# THE EFFECT OF HUMAN RIGHTS ON TRADITIONAL LAND RIGHTS: THE NEW ZEALAND EXPERIENCE

***Hon Justice Randerson****

*Traditional land rights in New Zealand have been affected to a significant extent by the Treaty of Waitangi rather than a human rights regime. The protections arising from the Treaty frame the approach to traditional land rights in New Zealand. This article discusses the development of Treaty of Waitangi jurisprudence as it relates to indigenous land rights as well as the judicial application of customary land rights in New Zealand.*

*Parce qu'en Nouvelle-Zélande, le Traité de Waitangi prend en compte la dimension coutumière des droits, son influence sur les modes de reconnaissance des droits fonciers s'est révélée beaucoup plus profonde que celle exercée par les principes qui régissent les Droits de l'Homme. Dans cet article, l'auteur analyse l'évolution de la jurisprudence relative aux droits coutumiers fonciers telle qu'elle est issue du Traité de Waitangi et comment ces droits ont été intégrés dans le droit positif néo-zélandais.*

## *I INTRODUCTION*

In common with a number of Pacific nations, New Zealand has experienced a process of colonisation of its indigenous peoples over a period in excess of the past 150 years. Prior to that time indigenous Māori tribes had occupied the land, its fisheries and forests. Traditional land rights in New Zealand have been affected not so much by human rights but to a much more significant extent by the Treaty of Waitangi, entered into between the British Crown and most of the indigenous Māori Tribes in 1840. The protections arising out of the Treaty, together with customary rights and aboriginal title, which predate European settlement, effectively frame the approach to indigenous land rights in New Zealand.

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Traditional land rights in New Zealand have also been strongly influenced for well over a century by the Māori Land Court, which is the only Crown institution with the power to determine Māori customary rights to land. The role of the Court upon its establishment was to supervise the transition of land titles from customary title to statutory title, which was individualised and designed to be easily alienable. The records of the Court include the testimony of thousands of Māori for every tribal group in the country and provide an extremely rich source of tribal whakapapa (ancestory) and debate.[1]

For the purposes of this conference, I plan first to canvass the development of Treaty jurisprudence in relation to traditional land rights, and secondly to consider the application of customary land rights in the New Zealand context.

## *II THE TREATY OF WAITANGI*

### *A Background*

The Treaty of Waitangi was drafted by James Busby, British Resident in New Zealand from 1833, upon the instruction of William Hobson, Lieutenant-Governor of New Zealand. Missionary Henry Williams then translated the Treaty into Māori. On the 6th of February 1840 more than 500 Māori signatories, together with representatives of the British Crown, signed the compact. It is interesting to note that only 39 of the Māori signatories signed the English version of the Treaty.[2]

The Treaty contained a preamble and three articles. Article one provided for the cession of sovereignty to the Crown. Article two provided for the protection of Māori rights over lands, estates, forests, fisheries and other property and established the Crown's right of pre-emption over native lands. This article has been equated with the preservation or recognition of customary aboriginal title at common law. Article 3 extended to Māori all the rights and privileges of British subjects under British rule.

Differences between the two versions of the Treaty (English and Mäori) have given rise to uncertainty, dispute and criticism over the meaning and application of the agreement. For example, the English version of article one cedes *sovereignty* to the Crown, while the Māori version of the document refers to *kawanatanga*, which translates to a form of governorship rather than complete sovereignty.

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1 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (Study Paper 9 2001) at 63.

2 Joseph *Constitutional and Administrative Law in New Zealand* (3 ed 2007) at 50.

The principles of the Treaty have provided more guidance to the Courts than the explicit textual provisions of the document itself. Chief Judge Durie of the Waitangi Tribunal considered that the Treaty of Waitangi "can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines".[3]

### *B Status of the Treaty*

A traditional approach to the Treaty holds to the view that the document cannot constitute cession at international law, as Māori society lacked the necessary statehood and capacity to enter into such an agreement.[4] Thus, Britain acquired New Zealand through occupation and settlement rather than cession. According to this reasoning, the Treaty does not confer any binding obligations under international law. However, this "eurocentric"[5] view has been contested by jurists such as Sir Kenneth Keith, A C McNair and Ian Brownlie QC, who recognise a degree of standing and contractual capacity on the part of Mäori, even if the Treaty cannot constitute a full cession of sovereignty under traditional rules of international law.[6]

Enforcing Treaty provisions by way of domestic law would require some form of legislative adoption. In *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 the Privy Council confirmed that international instruments, such as the Treaty, were not justiciable in domestic courts in the absence of legislative incorporation.[7] The Treaty has not been adopted into New Zealand law and is therefore not directly enforceable within the New Zealand legal system. This approach was confirmed by Richardson J in the *Lands* case.[8]

However, regardless of its legal standing, the symbolic importance of the Treaty and the principles derived from it have played a significant role in shaping the approach to indigenous land rights in New Zealand.

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3 Joseph at 51 citing Hon E T J Durie "Part II and Clause 26 of the draft New Zealand Bill of Rights" in Legal Research Foundation *A Bill of Rights for New Zealand* (1985) at 190, as noted in *NZ Mäori Council v A-G* [1987] 1 NZLR 641 at 672 per Richardson J.

4 Joseph at 54.

5 Joseph at 57, citing K J Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37.

6 See also the views expressed by Professor Matthew Palmer in his recent text *The Treaty of Waitangi in New Zealand's Law and Constitution* (2008) at 154 to 168.

7 Joseph at 67.

8 Ibid, citing *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 672 (HC & CA).

### *C Judicial Approaches to the Treaty*

Attitudes to the Treaty have developed over time. These changes are reflected in judicial decisions that have considered the status of the Treaty and related customary rights since the instrument was executed in 1840. There has been a significant attitudinal change toward the Treaty since it was described as a "simple nullity" in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72. This change was clearly marked in the watershed decision of *NZ Maori Council v A-G* [1987] 1 NZLR 641 (the *Lands* case). The Treaty is now treated as a partnership that legitimates the British Crown in New Zealand, provides protection of Māori as British subjects and ensures reasonable cooperation between races. Richardson J spoke of the Treaty as "a positive force in the life of the nation and so in the government of the country".[9] According to Chilwell J in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 206, the Treaty "has a status perceivable, whether or not enforceable, in law".

### *D Early Decisions*

In the case of *R v Symonds* (1847) NZPCC 387, Chapman J held that native title is a recognised right of customary use and possession of land, subject only to the exclusive right of the Crown to extinguish those rights. The decision affirmed the common law doctrine of aboriginal title and guaranteed Māori continued use of their lands, fisheries and traditional ways. The Crown was affirmed as the exclusive source of private title.[10]

In *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 Sir James Prendergast CJ considered the Treaty to be a "simple nullity" because, under doctrines of British colonial law, native tribes lacked the necessary standing to cede sovereignty.[11] Prendergast CJ observed that "…the aborigines were found without any kind of civil government, or any settled system of law…the Māori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community".[12] He went on to quote Lord Normanby's despatch to Governor Hobson, which stated:[13]

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9 Joseph at 47.

10 Ibid at 61.

11 Ibid at 62, citing *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

12 Ibid, citing *Wi Parata* at 77.

13 Ibid.

> We acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make such acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert.

The Judge concluded that New Zealand was an "uninhabited" territory in law ("inhabited only by savages") over which the British Crown acquired title by discovery and occupation.[14] Prendergast CJ found that the issue of a Crown grant implies that the Crown intended to extinguish native title. He further held that an executive decision to extinguish title was not justiciable.

In *Hunt v Gordon* (1884) 2 NZLR 160 (CA) Richmond J considered that British treaties with Samoa were not treaties in the strict sense. He compared instruments between Britain and Samoa with the "so-called Treaty of Waitangi", which was "not a treaty in the proper sense", holding that "the sovereignty of [New Zealand] was not acquired by virtue therefore, but by occupation".[15]

In *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) Turner J described the obligation arising under article 2 of the Treaty as "quasi-treaty" or something "akin to a treaty obligation".[16] This approach was later adopted by T A Gresson J in *Re the Ninety Mile Beach* [1963] NZLR 461 (CA), who stated (at 477) that, "this obligation [under art 2], was akin to a treaty obligation and was not enforceable at the suit of any private persons until carried into municipal law". This decision was later overruled in A-*G v Ngati Apa* [2003] 3 NZLR 643 (CA) (see 4.1 below).

In *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) Chapman J was concerned about whether the Māori signatories to the Treaty had contractual capacity. He noted (at 354) that the Treaty did not record over what territories each of the signatories claimed to exercise authority. The key question was whether all of the sovereign chiefs were among those who did sign. Additional signatures would add nothing and would not detract from the legal standing of the document. Sovereignty over the North Island was proclaimed by cession, yet it was noted that a significant number of chiefs in both islands refused to sign or could not be reached.[17]

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14 Ibid, citing *Wi Parata* at 78.

15 Joseph at 62, citing *Hunt v Gordon* (1884) 2 NZLR 160 at 185 to 186 (CA).

16 Ibid at 63, citing *Re the Bed of the Wanganui River* [1962] NZLR 600 at 623 (CA).

17 Ibid at 63, citing *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 354 (CA).

The decision in *Wi Parata* was perhaps the most significant judicial ruling on indigenous land rights in New Zealand until the *Lands* case was decided in 1987. *Wi Parata* was effectively codified by the Native Land Act 1909 and later by s 155 of the Māori Affairs Act 1953, which provided that customary title to land was not enforceable against the Crown. Section 158 removed the jurisdiction to challenge any Crown grant, lease or disposition by reason of customary Maori title not having been duly extinguished. However, these provisions did not limit the jurisdiction of the Maori Land Court to determine customary native title and to transform it into freehold estates (see 6 below).

### *E* NZ Maori Council v A-G *[1987] 1 NZLR 641 (the Lands case)*

The *Lands* case marked a new approach to Treaty jurisprudence in New Zealand. The case involved consideration of s 9 of the State-Owned Enterprises Act 1986, which gave statutory recognition to the principles of the Treaty of Waitangi.[18] The Act provided that shareholding Ministers could transfer Crown assets to recently established state owned corporations. The New Zealand Maori Council opposed the transfer of Crown land that was (or that might become) subject to a Waitangi Tribunal claim on the basis that this would breach s 9. The case was referred to the Court of Appeal where the central issue was whether s 27 of the State-Owned Enterprises Act 1986 could be considered a code, thereby excluding the application of s 9.[19] The provisions of s 27 restrained the sale of state-owned enterprise land to private interests if the land was subject to a tribunal claim lodged before the Act was passed (s 27(1)) and provided that the Governor-General in Council could order land held by a state-owned enterprise to be returned the Crown (upon payment of compensation) where this was recommended by the tribunal (s 27(2)). This provision did not cover situations where land had been sold to private interests in the meantime.

The Court of Appeal held that s 9 was an umbrella protection against the wholesale transfer of Crown lands and assets, considering that if s 27 were a code it would defeat s 9. The Court ordered the Crown to design a system that would guarantee the transfer of assets would not violate Treaty principles.[20] The passage of the Treaty of Waitangi (State Enterprises) Act 1988 gave statutory force to this

18 The relevant portion of s 9 of the State-Owned Enterprises Act 1986 states: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

19 Joseph at 70.

20 Ibid at 71.

agreement and provided for the Waitangi Tribunal to make binding orders for the resumption of land that had been transferred to the corporations.

This case demonstrates how the **principles** of the Treaty have become more significant than the terms of the Treaty itself. The Court focussed on the **spirit** of the agreement at Waitangi and considered that the treaty should be viewed and interpreted as a **living instrument** with a "positive and enduring role".[21]

The Court considered **partnership** to be the fundamental basis of the relationship between the Treaty parties, giving rise to "responsibilities analogous to **fiduciary duties**".[22] However, any actionable fiduciary duties arise out of common law aboriginal title rather than directly from Treaty obligations, unless those obligations have been incorporated by statute. The Court also held that the Treaty parties have a reciprocal responsibility to act towards each other reasonably with the "utmost **good faith**".[23] Cooke P considered that this imposed a duty of **active protection** on the Crown in relation to the use by Māori of their lands and waters.[24] This did not impose a general duty always to consult Mäori, however, Māori were entitled to rely on the enduring concept of the "honour of the Crown".[25]

The Court of Appeal acknowledged the doctrine of parliamentary sovereignty and upheld the ruling of the Privy Council in *Hoani Te Heuheu,* confirming that Treaty rights were not legally applicable without being incorporated through legislation. However, Cooke P stated that when interpreting statutes, the courts would not ascribe to Parliament an intention to allow actions that would breach the principles of the Treaty. This approach to statutory construction applied to "express reference" statutes and general statutes.[26]

### *F Modern Treaty Jurisprudence*

Later cases have built on the approach to Treaty jurisprudence established in the *Lands* case. Principles of the Treaty have since been considered in relation to

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21 Ibid at 72, citing *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 673 per Richardson J (HC & CA).

22 Ibid, citing *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 664 per Cooke P (HC & CA).

23 Ibid, citing *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 664 per Cooke P and 693 per Somers J (HC & CA).

24 Joseph at 72.

25 Ibid, citing *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 682 per Richardson J and 703 per Casey J (HC & CA).

26 Joseph at 72.

forestry: *NZ Maori Council v A-G* 1989 2 NZLR 142 (CA); coal mining rights: *Tainui Maori Trust Board v A-G* [1989] 2 NZLR 513 (CA); hydro-electric dams: *Te Runanganui o Te Ika Whenua Inc Soc v AG* [1994] 2 NZLR 20 (CA); permits for commercial whale-watching operations: *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA); Māori electoral options: *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA); radio frequencies and broadcasting assets: *A-G v NZ Maori Council* [1991] 2 NZLR 129 (CA), *NZ Maori Council* v *A-G* [1994] 1 NZLR 513 (PC), *NZ Maori Council* v *A-G* [1996] 3 NZLR 140 (CA); and Māori spiritual beliefs in the context of granting resource consent: *Friends & Community of Ngawha Inc v Minister of Corrections* 17/12/02, CA216/02.[27]

### *G Other Treaty Related Developments*

The *Lands* case affirmed the status of the Treaty as a non-justiciable instrument unless legislatively incorporated. The Treaty of Waitangi Act 1975 contains a schedule including the text of the Treaty but does not incorporate the Treaty into municipal law.[28]

Since 1991 the Cabinet Manual has required Ministers to specify whether a proposed bill complies with the principles of the Treaty and to provide details of Treaty related implications presented by any bill. Public sector statutes enacted since 1975 also make reference to the Treaty and Maori interests.[29]

A range of proposals has been made seeking to entrench the Treaty into Supreme law. These suggestions have been met with divided public opinion.[30]

### *I The Waitangi Tribunal*

The Waitangi Tribunal was established by the Treaty of Waitangi Act 1975. Its purpose was to facilitate the airing of Maori grievances, the accommodation of cultural differences and redress for historic treaty breaches.[31] The Tribunal is mandated to investigate claims that government legislation, policies or practices have prejudicially affected Māori, in breach of the principles of the Treaty.[32]

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27 Joseph at 73 to77.

28 Ibid at 77.

29 Ibid at 78.

30 Ibid at 78 to 79.

31 Ibid at 81.

32 Ibid at 81, see also Treaty of Waitangi Act 1975, s 6.

Except in very limited respects, decisions of the Tribunal are not binding, however the Tribunal may recommend that the Crown make reparation where a claim is upheld. The Tribunal has exclusive jurisdiction to determine the meaning and effect of the Treaty and to resolve issues raised by textual differences between the Māori and English texts. In 1985 the Waitangi Tribunal's jurisdiction was back-dated to include historic treaty claims. [33]

### *J Treaty Settlements*

In the 1990s the Crown began negotiating with iwi for the full and final settlement of historic treaty grievances. As at 28 February 2007 there had been 21 concluded settlements amounting in value to $791.992 million.[34] Settlements can include financial redress, a Crown apology for breaches of the Treaty and recognition of the claimant group's association with customary or culturally significant sites.[35] Direct negotiation between the Crown and Mäori, as an alternative to a Tribunal hearing, is available through the Office of Treaty Settlements. The aim is to achieve full and final settlements that address Māori grievances.[36] Leading Treaty settlements to date include: commercial sea fisheries (the Sealord deal) in 1992/93; the Waikato-Tainui Raupatu in 1994/95; Ngai Tahu in 1996/97; and very recently, the Central North Island forestry settlement.[37]

The settlement of very valuable assets in the form of land, fishing and forestry rights and cash on Māori tribes has given rise to the need for new legal structures to enable the tribes to manage the assets. These structures have been mandated by statute in some cases, such as the bodies necessary to receive fishing assets under the Sealord agreement. Other incorporations may be established to hold land under the Te Ture Whenua Māori Act 1993. The New Zealand Law Commission has recently prepared a report recommending new and innovative legal structures designed to meet the organisational needs of Māori tribes and other groups that manage communal Māori assets.[38]

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33 Ibid at 81 to 82.

34 Ibid at 83.

35 Ibid.

36 Ibid at 86.

37 Central North Island Forests Land Collective Settlement Act 2008 (08/99). For further discussion of the settlements discussed here refer to Joseph at 87 to 90.

38 New Zealand Law Commission Waka Umanga: A Proposed Law for Maori Governance Entities (NZLC R 92 2006).

## *III ABORIGINAL TITLE*

In *Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20 at 23, Cooke P stated that:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation.

The common law doctrine of aboriginal title or customary right acknowledges the rights of Māori established at Waitangi.[39] These rights emerge from the occupation of lands prior to colonisation. The Courts have attached the concept of fiduciary duty to this doctrine in order to reflect the relationship of trust between colonial powers and indigenous peoples.[40]

New Zealand judges upheld Māori customary title until this jurisdiction was denied in *Wi Parata*, where there was found to be no limit on the Crown's power to extinguish Māori customary rights. New Zealand legislation from 1862 did not acknowledge the importance of aboriginal title. Rather, the focus was on converting Māori customary title into freehold estates derived from the Crown.[41] This was the position until the High Court reaffirmed customary title in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 by acknowledging a customary Māori fishing right based on non-territorial aboriginal title.[42]

In *Ngati Apa* the Court of Appeal found that the Māori Land Court had jurisdiction to determine claims involving customary title in the foreshore and seabed.[43] The government then legislated to remove that jurisdiction with the passage of the Foreshore and Seabed Act 2004, which vested legal and beneficial ownership of the foreshore and seabed in the Crown.

### *A Common Law Position*

British common law affirmed that customary rights of the aboriginal population should be respected following colonisation. This view was confirmed in early New Zealand instruments, including the Treaty of Waitangi. The Courts have also recognised these customary rights. In *Te Runanganui o Te Ika Whenua* (the hydro-

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39 Joseph at 91.

40 Ibid.

41 Ibid.

42 Ibid.

43 *A-G v Ngati Apa* [2003] 3 NZLR 643 (CA).

electric dams case) the Court of Appeal held that article 2 of the Treaty preserved Maori customary title and was declaratory of existing common law rights. Treaty rights and Maori customary rights were thus found to overlap.[44]

Aboriginal or customary rights upheld at common law are binding on the Crown. *Ngati Apa* confirmed that aboriginal or customary rights pre-date the Treaty. The Court found that the Crown's radical title acquired on cession of sovereignty was subject to or burdened by the pre-existing rights of Maori and their native customary title of occupancy until lawfully extinguished.

The content of aboriginal title is fact-specific and requires evidence or customary use. These customary uses might be usufructuary (rights of occupancy and use) or proprietary (rights similar to ownership and exclusive possession) and can evolve in accordance with modern conditions.[45]

### *B Extinguishing Customary Title*

Aboriginal title to land cannot be transferred, sold or surrendered except to the Crown. The Crown can extinguish native customary title, through the proper legal process. Extinguishment might occur through sale to the Crown, investigation of title through the Māori Land Court and deemed Crown grant, legislation or other lawful authority.[46]

In *R v Symonds* Chapman J noted that extinguishment of customary title required the free consent of the native occupiers, at least in times of peace, and that extinguishment through confiscation was unacceptable.[47]

Legislative or executive action must demonstrate a "clear and plain intention" to extinguish aboriginal title.[48] *Ngati Apa* was significant in that it overruled *Re the Ninety Mile Beach,* which held that aboriginal title to the foreshore could be extinguished by a change in status to adjacent land above the high water mark. This decision was based on inference rather than an express or calculated intention to end customary title.[49]

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44 Joseph at 92.

45 Ibid at 94.

46 Ibid.

47 Ibid at 95.

48 Ibid.

49 Ibid.

### *C* Wi Parata *Decision*

*Wi Parata* stated that the Crown's duty to recognise aboriginal rights was a moral rather than a legal obligation. Following this decision, Parliament extinguished many Māori rights. The Court of Appeal endorsed the *Wi Parata* approach in two 1960s decisions: In *Re the Bed of the Wanganui River*, Turner J held that all land in New Zealand passed to the Crown and that Māori customary rights were unenforceable; and in *Re the Ninety Mile Beach*, the Court affirmed that Māori could claim tribal lands only by the grace and favour of the Crown. All titles derived from the Crown, which was the "sole arbiter of its own justice".[50] This view was confirmed by the Native Land Act 1909 and the Māori Affairs Act 1953. However, the Native Lands Act 1862 and the Native Lands Act 1865 allowed the Native Land Court (later the Māori Land Court) to ascertain customary title and to transform it into Crown derived estates. Professor Joseph notes that in New Zealand, title to land merged with sovereign ownership of the country. This had the effect of blurring the common law obligation to uphold the existing rights of indigenous peoples.[51]

### *E Non-territorial aboriginal title*

*Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 resurrected the concept of non-territorial aboriginal title. The High Court allowed Te Weehi's appeal against conviction under the Fisheries Act 1983, which provided that nothing in the Act shall affect Māori fishing rights. The Court held that Te Weehi was exercising a customary Māori fishing right courtesy of Ngai Tahu, who had exercised a customary fishing right along the Monunau foreshore well before British colonisation. This right was based on customary use rather than ownership. The case stressed the need for a "clear and plain [legislative] intention" to override a customary Māori right, and accepted that aboriginal rights are "highly fact specific" (at 147).[52]

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50 Ibid at 98, citing *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

51 Ibid at 95 to 96.

52 Ibid at 97 to 98.

## *IV FORESHORE AND SEABED*

### *A* A-G v Ngati Apa *[2003] 3 NZLR 643 (CA)*

In *Ngati Apa* the Court of Appeal overruled *Re the Ninety Mile Beach* and established that the Māori Land Court has jurisdiction to consider claims relating to customary title over the foreshore and seabed.[53]

The Court noted that prerogative instruments, such as the Letters Patent 1840 setting up government in NZ, and legislation, including the Land Claims Ordinance 1841 and the New Zealand Constitution Act 1852 (UK), recognised that Māori customary rights existed at common law until they were extinguished by process of law.[54] These rights included the foreshore and seabed and no change in the status or title of the land above the high water mark would limit such rights. The Crown bears the onus of proving extinguishment, which requires demonstration of a clear and plain intention.[55]

The Court found that Re the Ninety Mile Beach was incorrect for two major reasons:

- First, it upheld the *Wi Parata* approach, which denied that Māori property rights existed at law until they were translated into freehold estates vesting in the Crown, thereby limiting customary title.[56]
- Secondly, the Court was wrong in the approach to how customary rights could be extinguished, mistakenly assuming that converting Māori land into Crown-derived estates under the relevant land legislation also eliminated customary title to the foreshore. When land above the high water mark was converted to freehold land, the foreshore adjacent to this land was deemed also to have been converted. If the foreshore was not included in the freehold title then any customary title to it was held to be extinguished. This finding failed the requirement of a "clear and plain intention".[57]

### *B Foreshore and Seabed Act 2004*

In response to the *Ngati Apa* decision, the government introduced the Foreshore and Seabed Act 2004. The Act was introduced to preserve the "public foreshore

53 Ibid at 99.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

and seabed in perpetuity as the common heritage of all New Zealanders" (s 3). As set out by Professor Joseph, the Act vested the full legal and beneficial ownership of the foreshore and seabed in the Crown; provided for general rights of public access to and navigation within it; allowed for the recognition and protection of customary rights over it where these could be established; and enabled the High Court to investigate customary rights over foreshore and seabed with a view to redress where the Act interfered with the applicant's rights.[58] The High Court is empowered to declare that a group would (but for the Act) have held territorial customary rights to a particular area of the public foreshore and seabed at common law. This declaration can only be made if the group exclusively used and occupied the area without substantial interruption from 1840 to the date of commencement of the Act and the group had continuous title to the contiguous land (ss 32 and 33). If a declaration is obtained, the Act requires the Crown to enter into negotiations with the group to provide redress.

### *C Review of Foreshore and Seabed Act 2004*

On 4 March, 2009, Attorney-General Chris Finlayson announced the terms of reference and members of the Government's ministerial panel to review the Foreshore and Seabed Act. The Panel has yet to report.

## *V FIDUCIARY DUTY*

New Zealand courts have considered how equitable fiduciary duties might apply in the context of the Treaty relationship. As discussed above, in the *Lands* case, Cooke P considered that the Treaty relationship gave rise to "responsibilities analogous to fiduciary duties".[59]

New Zealand courts have followed the Supreme Court of Canada in *Guerin v R* (1984) 13 DLR (4th) 32 and have confirmed the existence of equitable fiduciary duties in the context of aboriginal or customary title.[60] In *Te Runanga o Muriwhenua Inc v A-G* [1990] 2 NZLR 641 the Court of Appeal acknowledged fiduciary obligations as applying to dealings for the extinction of Māori customary title. Compensation or damages could potentially flow from the breach of such a duty. This approach was found to be in harmony with the fiduciary analogies

58 Ibid at 100.

59 *NZ Maori Council v A-G* [1987] 1 NZLR 641 at 664 per Cooke P (HC & CA).

60 Joseph at 100.

drawn in the *Lands* case, where the Treaty was held to be a partnership between races, which created an obligation to act with good faith.[61]

In *Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20, the Court of Appeal reconsidered the case of *R v Symonds*, where Chapman J held that customary title could only be brought to an end with the free consent of Mäori.[62] Cooke P stated (at 24):

> An extinguishment by less than fair conduct of on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

This case further established that if the requirement of free consent should be undermined by the Crown's right to compulsorily acquire land for public purposes under its powers of eminent domain, then the Crown ought to provide appropriate compensation (at 24).[63]

In *NZ Māori Council v A-G* [2007] NZAR 568 the Court of Appeal overturned the ruling of the High Court and confirmed that an action for breach of fiduciary duty cannot arise directly from the unincorporated provisions of the Treaty (see *Hoani Te Heuheu Tukino*). Any claim for breach of fiduciary duty falls under the customary law of aboriginal title. The Court of Appeal declined to accept that fiduciary principles imposed a legal obligation on the Crown independent of the Treaty. The Court acknowledged that the obligations imposed by the Treaty relationship could be understood by way of fiduciary duties, such as good faith, reasonableness, trust and consultation. However, this analysis was held to be relevant by way of analogy rather than by direct application.[64] It would be open to the Supreme Court of New Zealand to reconsider the position taken by the Court of Appeal and to find the Treaty enforceable on the basis of equitable or fiduciary obligations. This would allow for the as yet hypothetical possibility of the Treaty having direct and binding legal force in New Zealand through the Courts by way of equity rather than incorporation.[65]

The Treaty is not directly enforceable in New Zealand, however the cases discussed earlier demonstrate that New Zealand courts have indirectly applied the

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61 Ibid at 101.

62 Ibid.

63 Ibid.

64 Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (2008) at 202.

65 Ibid at 203.

Treaty both as an aid to statutory interpretation and as a relevant consideration to be taken into account in administrative decisions (such as judicial review proceedings).[66] The possibility for indirect judicial enforcement of the Treaty might also arise in the context of interpreting statutes as consistent with domestically unincorporated international obligations and by way of judicial consideration of the Treaty from a constitutional perspective, as a 'living instrument'.[67]

## *VI THE ROLE OF THE MĀORI LAND COURT (FORMERLY THE NATIVE LAND COURT)*

The Native Land Act 1865 first created the Native Land Court as a Court of record, which has continued, subject to modification by various statutes, since that time. It has been known as the Māori Land Court since 1947.

The original mandate of the court was to investigate Māori customary land rights, which were often communal, and to convert customary title into freehold title acceptable under British law. Hapu (sub tribes) or iwi (tribes) were required to establish their customary rights to land by demonstrating occupation, conquest, or ancestry. The Court recorded this information.

About 1.3 million hectares, or just under five percent of the total area of New Zealand, is held as Māori freehold land. The Māori Land Court acknowledges the importance of cultural tradition and takes into account the significant bond between Māori people and the land. This unique approach is confirmed by s 2(2) of Te Ture Whenua Māori Act 1993 (under which the Court is now established):

> …[I]t is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants.

The Judges of the Māori Land Court are also Judges of the related Māori Appellate Court. These Courts may state a case requesting the opinion of the High Court on a point of law. The decision of the High Court is subject to appeal and any consequent decision of the High Court or the Court of Appeal will be binding on the Māori Land Court and the Māori Appellate Court.

Today, the functions of the Māori Land Court include: promoting the use, management, administration and development of Māori land; maintaining records

66 Ibid at 205 to 206.

67 Ibid at 207.

of title and ownership information; providing land information to appropriate agencies; servicing related courts and tribunals; and preserving taonga Mäori.

Under Te Ture Whenua Māori Act, the Māori Land Court has jurisdiction to: appoint trustees for persons under disability; make succession orders in respect of interests in Māori land; make partition orders under section 289; make vesting orders transferring or gifting land or interests in land under section 164; make orders incorporating Māori land owners under section 247; call meetings of owners to consider alienation and use of Māori land; confirm alienation of Māori land under section 326; appoint trustees to carry out certain functions for the benefit of beneficial owners; make charging orders in respect of rates owing; and appoint of agents for various purposes.

Another important function of the Māori Land Court is conferred by section 30 of the Te Ture Whenua Māori Act, which allows the Court to determine the most appropriate representatives of a class or group of Māori for the purpose of proceedings, negotiations, consultations, allocations of property or other matters. This function can be critical in resolving disputes over mandate between tribal groups.

## *VII CONCLUSIONS*

While New Zealand still has much to do in providing redress for historical treaty grievances over land and other issues, great progress has been made. Successive administrations have committed themselves to the completion of this process, which is regarded as essential not only to the social and economic future of Māori but also to the enhancement of social harmony amongst all the peoples of New Zealand.

The key role for the Courts since the mid-1980s has been involvement in the growing harmonisation of customary practices, the developing principles of the Treaty of Waitangi, and law. Indeed, it is fair to say that the distinctions between these three are steadily diminishing and, in time, may disappear if current trends continue.