Fish & Game
NEW ZEALAND

MEMORANDUM TO: **All Freshwater Angling Clubs**

HIGH COURT DECISION ON WANGANUI TROUT (BECROFT) CASE

Please find attached for the information of your club members a copy of the recent High Court decision that overturned the earlier decision of District Court Judge Andrew Becroft granting Maori the right to take trout without a licence or compliance with an Anglers Notice. It's an interesting read! The attached press release and letter from our Lawyer will also be of interest.

While this has cost Fish and Game New Zealand (ie., anglers and hunters) a very large amount of money it has demonstrated the need to have Fish and Game Councils, and has increased public awareness and support for both councils and anglers. 'Angler dollars protecting the wider public interest etc., ...'. Does anyone seriously think the Department of Conservation would have taken this case if fish and game management was run by public servants?

As many of you may now have heard, the Maori Legal Service (representing Kirk McRitchie, the young Maori chap caught fishing without a licence) has sought the leave of the High Court to appeal the case to the Court of Appeal.

Clearly the case is assuming far higher significance than the simple issue of fishing without a licence. The initial "offence" has acted as a trigger to a much larger debate about whether or not the reference in Article II of the Treaty to Maori having ...."full, exclusive and undisturbed possession of their .....fisheries" actually includes introduced trout. It has also challenged the sovereign right of Parliament to make laws under Article I of the Treaty. All in all, pretty heavy stuff.

At the time of writing this memo the High Court has not considered the MLS request to appeal the High Court decision to the Court of Appeal. However, our legal advice is that it will in all probability be granted, and Fish and Game will find itself defending the High Court decision before the Court of Appeal. The only consolation is that defending a decision of the immediately lower court is generally easier than trying to overturn it (as Fish and Game had to do at the High Court).

You may be wondering where the Crown fits into all of this. After all, Fish and Game Councils are Crown entities and carry out duties and functions on behalf of the Crown.

In practice "the Crown" is the executive council of the Government of the day, represented in the form of the Cabinet - and the Cabinet is comprised of the coalition partners. My own suspicion is that the National arm of the coalition supports the High Court decision and Fish and Game, while the NZ First arm supports the Wanganui District Court decision and Whanganui Maori (Kirk McRitchie).

The Crown can in fact join any case such as this if it judges that it would be in the 'public interest' to do so. So what is the public interest? Well the public interest also has to be the 'government's interest', so your guess is as good as mine. However, the Crown (ie., Government) has decided to join the Marlborough Sounds sea bed ownership case, so it just might come in on our case as well - the question it will be asking is ...."What's in it for us?" And there's no guarantee the Crown would join in order to argue in favour of our case, although both the Minister of Conservation (Nick Smith) and the Attorney General (Doug Graham) are both on public record supporting the High Court decision.

So what can angling clubs do right now? To my mind I think the best thing you can do is try and make an appointment for a small delegation (maximum of three) from your club to meet each MP in your area to express your clubs point of view, 'extract' the MPs support for that view, and obtain his/her commitment to the Crown joining the Court of Appeal case in support of the High Court decision.

In closing, our decision to send each club a copy of the High Court decision is a precursor to our intention to begin communicating directly with clubs on a regular basis. While regional Fish and Game Councils have the field job of ....."maintaining, managing and enhancing sportsfish and game...." the New Zealand Council has the job of ....."representing nationally the interests of anglers and hunters". While we tell you some of these things through the special fishing issue of Fish and Game New Zealand magazine, we now want to communicate with you all more regularly, and are currently planning a special (regular) newsletter to 'friends of Fish and Game'.

Bryce Johnson

W B JOHNSON
Director

11 June 1998

P.S. I would like to hear how any of you get on with your local MPs - do they support the High Court decision? Do they think the Crown needs to stand up and be counted in support of it? What are they actually going to do about it? etc.

BARRISTERS & SOLICITORS
Level 6, NGC House
22 The Terrace
PO Box 2160 DX SP26503
Wellington, New Zealand

Chen & Palmer
PUBLIC LAW SPECIALISTS

Telephone 64-4-499 8990
Facsimile 64-4-499 8992
email:chenpalm@xtra.co.nz

May 14, 1998

Bryce Johnson
Director
New Zealand Fish & Game Council
P O Box 13-141
WELLINGTON

Dear Bryce

Taranaki Fish and Game Council v Kirk McRitchie

1. We have previously transmitted to you a copy of the Judgment of the Full Court of the High Court delivered today in this case. The Court took the unusual step of issuing a media statement so that its decision could be properly understood by the public. As the media statement makes clear, and it is quite accurate "There is no Maori fishing right in respect of trout".

2. We thought it would be helpful to set out our preliminary views of the decision of Neazor and Greig JJ.

3. The first point to be made about the decision is that it ruled in your favour on the most fundamental ground possible. You will recall that our first argument to the Court, both in the Submissions and orally, was that no Maori fishing rights defence exists for trout. That argument has been upheld.

4. The great advantage of the decision from the Fish & Game Council's point of view is that none of the complications that could have resulted from the other grounds of appeal that were advanced now arise. In particular, the third argument about the content of the defence in the Court below being defined too broadly is no longer relevant

5. The second point that should be made about the Judgment is that the basis of it is to uphold the power of Parliament to legislate. It was the historical analysis of the legislation that we stressed in the oral argument that appears to have been critical. The Court has taken the historical arguments very seriously indeed and relied on them; the result is a decision which upholds Article I of the Treaty over Article II.

Chen & Palmer

...Page 2...

15 MAY 1998

6. A third feature of the decision which is of considerable utility to you is the fact that there are no further proceedings that flow from it. There were two questions in the actual Case Stated that the Court answered, and they answered them both in the negative.

Question:

"Do the 'Maori fishing rights', described and protected in the Conservation Act, include the right to fish in a river for non-indigenous trout, as qualified in my judgment:

(a) without a licence; and/or

(b) in a method that is inconsistent with the scheme of the Taranaki District Anglers Notice although no offence was committed thereby and even though no evidence was led to establish that the method actually used detrimentally affected the conservation of the trout resource."

Answer: No.

7. The second question was Question 5 - "Was the decision correct?" That was also answered in the negative.

8. The result is that there is no need for the case to be remitted to the District Court; the decision stands as it is; the District Court decision is overruled and the matter is at an end unless there is an appeal. This is a very clean situation from a legal point of view and in our view is ideal.

9. The question therefore becomes is an appeal likely? We take the view that the Judgment is both careful and robust. We think it would be extraordinarily difficult for it to be reversed on appeal. That is not to say that Maori interests will not want to do that. You will recall that we had previous discussions on whether some negotiation might be entered into. In our view this legal decision is so tidy and so fundamental that you ought not to commit yourself to negotiating away the fruits of this legal victory as a price for Maori not taking an appeal.

10. The High Court has declared the law to be as we have consistently advised you that it is. We do think, however, that it would be advisable for you to be generous and to ensure that the obligations the Councils have under the Conservation Act to take into account Treaty matters is fully and consistently followed, as we have advised you in the past.

11. The question of costs was reserved by the Court, but we do not think you should take this up. In any event, in the case of a criminal prosecution, the costs would be small compared with what obtains in a civil case.

12. In conclusion, can I say how delightful it was to work with you over all the months that led to this decision. As a firm, we found it a truly fascinating experience. We came to have a more significant appreciation of the place Fish and Game Councils play in enhancing the quality of life in the great New Zealand outdoors.

Best wishes,

Yours sincerely

Sir Geoffrey Palmer
Partner

Fisheries

679 — Maori customary fishing rights — Appeal — Case stated — Meaning of "any Maori fishing rights" — History of relevant legislation — Differentiation between existing species of fish and new species — Treaty of Waitangi, Article II — Conservation Act 1987, s 26ZI(1)(a). This was an appeal by way of case stated relating to the acquittal of the respondent on a charge that he committed an offence against s 26ZI(1)(a) of the Conservation Act 1987 in that he fished for trout without a licence. The respondent claimed a Maori fishing right. In the District Court it was held that this was a defence, given certain conditions. The essential argument for the respondent was that "any Maori fishing rights" was to be construed by reference to the Maori custom of fishing and the place and activity of fishing. The defence would be made out if the respondent could show sufficient connection to Maori people and that they were accustomed to fishing in particular freshwater; and there is no justification for limiting the defence to any particular species of fish. The appellant's argument was based on the particular species of fish, in that fishing for that species had always been the subject of statutory control; "and that there has never been occasion for the Maori to acquire a right to take such fish regulated only by Maori custom and not by the statutory provisions". The High Court saw no reason to construe the Maori fishing right reserved in Article II of the Treaty of Waitangi more narrowly than has been said by the Waitangi Tribunal to be the proper approach in respect of sea fisheries. However it was evident from the history of the prevailing legislation that the taking of salmon and trout was, from their introduction, controlled by law, with primary legislation authorising the control of all freshwater fish. The Court differentiated between "existing species of fish not subject to control and new species that would be so subject". "In our view, because the taking of trout was always controlled by law, there was never a time when the taking of the fish could have been regarded as an existing and preserved Maori right." The Maori fishing right did not include the right to fish in a river for non-indigenous trout without a licence, as qualified in the original judgment. *Taranaki Fish and Game Council v McRitchie* (High Court, Wanganui AP 19/97, 14 May 1998, Neazor and Greig JJ). [29 pp]

Level 6, NGC House
22 The Terrace
PO Box 2160 DX SP26503
Wellington, New Zealand

Chen & Palmer
PUBLIC LAW SPECIALISTS

Telephone 64-4-499 8990
Facsimile 64-4-499 8992
email:chenpalm@netlink.co.nz

MEMORANDUM

TO: NEW ZEALAND FISH AND GAME COUNCIL

FROM: CHEN & PALMER, BARRISTERS & SOLICITORS & PUBLIC LAW SPECIALISTS

DATE: MARCH 4, 1997

SUBJECT: INFORMATION REQUIRED FOR DESIGNING GROUNDS OF APPEAL

INTRODUCTION

1. The purpose of this memorandum is to outline the information we need from the Regions in order to complete our analysis of the grounds for appealing the decision of Judge Becroft in *Taranaki Fish and Game Council v Kirk McRitchie*. Some of the requested information will be easier to access than other parts of it. We would appreciate obtaining as much of the information as possible as soon as possible. We suggest that you send the information to the New Zealand Fish and Game Council in the first instance, so that Bryce and Mike can forward it to us. We may contact you directly if we have further questions.

FURTHER INFORMATION

2. We need an estimate of the amount of fishing without a licence that went on amongst Maori prior to the District Court decision. Can you supply Bryce with

an estimate for 1996 for your region? Any hard facts of successful prosecutions of Maori would be appreciated.

3. We need copies of all the documents tabled at the District Court hearing. This includes submissions of counsel on both sides, agreed statements of fact, published material, reports and related material.

4. We need all evidence of the history of Maori fishing trout in the Wanganui river. We understand from today's discussions that the person who was due to give evidence on this point passed away prior to trial and that an amended copy of his evidence was tabled in Court. Can we have copies of the evidence tabled and the original document prior to deletions being made. In particular, we need to know whether this evidence relates to Maori fishing with licences to fish trout or to fishing without a licence.

5. We need information as to cases where a defence of Maori customary fishing rights has been raised on a prosecution by a Fish and Game Council. Please supply full details of cases including the judgment reached. In particular, we need a copy of the case decided in the District Court in Whakatane.

6. We need details of the request by Maori in the Hawkes Bay for the ability to control and stock a trout fishery in the area. Who made the request, on what basis and what was the Fish and Game response?

7. If any of you have any written accounts of Maori fishing practices with respect to trout these would be useful. Was trout fished for sport or for food? An example of net fishing was raised for Taranaki, could we have details of this.

8. We need information on the geographical spread of the trout fishery and the stocks present in each area so we can place the Wanganui river fishery in the national context.

9. We need information on other species that are classified as sports fish, their geographical spread and the stocks present.

10. We need copies of any literature on trout - why it is a sports fish and the history of its management in New Zealand.

11. We need any comments you can make on the uncertainties inherent in the District Court judgement. For example, it may be uncertain whether or not Maori can now sell trout. If you have other ideas write them down and give them to Bryce. We will want to highlight the uncertainties the judgment has created for Fish and Game Councils in their administration of the trout fishery.

12. We need details of the case in Canterbury where the solicitor advised that prosecution of a person for using an illegal fishing method was possible despite the fact that they did not have a licence. Can you send us a copy of the solicitor's advice so we can see if it is relevant to points made in the judgment?

13. Can the relevant Regional Council explain for us the Lake Taupo situation. We need to know how the situation differs from that described in the judgment. How is the judgment misleading on this point?

14. We need some material on the nature of the trout fishery in New Zealand. In particular the unique characteristics that were not argued in the District Court. Could someone write a description for us that includes the fact that the fishery is self funding, how this works and the role of prosecutions, how they are vital

to the sustainability of both the trout fishery and the management system. It is particularly important to outline how the conservation of stocks works under the present regime (maybe Mike or Bryce).

15. Can someone go through the annual reports and work out the number of prosecutions for each region for each year for the last five years. The list should cover prosecutions and successful prosecutions (maybe Bryce or Mike).

16. We need some information on the historical basis of the provision which allows private landowners whose land is beside a river to fish in the river without a licence. Can someone write this up for us (maybe Bryce or Mike)? We also need some information on how often this situation arises and the number of times the Fish and Game Councils have actually observed this being practised. Again we are after the context. We need to know why the provision is hardly ever relevant. The District Court Judge made much of this point but today's discussion suggests that it is not a big issue. Some statistics on how common this phenomenon is compared to hunting would be helpful.

17. We need any statements you can locate which suggest that the New Zealand trout fishery is important in international terms. Statements made by overseas tourists etc. We understand that some of the evidence at the Buller water conservation order hearing addressed this point. Could we have copies of that evidence.

18. We need background information on the number of licence holders in New Zealand and on the number of New Zealanders who fish (Bryce or Mike).

19. If you can think of any reports which outline the economic benefits of the trout fishery send them in with the relevant bits marked. We understand that an

economics consultant compiled such a report for the Matoua water conservation order hearing.

CONSISTENT APPROACH TO PROSECUTIONS

20. We want you to keep a record of the number of licence holders who contact you threatening to cease renewing their licence. This evidence will be useful for establishing the impractical nature of the District Court decision.

21. We want you to send Bryce a copy of all the paperwork relating to planned prosecutions of Maori caught fishing without a licence that have not yet been to court. This will allow the Council to coordinate its response to any organised challenge to its authority. Pursuant to section 43(2) of the Conservation Act 1987 you have twelve months to bring a prosecution so there is no need to hurry.

22. Our advice is that you should continue to police the trout fishery and take steps to prosecute any Maori you catch fishing without a licence unless you know that they are doing so according to the terms and conditions of local protocol and they are able to prove to your satisfaction that they are properly authorised to do so and that they are fishing for personal or family consumption or for a hui or tangi and the like and that the fishing does not impinge upon the conservation and sustainability of the resource. We would expect you to be unable to ascertain these matters and therefore you should be prosecuting in most cases.

23. Finally, we note that our letter to Bryce dated 27 February stated that a notice of appeal would have to be filed by Friday 14 March and the case by Friday 28

March. This is incorrect. The correct dates are Thursday 13 March and Thursday 27 March.

24. If any of our requests are unclear please contact either Bryce or Mike or Sharron Came direct. Sharron's telephone number is 04 471 6610. Thank you for your assistance.

Sir Geoffrey Palmer
Partner

Sharron Came
Associate

MEMORANDUM

TO: BRYCE JOHNSON, DIRECTOR, NEW ZEALAND FISH & GAME

FROM: CHEN & PALMER, BARRISTERS & SOLICITORS, PUBLIC LAW SPECIALISTS

DATE: MARCH 3, 1997

SUBJECT: THE TARANAKI FISH AND GAME COUNCIL V KIRK MCRITCHIE

---

1. The following constitutes a summary of the decision reached in The Taranaki Fish and Game Council v Kirk McRitchie , District Court, Wanganui, 27 February 1997, Judge AJ Becroft. We are also preparing a memorandum on the grounds for appeal. However, the New Zealand Fish and Game Council ("**NZFGC**") need to be clear on the parameters and immediate ramifications of the decision in order to advise their constituents.

2. McRitchie was charged under section 26ZI(1)(a) of the Conservation Act 1987 with fishing for sports fish during an open season while not being the holder of a current licence authorising him to fish for such fish. In his defence that he was exercising a Maori fishing right, McRitchie relied upon a combination of section 26ZH of the Conservation Act which provides:

> **26ZH Maori Fishing Rights Unaffected by this Part of the Act -** Nothing in this Part of the Act shall affect any Maori fishing rights.

and section 4 of the Conservation Act which states:

> **4. Act to give effect to the Treaty of Waitangi -** This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

3. Judge A J Becroft found the defence of a Maori fishing right to be made out on the balance of probabilities. However, this decision does not mean that Maori have been granted an open charter to fish for sportsfish without a licence anywhere in New Zealand, and the judge was careful to make this point (page 55). The defence was made out within certain defined parameters.

4. Furthermore, the practical outcome of the decision is that this amounts to an affirmative defence to an otherwise strict liability offence (which usually only has available the narrow defence of intention and the taking of reasonable steps - see section, 43B). Thus, in the interim all anglers still require a licence to fish for trout. This is a special defence which in each case will turn upon its own facts. These facts will require to be proved in every case. Thus, law enforcement officers can continue to carry out their duties in the ordinary fashion.

5. The parameters of the defence are set out by Judge Becroft on pages 54 and 55 and are as follows:

> Lest I be misunderstood, the effect of my decision is to allow Maori from hapu or iwi having traditional territorial authority over a river fisher, to fish for trout without a licence, provided:
>
> (a) they do so according to the terms and conditions of local kawa/protocol and are able to prove they are properly authorised to do so;
>
> (b) the fishing is for personal/family consumption or for hui/tangi and the like; and
>
> (c) that the fishing does not impinge upon the conservation and sustainability of the trout resource.

6. There are many aspects of the particular fact situation here which can be identified as contributing to Judge Becroft's decision. Whilst these are of course particular to each and every case and the different tikanga applicable for different iwi and hapu, the following does demonstrate the type of factors which will be necessary in future to prove the above elements. These are:

(a) the Mangawhero River was McRitchie was fishing is within the rohe (area) where McRitchie's hapu have manawhenua.

(b) McRitchie had fished the river for all manner of species since he was a child and is the tohunga for fishing in his hapu. He has always had authority from the kaumatua in his hapu to fish in the river and is often asked to gather food for hui. He is a provider for the hapu and a descendant of those holding manawhenua over the river. This was confirmed in evidence by a respected kaumatua.

(c) On the occasion in question, McRitchie was fishing for trout to feed his family as is customary in his hapu.

(d) McRitchie genuinely believed that he was exercising a traditional Maori fishing right according to the kawa of his hapu.

(e) The iwi has held rangatiratanga over the river since time immemorial and their use of the river is governed by their tikanga. This tikanga permits no fishing for commercial gain. Te rangatiratanga includes all

aspects of the river including habitat protection, fisheries, species, places of fishing, taniwha, kaitiaki, river flow levels and mauri.

7. Judge Becroft recognised that there will be those who will argue that "the intent of the Act and the work of the Fish and Game Councils will be frustrated if Maori are effectively exempt from obtaining a licence", and that "such a right will not apply to Europeans or other New Zealanders fishing without a licence." However, he believed out that his conclusions were justified given the approach taken by the Court of Appeal in the last ten years (most recently in the *Ngai Tahu Whales* decision).

8. To conclude, the most crucial point for the NZFGC to recognise in the meantime is that this decision does not give Maori an open mandate to fish for trout. The section 26ZH and section 4 defence is an affirmative one for which the onus to prove rests upon the defendant. Even then, the defence exists within clearly defined parameters, and therefore is not one available to every Maori in every prosecution for the unlicenced taking of sports fish.

NEW ZEALAND FISH & GAME COUNCIL

MEMORANDUM TO: **NEW ZEALAND FISH & GAME COUNCIL**
REGIONAL COUNCILS

DECISION OF JUSTICE A J BECROFT

Currently the decision and its implications are being considered by Chen and Palmer on behalf of the Council The Department of Conservation is also concerned because of the wider implications for other species, and in fact other resources, and so the judgement is being reviewed by Crown Law on behalf of the Government It has been suggested, and I have made the connection, that Chen and Palmer Solicitors liaise with the people in Crown Law At this stage no final decision has been made by the Government but there is a good chance that the Crown would wish to be associated with the appeal Any appeal will, of course, have to be in the name of the Taranaki Fish and Game Council

I attach, for your information, two press releases that have been made from this office The second shorter press release is on the advice of Geoffrey Palmer and that is basically that the defence is a very specific one and must be proven in each individual case The reason for putting out the short press release was simply to hold the line in the meantime No doubt Bryce will provide you with additional information as it comes to hand next week We do expect a written response from Chen and Palmer by the time of this mailout and if that has arrived we will include it

MIKE BRITTON
Assistant Director

28 February 1997

2 Jarden Mile, Ngauranga, Wellington
Telephone (04) 499-4767

NEW ZEALAND FISH & GAME COUNCIL

PRESS RELEASE

MAORI FISHING RIGHTS OVER TROUT

The long awaited decision by Wanganui District Court Judge Andrew Becroft, notionally allowing Maori under certain circumstances to fish for trout without a licence, is bound to cause a huge backlash against the Treaty and Maori by non-Maori New Zealanders, according to Bryce Johnson, Director of the New Zealand Fish and Game Council

The decision essentially says that Maori will be able to fish for introduced trout without a fishing licence in the same water as non-Maori anglers who will continue to require a licence

"This has to be a sure recipe for racial tension, when something as fundamental as the right to catch a fish is suddenly made free to one group in society. The point that will really bite home is the fact that the trout fishery of New Zealand is managed and protected by the anglers themselves and paid for by the licence fees. No government money is paid to Fish and Game Council to provide this popular resource for public use "

2 Jarden Mile, Ngauranga, Wellington
P.O. Box 13-141, Wellington, 4
Telephone (04) 499-4767
Facsimile (04) 499-4768

"What the Judge has effectively done is handed Maori access to a public resource that was established for the use and enjoyment of all New Zealanders, after the Treaty was signed.

"Setting aside for one minute the things that many people will be angry about, the sad thing in all of this is that Fish and Game Councils have been gradually working closer to Maori on issues of common interest, such as customary use of natural resources and the protection of natural water quality. A decision like this will make it very difficult for this country's many thousands of anglers and hunters to feel good about continuing with those initiatives."

However, the Judge has included one telling comment in the conclusion to this judgement At Page 54 the Judge states ..."I fully accept that this decision is at what might be called 'the liberal' end of the spectrum." That seems like a plea from the Judge for someone to appeal his own decision.

Anglers and other concerned New Zealanders should write to their local MP and the Prime Minister, if they want to retain equal access to public resources such as fisheries.

ENDS

For further information please contact:

Bryce Johnson
Director
Fish and Game New Zealand
Telephone (04) 499-4767

Fish & Game
NEW ZEALAND

PRESS RELEASE

LICENCE STILL NEEDED TO CATCH TROUT

"All anglers still require a licence to fish for trout", Bryce Johnson of Fish and Game New Zealand advised today

The decision of the District Court in Wanganui revolves around a special affirmative defence which in each case, turns on its own facts "

"Those facts will need to be proven in each case" Mr Johnson said "Law enforcement rangers will continue to police the lakes and rivers and report offences in the normal way "

Fish and Game New Zealand is examining the decision and has taken legal advice on whether to appeal Mr Johnson concluded

ENDS

For further information please contact:

Mike Britton
Assistant Director
Fish and Game New Zealand

Telephone (04) 499-4767
Fax (04) 499-4768

Public Access New Zealand

INCORPORATED

R D 1 Omakau 9182 Central Otago New Zealand Phone & Fax 64-3-447 3554

Friday, March 14, 1997

Bryce Johnson
NZ Fish & game Council

Becroft decision on Taranaki Fish & Game Council v Kirk McRitchie

I have read the full decision and Sir Geoffrey's correspondence with yourself and Peter Hill. (Niall forwarded these to me).

As someone who has taken an active interest in the Treaty, and the Courts' deliberations on it, I offer the following thoughts regarding grounds for F&G appeal.

As I am reasonably familiar with the development of so-called Treaty jurisprudence over the last decade, I believe that it was almost inevitable that Judge Becroft decided the way he did. The Courts and Waitangi Tribunal have become politicised or 'socially adventurous' in their determinations. Judge Becroft's decision flows on from the follies of the Court of Appeal and the Waitangi Tribunal. Judge Becroft has uncritically adopted other's reasonings. He has not examined the assumptions and omissions behind previous judgements.

I believe that his decision, like many other Court's decisions on which he relies, is fundamentally flawed. He has adopted the Ken Mair view of the Treaty, by plucking out isolated terms and phrases from Article II, principally 'tino rangatiratanga', and interpreting their meaning completely out of context with the rest of Article II, as well as Articles I and III. The fact that other courts have done the same does not validate their reasoning or judgement.

I am pleased to see that the appeal will raise matters of treaty interpretation (a whole-Treaty approach) which I believe has been absent from the arguments heard before the Tribunal and Courts for too long. Continuation of a 'politically correct' and myopic approach not only endangers sports fisheries but just about ever other civil freedom and democratic right New Zealanders enjoy. It is an attack on the very foundations of our society. Despite the ravings of Mair et al, I, and most New Zealanders, are indigenous New Zealanders (having being born here). I know no other home and am not about to be deported or turned into a second class citizen or 'invitee', despite the best effort of the Courts. If the decision established by Judge Becroft stands there is

little further judicial 'reasoning' required to extend its application to just about every other sphere of civil and public life.

The Treaty of Waitangi (my emphasis added)
In 1840 the Crown and the majority of Maori chiefs signed a compact that created reciprocal rights and obligations for both parties. The Treaty consists of a preamble, three articles, and an epilogue. In broad terms, on the ceding of the right of complete sovereignty **or** government (Article I) *and the granting of exclusive pre-emptive (purchase) rights of land to the Crown* (Article II), Maori would retain either exclusive and undisturbed possession of their lands and estates forests fisheries and other properties *so long as it is their wish to retain the same in their possession* **or** the unqualified exercise of chieftainship over all their lands, villages and all other treasures (Article II), and be given the same rights *and duties* of citizenship as the people of England (Article III).

Article II
The text in English
"Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of *their* Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess *so long as it is their wish and desire to retain the same in their possession; **but*** the Chiefs of the United Tribes and the individual Chiefs *yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate* at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf".

The text in Maori
"Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona".

Translation of Maori text
(by I H Kawharu in, 'Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi' (1989) --a reconstruction of a literal translation).
"The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. ***But on the other hand*** the Chiefs of the Confederation and all the Chiefs *will sell land to the Queen* at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent".

Judge Becroft perpetuates the myth that there is an **unqualified reservation** to Maori of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties.."

under Article II. Clearly, in the full context of Article II, as well as Articles I and III, this is not the case. I believe such selective quotation by people trained to be analytical and inquisitive to be professionally dishonest if not fraudulent. Such is the power of political correctness! Unfortunately the consequences for the rest of us may be profoundly detrimental.

The matters and resources that should be subject to tino rangatiratanga are those reserved to hapu under the Treaty, not **all** lands, forests and fisheries as implied. The latter view ignores the land sales provisions of Article II. If land and associated resources have been lawfully sold to the Crown then tino rangatiratanga is extinguished over these.

I have examined the sales deeds for most of the South Island and have found that "rivers, lakes, the woods, and the bush, and all things whatsoever within those places, and all things lying thereupon" were explicitly sold by chiefs to the Crown. I am aware of similar North Island provisions but do not know the Wanganui river situation. I believe that this is an area you should look at in your appeal. If there was a valid land sale or sales to the Crown this may well have included the river and its resources, including 'fisheries'. If so, end of argument. I am aware that the Wanganui District Council went to court to determine the question of ownership of the Motua gardens and the Court found in their favour. If there was no land/resource sale to the Crown of the Wanganui River etc, and/or the Wanganui chiefs did not sign the Treaty, then the applicability of the Maori 'reservation' under Article II is an open question.

Another matter is the meaning of 'tino rangatiratanga'. Even Sir Geoffrey believes that Article II "concerns protection of Maori *sovereignty* and mana over treasured goods and fisheries..."

Most definitions I have seen have 'rangatira' meaning chief; 'rangatiratanga' as chieftainship; 'tino rangatiratanga' being a superlative form of chieftainship or evidence of greatness. It is nevertheless a different and lower order of authority from the supreme sovereignty ceded to the Crown under Article 1.

The Waitangi Tribunal is of the view that tino rangatiratanga does not refer to a separate sovereignty but to tribal self management on lines similar to what we understand by local government. "Contemporary statements show well enough that Maori accepted the Crown's higher authority and saw themselves as subjects, be it with substantial rights reserved to them under the Treaty" (I could find the particular case if necessary).

The main point of Article II was to prevent (at Maori initiative) racketeering 'land sales' between a variety of dubious foreigners and 'chiefs' who were not duly authorised to sell. The pre-emptive right of the Crown to purchase any lands which the proprietors "...may be disposed to alienate..." is the main effect of Article II. It certainly does not hint at any possible separate legal system or jurisdiction for Maori any more than for other landowners.

Judge Becroft has gone far too far and his judgement needs to be overturned. I wish you well in doing so.

A final point: I note that you will be pursuing the matter of the meaning/scope of 'fisheries'. You should challenge the assumption that 'fishery' means (all) 'fish', and that 'customary' rights are synonymous with 'aboriginal' rights. The Judge used these terms interchangeably, yet they have different meanings. There are no aboriginal people left in NZ. If the judge means 'indigenous', every New Zealander born in NZ is indigenous. Look at the dictionary meanings!

Bruce Mason
PANZ Researcher

cc Niall Watson OF&G C