Treaty rights or aboriginal rights?

By R P Boast, Senior Lecturer, Faculty of Law, Victoria University of Wellington

The year 1990 is one in which there will obviously be much discussion about the Treaty of Waitangi. This article is a brief survey of the literature of one issue, namely the question of aboriginal title. As the author acknowledges, this is very much associated with the influential writings of Dr Paul McHugh who has contributed articles on the subject to the New Zealand Law Journal *— see [1988] NZLJ 39 and in this issue at [1990] NZLJ 16.*

Introduction

Maori claims to ownership and management of land and resources have — in terms of the norms of the existing legal system — two possible sources. One is the Treaty of Waitangi, concluded between the Maori tribes of New Zealand and the British Crown in 1840. (This paper will leave to one side the interesting question as to what the status of other, post-Waitangi, Crown-Maori treaties — such as the Fenton Agreement of 1880 or the Aotea Agreement of 1882 — might be.) The other source of a legal basis to Maori claims is the common law rule, or 'doctrine' of aboriginal title.

The relationship between treaty rights and aboriginal title rights is obscure. Recent decisions of the courts have not altogether succeeded in resolving the obscurities. The interpretation of s 88(2) of the Fisheries Act 1983 has caused particular difficulty. In this paper I will discuss briefly the nature of treaty rights and aboriginal title rights, attempt to identify the distinctions between them and consider the approaches taken by the courts. It is hoped that in so doing at least the basic issues will be clarified.

Aboriginal title rights

Anyone wishing to explore in any detail the aboriginal title doctrine as it relates to the circumstances of New Zealand should consult the publications of Dr Paul McHugh, now of Sidney Sussex College, Cambridge University. What follows here is only a very abbreviated survey.

The aboriginal title doctrine is a rule of common law although its actual juristic sources derive from sixteenth-century Spain and the writings of pro-Indian scholars such as Las Casas and Vitoria. It received its classic formulation in two judgments of Marshall CJ in the United States Supreme Court, these being *Johnson v McIntosh* (1823) 21 US 543 and *Worcester v Georgia* (1832) 21 US 315. The principle has been recognized repeatedly in United States law, and is also a feature of Canadian and New Zealand law. Leading recent cases from each of these three jurisdictions are *County of Oneida v Oneida Indian Nation* (1985) 470 US 226; *Sparrow v R* [1987] 2 WWR 577, 246, and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

The concept of aboriginal title is not difficult to understand. It is a rule that rights of use and occupancy in lands and waters formerly exercised by native peoples continue as a recognized legal interest after conquest discovering or cession until such time as the rights are extinguished by the colonizing power. The aboriginal title is a burden on the Crown's primary title. Since the rule is a rule of common law it can be enforced in the ordinary courts; no statutory recognition of the right is necessary. Unless the aboriginal right has been taken away ("extinguished"), it still subsists and the courts can and do recognize and enforce it.

What is necessary to constitute extinguishment is uncertain. American cases have taken the view that aboriginal rights are extinguishable by treaty. No-one has so far attempted to argue that the Treaty of Waitangi amounts to an extinguishment of aboriginal rights by treaty in this country, but this might be a possibility, particularly if and when the Treaty of Waitangi is given some kind of formal legal effect. In *Te Weehi* (supra) Williamson J referred to the important Canadian case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d), and adopted the *Baker Lake* "test" for the purposes of New Zealand law. This requires that where aboriginal title rights are extinguished by statute the statute must exhibit a "clear and plain intention" to extinguish the right. An example of such statutory extinguishment is s 155 of the Maori Affairs Act 1953, which extinguishes Maori customary title to full-fee interests in land in New Zealand. An example from a different jurisdiction is the Alaska Native Claims Settlement Act, which the Ninth Circuit, United States Court of Appeals, has held to be an extinguishment of native hunting and fishing rights off the Alaska coast: *Village of Gambell v Clark* (1984) 746 F 2d 572. (This judgment has, however been reversed in the United States Supreme Court on the basis that the extinguishment could not apply to claims to the continental shelf outside the boundaries of Alaska see 107 s. Ct 1396 (1987).

Does statutory extinguishment of aboriginal title carry a right of compensation? No-one has ever

attempted to persuade a New Zealand Court that s 155 of the Maori Affairs Act is prima facie an expropriation of property rights and thus carries a right of compensation. Nor has such an argument been determined by any Court in relation to the provisions of the Coal Mines Act 1979 which vest the beds of navigable rivers in the Crown. In the United States the rule is clear: extinguishment is non-compensable. This was decided in the *Tee-Hit-Ton* decision of the United States Supreme Court — (1955) 348 US 272. But in Canada the question has been left open: see Hall J's judgment in *Calder v Attorney-General of British Columbia* [1973] SCR 313. Certainly this is a question deserving of exploration by the New Zealand Courts.

Limitations of the aboriginal title doctrine

The scope of the doctrine is somewhat elusive. What exactly are the "aboriginal" rights it protects? The answer appears to be that it relates only to property which was in some sense "aboriginally" used. It is hard to conceive of an aboriginal title claim to oil and natural gas (except as an adjunct to land), to non-traditionally used minerals, or to interests such as the preservation of the Maori language. Nor are Courts able to question the motives for Crown extinguishment — thus the New Zealand Settlements Act 1863, which confiscated huge tracts of land from some Maori tribes, was never open to challenge on the basis that it overrode aboriginal rights to land. Another criticism is that the rule forces indigenous claims and indigenous rights into the rather Procrustean bed of an obscure feudal rule of the common law. It is but another example of the dominant legal system constraining a minority within the terms and limitations of its own discourse.

For such reasons some North American commentators are somewhat less than enthusiastic about the rule. One Canadian scholar has described it as an "*a priori* legal postulate based on the popular wisdom of the eighteenth century and not on what the Indians themselves conceived to be their relationship to their lands". The preoccupation of the Canadian courts with it "forcefully emphasizes the colonial and feudal heritage with which much of our property law is still imbued". (W H McConnell, "The *Calder* case", (1973) *Saskatchewan Law Review* 88, 117-9.) For all that, the aboriginal rights doctrine has one great compelling advantage. It is enforceable in the ordinary courts and enforceability is not dependent on legislative recognition — as, of course, is the case with the Treaty of Waitangi.

Treaty rights

It is trite law that rights conferred by Treaty, even those protected by a Treaty of cession such as the Treaty of Waitangi, must be incorporated into a statute before they become enforceable in the Courts. The leading New Zealand case, *Maori Council v Attorney General* [1987] 1 NZLR 641 did not fundamentally alter this basic rule. Probably of greater significance is the High Court decision in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, where Chilwell J held that the Treaty of Waitangi "is part of the fabric of New Zealand society". Chilwell J said that the Treaty is part of a "context" in which "legislation which impinges upon its principles is to be interpreted, when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material" (p 210). This has much in common with Cooke P's statement in *Maori Council* ([1987] 1 NZLR 641, 656) that the Treaty can be used to interpret ambiguous legislation even in the absence of a statutory reference. (No such observation was made by the other four Court of Appeal judges in *Maori Council*.)

The extent to which the Treaty of Waitangi can be used as an interpretive device has been rendered uncertain by Ellis J's decision in *MRR Love v Attorney-General*, (unreported, 15 March 1988, High Court Wellington, CP 135/88). Here Ellis J interpreted *Maori Council* to mean only that "were it not for s 9 of the State-Owned Enterprises Act 1986 which expressly imposed the obligations of the Crown on the Ministers, the Court would not have been able to restrain the Crown from transferring Crown lands to the State-Owned Enterprises" (p 21). The legislation at issue in the *Love* case, the Ministry of Energy Act 1977 and the Finance Act 1982 made no reference to the Treaty; therefore the applicants had no present privilege or right which might be affected by the proposed sale of a state-owned corporation and their application for an injunction had to be refused. The logic of this seems unimpeachable; but the difficulty is that in *Huakina* the relevant legislation made no reference to the Treaty either, and yet Chilwell J's approach was very different. Why was the Treaty part of the relevant "context" in one case but not in the other?

At the present time one must conclude, then, that the basic rule that the Treaty requires statutory recognition to be enforceable, or even cognisable, remains intact. The somewhat broader approach of Cooke P in *Maori Council* and of Chilwell J in *Huakina*, emphasising the Treaty's relevance to the interpretation of statutes, certainly does not reflect judicial consensus and may be a minority view. The situation may be contrasted with the United States. American law differs from English and New Zealand law in that by Article VI of the Constitution treaties are "the supreme law of the land" and override anything in the constitutions or laws of any of the states. That this constitutional provision applies in full measure to treaties concluded with the Indian tribes has been recognised since 1832 (*Worcester v Georgia*, above).

This constitutional enshrining of the treaty rights of the Indian tribes has allowed the American courts to evolve a distinction between "treaty rights" and mere "privileges". This analysis has been given particular emphasis in cases dealing with Indian treaty fishing claims. If a treaty protects tribal fishing interests, then the members of the tribe have a "right" to the resource, and they are to be contrasted with other ordinary members of society — meaning, here, commercial and recreational fishermen — who have a mere "privilege". Indian rights in the resource, while not absolute, are of a special legal character. Important cases exploring the implications of this are *United States v State of Washington* (1974) 384 F Supp 312, at 322; and *United States v State of Michigan* (1979) 471

F Supp 192, at 266. Aspects of this analytical structure have been applied to the situation in New Zealand by the Waitangi Tribunal in its recent *Muriwhenua Fishing Report* (Wai-22, 1988).

Is the Treaty "declaratory"?

One view of the relationship between the rights protected by the Treaty of Waitangi and by the aboriginal title rule is the so-called "declaratory" model. Essentially, the argument is that the Treaty was intended to do no more than "declare" the existing common law as at 1840. The argument was recently raised before the Waitangi Tribunal, and is dealt with in *Muriwhenua* (above, at pp 208-209). Counsel for the Fishing Industry Association submitted that the Treaty was merely "declaratory" of the aboriginal title doctrine, and it could not, therefore, "be construed to confer rights any greater than the doctrine gave". The purpose of such an argument was clear enough. The objective was to establish that the only fishing rights protected by the Treaty were those in existence in 1840, determined according to fish species, fishing methods and fishing places. The Tribunal, however, was unimpressed, and at p 209 observes

> The [aboriginal rights] 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 had therefore to mean the same. . . The trouble is, it doesn't. Once more a major rewriting would be required. Amongst other things, "exclusive" would need to be changed, and Lord Normanby would need to recall his instructions. He clearly envisaged that Maori would profit from the value development of those properties they had retained.

It is undoubtedly the case, thought the Tribunal, that the doctrine of aboriginal title did "form part of the necessary background to Colonial Office opinions" in 1840. Obviously there is "some concurrence between the doctrine and the Treaty principle of protecting Maori interests". Nevertheless the principles of the Treaty and the principles of the aboriginal title rules are distinct. The Tribunal could have said, additionally, that there is even less of a case for stating that the Treaty is "declaratory" when the specific provisions of the *Maori* text are taken into account. How can the concepts of rangatiratanga and taonga be said to be "declaratory" of the English common law rule of aboriginal title?

The Tribunal's view is that Treaty rights and aboriginal title rights subsist side by side. There is no indication in *Muriwhenua* that the Tribunal regards the Treaty of Waitangi as having the effect of extinguishing aboriginal title rights by consent. Extinguishment by treaty is a well-recognised mode of extinguishment of aboriginal title in the law of the United States. In fact that was a prime objective in concluding treaties with the various Indian tribes. In the United States, of course, treaties concluded with indigenous peoples are part of the law of the land; but the Treaty of Waitangi is not, except in so far as Treaty "principles" have been referred to in a variety of ways in a thin scattering of statutes. It would be too harsh to conclude that enforceable aboriginal title rights have been extinguished by the act of signing an unenforceable treaty of cession in New Zealand.

"Any Maori Fishing Rights"

Section 88(2) of the Fisheries Act 1983 states:

> Nothing in this Act shall affect any Maori fishing rights.

The section has a long legislative history. Statutory protection of Maori fishing interests has been in existence since 1877. But what is a "Maori fishing right"? Does it mean a *Treaty* right? Or does it it refer to "rights" protected by the aboriginal title rule — whatever they may be? Perhaps its refers to both? And what difference does it make?

These difficulties have led to a considerable amount of confusion.

The phrase "any Maori fishing rights" was considered at length in the High Court by Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. Williamson J does indeed mention the Treaty of Waitangi in the course of his discussion. He refers to the rights protected by s 88(2) as "customary rights" (p 690, 691) which pre-dated and which were preserved by the Treaty of Waitangi. It seems clear, however, that in Williamson J's view the rights protected under s 88(2) are "aboriginal title" rather than "Treaty" rights in that he considers that the rights protected by the section are non-exclusive subsistence rights. The right is only a "right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply". (p 692) It should be noted that *Treaty* fishing rights — in the Waitangi Tribunal's view — are not so limited, and extend to a right to commercial development. In *Muriwhenua*, at pp 234-235, the Tribunal refers to the emerging body of international law on "rights to development" and notes, too, that although Maori fishing prior to 1840 undoubtedly did include a commercial component, the "right to commercial development of resources does not depend upon proof of a pre-Treaty commercial expertise". (p 235)

The exclusivity point is crucial. Williamson J felt able to distinguish earlier New Zealand cases on the basis that the right being contended for in Te Weehi was not exclusive: it was not being asserted that s 88 (2) preserved exclusive fishing rights for Ngai Tahu off the South Island coast. (As it happens, it might well be argued that aboriginal title rights can be exclusive, a point which I do not intend to pursue here.) What is clear is that the non-exclusive right to take shellfish for personal needs is very different from the Waitangi Tribunal's characterisation of the nature of Treaty fishing rights in *Muriwhenua*. It seems that if it had been asserted that s 88(2) did preserve exclusive tribal fishing properties Williamson J would have been unable to agree.

In *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370, a decision of the District Court at Blenheim, Judge Taylor applied *Te Weehi* and acquitted the defendant, who had been charged under the Fisheries (Commercial Fishing) Regulations 1986. In this case, however, the defendant was taking undersized crayfish, and not for subsistence, but at least in part for commercial purposes. Judge Taylor found however, that s 88(2) still applied. After concluding that the defendant had shown that he was

exercising a Maori customary fishing right, Judge Taylor said:

> It is clear on the evidence that the local tribes jealously guarded their own fishing rights and endeavoured to exclude tribes who had no right to the particular area, but I imagine that even between tribes there were exchanges of fish for other articles, as would happen in any society. I find that clearly there were inherent in Maoris, in accordance with Maori custom, commercial fishing rights, that is rights of trading with fish. It is contrary to the traditions of any people to suggest that there was no use of the fish as a commercial object in the ordinary sense of the word. I find that there was and always has been a commercial fishing right among Maoris. . . I therefore find further that these commercial fishing rights are preserved by s 88(2).

Certainly Judge Taylor's view of the nature of Maori fishing practices is abundantly documented by the Waitangi Tribunal in *Muriwhenua*. His approach goes somewhat further than did Williamson J in *Te Weehi*. Judge Taylor does not make it clear whether he thinks s 88(2) preserves *Treaty* rights, such rights being distinct from aboriginal title rights, or whether the section is aimed at aboriginal title rights but that he is taking a broad view as to what the content of such rights are. (The overall structure and approach of his judgment seems to point to the latter.)

The third case is another District Court decision, that of Judge Cullinane in *Ministry of Agriculture and Fisheries v George Campbell and others*, unreported, District Court, Gisborne, 30 November 1988 (CRN 8016004552 – 4556). Judge Cullinane did not accept Judge Taylor's approach in *Love*. In *Campbell* Judge Cullinane appears to regard the rights protected by s 88 (2) as Treaty rights. "What I am concerned with here," he says, "is the exercise of rights purporting to be Maori fishing rights and plainly deriving from the overall protection accorded Maori fisheries by the Treaty of Waitangi" (p 75). However he cannot accept that the rights protected by s 88(2) could include any kind of commercial component. At p 76 of his lengthy judgment in this case he observes:

> It is neither in my view correct nor logical to proceed by a process of extrapolation from the extensive and sophisticated fishing practices of the pre-European Maori a practice of trading of sufficient size or significance to be designated commercial.

Most recently, Judge Inglis, in *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott* (unreported, District Court, Levin, 19 May 1989 CRN 8031003482 – 3) has come down firmly on the side of a "Treaty" approach to s 88 (2). Section 88(2), he says, "must include fishing rights preserved by the Treaty". The defendants were acquitted on a charge of taking toheroa contrary to the Fisheries (Amateur Fishing) Regulations 1986. As a criminal prosecution this case did not, said Judge Inglis "involve consideration of the wider issues raised in [*the Muriwhenua*] report or the litigation which has stemmed from it". Judge Inglis also paid close attention to the fact that in this case there had been strict compliance with the customary fishing practices of Ngati Raukawa. This is "not a case of harvesting toheroa for sale in the pub" said Judge Inglis (p 14). But what if it had been? Does Judge Inglis mean that *Treaty* rights extend only to "traditional" uses of kai moana?

All four cases are, of course, criminal prosecutions. The rules relating to the prosecutor's burden of proof in negating an affirmative defence such as s 88(2) may have had some impact in causing the current confusion about the content of the rights protected by the section. The review proceedings currently pending in the High Court will require a definitive settlement of the point. At present, three distinct theories emerge from the cases. One is that s 88(2) preserves fishing rights as defined by the aboriginal rights rule, rights which are non-exclusive and restricted to harvesting for personal needs (*Te Weehi*). A second possibility is that raised in *Love* – that s 88(2) refers to aboriginal title rights, but such rights *do* include a right to harvest the sea for commercial purposes. Thirdly, there is Judge Cullinane's view in *Campbell* and Judge Inglis' in *Hakaria and Scott* that the rights protected by s 88(2) are *Treaty* rights, but (confusingly) Treaty rights which do not include a commercial component but which extend only to the taking of fish in a "traditional maner" for subsistence purposes.

The Ngai Tahu case

The analysis of the four criminal cases considered above is incomplete as a discussion of the effects of s 88(2) without reference to Greig J's judgment in *Ngai Tahu Maori Trust Board v Attorney-General* (unreported, 2 November 1987, High Court, Wellington, CP 559/87). This, of course, was a civil case, an application for an interim injunction to restrain the Minister of Agriculture or his officers from issuing any further fishing quota in marine areas subject to Ngai Tahu's claim. Greig J granted the injunction and in so doing made a number of interesting observations on the effect of s 88(2).

Greig J characterised the effect of *Te Weehi* as correctly establishing that s 88(2) has at the very least a "passive" effect – that the provisions of the Fisheries Act do not apply to Maori fishing rights. Greig J thought, however, that the provisions of s 88(2) could be rather more far-reaching – "the carrying into municipal law of the Treaty obligation", which would have the effect of "making the right under the Treaty obligation enforceable directly". The section in other words not only might have the effect of putting into effect Treaty-based fishing rights, but doing so in an "active" (enforceable) rather than in a "passive" (mere non-applicability of the Fisheries Act provisions) sense. *Ngai Tahu* was only an interlocutory application, and therefore Greig J did not need to settle the point. The substantive proceedings in *Ngai Tahu* are now due to be argued in the High Court: the hearing has been timetabled for five months of evidence and legal argument. It will be interesting to see to what extent Greig J's suggestions are taken up.

Summary and conclusions

Who is right here? Does s 88(2) refer to "treaty" or to "aboriginal title" rights? Since the matter is about to be extensively litigated before the High Court it is perhaps somewhat presumptuous to venture an opinion. (But I shall do so anyway.) It seems that a compelling argument can be made that s 88(2) refers to *Treaty* rights because if it was meant to refer to "aboriginal title" rights the section might, in fact, be superfluous.

It is of the essence of aboriginal title rights that they are not dependent on statutory recognition. A persuasive argument could be made that the result in *Te Weehi* ought to have been the same even if s 88(2) had not been there. To the counter-argument that without it the rest of the Fisheries Act would have the effect of impliedly extinguishing aboriginal title there is the rejoinder that — as Williamson J emphasised in *Te Weehi* itself — there must be a "clear and plain intention" to extinguish.

This argument, if accepted, does not solve the problem as to what the content of Treaty-based fishing rights might be. The Waitangi Tribunal's view as noted above, is that Treaty rights do include the right to commercial development of the fishery. In *Muriwhenua* the Tribunal paid particular attention to the respective rights of the Crown and tribes arising from the cession of kawanatanga in Article I of the Treaty of Waitangi and the reservation of rangatiratanga in Article II. The Tribunal found, for instance, that laws of general applicability made for the purpose of conservation are a valid exercise of the kawanatanga (governorship) granted to the Crown, provided that the priority of treaty fishing interests over recreational and commercial fishing is taken into account (*Muriwhenua*, 227). This position is similar in many ways to that developed in Judge Boldt's epochal decision in *United States v State of Washington* (1974) 384 F Supp 312 and to the British Columbia Court of Appeal's decision in *Sparrow v R* [1987] 2 WWR 577. The Treaty, in other words, already provides a framework within which the proprietary rights of the tribes and the Crown's interest in conservation can be worked out.

The Treaty of Waitangi was a compact between the Crown and the tribes. The Treaty is written in the Maori language and at least to some extent the Maori text is based on Maori concepts. The Treaty of Waitangi, once recognised and given effect to, allows for a truly bicultural approach to the law to develop in a way that the aboriginal title rule — which is but a rule of the common law itself — never could do. The Treaty has value as a symbol: we can give meaning to it, and it can give meaning to us. The symbolic value of the aboriginal title rule, by contrast, is nil. Although it may provide a useful weapon in the legal armoury, its place in the New Zealand scheme of things can only be secondary. □

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specific fiduciary duty to its aboriginal tribes thus has at least one strong analogy.

Crown assets will be peculiarly vulnerable to the argument that the Crown holds them subject to an aboriginal fiduciary duty. The basis of this duty has varied in the important cases. Its source so far as Crown land and coal has been concerned is s 9 of the State-Owned Enterprises Act. Where the fisheries are concerned, it is the common law aboriginal title restraining the Crown. Both of these sources contained a statutory or common law rule of recognition incorporating a fiduciary aspect. My suggestion is that this fiduciary aspect can stand on its own apart from express statutory acknowledgment or the common law aboriginal title. Once that recognition occurs, if it occurs (as the American caselaw shows it can), Crown ownership and administration will be significantly affected.

In conclusion, I will repeat the earlier observation about New Zealand witnessing a fundamental shift of power. The restoration and recognition of Maori property rights under legal processes, through Court and the Waitangi Tribunal, have much to do with this. It is no wonder some are saying that Maori claims should be left entirely to the political process. There is, however, a legal backdrop to the Crown's activity, be it legislative or executive, delegated or otherwise. This legal backdrop does not give the Crown the free hand which might have been supposed a generation ago. No wonder those who would have the Crown concede less rather than more to Maori are worried by the prospect of litigation. Long used to a legal desert, the Crown now finds itself in something of a legal jungle using the machete-like approach of the now-dropped Maori Fisheries Bill 1988. This Bill contained an "Idi Admin clause", as Prime Minister Lange termed it, extinguishing the tribal aboriginal title over the coastal fisheries. This is symptomatic of how the shift of political power in New Zealand is not simply a function of the Crown's perception of some "moral" or entirely political obligation. The forces of movement have a solid legal core and that for some Pakeha may be most frightening of all. □

Perspective for 1990

Australia has just celebrated its Bicentennial. The written history of Australia is a history, most parts white, that goes back 200 years. The archaeology of Australasia currently goes back more than 30,000 years; it would not be a surprise if it went back well beyond 50,000. It is archaeological study that made Australia's birthday jamboree in January appear what it was: the celebration of a very recent episode only within a larger Australian human history.

The Cambridge Review
March 1988

Taipei Declaration

on the Rights of Indigenous Peoples

International Conference on the Rights of Indigenous Peoples

June 18-20, 1999

National Taiwan University, Taipei, TAIWAN

We are 220 participants from around the world, including representatives of the Aboriginal Peoples of Taiwan, the Ainu of Japan, the Khoi-Khoi of South Africa, the Maori of Aotearoa-New Zealand, the Dusun People of Malaysia, the Mohawk of Canada, and other participants from Australia, Canada, Japan, France, the United States and Taiwan. After three days of interactive discussion of various issues related to land rights, resources, cultural rights and international law concerning Indigenous Peoples, we hereby declare as follows:

Preamble:

That we reaffirm the purposes and principles of the United Nations Charter. We declare to respect the rights of all peoples as declared in Article 1.2 of the Charter of the United Nations which reads as follows;

"To develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

Land and Resource Rights

1. States shall recognize the right of Indigenous Peoples to own, use and control the development of their lands, territories, waters and other resources. States shall adopt appropriate laws and other measures to effectively protect and retain the ownership, use and control of Indigenous Peoples lands, territories, waters and other resources. Furthermore, States shall facilitate the restitution of lands, territories, waters and other resources confiscated, taken or used without their informed consent.

2. States shall respect the laws, customs and traditional land-tenure systems of Indigenous Peoples, abide by the principle of sustainable development, and prohibit all development affecting Indigenous Peoples and their territories which is undertaken without their informed consent.

3. We affirm that Indigenous Peoples are affected by development and therefore Indigenous Peoples have a right to be consulted and to all decision-making concerning all development which affects

Indigenous Peoples.

4. We declare that whenever development, including mining, fishing, agriculture, tourism or any other activity is proposed in either the territories of Indigenous Peoples, or other territories which affect Indigenous Peoples, the State and any other relevant authorities shall consult with local Indigenous Peoples concerned in order to gain their informed consent. States shall prevent any harm to Indigenous Peoples interests, and ensure that Indigenous Peoples benefit equitably from any proceeds therefrom.

5. Indigenous Peoples shall have the right to sustainable maintenance of the total environment and also the productive capacity of their territories, and to control their own processes of development. The State shall take effective measures to prevent storage or disposal of all harmful materials including nuclear waste on territories of Indigenous Peoples and territories affecting Indigenous Peoples.

6. Indigenous Peoples shall be provided with conditions allowing for sustainable economic, social and cultural development compatible with their distinct development and communal practices.

Cultural Rights

1. The cultures of Indigenous Peoples form a valuable and intrinsic part of the diversity of all humanity's cultures. The cultures of Indigenous Peoples are vulnerable to external influences and forces. The dignity, beliefs and values of Indigenous Peoples' cultures shall be given respect and appropriate protective measures implemented.

2. Indigenous Peoples shall have the right to enjoy their own cultures, to practice their own beliefs and religions, and to use their own languages. The enjoyment of such rights shall be protected and facilitated by national laws and other measures, devised and implemented in consultation with the representative institutions of the Indigenous Peoples concerned. No decisions relating to the rights and interests of Indigenous Peoples shall be taken without their informed consent.

3. Indigenous Peoples shall have the right to own, protect and control the development of their cultural heritage, including biological and human genetic material, which constitutes their shared estate. Each State shall adopt legislative and other measures to recognize and ensure that Indigenous Peoples can protect their cultural heritage, including their technologies and cultural manifestations. No individual or enterprise shall be allowed to acquire an interest in indigenous cultural heritage, for example through patents, copyrights, or other intellectual property right laws without the informed consent of Indigenous Peoples and their communities.

4. States shall provide financial and other resources so that Indigenous Peoples can establish and administer independent "Trust Funds" in order to protect and assert their collective rights. Such Funds shall be controlled by Indigenous Peoples, and income arising

therefrom shall be applied by Indigenous Peoples in the pursuit of their self-determination and their economic, social and cultural development.

International Law

1. We declare Indigenous Peoples have the right to freely determine their political status and to pursue their economic, social and cultural development. We call on the United Nations General Assembly to adopt the "Draft Declaration on the Rights of Indigenous Peoples" as soon as possible in its present form. During the on-going International Decade for the World's Indigenous Peoples, we call on the United Nations to establish a "Permanent Forum for Indigenous Peoples", to address the rights of Indigenous Peoples at the highest level within the UN system. All Indigenous Peoples shall have the right to attend the Permanent Forum, WGIP, and other International fora. The United Nations Draft Declaration on the Rights of Indigenous Peoples shall guide all legislation and matters concerning the rights of Indigenous Peoples.

2. We call on the international community to elaborate a set of international Conventions to protect the lands, territories, waters and other resources of Indigenous Peoples from exploitation or degradation (including as military bases, military exercise fields, nuclear waste dumps or nuclear testing sites). We wish these international standards to protect Indigenous Peoples' rights, and to facilitate the restitution to Indigenous Peoples of lands, territories waters and other resources confiscated or taken and used without their informed consent and to ensure appropriate compensation measures are taken to remedy the breaches of the rights of Indigenous Peoples.

3. Indigenous Peoples shall have the right to access those Courts, including the International Court of Justice, Tribunals and other legal institutions to take concerns and matters regarding their rights.

4. We call on the international community to faithfully respect the Indigenous Peoples' demand that their cultural heritage be recognized as collective rights. Each State shall institute and enforce laws to protect these rights.

5. We call on the United Nations to establish an "International Trust Fund for Indigenous Peoples' Cultural Heritage" to facilitate the promotion and protection of the Cultural Heritage of Indigenous Peoples by Indigenous Peoples.

6. Adopted by unanimous consent of the International Conference on the Rights of Indigenous Peoples at Taipei.

[Taipei Resolutions>>]

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Christian Heritage's Election Policies

Public Access New Zealand plans to publish an assessment of party policies for this year's general election.

I would appreciate receiving your Party's policies on the following subject areas as soon as they become available – CONSERVATION, ENVIRONMENT, TRANSPORT, TREATY OF WAITANGI, CONSITUTIONAL, OUTDOOR RECREATION, CROWN LANDS.

Additionally I enclose a detailed questionnaire on the above subjects. This is designed to gain insight into the level of understanding of issues that concern us and to solicit specific policy responses that are unlikely to be contained in publications aimed at general audiences. Please would you refer this questionnaire to your party's relevant spokespersons. If they require background to any of these questions I would be pleased to provide this.

I need to receive all your policy material by Friday 22 October so that our publication deadline can be met.

Public Access New Zealand is not aligned to any political party. Our assessment of your policies will be a weighted appraisal based on how closely they coincide with PANZ's objectives (see foot note), their specificality or ambiguity, as well as the absence of policy in important areas.

Yours faithfully

Bruce Mason
Researcher

Public Access New Zealand is a charitable trust formed in 1992. PANZ's objects are the preservation and improvement of public access to public lands, waters, and the countryside, through retention in public ownership of resources of value for recreation. PANZ draws support from a diverse range of land, freshwater, marine, and conservation interests representing approximately 200,000 people from throughout New Zealand.

Case and Comment

Aboriginal title returns to the New Zealand Courts

Two recent judgments, one in the High Court, *Te Weehi v Regional Fisheries Officer* [1986] BCL 1396, the other the Maori Appellate Court, *Higgins v Bird* (7 Waiariki ACMB 24, 13 October 1986), and both the subject of media attention, highlight the re-acceptance within New Zealand Courts of the common law doctrine of aboriginal title. This trend is not only bringing New Zealand into the Anglo-American mainstream on the question of aboriginal rights but if things continue will push it to the forefront.

The doctrine of aboriginal title is the corpus of common law principles governing the effect of British annexation upon pre-existing tribal property rights. The doctrine ultimately derives from the consistent practice of the Crown wherein tribal property rights were treated as "legal" as well as "moral" in character. This position dates at least from the mid-seventeenth century (for example "Councells' Opinions concerning Coll. Nichols Pattent and Indian Purchases" (1675), text in O'Callaghan *Documents relating to the Colonial History of the State of New York* (1881) XIII, 486). Thus one presumes a continuity of tribal title to land subsequent to British annexation modified only to the extent it became alienable to none save the Crown (the Crown's pre-emptive right as it was known). The Treaty of Waitangi then becomes no more than declaratory of rules which applied in any event. This position was taken in *R v Symonds* (1847), [1840-1932] NZPCC 387 but later eclipsed by the notorious judgment of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur 72 (SC). The doctrine of aboriginal title upends the *Wi Parata* approach, holding, instead, that one must screen local statutes for an extinguishment rather than recognition of tribal property rights. These rights survive at law in the absence of legislative provision otherwise or abandonment by the tribal owners.

In both the cases with which this short article is concerned the doctrine of aboriginal title played an important part. This role is explicit in the judgment of Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] BCL 1396 but remains implicit in the judgment of the Maori Appellate Court in *Higgins v Bird* (7 Waiariki ACMB 24, 13 October 1986).

Te Weehi v Regional Fisheries Officer (1986)

The common law doctrine of aboriginal title was successfully invoked in this case as a defence to a prosecution under the Fisheries Act 1983. The Act provides that nothing in it (which includes, of course, subordinate legislation under its ostensible authority) shall affect "Maori fishing rights". The defendant successfully submitted that these words protected fishing rights derived from the common law as well as statutes other than the Fisheries Act. Relying upon the doctrine of aboriginal title the Judge accepted the distinction between "territorial" and "non-territorial" aboriginal title. The former variety of aboriginal title amounts to a claim to titular and exclusive ownership of the land or what the Maori Affairs Act 1953 terms "customary land". A non-territorial aboriginal title signifies an aboriginal charge (clumsily analogous to a profit a prendre or easement) upon the land (see more fully (1984) 14 VUWLR 247).

Williamson J accepted that a non-territorial aboriginal title might arise over Crown-owned land subjacent to tidal and navigable water. He distinguished the Court of Appeal's judgments in *Re the Ninety Mile Beach* [1963] NZLR 461 on the basis that the case concerned a territorial aboriginal title.

The judgment in *Te Weehi* effectively overrules *Wi Parata* and rehabilitates the doctrine of aboriginal title. It also emphasises the important role of Maori customary law in matters of aboriginal title: To invoke successfully the defence of aboriginal right under the Fisheries Act a defendant has to prove he was fishing in accordance with Maori customary law. The defence cannot be used and a prosecution can proceed against Maoris fishing in violation of the customary code. Thus the placing of a *rahui* (banning order) upon certain beaches or tribal regions (particular localities as well as the tribal area at large) by the tribal authorities will prevent the exercise of any aboriginal fishing right. At a single judicial stroke *Te Weehi* thus accomplishes what years of bitter relations between Maori representatives and Government officials have failed to reach: The judgment requires co-operation between tribal authorities and local fishery officials and so gives the Maori tribes a responsible role in the conservation of the country's littoral fisheries.

It will be interesting to see what the New Zealand Law Reform Commission makes of *Te Weehi* as part of its reference regarding Maori fishing rights. The Australian Law Reform Commission recently rejected a common law approach to the vexed question of Australian Aborigine hunting and fishing rights on grounds of the incomprehensive character of such rights (*The Recognition of Aboriginal Customary Laws* (1986) Part VII, chapter 34). The *Te Weehi* case was handed down soon after

some authority given to Indian people so that we can exercise our rights and carry on with our way of life" (Njootli 1994). Through the land claims process, VGFN has secured several park co-management rights and responsibilities: harvesting rights, advisory obligations, park planning and management duties, and employment and economic opportunities (DIAND 1993; Njootli 1994).

VNP is closely linked to the aboriginal ethic of conservation through sustainable use rather than wilderness preservation per se (Sadler 1989). Both traditional and current aboriginal uses of the park are recognized and protected under a cooperative management agreement. This is a significant provision since it respects the right of aboriginal cultures to build on the experience of earlier generations by adapting to the technological and socioeconomic changes of the present (e.g., firearms, snow machines, a cash economy). The Vuntut Gwitchin have exclusive rights to hunt, trap, and gather in the park for subsistence purposes and have priority access over sport fishers (Morrison 1993). VGFN has rights to give, trade, barter, or sell edible fish, wildlife, and plant products harvested within the park for domestic purposes (DIAND 1993). This is a critical recognition of the importance of informal aboriginal economies based on reciprocity and communal sharing.

Co-management of Park Planning

Designed to ensure VGFN shares significantly in decision-making and implementation processes, the VNP's comanagement committee is composed equally of representatives of VGFN and Parks Canada. This advisory body makes broad management, administrative, and planning decisions that involve heritage and cultural resources; travel routes, harvest limits, locations, and seasonal restrictions; development and revision of the park's management plan; and the management of transboundary fish and wildlife (DIAND 1993). The minister of heritage and parks does retain the ultimate authority to accept, reject, or vary the comanagement committee's recommendations and alter VGFN park use (DIAND 1993).

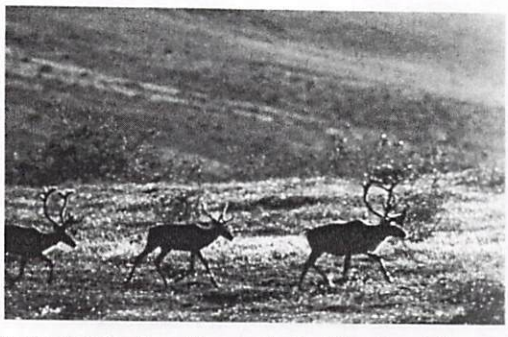
Cooperative management is described as "both a cornerstone and a barometer in the relationship between aboriginal and non-aboriginal society" (Hawkes 1995). The comanagement of VNP is an approach designed to "combine the best of both worlds," blending aboriginal and state management approaches. This arrangement entails sharing responsibility and balancing power between local resource users and government agencies. An environment is created where payoffs are greater for cooperation than for competition, and where actors optimize their mutual good by planning jointly with long-term vision. Kofinas (1993) specifies three ways comanagement can contribute to economic development: (1) confronting external competing demands and values that threaten the resource base of subsistence economies; (2) creating new and appropriate economic opportunities; and (3) redirecting the flow of resource benefits to local communities. The government–Gwitchin partnership also enhances several park management functions including data gathering and analysis; logistical harvesting and allocation decisions; resource protection; enforcement; long-term planning and enhancement; and broad policy decision-making. Currently the Old Crow community and government agencies are jointly implementing a project focused on mutual learning, cultural research, and park resource management. This community-based investigation into Vuntut Gwitchin traditional ecological knowledge and oral history has the potential to overcome the cultural, perceptual, and disciplinary barriers conventionally impeding sustainable resource management endeavors.

Barriers to Progress

Despite an encouraging outlook, several unresolved issues are acting as barriers to progress in the application of comanagement principles throughout northern Canada. First, shifts in the balance of power and control away from government agencies are typically met by reluctance. A second obstacle is learned dependency, resulting from the appropriation of local authority and responsibility by centralized resource management agencies (Hawkes 1995). The breakdown of traditional aboriginal management structures has many causes: loss of resource access and control; disruption of social systems defining property rights, stewardship responsibilities, and community obligations; interference with intergenerational patterns of education and information transmission; and the introduction of cash economies and wage employment. Reintroducing local level control will require the reversal of centuries of dependency and distrust.

Economic and Employment Opportunities

The VGFA ensures Vuntut Gwitchin involvement in park design, tourism



Barren ground caribou of the porcupine herd filter through Vuntut National Park by the thousands en route to their wintering grounds. The pervasive spiritual and cultural connections between Vuntut Gwitchin and porcupine caribou will endure only if the herd is protected against threats to their natural existence. Photo by Wayne Lynch, Parks Canada.

ventures, and facility construction on the Old Crow town site (DIAND 1993). A Vuntut Gwitchin "community impacts and benefits analysis" must be completed under the terms of the VGFA for any proposed development. This is critical since those who best know local landscapes, wildlife, and natural processes can bestz assess the potential for overdevelopment (Morrison 1993; Morrison 1995). Local people receive priority in park employment, contract tendering, and business ventures (DIAND 1993). This is highly appropriate since Vuntut Gwitchin have the experience, skills, and interest required to play key roles as park managers, park wardens, park rangers, tour guides, and interpreters.

Vuntut National Park—A New Type of Protected Area

The establishment and comanagement of VNP represents an end to policies and practices based on exclusionary principles that have subverted aboriginal rights and destroyed traditional lifestyles. This regime transfers a large measure of control over decisions affecting park planning, use, and management to Vuntut Gwitchin. It emphasizes the underlying importance of integrating traditional aboriginal use and occupancy within park boundaries. VNP has the potential to emerge as a model of how government and aboriginal people can work together to preserve natural areas vital to cultural survival and the achievement of national wilderness conservation goals.

The Future of Protected Area Creation and Management

Recognition of wilderness as a cultural construct will revolutionize our belief in the existence of uninhabited, primordial landscapes. Wilderness preserved need not be wilderness dispossessed from the aboriginal people who view it as homeland. Development of the contemporary concept of usable occupied wilderness expands not only our view of humanity's place in nature, but adds new dimensions to western conservation goals. The alliance between conservation and aboriginal interests can bridge the gulf between wilderness preservation and sustainable development, enriching protected area values. The emergence of a new type of protected area, one that incorporates aboriginal use, interests, and wisdom, has the potential to ensure both the protection of unique functioning ecosystems and the preservation of ancient lifeways. IJW

ERIN E. SHERRY is a Ph.D. student in natural resource management and environmental science at the University of Northern British Columbia, where she studies Arctic aboriginal resource management and traditional environmental knowledge. Contact Erin at the University of Northern British Columbia, 3333 University Way, Prince George, British Columbia V2N 4Z9, Canada. Telephone: 250-964-3565. E-mail: eesdjs@netbistro.com.

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Bruce M 25/1/00

Protected Areas and Aboriginal Interests

At Home in the Canadian Arctic Wilderness

BY ERIN E. SHERRY

Abstract: An alliance in the Canadian Arctic between aboriginal and conservation interests through agreements that combine aboriginal entitlement, national park creation, and cooperative management is giving new dimension to wilderness preservation goals and is enriching protected area values. This article explores the historic roots and contemporary character of aboriginal and nonaboriginal views of wilderness. A case study analysis of Vuntut National Park, Yukon, Canada is presented to exemplify a new type of protected area establishment and management that promises to support both ancient aboriginal lifeways and national conservation objectives.

Differing Perspectives on Wilderness

For Canada's first people, wilderness protection is part of larger political and legal questions, those "bound up in the thorny issues of treaty rights, aboriginal title, and Land Claims" (Erasmus 1989). Through aboriginal eyes the Canadian Arctic embodies many pervasive and enduring connections, family ties; seasonal cycles of activity, a spirit of place, sacred spaces, and ancestral homeland (Klein 1994; Davis 1994). During the past three decades aboriginal land claims and self-government negotiations have altered the political, legal, and cultural face of the North. The exploration and development of energy, mining, water, and timber interests have affected traditional aboriginal lifestyles and the health of northern ecosystems. In the context of this contested terrain, aboriginal groups, resource managers, and conservationists are endeavoring to define common goals and mutual understanding.

Changing Wilderness Concepts

Northern First Nations, through the Land Claim process and self-government negotiations, are seeking both a land and resource base sufficient to support their communities and recognition of their inherent right to autonomous government. The role of protected areas in relation to northern aboriginal communities is being redefined through international documents such as the "World Conservation Strategy" (IUCN 1980) and "Our Common Future" (WCED 1987). These vision statements link the aesthetic, utilitarian, and ecological traditions of western wilderness protection with the broader processes of social development, economic development, and cultural survival (Sadler 1989). This global movement highlights the importance of self-sufficient communities and sound environmental management practices that reflect the cultural values, belief systems, and aspirations of indigenous people. Particular attention is focused on the rights and interests of aboriginal users directly affected by protected area creation and management.

Article author Erin Sherry beside the Mendenhall Glacier, Alaska. Photo by David Stuart.

Aboriginal Perspectives

Wilderness protection that supports the diversity and productivity of northern ecosystems is a common western and aboriginal goal. However, dissonant perceptions of wilderness and discordant attitudes toward formalized wilderness protection still echo between the two cultures. While there is no one aboriginal viewpoint, for many the land is synonymous with community and survival.

(PEER REVIEWED)

Gwitchin Elders, such as Charlie Thomas, emphasize the importance of integrating aboriginal use and occupancy within national park boundaries to ensure cultural survival and community well-being. Photo by Roy Moses.

Examine a map of aboriginal land use in the Arctic and misconceptions of untouched landscapes vanish. Instead, another face of the land appears—a traditional territory that is intimately known, traveled, used, and named. As Hrenchuk (1993) cautions, it is "illusory to think that others have not gone before us nor [use] these areas today." Aboriginal groups hold a large stake in "preserving areas as close as possible to their original state ... for without renewable resources to harvest, aboriginal people lose both their livelihood and their way of life" (Erasmus 1989). However, in the pursuit of this goal, many First Nations remain skeptical of alliances with governments and conservationists who have too often violated their aboriginal rights in the name of parks and environmental protection.

Aboriginal Relationships to Protected Areas

Historically, the establishment of Canadian parks meant the imposition of rules and regulations that jeopardized aboriginal ways of life by restricting or eliminating the people's legal rights (Hrenchuk 1993; Press et al. 1995). The freedom of First Nations to practice their cultures in harmony with nature was often abruptly overridden by state authorities: "We were told we may no longer take certain plants for medicines and food ... we may no longer pitch tents in certain places in which we had gathered for generations ... we may no longer start fires ... we may no longer carry firearms" (Erasmus 1989). Setting park boundaries alienated First Nations, divorcing people from their homeland. The creation of most wilderness-oriented protected areas in Canada involved the exclusion of aboriginal people. The Keeseekoowenen were evicted and their homes burnt in Riding Mountain National Park, Manitoba. Blackfoot and Stoney groups were expelled from Banff National Park, Alberta, and their hunting rights suspended. The Ojibway were prohibited from hunting, trapping, and fishing within Quetico Provincial Park, Ontario. It is an unequivocal truth that First Nations have heavily borne the costs of "protecting" natural areas in the "public" interest for the benefit of future generations (Hrenchuk 1993; Kassi 1994; Njootli 1994; Morrison 1995). The interests of the new dominant society were placed above those of minority aboriginal groups, making "an ancient way of life subject to the apparent modern-day whims of an alien culture, all in the name of conservation" (Erasmus 1989).

Will the persistent differences between western ideals of wilderness and aboriginal perspectives make the simultaneous protection of wildlife, unique landscapes, functioning ecosystems, and indigenous lifeways an impossibility? This difficult question remains unresolved; however, the northern Yukon contains a protected area, Vuntut National Park (VNP), which provides a promising working model of joint action in wilderness protection.

Vuntut National Park: Enriching Aboriginal Cultures

VNP bridges the divide between protected and utilized areas and gives new dimension to mainstream wilderness preservation goals. It lies within the Yukon, a region of internationally significant cultural and natural heritage, rich in its diversity of fish and wildlife, vegetation, landscapes, and lifeways. Here, the federal and territorial government have successfully negotiated comprehensive claims with aboriginal organizations such as the Inuvialuit, Tutchone First Nation, Champagne and Aishihik First Nation, Trondek Hwech'in First Nation, and the Nacho Nyak Dun First Nation (Morrison 1993; Peepre 1994; Morrison 1995). These agreements have emerged as a positive force for both the expansion of northern national parks and the recognition of aboriginal people's stewardship role.

VNP was established in the context of cooperation and shared responsibility as a provision of the Vuntut Gwitchin First Nation Final Agreement (VGFA) (DIAND 1993). The creation of VNP provided not only for conservation of this remote wildland, but fully integrated the traditional lifestyle, culture, knowledge, and spiritual values of the Vuntut Gwitchin First Nation (VGFN). Sitting north of the Arctic Circle and encompassing Old Crow Flats, the new park contains wetlands of international significance, critical portions of the Porcupine Caribou Herd range, important migratory waterfowl habitat, and archaeological and paleontological resources of global concern (DIAND 1993). Consequently, the park is a United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Site candidate, the first to be recognized for its combined natural and cultural resource wealth.

A Vuntut Gwitchin Viewpoint

VNP is part of the Old Crow community's conservation strategy. Under the direction of community elders, VGFN attempted to establish a park to "protect the wildlife, protect the land, and to have