare favourably with that taken by other Courts and Governments in their consideration of indigenous minorities. In North America for example treaties with the original Indian populations have been recognised by the Courts, and in areas not covered by treaties, common law rights are regarded as vesting in native peoples by virtue of their prior occupation (refer for example, *Calder v Attorney-General of British Columbia* (1973) 34 DLR 145).
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> The overseas experience must cause us to re-think our perception of the Treaty of Waitangi and of its significance. In its consideration of a major oil pipeline running the length of Canada for example, and in

[22] Foster, H 'Honouring the Queen's Flag: A Legal and Historical Perspective on the Nisga'a Treaty', (1998/99) 120 *BC Studies* 11, pp 25-6.

[23] Waitangi Tribunal, *Motunui Waitara Report*, Wellington, 1983, sec 10.1. The *Calder* citation should be: (1973) 34 DLR (3d) 145. [Chief Judge Durie was the first Maori lawyer to be appointed Chief Judge of the Maori Land Court. He is now a High Court judge and is the longest serving member of the New Zealand judiciary.]

> proposing a moratorium on the continuation of the works, the Royal Commission in the McKenzie Valley Pipeline Inquiry (Justice Thomas R Berger) considered it necessary that Native Land Claims be forst settled, and that "native hunting, trapping and fishing rights … be guaranteed". We consider that it will be increasingly unrealistic for New Zealanders to assess the Treaty of Waitangi in the context only of their own history.

This paragraph follows a long list of New Zealand cases that gave the Treaty 'a dubious status in international and municipal law'. The *Calder* case was in fact the only actual case cited for the more favourable legal climate in North America.

The re-thinking foreshadowed by the Tribunal was taken a big step further in 1986 when the High Court held that, even if customary rights had been extinguished along the adjacent shoreline, customary fishing rights below high-water mark in a coastal area remained unextinguished. The first instance judge, Williamson J, was assisted by the *Calder* decision, other more recent Canadian cases and the writings of a New Zealand expatriate academic, McHugh, in restrictively distinguishing an earlier decision by a Full Court of the Supreme Court: *Waipapakura v Hempton*.[24] In the *Waipapakura* case Salmond had argued that tidal waters vested in the Crown by its prerogative free of any customary rights. Stout CJ, for the Full Court, had denied that the explicit saving of 'existing Maori fishing rights' in the Fisheries Act 1908 included customary fishing rights to harvest whitebait in tidal waters unless they were explicitly recognised in some other statute. That was another example of *Wi Parata*-type reasoning that prevailed at that time.

[24] *Waipapakura v Hempton* (1914) 33 NZLR 1065. See Frame, pp 104-6.

Now in 1986, the High Court held that customary rights continued to subsist and continued to have the protection accorded by the aboriginal title doctrines of the common law outlined in the (now remembered) *Symonds* case unless clearly and plainly extinguished by statute or other lawful means. Mere assertion of Crown prerogative rights would not suffice and the onus of proving extinguishment lay on the Crown. Of the non-New Zealand cases relied upon in this judgment, four were Canadian precedents, three were Privy Council appeals from Africa, and one was a United States decision.[25]

Following *Te Weehi*, the Waitangi Tribunal undertook an extensive inquiry into the nature and extent of Maori customary fishing rights in its *Muriwhenua Fishing Claims Report* published in 1988. Counsel for the claimants submitted a number of overseas cases for the Tribunal's consideration. There were five Canadian cases, including *Calder*, three Privy Council decisions and four United States cases in favour of the claimants and two Australian cases the other way. In its detailed (and controversial) report the Tribunal found as an historical fact that Maori fishing rights were not merely traditional practices for subsistence living but included commercial opportunities exploited well prior to 1840 by Maori tribes.[26] It should be noted that the Tribunal received submissions from the Fishing Industry Council that also relied on the doctrine of aboriginal title, but in order to narrow the scope of the Treaty of Waitangi rights as put forward by

[25] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. The Canadian cases, in addition to *Calder* were: *Kruger and Manuel v R* [1978] 1 SCR 104;*Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; *Guerin v R* (1984) 13 DLR (4th) 321. The articles by PG McHugh were:'The Legal Status of Maori Fishing Rights in Tidal Waters' (1984) 14 *Victoria University of Wellington Law Review* 247; 'Aboriginal Title in New Zealand Courts', (1984) 2 *Canterbury Law Review* 235; 'Maori Fishing Rights and the North American Indian', (1985) 6 *Otago Law Review* 62.

the claimants. The Fishing Industry Council emphasised the usufructuary nature of aboriginal title rights as expounded by the Privy Council in cases such as *Amodu Tijani v Secretary, Southern Nigeria*.[27] It argued that Maori had no right to participate in modern commercial fisheries nor to obtain the quota rights created by statute to control access to commercial fisheries. The Tribunal wrote of Treaty principles of active protection and of development. It did not delve deeply into the content of aboriginal title rights but it rejected the industry's submissions:[28]

> The doctrine, it was claimed, upheld fishing rights but not exclusive rights, recognised fishing grounds but not zones, and was directed to sustaining traditional lifestyles, not to the pursuit of Western forms of trade. We were given to understand that the Treaty therefore had to mean the same. …
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> We reject the Industry's approach. While the doctrine of aboriginal title does form part of the necessary background to Colonial Office opinions as held at the time of the Treaty, and there is some concurrence between the doctrine and the Treaty principle of protecting Maori interests, the one is not determinative of the meaning of the other, and both have an aura of their own.

The Tribunal took the position that its primary task was to develop Treaty principles with practical applications for Maori claimants. It was for the ordinary courts to develop the aboriginal title doctrine.[29] The opportunity for the courts to do so arose soon enough.

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[26] Waitangi Tribunal, *Muriwhenua Fishing Claims Report*, Wellington, 1988, Record of Inquiry document B21. The Canadian cases in addition to *Calder* were *Baker Lake*, *Kruger*, *Guerin* and *Bolton v Forest Pest Management Institute* ? DLR (4th) 242.
[27] *Amodu Tijani v Secretary, Southern Nigeria* [1921]2 AC 399.
[28] *Muriwhenua Fishing Claims Report*, p 209.
[29] Waitangi Tribunal, *Kaituna River Claim Report*, Wellington, 1984, sec 5.6-5.12.

In *Te Runanga o Muriwhenua v Attorney-General* the Court of Appeal had its first chance to consider the modern relevance of aboriginal title rights since the *Te Weehi* case. The actual decisions of the court related to procedural matters and the evidential value of the Tribunal's *Muriwhenua Fishing Claims Report* in High Court proceedings. Yet Cooke P seized the opportunity to offer some wide-ranging observations on aboriginal title. His judgment for the court declared the 1914 *Waipapakura* decision on fishing rights, which had been followed in a number of subsequent cases prior to *Te Weehi*, to be 'a dubious authority, especially in the light of the Privy Council's subsequent exposition in *Tijani v Secretary, Southern Nigeria* of the principle of the preservation of the native title after cession of sovereignty'.[30] The President's lengthy obiter dicta observations on this topic waxed eloquently upon the virtues of Canadian case law. He went back to the old Privy Council case *St Catherine's Milling and Lumber Company* on the survival of fishing rights though land titles have been extinguished.[31] He also praised the 1980s decisions of the Supreme Court of Canada in *Guerin* and *Simon*:[32]

> More recently in Canada Indian rights have been identified as pre-existing legal rights not created by Royal Proclamation, statute or executive order. It has been recognised that, in some circumstances at least, the Crown is under a fiduciary duty to holders of such rights in dealings related to their extinction. … There are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these. Moreover, in interpreting New Zealand

[30] *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA), p 654.
[31] *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46.
[32] *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA), p 655 citing *Guerin* and *Simon v R* (1985) 24 DLR (4th) 390. In all 6 Canadian cases were cited in this judgment.

parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.

The interface between court decisions and direct negotiations

There is an interesting interface between court decisions supporting the aboriginal title rights of indigenous peoples and the process of direct negotiations between the Crown and Maori interests. In extra-judicial comments published in 2002, Durie J (as he now is) acknowledged the role of *Calder*and *Te Weehi* in this interface:[33]

> *Te Weehi* was consistent with modern developments of the doctrine of aboriginal title in commonwealth jurisdictions. These were set in motion by the Canadian case of *Calder v Attorney-General of British Columbia*. … *Calder*, like *Te Weehi*, recognised the continued existence of customary rights and in effect forced negotiation of claims to aboriginal title with indigenous groups.

Direct negotiations have been used to create modern instruments for the partial recognition of the bundle of rights claimed by Maori. These rights are a complex (and often undifferentiated) amalgam of customary rights under tikanga Maori, Treaty of Waitangi rights, aboriginal title rights, and rights flowing from the principles of the Treaty of Waitangi created by Parliament, the courts and the Tribunal since the Treaty of Waitangi Act 1975. Crown policy in an ad hoc way prior to 1992, and in a more systematic manner since then, has sought to persuade Maori to agree to comprehensive

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[33] Durie, E 'Constitutionalising Maori' in Huscroft, G & Rishworth, P (eds) *Litigating Rights: Perspectives from Domestic and International Law*, Oxford, Hart, 2002, p 262.

settlement packages intended to achieve 'durable, fair and final settlements' of all historical claims. Government ministers and legal advisers were taken by surprise with a number of decisions of superior courts in the 1980s. In addition to the cases on customary and commercial fishing rights mentioned above, the Court of Appeal found against the Attorney-General three times within two years. Litigation was launched by Maori to prevent the neo-liberal policies of corporatisation and privatisation undermining the opportunity to make good their claims for the return of Crown land and assets in partial satisfaction of historic grievances. The court thrice found that the Government was in breach of a statutory obligation to not act 'in a manner inconsistent with the principles of the Treaty of Waitangi'.[34] That obligation was originally thought to be a largely meaningless device to appease Maori. However, the Court of Appeal took seriously the opportunity judicially to create a jurisprudence of principles of the Treaty and this then flowed into the analysis of those principles in Waitangi Tribunal reports.[35]

All this induced successive governments to elaborate a co-ordinated approach to Treaty issues and then to establish a policy on the settlement of historical Treaty claims. This began with the formulation of principles for Crown action in 1989, a settlement policy in 1994 and a revised settlement policy in 2000.[36] The possibility of Maori claimants relying on customary

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[34] State-Owned Enterprises Act 1986, s 9; *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [SOE lands]; *NZ Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [Forests]; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [Coal]. See also *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 where the High Court held the Treaty of Waitangi relevant to an assessment of 'public interest' even when interpreting a statute containing no reference to the Treaty or to Maori values.

[35] Law Commission *Maori Custom and Values in New Zealand Law*, Study Paper 9, Wellington, 2001, pp 83-4; Te Puni Kokiri/Ministry of Maori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi/A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, Wellington, 2001.

[36] Treaty of Waitangi Policy Unit *Principles for Crown Action on the Treaty of Waitangi*, Wellington, 1989; Office of Treaty Settlement *Crown Proposals for the Settlement of Treaty of Waitangi Claims, Detailed Proposals*, Wellington, 1994; Office of Treaty Settlement, *Healing the Past, Building a Future: A*

rights and aboriginal title arguments was specifically addressed by Crown advisers. In respect of historical claims from 1840 to 1992, all customary entitlements are extinguished as part and parcel of the Treaty settlement process that claimants must agree to if they are to receive a Crown apology and the cultural and commercial redress package on offer in direct negotiations.

The courts/negotiations interface was highly relevant in the case *Te Runanga o Muriwhenua v Attorney-General* referred to above. Following *Te Weehi* there were a number of proceedings instituted that succeeded in obtaining interim injunctions preventing the government implementing its quota management fisheries policy until the position of Maori fisheries had been clarified.[37] As a first reponse to the hiatus thus created, Crown/Maori negotiations led to the Maori Fisheries Act 1989 which provided for the progressive tranfer to Maori interests of 10% of the total allowable catch but still retained section 88(2) of the Fisheries Act which saved 'any Maori fishing rights'. In addition to the obiter dicta quoted above on the importance of Maori receiving as much respect for their rights as Canadian indigenous peoples, the President made some observations that 'the task of the Courts in this field may be to interpret and apply the legislation in a way taking into account the realities of life in present-day New Zealand. A balancing and adjusting exercise may be called for.' This was essentially a warning to Maori not to hold out in negotiatations for the full extent of their exclusive fishing rights as guaranteed in the Treaty of Waitangi: 'The position

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Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown, Wellington, 1999; Office of Treaty Settlement, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (2nd ed), Wellington, 2002.

[37] *Ngai Tahu Trust Board v Attorney-General* CP 559/87, Wellington, 2 November 1987, unreported judgment but appended to Waitangi Tribunal, *Muriwhenua Fishing Claims Report*, Wellington, 1988, appendix 5.

resulting from 150 years of history cannot be done away with overnight. The Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.' In support of this pragmatic position Cooke P cited the Washington State fisheries litigation supervised by Judge Boldt as written up by 'Phil Lancaster for the Canadian Bar Association Committee on Native Justice, 1988.'[38]

Further litigation and then negotiations led to a more comprehensive settlement of commercial fisheries issues in 1992. This time the Maori negotiators and a national hui [meeting] agreed to the extinguishment of all commercial fishing customary rights 'whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise' and the statutory regulation of non-commercial customary fishing rights. In return for this extinguishment and the discontinuance of litigation, a commercial settlement valued at $170 million - including control of the major fisheries company, Sealords, and access to further quota entitlements - was to be made available to iwi [tribes] for the benefit of all Maori. The settlement was not greeted with universal approval by Maori and the Court of Appeal was called upon by a number of dissenting Maori tribes and organisations to intervene so as to prevent the memorandum of understanding being translated into statute law. It refused. Again Cooke P delivered the judgment of the court in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*. Again he praised Canadian contributions, especially *R v Sparrow*, as 'part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.' He then made a somewhat realpolitik comment on the speed of negotiations and court decisons in New

[38] *Te Runanga o Muriwhenua v Attorney-General*, p 656.

Zealand. His judgment was delivered 12 days after the end of the hearing - rather than the 18 months the Supreme Court of Canada required in *Sparrow* and the year the High Court of Australia took in *Mabo*: 'in New Zealand circumstances this Court has had to move more quickly – possibly at the cost of some public and other understanding of the complexity of the task.' This did not deter him from concluding that the settlement proposals were 'in accord with the evolving concept spoken of in our *Muriwhenua* judgments' and were 'an historic step.'[39]

Aboriginal title: river cases

Cooke P's willingness, in obiter dicta, to paint a picture of the law's magnanimous treatment of indigenous peoples certainly did not mean that Maori litigants necessarily achieved the outcomes they sought. This was particularly clear in *Te Runanganui o Te Ika Whenua Inc v Attorney-General* in 1993.[40] Part of the ongoing neo-liberal project of successive New Zealand governments led to the Energy Companies Act 1992. Under this Act certain state-owned hydro-electricity dams were about to be transferred from Crown ownership to newly established energy companies. The plaintiffs were Maori claimants with customary rights over two rivers that had been dammed for electricity generation stations. At their instance, the Waitangi Tribunal issued an interim report recommending that the legal status quo be maintained until ownership and control issues were inquired into thoroughly. In both *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992, the Tribunal had found that rivers as 'a whole indivisible

[39] *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301, p 306. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 was duly enacted shortly after the court decision; section 9 is the extinguishment provision. The *Mabo* reference is *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1.

entity, not separated into bed, banks and waters' were a 'taonga' [treasure] explicitly guaranteed by the Treaty of Waitangi.[41] Cooke P cited these reports and went on to doubt a 1963 decision of the Court of Appeal - *In re the Bed of the Wanganui River*:[42]

> Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of the water, is an example of the tendency against which the Privy Council warned in *Amodu Tijani* (at p 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law.

Cooke P went on to heap further praise on the Canadian courts for developing the principle of fiduciary duty linked with aboriginal title and cited the *Baker Lake*, *Guerin* and *Sparrow* decisions. Those Canadian cases, *Mabo* and New Zealand cases indicating that 'the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law' led the President to conclude: 'The legal system is not powerless to provide remedies for racial injustice in appropriate cases, and decisions of the Courts in this field have assisted the parties to achieve voluntary settlements.'

It has to be said, though, that the court's actual decision did not assist the negotiating position of the Te Ika Whenua claimants at all. Quite the contrary. The judgment insisted that an extinguishment of customary title by less than fair conduct would be 'a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power' - referring to

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[40] *Te Runanganui o Te Ika Whenua Inc v Attorney-General* [1994] 2 NZLR 20.
[41] Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report*, Wellington, 1993 and *Mohaka River Report*, Wellington, 1992. For an exposition on the meaning and essence of 'taonga', see *Muriwhenua Fishing Claims Report*, sec 10.3.2.
[42] *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, p 26 doubting *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA).

earlier Canadian and New Zealand precedents and adding two more recent Canadian Federal Court of Appeal decisions. Yet the crucial conclusion, in the court's baldly stated assessment of customary rights, was that 'however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power.'[43] No consideration at all was given to the findings of the Waitangi Tribunal in earlier hearings where a Treaty principle of development and mutual benefit had been discussed. In *Muriwhenua Fishing Claims Report*, as noted above, the Tribunal accepted that Maori had commercial fishing rights and these rights included the right to use modern technology in pursuit of fish. In its interim *Radio Frequencies Report* in 1990 the Tribunal found as follows:[44]

> As we see it the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. … Tribal rangatiratanga gives Maori greater right of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general public, and especially when it is being used for the protection of taonga of the language and culture.

On the radio spectrum and other broadcasting assets issues, further litigation went right up to the Privy Council and further negotiations led to the establishment in 1995 of Te Mangai Paho (Maori Broadcasting Funding Agency). This agency now funds, among other things, 21 iwi radio stations

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[43] *Te Runanganui o Te Ika Whenua Inc v Attorney-General*, p 24. The Canadian cases cited with approval were *Eastmain Band v James Bay and Northern Quebec Agreement (Administrator)* (1992) 99 DLR (4th) 16 and *Apsassin v Canada (Department of Indian Affairs and Northern Development)* (1993) 100 DLR (4th) 504.

[44] Waitangi Tribunal, *Radio Frequencies Report*, Wellington, 1990, pp 42-3.

in many parts of the country.[45] The Government was open to negotiation on radio resources, but it remained adamant that Crown ownership over rivers should be maintained and the Court of Appeal's *Te Ika Whenua* judgment did not help the Maori claimants.

Ironically, the most recent (and most thorough) discussion of the *Calder* case in the New Zealand legal system arose from the fact that it was put at the forefront of Crown legal submissions to the Waitangi Tribunal inquiry on the Whanganui River. In its 1999 report the Tribunal considered Te Atihaunui-a-Paparangi claims that their tribal customary rights to the waters of the river amounted to the equivalent of ownership of the river. Crown counsel, citing *Calder*, agreed that aboriginal title recognises a right to water but argued that this is a use-right only. Any sort of ownership claim to running water is novel and should be rejected. The Tribunal report extensively considered the views expressed in the judgments of Judson, Hall and Pigeon JJ, especially with respect to the expert evidence of Dr Wilson Duff. The report's conclusion on *Calder* was as follows:[46]

> In our view, this case, which was invoked by the Crown, does not support their contention that Te Atihaunui-a-Paparangi had no more than a use right in their river. Rather it supports the view that they did in fact own it. Dr Duff's statement, approved by six of the Supreme Court judges in *Calder* that the Nishga 'patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognised by our system of law, but were nonetheless clearly defined

[45] See *New Zealand Maori Council v Attorney-General* [Broadcasting Assets] [1994] 1 NZLR 513 (PC); Waitangi Tribunal, *Radio Spectrum Final Report*, Wellington, 1999. Information on Maori radio stations can be accessed at http://www.tmp.govt.nz/radio/radio.html

[46] Waitangi Tribunal, *Whanganui River Report*, Wellington, 1999, p 294. [Whanganui is the correct spelling of the name of the river; it is the same 'Wanganui River' whose bed was the subject of the 1962

> and mutually respected' applies equally to the relationship of the Whanganui iwi to their river. … Lord Haldane's warning [in *Amodu Tijani*] against imposing common law notions on those of indigenous peoples with a distinct concept of ownership should be applied to Aithaunui in our view, and to their concept of their relationship with the river.

Aboriginal title reappears again (but for how long?)

In June 2003 the Court of Appeal decided that the Maori Land Court had jurisdiction to inquire into customary entitlements to foreshore and seabed lands. The Court of Appeal media release stressed that the Court's 'decision is a preliminary one about the ability of the iwi to bring their claims. The validity and extent of the customary claims in issue have yet to be decided by the Maori Land Court. The impact of other legislation controlling the management and use of the resources of maritime areas also remains to be considered.'[47] This *Ngati Apa* decision was a modest procedural victory for seven tribes from the north of the South Island. They had resorted to litigation after years of unresolved difficulties over procedures to obtain permission to engage in commercial aquaculture activities in the Marlborough Sounds. The court decision did not define their customary rights, if any, but merely enabled the plaintiffs to adduce evidence to the Land Court as there has been no explicit statutory extinguishment of those rights. Nevertheless, the court ruling created a storm of controversy. The fierce debates on talkback radio, letters to editors, opposition political party

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Court of Appeal decision cited above.] See Brookfield, FM 'The Waitangi Tribunal and the Whanganui River-Bed' [2000] *New Zealand Law Review* 1.

[47] Court of Appeal of New Zealand, 'Media Release: Seabed Case', 19 June 2003. The as yet unreported decision is *Ngati Apa & others v Attorney-General & others*, CA 173/01 & CA 75/02, 19 June 2003.

rallies and the like went on about 'public access to beaches' being threatened by Maori claims to exclusive rights. This rhetoric had little or no connection to the narrow findings of the Court of Appeal or to the actual practical claims of the plaintiffs.

The normal means to resolve ambiguities in the law is to allow a court to hear evidence and to make a ruling based on that evidence. The Government decided that it could not wait. It would introduce legislation immediately to assert Crown ownership over the foreshore/seabed areas.[48] This then provoked a howl of anguish from Maori interests, including the Government's own Maori members of parliament. What followed was a proposal to create a new concept of 'public domain' over foreshore and seabed areas and to recognise customary rights if and only if those rights were not 'used for commercial purposes', nor 'in any way used for pecuniary gain or trade'.[49] It now looks as if the Maori Land Court will never have the chance to hear evidence from the tribes of their claims to customary entitlements, let alone issue a judgment as to the property rights, if any, that might flow from any proven customary rights. Parliament will create a new statutory regime.

The Government was unprepared for the unanimous decision of a five-judge bench of the Court of Appeal in the *Ngati Apa* case. Crown advisers had long assumed the correctness of the 1963 Court of Appeal decision in *In Re the Ninety-Mile Beach*. That decision was based on the reasoning of cases such as *Wi Parata*, and *Waipapakura* and the arguments of Solicitors-General following in the footsteps of Salmond discussed above. However, *In*

[48] 'Seabed owned by the Crown says PM', *The New Zealand Herald*, 23 June 2003.
[49] Department of the Prime Minister and Cabinet *The foreshore and seabed of New Zealand: Protecting Public Access and Customary Rights: Government Proposals for Consultation*, Wellington, 2003, pp 15 & 30.

Re the Ninety-Mile Beach had been the subject of sustained academic criticism.[50] It was inconsistent with the reasoning in a number of more recent Court of Appeal decisions as well as Privy Council decisions in the past.[51] The protection of the Crown in the privative clauses of Salmond's 1909 Act had been repealed in 1993 and replaced by limitation of actions protections to prevent historic claims being relitigated. This did not protect the Crown in respect of new claims that might arise based on customary rights and aboriginal title doctrines. It was no doubt assumed in 1993 that all customary rights to dry land, the beds of inland waters and (more recently) fisheries had been extinguished. There was thought to be nothing left for aboriginal title doctrines to apply to perhaps. Furthermore, Salmond's definition of customary land had been replaced in 1993. The former reference to such land being 'vested in the Crown' had been removed and the new definition acknowledged an entirely different conceptual framework: 'Land that is held in accordance with tikanga Maori shall have the status of Maori customary land'.[52]

In *Ngati Apa* the unanimous decision was that *In Re the Ninety-Mile Beach* should be overruled. Tipping J, usually one of the more conservative figures on the Court of Appeal bench, began his judgment:

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[50] Roberts-Wray, K *Commonwealth and Colonial Law*, London, 1966, pp 626-635; Brookfield, FM 'The New Zealand Constitution: The Search for Legitimacy' in Kawharu, pp10-12; Boast, RP '*In Re the Ninety-Mile Beach* Revisited' (1993) 23 *Victoria University of Wellington Law Review* 145; McHugh, PG *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, pp 117-126. See para 87 per Elias CJ in *Ngati Apa* case.

[51] Recent Court of Appeal decisions include *Te Runanga o Muriwhenua v Attorney-General* and *Te Runanganui o Te Ika Whenua v Attorney-General* discussed above. Relevant Privy Council cases on appeals from New Zealand include the *Nireaha Tamaki* and *Wallis* cases cited above and *Manu Kapua v Para Haimona* [1913] AC 761. The Nigerian appeal to the Privy Council, *Amodu Tijani v Secretary, Southern Nigeria* was crucial to the reasoning of the judges in *Ngati Apa*.

[52] Te Ture Whenua Maori Act 1993, s 129 (2)(a). For a list of some 17 statutes in force that explicitly mention 'tikanga' see Frame, A *Grey & Iwikau: A Journey Into Custom*, Wellington, Victoria University Press, 2002, p 90 (fn 102).

> When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not therefore acquire wholly unfettered title to all the land in New Zealand. …
>
> It follows that as Maori customary land is an ingredient of the common law of New Zealand, title to it must be lawfully extinguished before it can be regarded as ceasing to exist. … Undoubtedly Parliament is capable of effecting such extinguishment but, again in view of the importance of the subject matter, Parliament would need to make its intention crystal clear. In other words Parliament's purpose would need to be demonstrated by express words or at least by necessary implication.

Tipping J went on to stress that 'I have deliberately referred to the common law of New Zealand in this context to distinguish it from the common law of England which of course lacked any ingredient involving Maori customary title or land.'[53] In the event the Court held that the Foreshore and Seabed Endowment Revesting Act 1991, numerous statutes on the territorial sea and exclusive economic zone and many more statutes on empowering harbour boards and vesting land in them, did not conclusively extinguish customary title. One judge, Gault P, expressed 'real reservations about the ability of the appellants to establish that which they claim' in terms of an ownership interest under Te Ture Whenua Maori Act 1993.[54] He agreed, however, that the appeal be allowed so as to permit a Maori Land Court hearing to investigate the facts and assess the evidence.

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[53] *Ngati Apa* case, para 183, 185 & 212.
[54] *Ngati Apa* case, para 106.

With the court's emphasis on New Zealand common law there was less emphasis on Canadian judgments in this case than had been a feature in Cooke P's judgments in the 1980s and 1990s. The High Court decision of Ellis J in favour of the Crown was in error and had to be reversed, according to Elias CJ. She wrote:[55]

> I consider that in starting with English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty, the judgment in the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law. I agree that the legislation relied on in the High Court does not extinguish any Maori property in the seabed or foreshore. I agree with Keith and Anderson JJ and Tipping J that *In Re the Ninety-Mile Beach* was wrong in law and should not be followed. *In Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington*, which was rejected by the Privy Council in *Nireaha Tamaki v Baker*. This is not a modern revision, based on developing insights since 1963. The reasoning the Court applied in *In Re the Ninety-Mile Beach* was contrary to other and higher authority and indeed was described at the time as "revolutionary".

Further on:[56]

> The applicable common law principle in the circumstances of New Zealand is that rights of property are respected on assumption of sovereignty. They can be extinguished only by consent or in accordance

[55] *Ngati Apa* case, para 13 [case citations omitted].
[56] *Ngati Apa* case, para 85-6.

with statutory authority. They continue to exist until extinguishment in accordance with law is established. Any presumption of the common law inconsistent with the recognition of customary property is displaced by the circumstances of New Zealand (see Roberts-Wray, at 635). …

The approach adopted in the judgment under appeal in starting with the expectations of the settlers based on English common law and in expressing a preference for "full and absolute dominion" in the Crown pending a Crown grant is also the approach of *Wi Parata*. Similarly, the reliance by Turner J [in 1963] upon English law presumptions relating to ownership of the foreshore and seabed (an argument in substance re-run by the respondents in the present appeal) is misplaced. The common law as received in New Zealand was modified by recognising Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

Despite the emphasis on the circumstances of New Zealand, Canadian influence is still readily apparent in the reasoning of the judges. Elias CJ wrote:[57]

As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom (as appears to be the position described in *St Catherine's Milling and Lumber Co v The Queen* …). On the other hand, the customary rights might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference" (*Amodu Tijani v Secretary, Southern Nigeria* at 410). The

> Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructary rights to exclusive ownership with incidents equivalent to those recognised by fee simple title (see, for example, *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at paragraphs 110-119 per Lamer CJ).

Keith J (for himself and Anderson J) emphasised the older United States cases, the 1847 New Zealand case *Symonds*, *Amodu Tijani* and the Privy Council appeals from New Zealand and then wrote:[58]

> The protective approach adopted in the earlier American and Privy Council authorities is to be seen in more recent rulings of the Supreme Court of Canada, the High Court of Australia and this Court: the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.

The cases cited in support were *Sparrow*, *Mabo* and *Te Runanga o Muriwhenua*. Cited with approval by Keith J from the latter case were Cooke P's remarks, already quoted above, that New Zealand courts should 'lean against any inference that in this democracy the rights of Maori people are less respected than the rights of aboriginal peoples are in North America.'

Will history be repeated?

The *Ngati Apa* decision finally and conclusively overrules the *Wi Parata* approach. It no longer has any authority as a precedent in court proceedings.

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[57] *Ngati Apa* case, para 31. See also para 87.
[58] *Ngati Apa* case, para 148-9.

The decision also restores the Court of Appeal's 1980s reputation for being willing to move into unfamiliar legal territory for the benefit of Maori plaintiffs and their putative property rights, and contrary to the position strongly advocated for by the Crown as being in the interest of all New Zealanders. Nevertheless, the chance to learn how the Canadian cases from *Calder* to *Delagamuukw* will be applied in the New Zealand context to foreshore and seabed claims is likely to be denied us. For, at the end of the day, the *Wi Parata* approach lives on, not in the courts, but in the Government's response to the unexpected court decision. The Government now insists, just as Prendergast CJ had suggested in 1877, that 'the supreme executive Government must acquit itself as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice'. Again, just as Salmond had urged in 1909, the Government in its 2003 consultations with Maori is insisting that 'when a dispute arises between Natives and the Crown as to the right to customary land, the dispute shall be settled by Parliament and not otherwise.' In a number of pan-tribal meetings and in the Government-organised consultation meetings the Government's proposals were resoundingly rejected.[59] Despite this, what the Deputy Prime Minister said in late October 2003 was entirely consistent with Salmond's doctrine: 'But in the end, this matter will be resolved in the legislative arena so any solution must be able to attract a Parliamentary majority.'[60]

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[59] Te Ope Mana a Tai 'Discussion Framework on Customary Rights to the Foreshore and Seabed', August 2003 – see **http://www.teope.co.nz** ; Indigenous Research Institute *Te Takutai Moana: Economics, Politics & Colonisation*, vol 5 (2nd ed), Auckland, 2003.

[60] Cullen, M 'Govt aiming for foreshore policy statement by Xmas' 23 October 2003 Media Statement [attached to 'Memorandum (No 3) of counsel (TJ Castle) for Ngati Rarua and Ngati Apa', 24 October 2003: Wai 1071, doc 2.142].

The application of the common law to the circumstances of Aotearoa New Zealand as now understood gives greater credence to customary title rights than was permitted for most of New Zealand's legal history. Yet in some respects the colonialist assumptions accompanying the reception of English law in British colonies remain powerful and persuasive for those acting on behalf of the Crown in right of New Zealand. As suggested in an aphorism attributed to Mark Twain 'history does not repeat itself but it usually rhymes'. When the sea spray settles, to coin a phrase, I would predict that there will be a negotiated settlement – or, more accurately, a take it or leave it imposed solution devised by the Government for Maori to agree to. This is likely to offer a proportion of marine aquaculture opportunities to Maori interests in return for the full and final extinguishment of any commercially valuable customary rights to the foreshore and seabed lands. Time will tell.